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A REPORT EVALUATING THE PERCEIVED VALUE OF THE CONSTRUCTION AND ENGINEERING PRE-ACTION PROTOCOL

Research into perceptions of the construction and engineering pre-action protocol

This report, prepared for TeCSA summarises the results of research conducted with law firms who serve the construction sector and representatives of major construction companies between September and November 2015. It discusses; the extent to which the Construction and Engineering pre-action protocol (PAP) meets its objectives as defined in the PAP, if it adds value to construction clients following the PAP and what changes should be made.

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FINAL REPORT

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Contents

Executive Summary

This report summarises the perceptions of the effectiveness of the Pre-Action Protocol (PAP) in construction or engineering disputes gathered during the period September and December 2015 from:

- Data summarising the outcomes of 216 disputes to which the PAP was applicable provided by law firms who provide services to the construction sector
- 39 detailed telephone interviews with law firms, in-house counsel and commercial directors of construction clients (contractors, consultants, specialist sub-contractors, employer clients, insurers) who collectively had experience of 677 disputes to which the PAP was applicable

Almost all respondents (95%) thought that the PAP was a valuable pre-action mechanism, 87% believe that it is creating access to justice. 49% of respondents felt that PAP should be retained substantially in its current form whilst a similar figure of 49% felt that it should be amended in some way. Proposed amendments are identified in the report.

Respondent opinion on the extent that the PAP meets its high level objectives (as defined on the Ministry of Justice website) was sought. Almost all respondents (clients and firms) thought that it was important that the PAP encourages early and full information exchange and avoids litigation. However, only half of the respondents considered it important that it supports the management of proceedings where litigation cannot be avoided.

Whilst the majority of respondents (71%) agree that the PAP is effective in encouraging an early and full exchange of information about the prospective claim, some 13% disagree. A similar number (68%) agree that the PAP enables parties to avoid litigation with 19% disagreeing. When asked whether PAP is effective in supporting the efficient management of proceedings, views are almost equally split, for, against and undecided.

95% of all respondents felt that the protocol was a valuable pre-action mechanism. When law firms were asked why they thought it was valuable they said the PAP:

- Encourages parties to consider their dispute
- Promotes settlement/early resolution
- Narrows issues
- Promotes communication/exchange of information
- Saves costs
- Creates structure

When construction clients were similarly asked why they thought it was valuable, they said the PAP:

- Facilitates early consideration of issues/dispute
- Prevents litigation - promotes mediation
- Promotes communication
- Saves time
- Provides structure
- Saves costs
- Gives options

82% of respondents thought that the PAP remains up to date with the needs and dynamics of pre action litigation processes. Approximately half of the respondents thought that the protocol should be retained substantially in its current form whilst the other half thought that it should be amended in some way. One respondent considered that it should be abolished.

When asked how the proposal should be amended, the respondents proposing change suggested that it should be amended to become a cost recoverable exercise, or part of the TCC court process, although a smaller number felt that it should become voluntary, or voluntary with penalties for non-compliance. The report contains discussion of the respondents perceived impact that these changes.

Respondents were also asked more generally if they would change the PAP in anyway, Law firms suggested:

- Enabling access to court to enforce PAP
- Providing flexibility around time frames
- Providing clear guidance on what documentation is required
- Allowing some flexibility in application to suit the litigation
- Encouraging early conciliation
- Amending to prevent front end cost

40% of construction clients interviewed thought that no change was required. Those that proposed changes suggested:

- Extending, but control the timeframes
- Exploring further opportunities for ADR
- Making it applicable only to certain types of dispute
- Making it more informal
- Enforcing full disclosure of expert evidence at the outset

This report provides an indicative view from a small sample of law firms and construction companies about the PAP, undertaken on a limited budget. It is not intended to be a statistically representative view of law firm and industry opinion nationwide, but this report acts as a pilot that gauges the variety of opinion and evidence available from firms and construction companies. A pilot project of this type gives an indication of the likely opinion and type of evidence from respondents if the project was increased in size. More interviews and research will provide increased accuracy, depth and granularity of opinion.

The report provides recommendations on the next stage of research on page 10.

Introduction and Objectives

This report summarises the opinions of a sample of law firms providing services to the construction sector, in-house counsel and commercial directors in major construction clients (contractors, consultants, employee clients, insurers). The insight gained is intended to inform the Technology and Construction Solicitors' Association (TeCSA) as to the perceived effectiveness of the Pre-Action Protocol (PAP) in construction or engineering disputes, and to gain opinion into whether it would be helpful to make any changes to the Protocol.

More specifically, the research objectives for this project were to:

- Seek the opinions of lawyers, from law firms with construction teams, about the extent that the PAP meets its objectives, as defined on the Ministry of Justice website1
- Investigate if the PAP is valued/adds commercial value to construction clients by assisting them to manage their costs and exposure to risk more efficiently. In doing so, does it help to save them time or money in the long run
- Enquire if firms and clients who followed the PAP think that it should be amended in anyway, or should be a voluntary process
- To investigate whether the PAP assists by encouraging a more efficient or cost effective approach to be adopted in any subsequent proceedings

Background

TeCSA is a leading organisation which supports solicitors practising construction and information technology law in England and Wales. TeCSA is involved in helping to shape court practice and legislation relating to dispute resolution. It also promotes best practice in all forms of disputes resolution.

In October 2000 the Construction and Engineering Pre-Action Protocol (PAP) was introduced by the Technology and Construction Court (TCC) and was intended to be followed by all parties involved in all construction and engineering disputes to assist them to avoid litigation altogether, or to reduce the areas of contention where litigation is unavoidable. Following a review undertaken in 2005 by Mr Justice Jackson and reported in 2006, the rules committee of the TCC implemented a revised protocol which is still in use.

Subsequent reviews, consultation and reports have been completed. In 2011 the TCC reconstituted a working party to review the PAP in light of Lord Jackson's report into the costs of civil litigation. This report concluded that the current process requires parties to construction disputes to effectively front load their costs. TeCSA was involved with the working party for the 2011 review and considered that the opinion of claimants, or clients who use the TCC were under represented. Mr Justice Coulson has recently indicated an interest in undertaking a further review of the PAP.

Research Methodology

To assist the management of the research, the project was split into 3 tracks:

- Track 1 comprised of the collection of facts from law firms pertaining to disputes, to which PAP was applicable
- Track 2 comprised of telephone interviews with law firms, identified as providing services to the construction sector
- Track 3 consisted of telephone interviews with construction clients (contractors, consultants, specialist sub-contractors, employer clients, insurers) identified by the TeCSA project team as being capable of providing an informed opinion.

In addition, at a later stage in the project, an email was sent to those that had provided feedback in all tracks requesting a response to three supplementary questions regarding a Shorter Trial Scheme pilot (STS)[2].

Fieldwork (both telephone interviews and the collection of the Excel sheets) was conducted between 17th September 2015 and 9th November 2015 by 3 executive interviewing staff, employed by Acuigen during normal

[1] Para 1.3 of https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_ced, accessed 20/11/15.

[2] https:// www.justice.gov.uk/courts/procedure-rules/civil/rules/part51, accessed 20/11/15

business hours. No incentives were offered or given for participating. Respondents were offered the opportunity to respond anonymously, 8 firms requested that their contribution remain anonymous.

The interview length for Tracks 2 and 3 was approximately 20 minutes and followed a structured questionnaire comprising of both closed and open-ended questions. The questionnaire is provided on page 41. Open-ended responses were coded prior to reporting to assist interpretation.

Sample Information

Track 1 research

A list of 95 law firms identified as providing services to the construction sector were identified from The Legal 500 and Chambers and Partners. These records were appraised by the TeCSA committee who confirmed the firms' suitability. Some smaller law firms and legal consultants specialising in this sector were added, and a senior lead contact for each firm was nominated by the TeCSA project team.

Each firm was invited by TeCSA, in an email letter, to complete an Excel spreadsheet to provide information about their use of the PAP over the past 3 years. Of the 95 law firms invited to participate, 20 law firms responded by providing a spreadsheet of data. In total this summarised 216 construction litigation matters that have involved the PAP in the past 3 years.

Track 2 research

Most of the 95 law firms identified in Track 1 were ranked either by The Legal 500 or Chambers and Partners on a tier scale of 1 (high) to 5 (low), from which Acuigen used these rankings to calculate an average ranking for each firm[1]. Firms with no appropriate Legal 500 or Chambers ranking received a tier ranking of 6. Table 1 summarises the number of law firms identified from which interview targets were derived.

Average Tier Ranking	Count of firms	Percentage of firms	Count of interviews achieved	Percentage of tier interviewed	Percentage of total interview targets	Stated no experience of PAP	Declined to participate
1 & 2	15	16%	6	40%	29%	0	0
3	11	12%	5	45%	24%	0	0
4	18	19%	5	28%	24%	1	0
5 & 6	51	53%	5	10%	24%	1	4
Total	95	100%	21	22%	100%	2	4

Table 1 - Summary of track 2 sample and interview targets

Prior to interviewing during Track 2, each firm was assigned a random number to facilitate a stratified randomised priority order in which to contact firms. Where an identified candidate law firm for the research was either unable or unwilling to contribute, the next available firm name was taken with a view to undertaking the interview. This was done in order to remove potential selection bias within this track of interviewing.

Track 3 research

A list of 39 organisations representing consultants, contractors, employers and sub-contractors from the construction and engineering field were identified by the TeCSA project team as being capable of providing an informed opinion.

Table 2 summarises the counts of firms identified and the proportion invited to participate.

[1] Consent to use the lists was provided by both The Legal 500 and Chambers and Partners

Type of party	Count of firms identified by TeCSA	Count of interviews achieved	Percentage of each type of party interviewed	Percentage of total interview targets	Stated no experience of PAP	Declined to participate
Consultants	4	4	100%	22%	0	0
Contractors	10	5	50%	28%	2	0
Employers	16	3	19%	17%	5	1
Sub-contractors	9	6	67%	33%	1	1
Total	39	18	46%	100%	8	2

Table 2 - Summary of track 3 sample and interview targets

10 individuals from these organisations, who were invited to participate in this research, stated that they did not have experience of the PAP and were therefore not able to contribute.

TeCSA Project team

The TeCSA project team comprised of:

- Dominic Helps – Corbett
- Kevin Forsyth - Charles Russell Speechlys
- Simon Tolson (Chair) – Fenwick Elliott
- Steven Williams – Nabarro

Two pilot interviews were conducted with members of the TeCSA project team to assess the format and presentation of the questions. Content from these pilot interviews has been excluded from the results.

Where the randomised listings in Track 2 identified a TeCSA project team member's firm to be interviewed, the interview was carried out with an alternative representative of the firm and not the TeCSA project team member.

Note on sample sizes

Acuigen worked with the TeCSA committee to identify a sample of potential respondents whose views were considered to represent an insightful and balanced opinion, working within a limited budget. The views expressed represent the opinions of the parties interviewed and are indicative of what opinions are likely to be if a larger sample of respondents had been interviewed as part of a wider study. The sample size does not allow this report to be a statistically representative view of law firm and industry opinion nationwide, rather, this report acts as a pilot project that gauges the variety of opinion and evidence available from firms and construction companies.

A pilot project of this type gives an indication of the likely opinion and type of evidence from respondents if the project was increased in size. More interviews and research will provide increased accuracy, depth and granularity of opinion

Notes on verbatim comments

Verbatim comments are as stated by respondents during interviews. Minor edits may have been applied for report readability.

Additional Insight gained from related studies

Two additional sourced of research into PAP are noted below.

TeCSA 2011 survey about effectiveness of PAP

TeCSA as part of the TCC's PAP review working party undertook a straw poll self-completion survey [1] via SCL, TeCSA and TECBAR between August and October 2011 which took responses from contractors, consultants, solicitors, barristers, employers and other consultants. 172 individuals responded to the survey as follows:

Respondent type	Count of responses
Developers	1
Contractors	12
Construction professionals	29
Solicitors	84
Barristers	46
None of the above	7

Table 3 - Summary of TeCSA interview sample from 2011 survey

Source: http://www.tecsa.org.uk/pre-action-protocol-pap

Key findings were:

- 88% or 147 respondents had experience of using the Protocol;
- 77% or 110 respondents said they found the Protocol useful;
- 47% or 67 respondents said the Protocol should be retained substantially in its current form;
- 11% or 16 respondents said it should be abolished altogether, and
- 42% or 60 respondents said it should be amended in some way.

Further details can be found by accessing http://www.tecsa.org.uk/pre-action-protocol-pap.

MSc dissertation paper into the impact of the pre-action protocols on dispute resolution proceedings

The paper[2] by Maria Oliveira in January 2015 into the impact of pre-action protocols on dispute resolution in the construction industry the author aims to determine the impact of the PAP on dispute resolution proceedings in the construction industry. In doing so the author engaged upon a literature review, a survey of relevant case law and collected quantitative data using an online self-complete questionnaire with construction lawyers and mediators.

The report finds that the industry perceives the advantages of pre-action proceedings and considers the Protocol as an opportunity not only to settle disputes but to ventilate and narrow the issues at an early stage before the litigation process. The research indicates that the success of the Protocol depends mainly on the parties' collaborative approach. The Protocol has positively contributed to the development of amicable means of dispute resolution though there is not a link between the use of the Protocol and the recourse to mediation. The use of mediation is limited and far from having been considered as the industry's favoured means to settle disputes.

[1] Source: http://www.tecsa.org.uk/pre-action-protocol-pap accessed 16th December 2015

[2] The impact of pre-action protocols on dispute resolution in the construction industry, MSc Construction Law & Dispute resolution dissertation by Maria Olivieira, Leeds Beckett University, January 2015

Recommended further research

Whilst this report provides an overview of the key themes within the research undertaken, there is a rich data source which could potentially assist TeCSA to further their understanding of opinions. It is recommended that:

- Further analysis of the available data be undertaken in discussion with TeCSA to ensure the maximum benefit is gained.
- Commence a larger project which becomes a more representative view including contributions from law firms, the bar, the judiciary, and industry clients. This would provide an opportunity for more parties to both contribute and facilitate the canvassing of wider opinion, thereby further informing opinions on PAP and therefore access to justice. As the sample size of respondents increases, the accuracy of the findings will increase and the granularity of the findings can be examined in greater detail, as can sub-sets of opinion. It is therefore proposed that the following be considered as part of the wider project:
  - Consider involving TECBAR, TeCSA, TCC Judges, the Civil Procedure Rules Committee, the Construction Industry Council and industry boards in extending the project
  - Construction law firms/sets be invited to [confidentially] nominate key construction clients to Acuigen (including those who may have or have not used PAP) whose opinion would further represent the construction industry, supplemented by further names obtained from reputable industry list brokers
  - More law firms be invited to provide facts about PAP matters to build a more comprehensive assessment of costs and outcomes
  - More law firms and specialist barristers be contacted for their contribution.

Detailed Findings of the Research

This section of the report summarises key findings from Track 2 and 3 research, and where appropriate, is supported by data collected during Track 1. Responses are typically reported for the sample as a whole (i.e. from all 39 interviews). Where any relevant variation between tracks of research, types of clients or tiers of law firms within the sample is identified, this will be highlighted.

What percentage of disputes achieve settlement during PAP?

39 respondents[1] who were interviewed during the Track 2 and 3 research had experience of disputes to which the PAP was applicable. They stated that they had been involved in circa 677 disputes to which the PAP was applicable, as shown in Figure 1. 41% of these disputes achieved settlement during pre-action and 8% went on to trial.

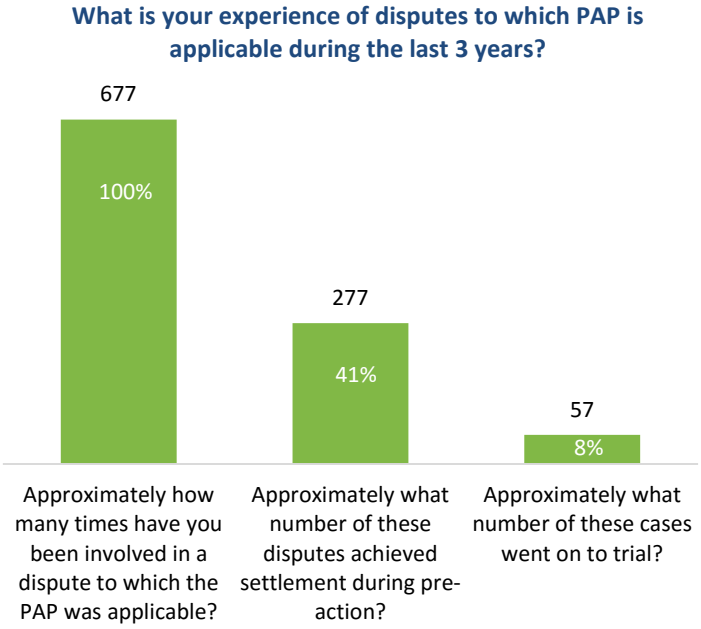

Figure 1 - How many times PAP has been used in the last 3 years

Comparatively, the Track 1 data suggests that circa 35% of disputes achieve settlement prior to issuing of court proceedings, as shown in Table 4.

It should be noted that the data in Table 4 includes a number of disputes which are in progress and so may, in part, explain the difference in figures between Track 1 and 2.

[1] It is noted that 10 individuals were invited to participate in the Track 3 research declined to participate in the study stating that they did not have experience of the PAP and were therefore unable to contribute.

During Track 1, 20 firms provided data of disputes to which the PAP was applicable during the last 3 years. They listed 216 matters. The following summarises the outcomes of these cases; it excludes some matters which were reported but had incomplete entries.

	Did settlement take place prior to issue of court proceedings?	If settlement did not take place prior to court proceedings, did settlement take place prior to trial?	Was Alternative Dispute Resolution (ADR) attempted as part of the PAP?	Did settlement occur during this ADR?
Yes	42	23	65	24
No	79	21	86	49
Total	121	44	151	73
Percentage achieving settlement	35%	52%	N/A	33%
Matters in progress	55	32	27	21

Table 4 - Summary of outcomes of cases in Track 1 research

PAP Objectives

The high level objectives of the PAP, as stated on the Ministry of Justice website[1], are:

- To encourage early and full information exchange about the prospective legal claim
- To enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings
- To support the efficient management of proceedings where litigation cannot be avoided

Respondents were asked to consider how important these objectives were, and how effective each of the objectives were in assisting both parties to agree a settlement before going to court.

[1] Para 1.3 of https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_ced, accessed 20/11/15.

The importance of PAP

Almost all respondents (clients and firms) thought that it was important that the PAP encourages early and full information exchange and avoid litigation as shown in Figure 2. However, only half of the respondents considered it important that it supports the management of proceedings where litigation cannot be avoided.

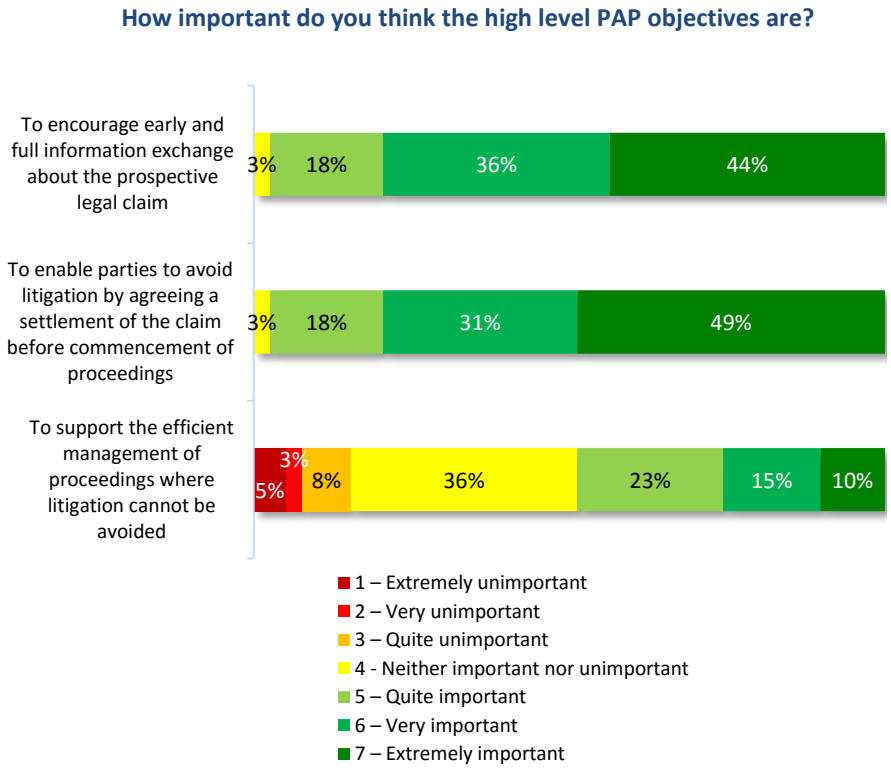

Figure 2 – Rating of importance of high level PAP objectives

(n = 39 respondents)

The effectiveness of PAP

Whilst the majority of respondents (71%) agree that the PAP is effective in encouraging an early and full exchange of information about the prospective claim, some 13% disagree, as Figure 3 shows.

Unsurprisingly a similar number (68%) agree that the PAP enables parties to avoid litigation, with 19% disagreeing.

When asked whether PAP is effective in supporting the efficient management of proceedings, views were almost equally split, for, against and undecided.

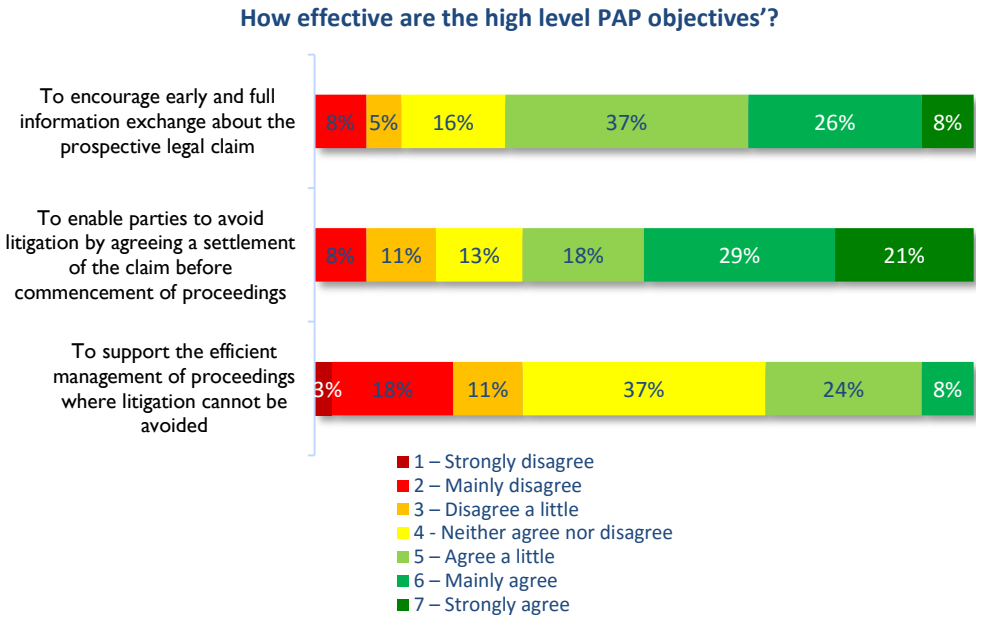

Figure 3 - Extent to which the PAP objectives are effective

(n = 38 respondents)

The differing views as to whether PAP supports 'efficient management of proceedings' shown in Figure 3 (lower data series) above are also supported by the verbatim comments gathered from law firms in Track 1.

Track 1 respondents were asked if PAP assisted efficient management of proceedings. Excluding matters which were ongoing, circa 50% of the track indicated it did, 45% indicated it did not and 5% were unsure.

Does settlement lead to lower costs

Data gathered in Track 1 suggests that the total costs as a percentage[1] of the amount in dispute are kept lower when the settlement is reached prior to issuing court proceedings, as shown in Table 5.

	Did settlement take place prior to issue of court proceedings?		If settlement did not take place prior to court proceedings, did settlement take place prior to trial?		Was Alternative Dispute Resolution (ADR) attempted as part of the PAP?		Did settlement occur during this ADR?	
	Yes	No	Yes	No	Yes	No	Yes	No
Average total costs incurred in dispute as a percentage of the total amount in dispute	13%	28%	17%	35%	19%	23%	13%	33%
Average costs incurred up to end of PAP period as a percentage of the total amount in dispute	11%	6%	5%	5%	8%	8%	10%	8%

Table 5 - Summary of impact of outcome of dispute on the costs involved

Is the PAP a valuable mechanism?

Respondents were asked if they felt that the PAP was a valuable pre-action mechanism and 95% of those interviewed thought that it was. Figure 4 and Figure 5 summarise the themes within the responses given by law firms and construction firms respectively.

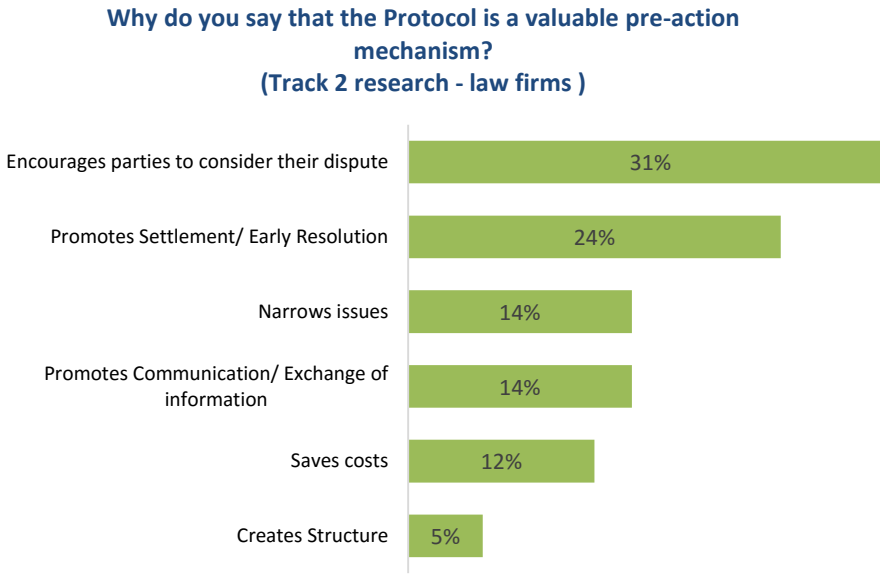

Figure 4 - Reasons why law firms think the PAP is a valuable mechanism

(n= 42 themes in 20 interviews)

[1] In compiling the average figures in Table 5, the actual costs of each matter provided in Track 1 have been calculated as a percentage of the total amount in dispute, and the values reported in Table 5 are the averages of the percentages for each respective row in the table. The averages of the totals of the actual figures have not been used due to the large variation in the amounts in dispute and the variation that this introduces.

Why do you say that the Protocol a valuable pre-action mechanism?
(Track 3 research - construction firms)

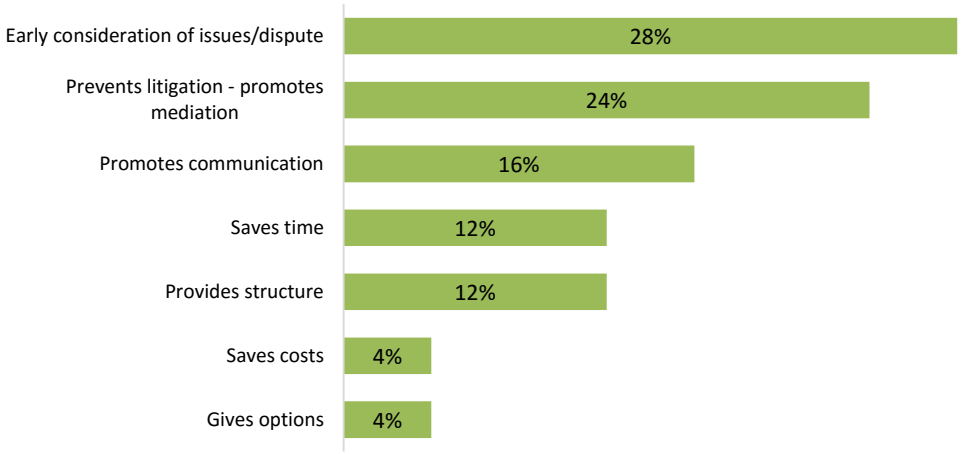

Figure 5 - Reasons why construction clients think the PAP is a valuable mechanism

(n= 25 themes in 17 interviews)

Table 6 below provides example comments to evidence the summary in Figure 4. It should be noted that although these firms felt the PAP was valuable, some criticisms of the existing process were explained. For instance, one firm felt that it did contribute to extending the time frame of proceedings, or front loaded the costs.

Theme	Comment
Encourages parties to consider their dispute	I think that it forces both clients and solicitors to evaluate the claim and the evidence. You may have a client who believes that they have the best case in the world. However, if it cannot be backed up with the evidence, which is necessary for the purpose of protocol, you have to tell them that their case is not as strong as they would like it to be. That can then lead to either poor claims not getting off the ground or lowering client expectations and promoting settlement."
	It is another mechanism for forcing the parties to think about their positions. The other way in which it is useful, but this not always appreciated, is when a matter is being dealt with through a cluster of individuals within an organisation where they may not be obliged to, or feel suitably free to report genuine positions to their superiors, who may be the decision makers in the business. By forcing a process upon them it is likely to assist in making sure that the business understands the risks and the issues.
	It genuinely does make parties think about their claim before pressing the button and going to full proceedings. The number of claims that commence in court, which require substantive amendment and re-amendment because the parties have not thought about what their claims are really about, is reduced. Where operated properly, the Protocol really does narrow what can be sometimes quite a broad nebulous dispute to the real crux of what is in dispute between the parties. If you look at a contractor's final account claim as an example, with all of its claims for an extension of time money all thrown in in one go; if the Protocol is effectively used then there is a real opportunity to narrow some of the issues, so that the substantive issues between the parties are the only ones that are left if you end up needing to go to court.
	It encourages people to set out in a reasonably coherent and flexible way what the case is; often that is not done prior to court processes where there is not a protocol that is applicable. More importantly it gives you an opportunity to gain a coherent response to the position that has been presented by you or vice versa. I think it does do something valuable and it is a valuable process; it makes a contribution. It can front load costs enormously. I had a Pre-Action Protocol process that lasted for eighteen months and it was actually a complete waste of time because none of the deadlines were met by the other side. The case ended up being tried and it ended up with a court dispute and a one

Theme	Comment
	hundred and eight-page judgment. However, that was not for want of the Protocol; it was because of the other side. In my experience the Protocol has tended to promote mediation in two of the cases where we had the Protocol. In those cases it was a stepping stone to having a pre-action mediation; we did not settle during mediation in either of those cases, but the very fact that it was something that the Protocol expected, or encouraged was of help.
Promotes Settlement/ Early Resolution	It does a number of things. It avoids vexatious litigation. It forces parties to articulate their claim in some level of detail, which often flushes out claims that are either entirely bad, or bad in part. It often has the result of moving the parties toward settlement at what is considered as a far cheaper route than if the parties went to litigation straight off.
Narrows issues	If I cast my mind back to when I was more junior, and I was dealing with lower value disputes, there was a greater percentage of success in narrowing or settling disputes as I went through the Protocol. I think the Protocol is less effective when you have very complicated or multi-party cases. This may be because when you have a very complicated delay and disruption claim, it would be difficult to bring parties closer together without going through detailed expert analysis. Sometimes it feels like the parties are already aware that the path is going to be a long one, particularly in this industry where you have people who work in engineering firms who are particularly savvy. They will have made their own efforts to resolve matters before they have even contacted lawyers. Sometimes it does feel like you are just going through the motions of the Protocol on these big cases where people are a long way apart and they are concerned that they will get penalised in terms of cost if they do not do it. Some people take advantage of that by dragging their heels and making things go on for longer than they need to.
Promotes Communication/ Exchange of information	I see the Protocol as facilitating the opportunity to resolve a dispute early on; which is clearly one of its objectives, and it does achieve that aim. Secondly, it provides a solicitor dealing with clients an important check on the ability of the client, together with the solicitor, to articulate its claim in a meaningful way. I think that in itself it enables you to essentially access whether you have actually got a claim or not, and it is useful from that perspective. So, as I have said, it offers the chance of settlement, and the chance to articulate a claim and thirdly it is a useful tactical tool for advocating your client's position. It can be used tactically, and it is an important tactical tool that I suppose I would not like to lose.
Saves costs	If you have a good claim as a claimant, or you are a defendant and you present a claim which shows you really have not got room to manoeuvre, then the Protocol does promote early settlement of the claim before proceedings are issued. I think that solves the problem of the parties incurring unnecessary costs by going straight through to proceedings and then having to discuss it. It is often that when you do have this process you will agree ways to settle which are more innovative than just going through court proceedings and simply giving someone some money, especially if you have not incurred substantial costs. In those circumstances you are able to come up with different methods of settlement.
Creates Structure	It focuses each party's minds, which is a key point. It sets out an indicative timetable, it cannot be extended indefinitely and therefore it focuses the parties on having a structure in place that they have to go through to commence proceedings. I think that otherwise there is a risk of things either drifting for years and years or one party pushing things too quickly, which does not give the other side the chance to consider their case properly and take advice on it.

Table 6 - Example comments explaining why the PAP was a valuable exercise for law firms

(n = 20 interviews from Track 2 research)

One law firm interviewed in Track 2 research did not think that the PAP was valuable, they felt that this was because it prevented settlement or the effective management of the case:

Theme	Comment
Prevents settlement	I think that the attempt to impose a structure on what professionals are expected to do in any event is unwarranted interference, which if anything inhibits the parties' ability to try and settle, or to manage a case effectively. What it is effectively saying is that we do not trust professionals to do this, so we are going to try and impose it. In some ways it is an impertinence.

Table 7 - Comment explaining why the PAP was not a valuable exercise for law firms

Table 8 provides similar example comments from construction clients in support of Figure 5. It should be noted that, although these firms felt the PAP was valuable, there were some issues highlighted within these comments, for instance that the PAP meeting is too early for a view as to whether parties wish to settle or not.

Theme	Comment
Early consideration of issues/dispute	It involves the early identification of issues, subject of course to the fact that things can come out of the woodwork during more formal issues, such as discovery, and the development of arguments. It is certainly a shining contrast to the days of many years ago when you simply had to issue a writ, having written a seven day letter with a very cursory summary of your position.
	I fully support the objectives and I think there are reasons why parties go to litigation; these often happen due to misunderstandings and misperceptions. All too often the senior people in an organisation do not fully appreciate what is involved until they get there. In the construction industry, where projects can last several years, certain forecasts will be put in by the different parties regarding the various outcomes; I suppose that could be delayed costs of variation agreements or whatever else. You can have built-in adversarial views before the case will ever get to court, but quite often the senior people in a company do not get to explore what the arguments are about until they are sitting in the court room wondering why they are there because the matter could have already been dealt with. The Pre-Action Protocol offers a reasonable balance because it is serious enough to draw in the senior people in a company provided it is managed properly. They should then be made aware of what it is all about before it gets out of everybody's control and you find yourself up in front of the judge.
Prevents litigation - promotes mediation	It is partly influenced if you are the claimant, but more so if you are the defendant which is what I have generally tended to be, but it tends to flush out a position. The Pre-Action Protocol process makes people think about the claim and the presentation of the claim. Rather than rushing off and issuing proceedings, if it works effectively the process makes someone think that they have to try and convince a claimant on the other side of what my position is, and equally if I am the defendant I have to understand what difficulties lie in presenting the position. At its best the Protocol process, coupled potentially with mediation, has that benefit.
	I think that having a Protocol period is very helpful, if you have the right Protocol. It is an opportunity for the parties to resolve claims before litigation commences, before people have to start fitting into a court timetable; that can be very helpful. With sufficient exchange of documentation by both parties, they will really know where the claim is going beforehand, without having to wait for very late disclosure later on. The parties can decide to mediate at an earlier stage or make concessions, even to have without prejudice discussions to get the parties closer to resolution. The Protocol period can allow that and can be very helpful indeed. However, I feel that the construction Protocol tends to force the parties into a defensive position; in particular, with regard to the Pre-Action Protocol meeting which is far too early for anyone to have taken a view as to whether they want to get this settled quickly. I think that this can be unhelpful and can end up incurring more costs.
Promotes communication	It is very helpful to get the information upfront regarding why the other party thinks they have a claim against you, and to have the opportunity to look into it. It is also helpful to have some parameters around timescales; it does generally lead to the without prejudice protocol meeting, which is useful to get an understanding of the dispute and get people around the table to work out possible resolutions where it often goes to mediation.
	It is a valuable mechanism because it is important that the parties get to meet each other, and see the whites of each other's eyes before they go to court. However, I think there are flaws in the Protocol which I think we may well come on to.
Saves time	I think that any Pre-Action Protocol is a useful mechanism to follow. Not least because under the Construction Pre-Action Protocol there is less of a requirement to exchange huge amounts of documentation, as opposed to the normal litigation version. I think that the time limits are extremely useful. However, that can also be a hindrance in some circumstances, particularly if you have a claim which is extremely complicated which would rely on a lot of people for input. I think that 28 days to respond to a Letter of Response is a bit too short. Although I do think that it is a good yardstick, I think that there needs to be an explicit ability to be able to extend that period of time by agreement.
Provides structure	If it is used correctly it gives a good structure and you can get a feel for how things are going to go. I only qualified as a solicitor and came in post Woolf, so I only know the pre-action world of litigation. I think you would be surprised now if parties actually issue proceedings before

Theme	Comment
	exhausting the Protocol and they had a good handle on the pre-litigation stage, whereas before I do not think they would have quite had the same grasp of it.
Saves costs	I think that it saves time and money basically. It could be more effective, but it does save time and money. I remember the old days before the Pre-Action Protocols and I am glad that we are here where we are today, rather than where we were 20 years ago.
Gives options	I think that it suits certain types of claims. You have a choice; if for example you are a claimant you can do the Pre-Action Protocol or you can adjudicate. Obviously, adjudication is much more immediate and quicker, however, it has its own risks. I think that it gives you options.

Table 8 - Example comments explaining why the PAP was a valuable exercise for construction clients

(n = 17 interviews from Track 3 research)

One construction client interviewed in Track 3 research did not think that the PAP was valuable, they felt that this was because it incurred additional costs:

Theme	Comment
Incurred additional costs	The times that it does not work, it really does not work at all. We would mostly be defending PI claims, and I think that it probably costs us more money. That is because we do not always get enough information to be able to work out what our position is. It is not clear what they are actually saying and sometimes things are not so relevant; I do not think those would be in there if the claimant was forced to refine everything before they went to trial. It is probably circular, because probably part of it is the point to see if you have common ground before you go to trial and spend a lot of money. I think that for a defendant you can end up spending quite a bit of money saying something that does not ever get into a particular claim. I think that is lost money. I think that I have settled one case in a without prejudice meeting, but that was because we lost the argument. It was a bangs to right decision, whereas I think it was more grey than that. You do not have a strong hold on your settlement value.

Table 9 - Comment explaining why the PAP was not a valuable exercise for construction client

Does the PAP create access to justice?

Of the 39 respondents interviewed 87% felt that the PAP was creating access to justice, however there were 5 respondents (13%) who felt that it was acting as a barrier. 4 of these 5 were law firms, one respondent was a sub-contractor construction client.

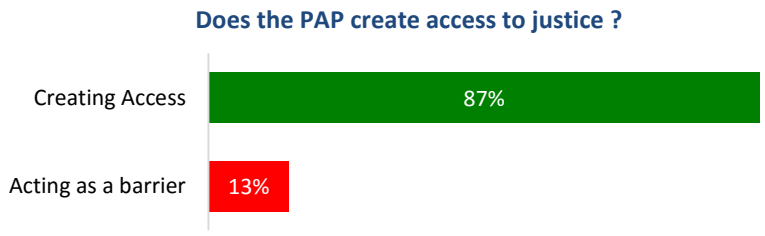

Figure 6 - Is the PAP creating access to justice or is it a barrier?

(n= 39 interviews)

When respondents felt that it was being a barrier to justice, they thought that this was because it slows the process, increases costs, or penalises a less well funded party to litigation.

Theme	Comment
Slows process	I think it is potentially a barrier because it is an added set of processes before you actually get to the start line. I entirely realise that the main penalty for failure to meet the Protocol is in the costs or potentially in costs but for those who are not so well funded it could be a barrier.
Penalises a less well funded litigation	I think that it is very easy for people with bigger law firms or large resources to have an unfair advantage in the protocol. I am not sure that there is any way in which you can get over that. The Pre-Action Protocol is not judiciously led; there is no one to protect the little guy. So I think that it is potentially acting as a barrier. However, I am not sure what can be practically be done to deal with the situation.

Table 10 - Comment explaining why it is a barrier to justice

How is the PAP working in practice?

Respondents were asked to consider a number of statements which describe benefits and criticisms of the PAP process which have been highlighted in previous reviews, studies, descriptions and commentaries. The respondents were asked to rate the extent that they agreed or disagreed with each statement on a 7-point scale. Their responses are show in Figure 7 below.

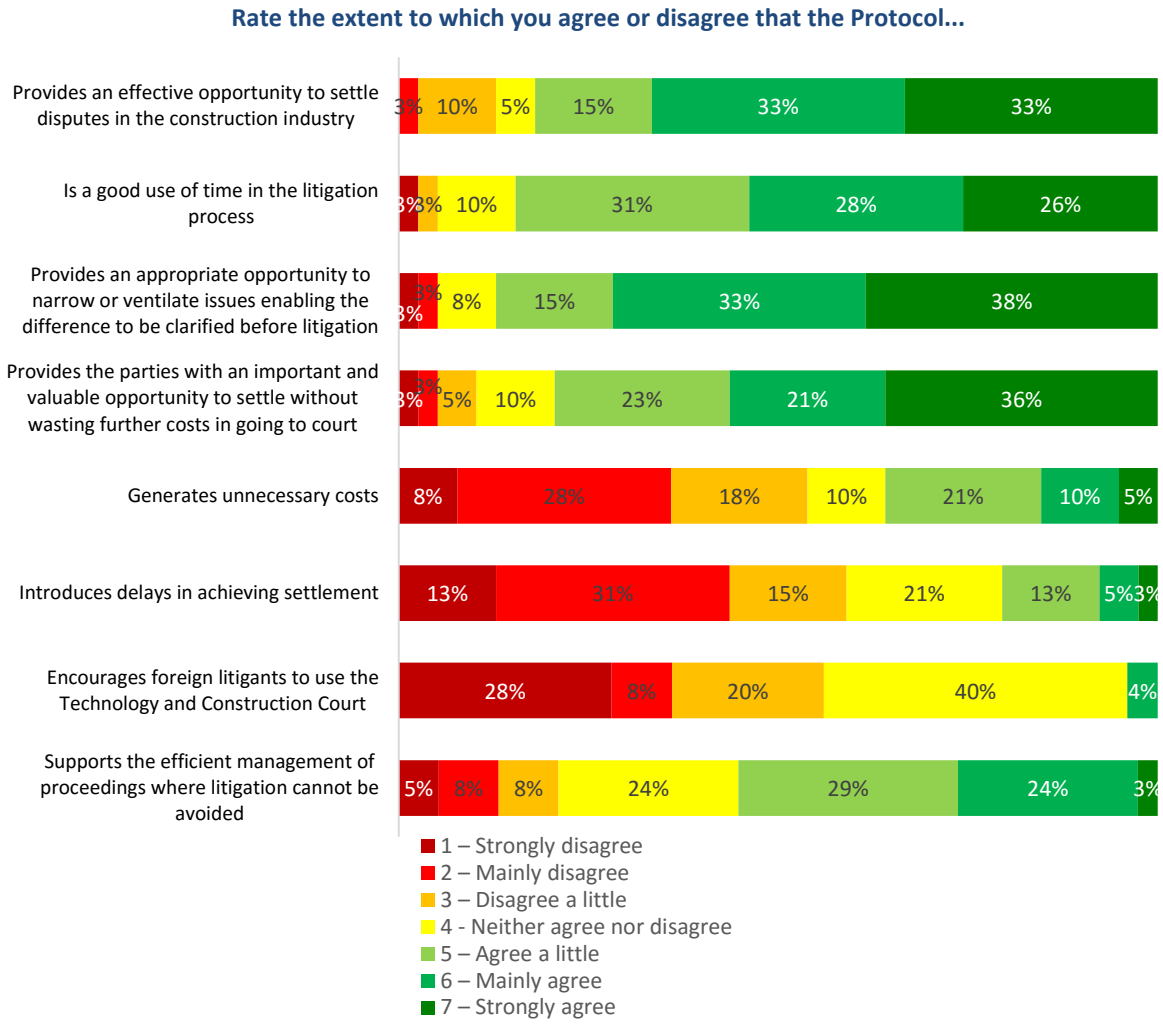

Figure 7 - Ratings on key statements describing how the PAP is working in practice

(n= 39 interviews)

When the total ratings in Figure 7 are compared with those given by respondents to Track 2 and Track 3 research the ratings for each track follow a similar pattern to those shown above. However, a higher number of the

Track 2 law firms have rated 1 indicating that they strongly disagree with the statements 'the PAP introduces delays in achieving settlement', 'encourages foreign litigation' and 'supports efficient management of proceedings where litigation cannot be avoided' than the track 3 construction clients.

When does the PAP generate unnecessary costs?

Where respondents indicated that they agreed that the PAP does generate unnecessary costs, they gave comments of the type shown below:

Theme	Comment
Cases were complex, or involved multiple parties	I think that this happens on multi-party cases and delay cases. Quite often the types of disputes that we end up dealing with are when a project has overrun on its construction schedule and the parties end up falling out over whose responsibility is for it taking longer and for the resulting costs. On a practical level this can be quite difficult to determine because you have to get specialist scheduling experts in to pour over all the progress records; it can be very time consuming and expensive. That is complicated further when you have a complex construction project where it might not be just one employer and one contractor. There might be, for example, an employer and a contractor, two different types of designer, specialist sub-contractors, and then apportioning liability between all those parties is difficult. You might have insurers involved as well and they would have a different attitude to things. It can be very complicated and in my experience the extent to which you need to go through that in the Pre-Action Protocol is a constant source of disagreement between the parties.
When one party abuses, or delays the PAP process	I think for the defendants it does create excessive costs. I think that the claimants sometimes go very wide to begin with on the basis that they have not done enough work up-front, and they are just testing you to see what you bite down on. I think as a defendant you sometimes end up researching things which just are not relevant and do not appear in the particulars of claim.
	It can generate unnecessary costs in circumstances where a defendant asks for protracted documentation or information and is going on a fishing expedition.
Where there is a debate about how a party has complied with the PAP process or not	It can generate unnecessary costs because of the way it is implemented. The question of compliance with the claim letter and the response is often debated in correspondence between solicitors, under threat that an inadequately stated claim, or an inadequately stated response will put the relevant party at risk on costs. In that negotiation and debate you have not complied and that is sometimes necessary because sometimes the claim letters are inadequate, but of course it should not turn into a debate about whether or not a claim was adequately pleaded. I think what the claim letter should do is essentially give the gist of the claim to the responding party or the defendant, otherwise it can get a bit silly.
It is labour intensive	It is labour intensive and although I might be talking against myself, there are aspects of it that you cannot let your client get on with and do. It does require a lot of solicitor input, which then generates costs. I do not know the answer to this, but if there was some way of simplifying the process then costs could be saved. However, I can only offer an observation; I cannot offer a solution.
	I would say in the ideal world no, but in practice yes it does create excessive costs. I think that where you to have larger or more competitive law firms involved, that is when it happens.

Table 11 - comments illustrating when the PAP generates unnecessary costs (n = 14 respondents)

These respondents were asked if value could be created from incurring these costs prior to proceedings being issued. Of the 14 respondents who felt that the PAP generated unnecessary costs, 9 felt that these costs did create some value prior to proceedings being issued. They were also asked if they could propose any improvements to the process so as to create value, some of the suggested improvements were:

Theme	Comment
Limit and be proportional with the	Generally speaking, the more information that is on the table, the better it is for both parties in understanding their position; that refers not only to an opponent, but also to the client. So I suppose there is value in that. I think that applying proportionality is a factor; but it may be argued that that would be the case already. If there are multiple

Theme	Comment
documentation required	heads of claim, the prescriptive ability to focus on the main value claims might be quite useful.
	I think you could word the Protocol in such a way to better define what the key documents mean; it is an endless dispute that we encounter. It could also state the requirement for pragmatism and limited documentation and information in the Protocol process, as you are not litigating the whole dispute pre-action only to then to go and litigate it again in court under the CPR.
Encourage better pre-action meetings	My own view is that the stage that is often not employed to the fullest extent is the pre-action meetings. I think that you could almost agree not to meet and just to get on with things. However, I think that sometimes there would be a greater benefit from having a meeting. They could also add an element to that meeting of not just narrowing the issues, but really forcing the parties to consider the matters on a without prejudice basis to see if settlement could be reached at that stage.
Apply it only to the categories of dispute for which it is appropriate	Yes, there must be some value in it and I do not think it is a complete waste of time; I think that there is some value in it. It at least forces parties to meet before they go to court. Otherwise you could be at each other's throats for a year before you would see anybody and go to mediation. I do not think that we should get rid of it completely, because I do think there is some value in it. I just do not think that it works for all disputes. Then it must be just a case of working out the categories of disputes that it does work for, and I have not thought about that.

Table 12 - Suggestions for improvement to create more value from costs prior to proceedings being issued (n = 14 respondents)

When does the PAP waste time?

Where respondents agreed that the PAP introduces delays in achieving settlement they were asked where they thought that the delays were being generated; their comments indicate that the sort of delays that are introduced are as follows:

Theme	Comment
When one party does not comply with the PAP	Sometimes it can introduce delays. If you are looking at it from the claimant's perspective, it really depends on whether the defendant wants to play ball with you or if they want to delay. From my experience, if the defendant is not insured and you present a robust case they will participate in order to reach some sort of settlement. If they are panel law firms for insurers that act for the insured abuse the Protocol and delay the inevitable; they string matters out for considerable periods of time. I think that could be for many reasons but one I tend to find is that when you first start a claim the panel law firm will allocate it to a rather junior solicitor who may not have much experience in construction law. They have a number of files sitting on their desk and they just pile them high. If it is then subsequently seen as a chunky claim it can get transferred to somebody else and there will be a few people working on it. Sometimes for example it can be one person in the London office and someone else in an office up north who are doing it for cheaper rates. There will then be a few people dealing with it and also there is inevitably a high turnover of staff. The insurers themselves are very reluctant to pay out money and it will take a long time before they are prepared to put some real money on the table and deal with it properly. They also have to get counsel's advice to satisfy themselves that they should pay out. When you have that sort of defendant the process can take a lot longer and it can cost a lot more money and it can delay the actual inevitable settlement. The Protocol is far too flexible and there is no real bite to it. You have a process where somebody has got three months to respond to a letter of claim and inevitably they will try their best in defending a claim to string it out. They will use every excuse in the book to get your three months. You get to the end of the three-month process and you write a letter, you raise a lot of questions and ask for further information. You can string the whole process out for a considerable period of time before you come to a Pre-Action Protocol meeting. The Protocol needs more structure and a rigid timetable so that there is less abuse.
When there is excessive information exchanged	The issue is that once you start the process, there is a natural tendency for parties wanting to go through it all before they will agree to mediate or to have a settlement discussion. Where issues are well known, it may be quicker to get to the nitty-gritty of having those discussions directly without the need to exchange correspondence first.

Theme	Comment
Discourages mediation or ADR	The wasting of time goes back to my previous comments and my bugbear about the Protocol meeting. I think that it tends to stop people mediating. It does the opposite of what it is intending to do. It makes people more defensive. They could be given more general guidelines on what they should be trying to do in that period. They should be allowed to do that within their own timing, which I think would resolve things a bit quicker.

Table 13 - Comments illustrating when the PAP wastes time (n = 8 respondents)

These same respondents were asked to propose a way in which the PAP could be improved to ensure that parties did not spend too much time dealing with the pre-action steps, as shown below:

Theme	Comment
Clear guidelines on information exchange, and penalties for not complying	The biggest cause of delay comes once the pre-action correspondence has been exchanged and there is a delay in getting a meeting for a mediation. You could replace it with a long-stop date around the time that it needs to be undertaken prior to a party commencing proceedings; if it has not been achieved during that long-stop date, the adverse consequence of mediating would be removed.
	I think that more of a tight or definitive timetable for letters of response, testing and queries. There should also be clear guidelines on what documentation you can request from each other. Clearly you should not be put through the expense of disclosing all of your documents, but you need to supply some key documents; taking the opportunity to go on a fishing expedition, asking to see this or that, or witness statements, there is nothing about that in the Protocol. In the Protocol, if you have an expert you just need to identify who the expert is, but if for example you are defending a professional negligence claim you are not going to settle unless you actually see the experts report. If you claim a report is needed, from an expert. For example, to show that the building design was poor. When you receive the report, you want a reasonable amount of time to check with your own expert and for them to come back with their opinion on it. The Protocol is very lightweight on that; all it says is that you need to state whether or not you have an expert. I find that unhelpful because nine times out of ten, if you are defending a claim you want to see the expert's report. I think that makes the claimant go to the expense of producing the expert's report and you cannot bring the claim if you have not got an expert's report. You can always cite that point and say you will not consider things until you see the expert's report. The Protocol is very lukewarm on what the requirements are and people can abuse that; it makes people incur more expense and more delays.
Dispense with the meeting and replace it with compulsory mediation	I am not entirely sure, but I would dispense with the meeting. However, still having an expectation of the parties, if it were to get to litigation, that they must have shown they considered mediation at that stage. If not, then potential costs could be cinctured. They need to be aiming towards mediation during that Protocol period.

Table 14 – How can PAP be improved to reduce time dealing with pre-action steps

Does the PAP remain up to date?

When asked if the PAP remains up to date with the needs and dynamics of pre-litigation processes, overall 82% of respondents agreed that it did, as shown in Figure 8, but when examined by Track, 90% of law firms believed it was up to date compared to 72% of the construction clients. The organisations who thought it was no longer up to date were sub-contractors and employers.

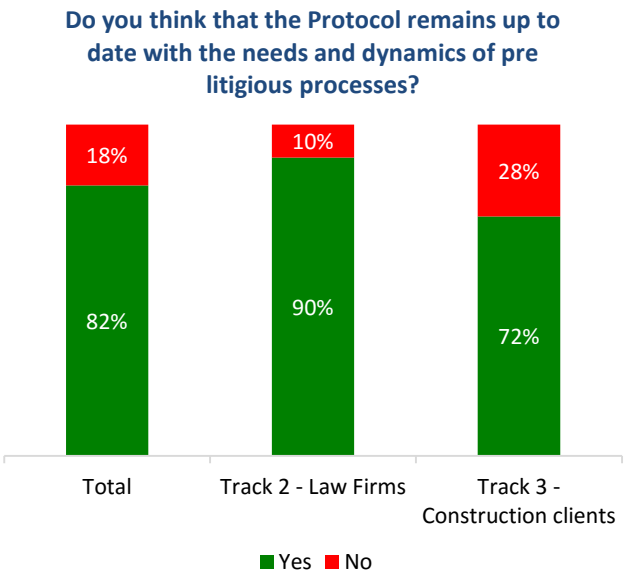

Figure 8 - Does the PAP remain up to date?

(n = 38 respondents, 20 in Track 2, 18 in Track 3)

Respondents were then asked if the process should be changed in any way, Figure 9 and Figure 10 summarise how law firms and construction clients respectively thought it should be updated

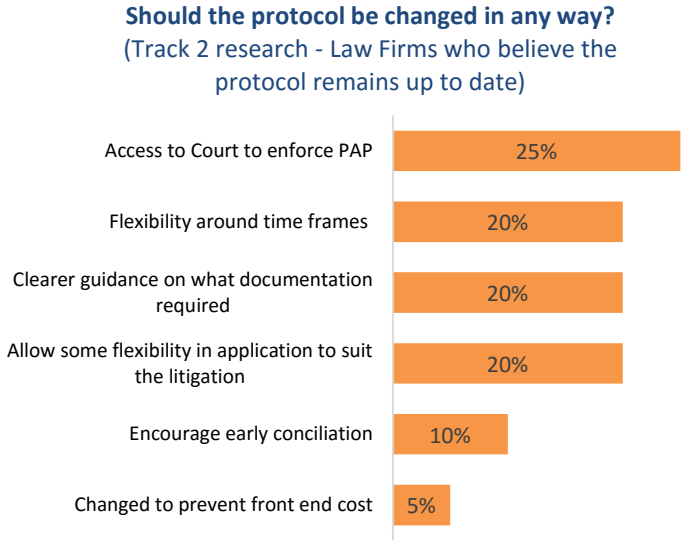

Figure 9 - Summary of comments describing how Law firms think the PAP should change (n = 18 respondents from Track 2 research who thought the PAP remained up to date)

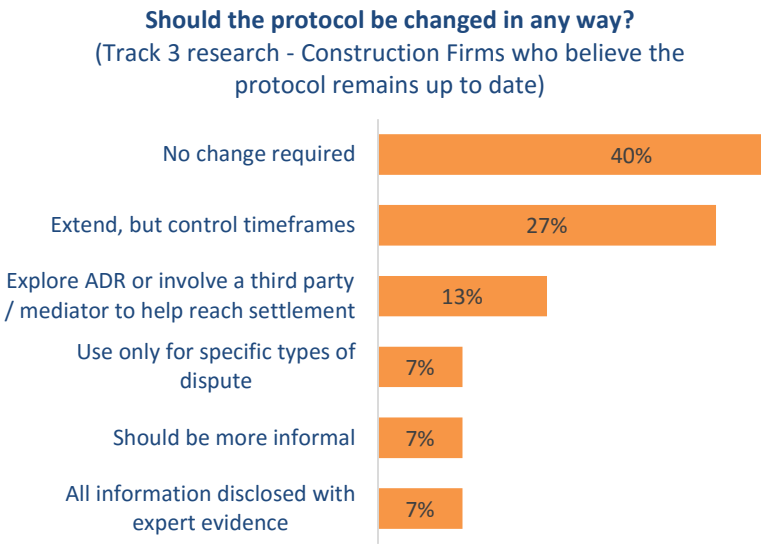

Figure 10 - Summary of comments describing how construction clients think the PAP should change (n = 13 respondents from Track 3 research who thought the PAP remained up to date)

Table 15 below provides example comments to evidence the summary in Figure 9.

Theme	Comment
Access to Court to enforce PAP	I think that one of the problems is that you cannot enforce it. If someone really does not comply with it there is no leverage. The person that refuses to comply at all can make it less effective because you are not really getting an answer from them. I think that if there were a means to apply to the court to require the other party to respond, that would be helpful.
	It does remain up to date, but I would say that would be subject to a process being put in place to prevent abuse. It needs to be changed to ensure there is a process in place that allows either party to go to the court for some direction, if they feel the Protocol is being abused.
	I think it would benefit from guidance in certain circumstances. I act for a lot of claimants on the whole and, in particular, I act against insurer defendants on the other side. I think there is a risk of abuse where defendants can use it as a tactic to delay, or attempt to force the other side to run up significant costs before they take on the costs risk of commencing proceedings. I think potentially there could be further guidance from the courts, or separate guidance on how the Protocol should be operated.
Flexibility around timeframes	I think that the periods of time that the parties have to respond should be linked to value of the claim. Where, for example, the claim is more expensive the parties should have a longer period to respond. I think these periods should be fixed and I also think the period between the letter of response and the without prejudice meeting should also be fixed. I think that will have the benefit of ensuring that both parties are clear how long the Pre-Action Protocol is going to take. I also think there should be a greater degree of consistency by the judges regarding how they impose sanctions for failing to comply with the Protocol. Judges should also be more supportive of the Protocol. My experience recently, in particular, is that unless there is a flagrant and very serious breach of the Protocol, the sanctions are limited.
	It probably achieves the right balance between being too prescriptive or too relaxed. It is intended to provide a framework without telling the parties exactly what to do and when, and I think you need that flexibility in the programme. Equally, you do not want anything too flexible because the whole objective is to have a structure in place that has to be loosely followed; it is getting that balance right. The parties can often supplement it, and they actually do that to suit their aims by agreement. I would say that possibly the only amendment I would suggest is the time for parties to agree could be extended slightly beyond what I think is three months. For a lot of the big claims that we deal with that is not enough. If both parties are in agreement to extend it, but you cannot do that because the Protocol itself describes that it cannot be extended beyond that timeframe. The only tweak

Theme	Comment
	I would make would be to have flexibility around the timetable. You would not want to necessarily allow one party to extend it unilaterally and indefinitely, but particularly in very document heavy cases there should be a little more flexibility within the timeframes.
Clearer guidance on what documentation required	One of the things that maybe needs to come forward in the Pre-Action Protocol, is considerations around those issues which come up typically at the case management stage and in particular with the electronic disclosure. By the time these are issued, it is often too late to get a full grasp of the requirement in terms of disclosure and how to deal with that in an orderly manner before the case management conference; that is something that needs to be considered.
	I would be thinking on my feet now, and maybe that is an answer in itself because I would almost scrabble around in order to think of something you would change about the process. Potentially there could be something around the content of the claim letters, correspondence and the degree of compliance. I suppose the one thing which might be helpful is to give greater guidance to litigants about the extent to which they should be spelling out their claims in correspondence.
Allow some flexibility in application to suit the litigation	In relation to the Protocol remaining up to date with the needs and dynamics of pre litigious processes; my yes here would be a qualified yes; it is a yes but there should be no reason why it should not remain a live document that can be updated to support how parties can best use it. In terms of it being changed in any way, there is a lot around compliance with the spirit of the Protocol and not the letter of the Protocol, which I think is the right thing. It should not be entirely prescriptive because if you are a party faced with another party who is not willing to engage properly, you should not be punished for not having complied with the Protocol to the letter; I think that only complying with the spirit is right. The Protocol could usefully provide for an almost separate process for claims which are the subject of defects which require expert evidence. With my example previously of the contractor's account claim, where it was just an argument about time and money, that could probably benefit from having a more streamlined process. Whereas where you have a defects claim, where the subject matter might be quite a detailed technical expert's explanation or the report of something failing, it could then provide for the exchange of expert views. At the moment, I think the Protocol only requires the parties to identify if they have experts appointed, and not for there to be any engagement between the experts. It is at the moment, a one size fits all protocol and there are certain types of claim that go to the TCC which could benefit from a more streamlined process. If a party is faced with the fact that the other side is just not complying, the court could have some sort of supervisory function. You should be able to go to the court to seek a direction, to be able to confirm that you have done everything that you need to do to comply with the Protocol, and that you are entitled to commence proceedings. It would allow the courts to have a bit more control over the process, which should prevent unnecessary costs being incurred, which I think is the biggest criticism of the Protocol at the moment.
Encourage early conciliation or mediation	Having given this some thought, I wonder if some sort of compulsory early conciliation or something similar to that would help. A requirement to go through, consider or invite the other side to some kind of early conciliation process before you can issue. To go through the Protocol stages of letter of claim, response, exchange of information, meeting and perhaps at that stage some early conciliation similar to what they do in employment cases nowadays, where parties are required to go through ACAS for early conciliation. I wonder if such a step could be introduced.
	It is not to say that it cannot benefit from some slight improvements. Sophisticated lawyers who use the protocol on a regular basis, of which we would put ourselves in that category, would normally appreciate that when there is more than one party it would be sensible to have mediation rather than just a without prejudice meeting, whereas the protocol sets out a without prejudice meeting. I think that parties themselves, if they are sensible, would amend it. It is not appropriate for a one size fits all because disputes are so different. At the moment I do not think that this is a simple question. I have seen a suggestion recently, where one of the options is that it should stay as it is, but it has recourse to the TCC judges pre-action; who can say if one of the parties is not performing as it should do. I think that would be a good and sensible resolution to some of the complaints that have been made by others in the industry.

Theme	Comment
Changed to prevent front end cost	It does remain up to date, but it would be good if it could be changed in a way that prevented overloading a front end cost, where it would be inappropriate to do that. However, I have no idea how you would achieve that.

Table 15 - Example comments showing how the PAP should be amended from those who thought it remained up to date (n = 18 respondents from Track 2 research who thought the PAP remained up to date)

Two law firms which thought that the PAP did not remain up to date, suggested that there needed to be a cost cap introduced and that the process should be amended to be optional rather than mandatory:

Theme	Comment
Introduce cost cap	There should be a more rigid timetable and firmer guidelines on the disclosure of documents, and the need for expert reports. One more reform could be that you could have a cap on costs that people incur, or costs that may be recoverable whilst going through the Pre-Action Protocol process.

Table 16 - Example comment showing suggested cost cap should be introduced

Table 15 below provides some exemplar comment to evidence the summary in Figure 10

Theme	Comment
No change required	My impression is that it is sufficiently up to date and it works well, but I am probably not best qualified to answer the question. I do not think it should be changed as I have not come across any problem with the protocol that has inhibited a process that where possible, creates the opportunity for a settlement.
Extend, but control timeframes	I think that sometimes you simply do not have time to be able to respond within the 28 days that you are asked to respond. You can request an extension but that is not always forthcoming. If I were to change a single thing, I would request a mandatory extended period in which the defendant is able to reply; a bit longer than the 28 days.
	Sometimes it can drift for too long and possibly there should be a prescribed timescale for holding the Pre-Action Protocol meeting. I do not think it is as prescriptive as it could be on that particular point.
Explore ADR or involve a third party / mediator to help reach settlement	My issue with the Protocol, bearing in mind I have only had one case within it in the last three years, is that it is the first opportunity the clients and their lawyers to meet each other and unfortunately it becomes a chance for both sets of lawyers to grandstand in front of their clients. They have an opportunity to show how good they are and outline that all the money that has been spent on them has been worthwhile, because they can argue the case for you very favourably and so on. To a degree for some of the barristers, their ego gets in the way and even if they were to concede certain points to the other side and even if they feel the opposition is correct, they are not going to drop their guard in front of their clients. They may do that outside of the meeting and suggest that the other side has a point, but the difficulty comes when you are in that cauldron of expectation; and as I have said no barrister wants to let his guard down in front of his client. I think that is the biggest difficulty, especially when the client has spent a lot of money getting to a certain stage in this process. It would be very difficult for a barrister to turn around and actually admit that the points the opposition have are very well considered and are good ones, and then suggest that it would be a struggle to overcome them. If one party has a weaker case the problem is first to admit it, and secondly get their client to come around to that viewpoint, because they may feel as though they have been led up the garden path concerning the merits and demerits of the case. The client will find himself in a position where he is backpedalling too fast considering where he is actually at. The suggestion I have may be a bit outlandish, but I would love to see a third QC involved, or somebody with some judicial nous to assist the parties in going back to their respective sides to reflect with them on their respective claims. For example, the third person could outline to the first party that they are a bit bereft of winning in areas A, B, and D, but they have good points on C, and suggest to them that they need to temper their expectations. He could then go to second party and say that they are strong on A, B and D, but they are very weak on C, and C is where the majority of the money is. He could then suggest that they look at their expectations because they would have quite a hurdle to climb in order to win all of what you are asking for. The third party could give them the opportunity to think about it for an hour or two before they go back into the room for another discussion. The third party could suggest

Theme	Comment
	that they broker some discussion on the key points. The parties could then come back in and the third party or mediator or whatever you want to call them could indicate that there is a settlement to be reached, but perhaps it is not near where either party thinks it is. However, they would then suggest where they think it is at. I think this could be the litmus for people really considering where they are at. The difficulty is, when you go there with your client, as a barrister of course, you do not want to concede. There is always a belief with certain barristers that even though things are not as strong as they would like them to be, they can create enough confusion, for want of a better word, or drive enough holes in the opposition's claim that they can muddy a settlement before they ever get to court. It may be that they think the expense of it may bring the other party to heel because they think they do not have the finance to cover it to the required degree. There are a lot of sub-texts and sub-plots within it.
Use only for specific types of dispute	It is not archaic. I do think that it does not suit all disputes so I think that perhaps its use needs to be narrowed. If you asked me what should be left in and what should be left out, that is where I would start to struggle because I have not thought about it. I do not think that it works for really complicated disputes that you would list in a court for several days. I think that it is pretty slap-dash, as you cannot respond to everything in 28 days. I know that you can ask for an extension, but you are not going into the same detail.
Should be more informal	I do not think so. I think it is just about the way people interpret it. Sometimes you get an opponent who says that you have not complied with the Protocol, when in fact you have. You do not have to state every facet of your case, and sometimes there is a suggestion that you might need to do that. I think communication about this could be clearer. It needs to be clear in the Protocol that parties do not have to provide the evidence that they would necessarily need to provide in a formal court process. It is a more informal process without the need to do that. You often get kickback on a letter you might have sent out before action, with people complaining that it does not comply strictly with the Protocol. The whole point of this is to try and be a little more informal and not have to go through a formal process.
All information disclosed with expert evidence	We had some ideas here about how it could be changed. We thought with professional negligence claims, expert evidence should be submitted with the Pre-Action Protocol letter. We thought that it would be good to limit the length of the Pre-Action Protocol letters. It should also be compulsory to disclose all of the documents that your case depends on and all the documents that go to the amount in dispute; that is all documents that go to quantum should be submitted.

Table 17 - Example comments showing how the PAP should be amended from those who thought it remained up to date

(n = 13 respondents from Track 3 research who thought the PAP remained up to date)

Five of the 18 construction clients interviewed felt that the PAP was not up to date and needed to be changed. Their suggestions for change involved:

Theme	Comment
Protecting smaller contractors to manage costs	I think it should be changed. I think that there needs to be some way of helping the smaller sub-contractors that do not have the resources the major five UK contractors have, or that big developers have. They should level the playing field. Perhaps there could be some way of having the ability to award costs for not following the spirit of the protocol or for exercising unfair advantage under it.
Be amended to be similar to the Professional Negligence Protocol:	I think that it compares unfavourably with other Protocols. I think that it should be brought more in line with the Professional Negligence Protocol, albeit that there is a difference. The document that you disclose in Professional Negligence Protocol is probably excessive for construction claims. Perhaps there could be a slightly less onerous duty to the documentation, but increased compared to what they have now. To get rid of the pre-action protocol meeting and to have 3 months as a standard period, rather than the 28 days that they have at present to get to the bottom of the claim. It takes longer than that to get the expert evidence that you usually require to work out whether or not it is reliable.
Change the mechanism to adjudication by a judge,	The reason it is not working is that irrespective of the Pre-Action Protocol you still end up in litigation, therefore what is the point in having it in the first place. I think you should either keep it with the current system or abandon it, but I think you waste an awful lot of costs in dealing with the Protocol if litigation automatically results. There

Theme	Comment
rather than following the PAP:	is another mechanism, namely adjudication, which is still used. It is not used as much as I would have thought it would be. Part of the problem is that I think people consider adjudication to be very rough justice, but so is going to trial. You can get some pretty rough justice at trial and I think therefore that adjudication needs to be changed rather than litigation. If adjudication was undertaken by judges, rather than appointed adjudicators from various expert bodies you might get a different answer, or at least you would not get a worse answer than going to trial.
Be amended so that each case is managed by a 3rd party who has the authority to intervene if requested:	Yes, I think it should be actively case-managed, whether that is by the TCC or someone who is specifically appointed; not that they should be in the court, but there should be the opportunity for any of the parties to ask for intervention to have the Pre-Action Protocol managed in terms of the time and the documentation. I appreciate that this is a difficult balance and if there is too much involved you might as well be in court. However, there needs to be perhaps some discipline on the timescale, the presentation of documentation and an encouragement to have mediation. There should be timescales for responses and there should be better case management with some teeth. I think that at the moment, although it is not voluntary, it might as well be in some cases.

Table 18 – Construction clients suggestions to change PAP to bring it up to date

Have you had to settle on poorer terms as a result of complying with PAP?

As shown in Figure 8 very few respondents felt that they have had to settle on poorer terms than they felt they could have as a result of complying with the PAP. The results were consistent across both tracks with a single law firm and a single construction client thinking that they could have achieved a more favourable settlement. On both occasions the respondent gave an example of sole traders facing court proceedings and choosing to settle.

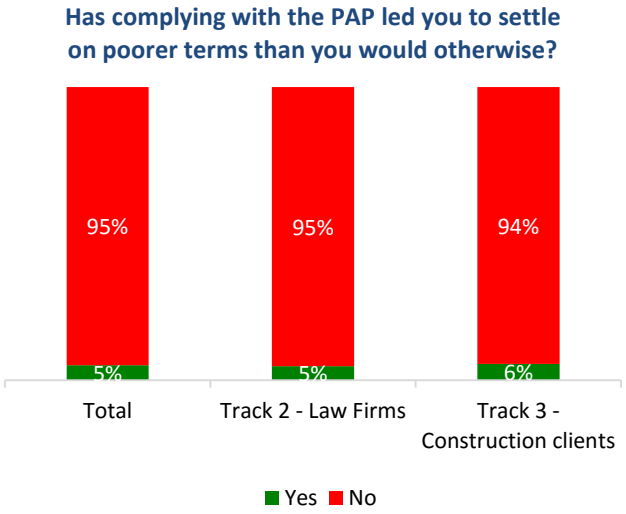

Figure 11 - Has the PAP lead you to settle on poorer terms that would otherwise have seemed justified?

(n = 39 respondents)

Should the PAP be amended?

Approximately half of the respondents felt that the PAP should be retained in its current form, but half think it should be amended in some way. A relatively small number of law firms felt that it should be abolished altogether.

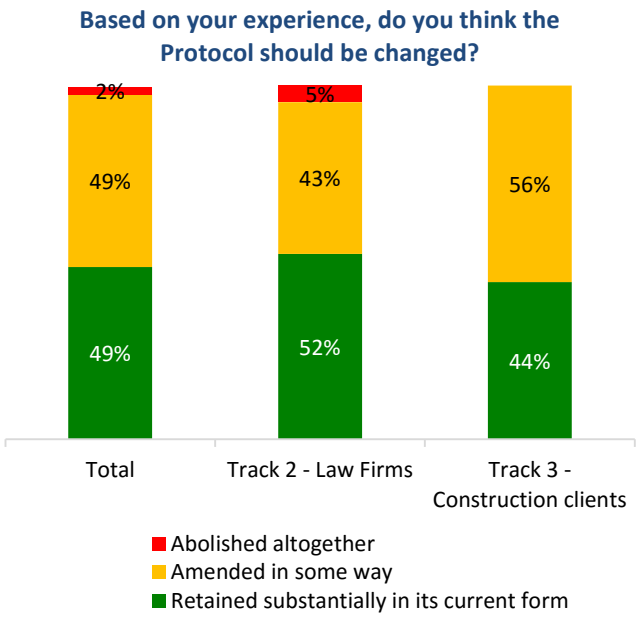

Figure 12 - Should the PAP be amended? (n = 39 respondents, 21 Track 2, 18 Track 3)

Would it be beneficial to have access to the TCC judges pre-action?

Figure 13 shows that approximately three quarters of respondents thought that it would be beneficial to have access to the TCC judges pre-action or to be able to apply for their direction during the process.

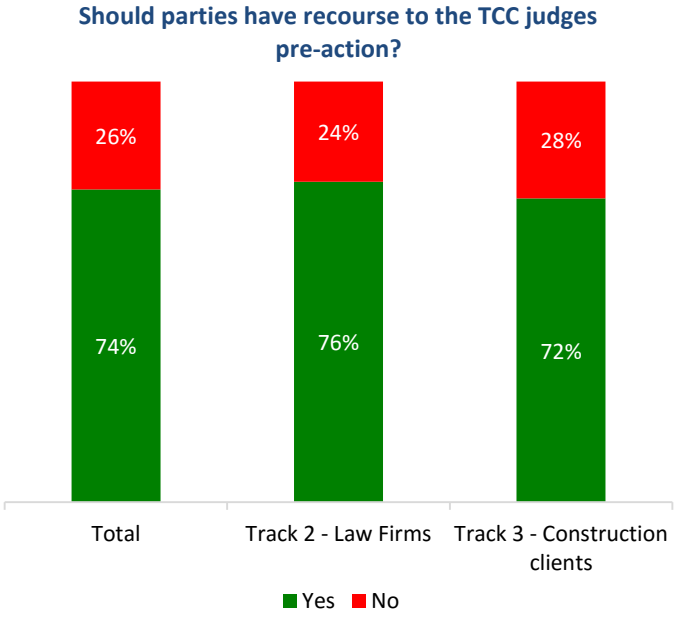

Figure 13 - Would it be beneficial to amend the rules of the TCC so that parties can have recourse to the TCC judges pre-action or apply to the courts for direction during the PAP process?

Whilst, in general, respondents thought that it would be beneficial to have recourse to the TCC judges pre-action, some also recognised that this may introduce potential delays or additional cost:

Theme	Comment
Introduce delays or additional costs	I think that is fine and guidance is useful, but that will probably have the equal effect of increasing court fees and also in delaying matters. If there is going to be reference to the judge's pre-action, then I think that it needs to be done under some very strict terms, and the judges themselves will need to have a very strict timetable to respond. It is useful, but also dangerous.

Table 19 – Comments discussing changing PAP to give access to TCC judges

How should the PAP be amended?

Figure 14 shows that around half of the individuals who responded to this study felt that the PAP should be amended to become a cost-recoverable exercise, or part of the TCC court process. A smaller number felt that it should become voluntary, or voluntary with penalties for non-compliance.

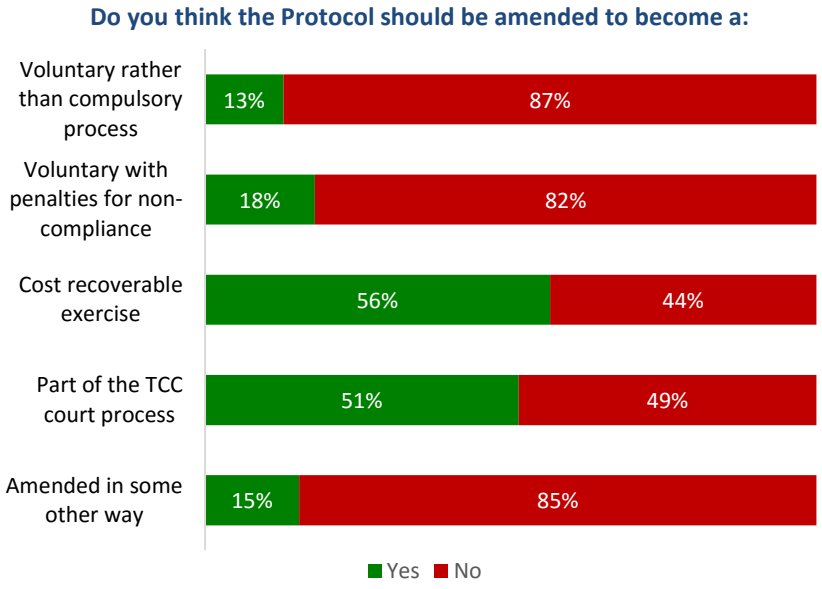

Figure 14 - How should the PAP be amended? (n = 39 respondents)

Respondents who felt that the process should be amended in a specific way were asked what impact the change would have on the PAP's effectiveness. The following section summarises their feedback.

What impact on the PAP's effectiveness would making it voluntary have?

Theme	Comment
Reduces opportunity to settle in simpler cases	I keep coming back to my split point; the Protocol is more appropriate for simpler cases because they are often ones where just the impact of setting out a claim and articulating it clearly can be enough. As can having it on official correspondence from solicitors; this can be enough to get the parties together or narrow the points between them. I think that can help, but for the complex proceedings, like the two examples that I have dealt with in recent years, I am not convinced that the Protocol in either circumstances helped the parties at all. Making the Protocol voluntary may in the lower value or simpler cases mean you lose the opportunity to settle, but I think for the more complicated cases, I am not sure that it would make much difference to the overall outcome on those types of disputes.
The PAP may be ignored	That might be helpful. However, people will ignore it if you make it voluntary. Claimants get to choose every time on who selects it. The first time you hear of a dispute is when you get a letter of claim on the Pre-action Protocol, which sounds as if you have volunteered for it.

Theme	Comment
It will be more effective as only cases who wish to settle would use it	I think it would make it more effective because it would only be used on disputes where people do not want to go to litigation. It simply gives them another way to try and settle and that would make it more effective. If it was to be voluntary with penalties for non-compliance, it would not be voluntary. If something is voluntary, and you set a penalty for not doing it, that means it is not actually voluntary. If you have set a penalty you feel that you are being forced into doing it, because you want to avoid a penalty, and that is not actually free will.
Avoid problems with PAP	It is not so much that it would increase its effectiveness, but it would reduce its problems.
If a party never intended to settle, and avoided the PAP you could seek punitive costs later	I think that some people go through it simply because it is compulsory without any intention of settling. They always know they are going to go ahead and issue proceedings and incur that cost, and they incur £15,000 or £20,000 prior to that. If you remove the compulsory element and they want to launch into proceeding, which would be a bullish stance, you can take them to task on the costs afterwards.

Table 20 - Comments explaining the likely impact of making PAP voluntary? (n = 5 respondents)

What impact on PAP's effectiveness would making it voluntary with penalties for non-compliance have?

Theme	Comment
Make it more effective	If there are penalties it is not really voluntary. I would say yes, make it voluntary with penalties, provided those penalties will be in the usual, general jurisdiction of the court. So they would do it if they felt that people had behaved unreasonably and not just because they did not do it. I think in terms of the impact if you had a little bit more flexibility, as I have described, it might improve the Protocol's effectiveness.
	It would make it more effective. I think it would bring the parties to settlement sooner, particularly if the penalties were financial.
Slow the process down	Unfortunately it could slow the process down if you have to go off and seek penalties.
No Change	In effect there are already penalties for non-compliance because you will have trouble. I would not envisage there being any additional penalties.
Encourage parties to settle	I think that the whole point is that you are supposed to be trying to find common ground by having a chat. However, that is the reason that the court works, as you have to say what you mean and you cannot go back and plead because it would cost a fortune. But, yes I think that it would be useful to have penalties, because then you have to be a bit more careful about what it is that you say. I think that it would make people more exact and would then possibly reduce defendants' costs.
	It would encourage people to use it perhaps with a bit more intent to settle rather than just ticking a box. I would draw parallels with people who simply mediate just so they can say they have done it, but when they get there they tell you they have no intention of settling. As I have said, it could encourage people to settle rather than simply going through a process.
Encourage parties to follow PAP	It may have the effect that a business with deeper pockets would ignore the Pre-Action Protocol to take advantage of the lack of structure presented to it in a case. They would just take a hit on the penalties. However, clearly it depends on the level of penalties, and if they are only a few thousand pounds, for example, then the largest companies might ignore that and get a jump on the other side. If they are a proportion of the claim or they are assessed at the end of the claim pending the outcome in terms of costs, then that might be useful. If you are facing both a cost and a penalty order, then that may well discourage you from taking advantage of stepping outside of those rules.

Table 21 - Comments explaining the likely impact of making PAP voluntary with penalties for non-compliance? (n = 7 respondents)

What impact on the PAP's effectiveness would making it a cost recoverable exercise have?

Theme	Comment
Increase its effectiveness by focusing attention on concluding matters	I think that if it became a cost recoverable exercise it might increase the Protocol's effectiveness because people might become a bit more conscious of not letting things drag on unnecessarily, and ensure they do not do unnecessary work. They may clarify their case earlier if they are going to go through the process, rather than doing half a job and then having to redo it again before proceedings. I think it should be cost-recoverable, assuming it works on the normal court basis.
	It might hasten the process up and get parties to do things a bit more efficiently, and not allow it to drag on so long.
	It would result in settlement earlier.
	I think that it would just make the parties focus on why they are using the Protocol to narrow the issues between them. At the moment there is this problem that if you drop a claim pre-action, because the Protocol has done its job and forced you to drop the claim, the cost of the claim you drop is not recoverable, but the costs of the claim you continue to pursue are recoverable. It sorts of acts as a penalty to a claimant when they do not waste the court's time with stuff, where had they gone to court, they might have got some of their costs back. I suppose you probably could not impose caps, but when parties engage in the Protocol process it can go on for months, if not years. So I think that some greater scope for the recovery of costs, if you can show that you have complied with the Protocol, would be of benefit. It would also stop the responding party or defendant using every trick in the book to prolong the process. If they know that they are on the hook for some of those costs they are unlikely to continue to take on unnecessary points which can delay everything.
Focus parties on PAP aims	I think people would participate in it more, with respect and comply with the Protocol's aims and policies. It is a carrot and stick; if they do not comply with it and cost sanctions are imposed, or a certain liability they probably would not be so negative or use delaying tactics.
	I think that it might serve to some extent to level the playing field.
	It might encourage people to comply, on the basis that any money that they invest in complying with the Pre-Action Protocol, if there is no resolution pre-action and it goes forward, then they can recover those costs, so it might encourage compliance.
	I am speaking broadly as a defendant, but I think that there would be certain circumstances where costs would hopefully go down, because you would not be forced to defend irrelevant or side issues. It might focus the mind on the real issues.
Stop parties from overloading PAP process	It would hopefully prevent people from overloading the Pre-Action Protocol process. If you go on to trial and the work that you have done during the Protocol is relevant to the trial or litigation process, there is no reason in principle that you could not recover those costs.
	I think more thought would go into it rather than embarking on pre-action knowing that the costs are not going to be recoverable. It might make people stop and think before they do too much. I think that recoverability of costs is something to consider. We act for defendants and we would certainly like to see that coming in.
	I think that it will concentrate peoples' minds on what is an appropriate level of investment in that protocol in the grand scheme of things, and is that proportionate in terms of money.
Reduce the likelihood of spurious cases	There may be circumstances, particularly if you were the defendant, where you might consider compliance with the Protocol justifies you recovering your costs through a spurious claim. I think what this question is addressing is that when you go through the Pre-Action Protocol process whether you should be able to recover your costs on a spurious claim, when you do not end up in litigation but have spent a lot of money, particularly if you are a defendant. There is no reason why a claimant should not also be entitled to argue for the recovery of costs where there is something that only came out as a consequence of the Protocol process. I can see that there are rare circumstances where even the claimant might seek to recover their costs. I am only thinking of the unusual circumstances where people write pre-action letters under the Protocol as a means of trying to pressurise a party into paying what otherwise might be a spurious claim. The other party then has to respond and engage with the lawyers and

Theme	Comment
	it can actually be quite expensive to investigate issues. You could investigate the issues and manage to persuade the claimant that it was a spurious claim all along and the litigation does not proceed, but as a defendant you might feel that you are entitled to recover your costs. There may be circumstances in which a claimant brings a case and feel that only as a consequence of going through the Protocol would they be able to illicit information which would essentially flush out the defence. It is less likely, but there are circumstances where it might be fair for the claimant to be entitled to the recovery of costs.
Fairer for defendants	I think that you would get a more realistic approach from defendants in particular.
	It would be fairer for defendants.

Table 22 - Comments explaining the likely impact of making PAP voluntary a cost recoverable exercise? (n = 22 respondents)

What impact on the PAP's effectiveness would making it part of the TCC process have?

Theme	Comment
Encourage more cases to settle	I do not think there would be a massive impact other than the fact that more cases would settle. Any claims that hit court should have gone through the Protocol anyway. In terms of the court work it would not affect adjudication, enforcement and things like that because they are excluded from the Protocol, but it will probably have some effect on claims settling.
	I think the parties would probably take it a bit more seriously and it would allow for the early intervention of judges in cases, which in itself would encourage parties to settle them.
Increases formality of PAP to increase engagement	It would provide the necessary discipline, formality and guidance; it should not be treated as court proceedings, but having someone overseeing it makes people more aware of taking it seriously.
	That would make it more formal and perhaps people would take it more seriously. There are people who feel that it is just a rite of passage and do not engage much with it. If it was put on a higher footing then it might be taken more seriously.
Increase costs	I like the suggestion of having recourse to the TCC judges for directions if one party is not complying. The impact unfortunately would be increased costs again, but if it ensures compliance then that should ensure that at least a proportionately greater number of cases will settle.
Reduce costs	I think that people would take the Pre-Action Protocol more seriously. I also think that it would reduce costs for the tax payer and for the interest of justice, it would be an ideal result!
	It would obviously allow the judge to have some oversight on it. I think there would be a stricter adherence to the guideline timescales and there would be more focus on complying with all of the steps in a timely manner and it would lead to more accountability.
	There should be some ability for intervention or for the parties to refer back to the court at an early stage, or where proceedings have not commenced, specifically where they need the court to intervene on Pre-Action Protocol matters. For example, this could apply if there has not been a candid disclosure of documents. This is one of my bug bears; when we find parties who are not prepared to disclose documents as they should do voluntarily. They will wait until formal disclosure hoping that they can avoid bringing out the dangerous documents, which would have been requested. The parties should have the ability to go to the court and ask that the court intervene rather than making a formal pre-action disclosure application, which can be costly.
Provide early access to judges	It would create early access to judges; I assume that the same judge would be assigned and the same one would be running with the pre-action issues as those from the action. I think there would be a valuable continuity of judicial input both pre-action side of things and also if the case went to action.

Theme	Comment
Early identification of issues	I think that issues would be fleshed out and better explained at the beginning if it became part of the court process. If there was a TCC judge in the background there would be less likelihood that the time schedule would be stretched out.

Table 23 - Comments explaining the likely impact of making PAP part of the TCC process? (n = 20 respondents)

What other way would you amend the PAP?

Theme	Comment
Introduce statutory ADR	There could possibly be statutory ADR, so that they must go through a mediation process. I appreciate that mediation is a consensual affair, but I think that it is certainly well worth people having to go through the process, even if it fails on the first day. They should be made to do it and if sufficiently senior people are there, they will be aware of what they are facing.
	My only thought on that would be a compulsory conciliation stage before issue of proceedings.
Allow access to Judges at start of process	The ability to get directions or to call for judicial help right at the start of the process would be good. Cost sanctions in terms of not following the earlier processes of adjudication or negotiation properly.
Introduce e-disclosure	The Protocol might lag behind on e-disclosure, which has come on leaps and bounds since the Protocol was first introduced. However, that might just be a bridge too far for the Protocol drafters. However, I am just conscious that in the real world the parties are wrestling with e-disclosure and how you actually do it in practice, and of course whether the Protocol would need to touch on that. I think that would be worth considering.
Remove PAP meetings and extend document exchange timeline	I think Protocols are good and the more relaxed they are the better. Understanding that there is a cost consequence if you show you have not been complying with the spirit of them; showing that you have not been agreeing to mediation. To be similar to now, with just a few tweaks to it, but no dramatic changes. I still think that they should get rid of the Pre-Action Protocol meeting and to also bring the timeline to 3 months and to have more in the way of documentation exchange.
Make it confidential	It should be expressly made confidential; that is the process should be expressly confidential.

Table 24 - Comments explaining what other amendments to the PAP should be considered.? (n = 6 respondents)

What can be learnt from other pre-action protocols?

Respondents were asked to consider if there were any parts of the protocol that should be compulsory before issuing court proceedings, or if there was anything else that could be learnt from pre-action protocols used in the commercial court or chancery division.

10 of the 21 law firm's interviewed in Track 2 were unable to comment, a further 6 did not think there were any lessons to be learnt. The remaining 5 firms thought that either the letter of claim should become compulsory or that a without prejudice meeting should become obligatory.

10 of the 18 construction clients interviewed in Track 3 were unable to comment, a further 5 did not think there were any lessons to learn. The remaining 3 clients thought that mediation or a meeting should be compulsory, as should a letter of claim which summarises the facts and provides document disclosure. The final point they mentioned was to introduce fixed timescales to the PAP process.

Shorter and Flexible Pilot Schemes being introduced in the TCC

During the period of this research, two pilot schemes were launched in all courts operating in the Rolls Building, and therefore the TCC, called the Shorter and Flexible Trial Schemes [1](STS). These pilot schemes launched in November 2015 and are due to continue through to September 2017. The STS is of relevance in the context of pre-action matters, as the objective of the STS is to offer judgment within a year of the issue of proceedings

[1] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51n-shorter-and-flexible-trials-pilot-schemes , accessed 20/11/15

through a revised procedure. It is intended to be used for streamlined cases. It is not suitable for cases involving fraud, extensive disclosure, extensive witness/expert evidence or complex multiple issue or parties' cases.

TeCSA requested Acuigen to pose some supplementary questions:

1. Do you consider that, for the type of case that the STS is apparently designed, it is desirable that the more detailed and structured requirements of the PAP should be replaced by the simplified pre-action procedure envisaged in paragraphs 2.16 – 2.19 of PD 51N ("the simplified PAP")?
2. If your answer to 1 above is "Yes", do you nevertheless consider that compliance with the requirements of the simplified PAP should be mandatory in all cases and not subject to the "good reason" exception?
3. If your answer to 1 above is "Yes", do you consider that the scope of what should be covered in the letters of claim and proposed defendant's response should be wider than what is currently stated in the simplified PAP?

These questions were sent in a letter attached to an email to the 39 respondents and 11 responses were received between the 23rd October 2015 and 9th November 2015.

Of these 11 responses, 5 respondents (4 law firms and 1 construction client) thought that it was desirable that the more detailed and structured requirements of the PAP should be replaced by the simplified pre-action procedure envisaged for the type of case that the STS is designed.

Theme	Comment
Replace PAP with STS when appropriate	As the STS sets out restrictions on the length of statements of case and supporting evidence, it is consistent for the PAP to also be simplified, for example to reduce the length of the pre-action letter. It seems likely that the types of cases which are eligible for the STS would also lend themselves to a simpler and shorter letter of claim. Nonetheless, it is important to bear in mind the overarching purpose of the normal PAP, namely to allow the parties to narrow the issues in dispute and, ideally, settle the dispute. Any simplification of the PAP which undermines and/or dilutes this purpose will be inherently counterproductive and should be avoided. Any reduction in the PAP timescales, or simplifying the PAP to a point at which the parties do not have to set out their position to an adequate level of detail, will have this effect. However, this has to be balanced with the purpose of the STS, to offer a shorter and more streamlined procedure.

Table 25 – Comments supporting view that PAP should be replaced with STS

Five respondents (4 law firms, 1 construction client) did not feel it was desirable to replace the requirements of the PAP.

Theme	Comment
Retain PAP	I think the existing PAP should be retained for the STS and not be replaced by a shortened PAP. The existing PAP is fairly streamlined but dictates certain key aspects of the case that need to be set out and allows sufficient time for the parties to properly consider them. This detail/time will allow the parties to make the best decision over whether the claim can be settled or, if not, what the best forum to resolve it is. I would have thought the success of the STS would depend on the right type of case being referred to it – the existing PAP would help ensure that only those cases that are suitable are referred.

Table 26 - Comments supporting view that PAP should be retained

Each of the 6 firms who thought the PAP should be replaced by the STS did not think the STS should be mandatory.

Theme	Comment
Make it voluntary	There will always be circumstances where parties have a genuine good reason for not complying with the PAP, for example where they are at the end of a limitation period. Removing the "good reason" exception for the Simplified PAP and STS could be seen to unfairly penalise parties for matters which are outside of their control. Nonetheless, the effect of a mandatory rule could be mitigated by the nature of the sanctions imposed for non-compliance. For example, if the Court would exercise its powers to award costs, parties would still have access to justice, albeit at a price. Alternatively, a stay for compliance could be granted, but this may not be practical given the reduced requirements set out

Theme	Comment
	in the Simplified PAP. A mandatory rule could therefore be imposed, but the resulting sanctions should be carefully considered.

Table 27 - Comments supporting view that PAP should be replaced with non-mandatory STS

Two of the 6 firms felt that the scope of what should be covered in the letter of claims should be wider than what was currently stated in the simplified PAP.

Theme	Comment
Introduce a meeting to STS	The Defendant is required to respond within 14 days whether the procedure is appropriate. There should still be a requirement for a meeting before proceedings are issued. Meetings lead to dialogue, and that often helps to resolve issues and save the costs involved with proceedings. This procedure seems to be predicated on the premise that there will be no attempt to settle or narrow issues, whether before issuing the proceedings or before trial. I do not understand why; just because a case is eligible for STS, it is not suitable to be settled. My guess is that the cost of an STS against the likely (lesser?) sums at stake will be just as disproportionate as the costs of a full process.
Provide details of defence	The obligation on the proposed defendant should mirror that on the claimant, such that the proposed defendant should be required to "give succinct but sufficient details of its defence to enable the potential claimant to understand and investigate the defence"

Table 28 – Comments suggesting that the scope of the claim letter should be wider

Conclusions

In summary the key findings were:

- The Track 1 respondents who contributed to this report have been involved in approximately 216 disputes to which the PAP was applicable. 35% achieved settlement prior to issue of court proceedings, 52% achieved settlement prior to trial
- Track 2 and 3 respondents who contributed to this report have been involved in approximately 677 disputes to which the PAP was applicable, approximately 41% of these reached settlement during pre-action and a further 8% went on to trial.
- The importance and the effectiveness of the key objectives of the PAP were considered and in summary:
  - 98% thought that it is important that the PAP encourages early and full information exchange about the prospective legal claim, however only 71% agreed that the PAP was effective in doing this.
  - 98% thought that it is important that the PAP enables parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings, however only 68% agreed that the PAP was effective in doing this.
  - 48% thought that it is important that the PAP supports the efficient management of proceedings where litigation cannot be avoided, however only 32% agreed that the PAP was effective in doing this.
  - 95% of respondents thought that the PAP was a valuable pre-action mechanism.
- The main reasons given by law firms for this were that it encourages parties to consider their dispute, it promotes settlement, narrows issues, creates structure, promotes communication and saves costs.
- The main reasons given by construction clients for this were that it encourages early considerations of the issues, it prevents litigation, promotes communication, provides structure, gives options, saves time and costs.
- 87% of respondents thought that the PAP does create access to justice with only 13% thinking it acts as a barrier. Reasons for disagreeing included: it slows the process, increases costs, or penalises a less well funded litigation
- There was high level of agreement that the PAP provides an opportunity to narrow issues before litigation, it provides an opportunity to settle disputes and that it was a good use of time.
- 82% of respondents felt that the PAP remains up to date with the needs of pre-action processes. This figure was higher with law firms (90%) than construction clients (72%)
- When asked how the PAP should be changed, the suggestions given can be summarised as:
  - Law firms: Provide access to the TCC to enforce the PAP's requirement, create flexibility around time frames, provide clearer guidelines on the documentation required, prevents front end costs, allow flexibility on how to apply the PAP to suit the litigation and to encourage early settlement.
  - Clients: 40% felt there should be no change, those that did propose a change suggest that the PAP should be amended to: extend but control timeframes, encourage more ADR to reach settlement, only be used for specific types of dispute, be more informal and encourage all expert witness evidence to be disclosed.
- Only 5% of all respondents felt that they had been involved in cases where the PAP led them to settle on poorer terms than they would otherwise have done.
- 49% of respondents felt that the PAP should be retained substantially in its current form, 49% felt that it should be amended in some way and the remainder felt it should be abolished altogether. When presented with proposals for how the PAP should be amended:
- 74% of respondents felt that it would be beneficial to have recourse to the TCC judges pre-action.
- 56% of respondents thought that the PAP should become a cost-recoverable exercise
- 51% of respondents thought that is should become part of the TCC court process
- 13% felt that it should be voluntary
- 18% felt that it should be voluntary with penalties for non-compliance

- When respondents thought the PAP should be amended in each of these manners, they were asked to consider the implications of the changes and their responses are summarised on pages 31 to 35.

Appendix 1 – Report contributors

Track 1 contributors

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Track 3 contributors

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Mace Group
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In addition to firms and organisations listed above, who were happy to be identified as contributors to this report, there were an additional 8 who requested that their contribution remain anonymous.

Appendix 2 – Questionnaire

Section	No	Questions	Response Options
Introduction	1.	Good morning / Good afternoon. My name is [SUserFullName] from Acuigen. May I speak to [AFullContactName] please? I am ringing on behalf of TeCSA who should have been in contact to let you know I may call. We have been asked to seek your feedback on the effectiveness of the pre-action Protocol in the context of supporting those involved in construction or engineering disputes. We are also seeking your feedback on whether it would, in your opinion, be helpful to make any changes to the Protocol Would it be convenient to ask you some questions about this? It will take about 20 - 30 minutes.	Yes / No
		This interview is being undertaken under the Market Research Society's Code of Conduct, as such your opinion is given anonymously unless you give consent for it to be attributed. I'll ask you at the end of the interview about this. I should mention that the research is being undertaken with a small number of people - if you do ask to remain anonymous there is a small risk that your identity may be inferred by somebody reading a report, arising from a comment you may make. During the interview I will ask a number of open ended questions in addition to some rating style questions, however feel free to make any comment that you think is relevant. If you would like to stop me at any time, please let me know. This interview will be recorded for quality and training purposes.	
Background	2.	During our conversation I would like you to consider construction or engineering disputes occurring during the last 3 years approximately. May I start by asking, approximately how many times you have been involved in a dispute to which the Pre-Action Protocol for Construction and Engineering Disputes was applicable?	Verbatim
	3.	Approximately what number of these disputes achieved settlement during pre-action during the 3 year period?	Record number
	4.	And approximately what number of these cases went on to trial during this 3 year period?	Record number
High Level Objectives	5.	I would now like you to consider the high level objectives of the Protocol listed by the Ministry of Justice on their website, and so for the following statements, please could you tell me how important you think these objectives are? Please could you give your answer on a 7-point scale where 7 would mean extremely important, 4 neither important nor unimportant and 1 very unimportant: 1. To encourage early and full information exchange about the prospective legal claim 2. To enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings 3. To support the efficient management of proceedings where litigation cannot be avoided	7 point importance scale
	6.	Could you now tell me the extent that you would agree that each of the Protocol objectives is effective in assisting both parties to 'agree a settlement before going to court, or make court proceedings more effective'? Please would you use a similar 7-point scale where 7 would mean strongly agree, 4 neither agree nor disagree and 1 is strongly disagree:	7 point agreement scale

Section	No	Questions	Response Options
		1. To encourage early and full information exchange about the prospective legal claim 2. To enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings 3. To support the efficient management of proceedings where litigation cannot be avoided	
Working in practice?	7.	From your perspective, is the Protocol a valuable pre-action mechanism? Ask only if Q7.1 is answered as Yes or No: Why do you say that?	Yes/No/DK Verbatim
	8.	In your experience is the Protocol creating access to justice, or acting as a barrier to justice?	Creating access Acting as a barrier Don't know
	9.	Again using a 7-point scale where 7 would be strongly agree, 4 would be neither agree nor disagree and 1 would be strongly disagree Please would you rate the extent to which you agree or disagree that the Protocol: 1. Provides an effective opportunity to settle disputes in the construction industry 2. Is a good use of time in the litigation process? 3. Provides an appropriate opportunity to narrow or ventilate issues enabling the difference to be clarified before litigation 4. Provides the parties with an important and valuable opportunity to settle without wasting further costs in going to court 5. Generates unnecessary costs 6. Introduces delays in achieving settlement 7. Encourages foreign litigants to use the Technology and Construction Court 8. Supports the efficient management of proceedings where litigation cannot be avoided	7-point agreement Plus, Unable to answer/uncertain
	9.	*Ask only If Q9.5 scores 5 or more:* In what types of circumstances does it create excessive cost?	Verbatim
	10.	Ask only If Q9.5 scores 5 or more: In your opinion, can any value be created from incurring these costs prior to proceedings being issued? How could it be improved?	Verbatim
	11.	Ask only If Q9.6 scores 5 or more: In what types of circumstance does it waste time? How could it be improved?	Verbatim
	12.	Ask only If Q9.6 scores 5 or more: What could be done to ensure that parties do not spend too much time dealing with pre-action steps? How could it be improved?	Verbatim
Options to amend	13.	Do you think that the Protocol remains up to date with the needs and dynamics of pre litigious processes? Should it be changed in any way?	Yes / No Verbatim
	14.	Have you been involved in cases where you felt that complying with the Protocol led you to settle on poorer terms that would otherwise have seemed justified? How could a change of process make improvements?	Yes / No Verbatim
	15.	From your experience of the process can you suggest any other ways or additional ways in which the Protocol could be improved or simplified?	Verbatim

Section	No	Questions	Response Options
	16.	Based on your experience, do you think the Protocol should be: (1) retained substantially in its current form, (2) abolished altogether or (3) amended in some way.	Drop down list 1. Retained substantially in its current form 2. Abolished altogether 3. Amended in some way.
	4.	Would it be beneficial to amend the rules of the TCC so that parties can have recourse to the TCC judges pre-action or apply to the courts for direction during the Protocol process.	Yes / No
	5.	Do you think the Protocol should be amended to become a: 1. Voluntary rather than compulsory process 2. Voluntary with penalties for non-compliance 3. Cost recoverable exercise 4. Part of the TCC court process 5. Amended in some other way	Multiple options permitted (yes/no)
	6.	*If voluntary:* What impact on the Protocol's effectiveness do you think making the Protocol voluntary would have?	Verbatim
	7.	*If cost recoverable:* If it was to become a cost recoverable exercise what do you think the impact would be?	Verbatim
	8.	*If court process:* If it was part of the TCC court process what do you think the impact would be?	Verbatim
	9.	*If amend in some other way:* How would you amend the Protocol?	Verbatim
	10.	Are there any parts of the Protocol that you think should be compulsory before issuing court proceedings, for example, is there anything that can be learnt from pre-action Protocols used in the commercial court or the chancery division?	Verbatim
International	11.	Do you have any experience of international cases?	Yes / No
	12.	If international experience: Should there be a different Protocol, or a route or exception to the Protocol for international cases?	Verbatim
Final comments	13.	Are there any other comments you would like to make?	Verbatim
Consent, Follow-up & Close	14.	Would you like your opinions to remain anonymous or may we attribute your comments?	Yes – remain anonymous No – Attribute comments
	15.	May we identify you as a contributor to the report, for example in an Appendix?	Yes – identify contributor No – not identified
	16.	It would be very helpful to list your firm as a contributor – may we do so?	Yes – identify firm No – do not identify firm
	17.	Thank you for taking the time to complete the survey.	

Appendix 3 – Overview of approach

This report summarises feedback comprising:

- 20 completed excel sheets providing details of 216 dispute matters that Law firms have advised upon in the last 3 years. This was called Track 1 research and was undertaken between 10th September 2015 and 15th December 2015.
- 21 structured telephone interviews completed with partners representing Law Firms. This was called Track 2 research and was undertaken between 17th September 2015 and 9th November 2015.
- 18 structured telephone interviews completed with construction clients. This was called Track 3 research and was undertaken between 17th September 2015 and 9th November 2015.

The track 2 and 3 interview was approximately 20 minutes in duration and followed a questionnaire comprising of both closed and open-ended questions. Open ended comments were coded prior to reporting.

Fieldwork was conducted by 3 telephone fieldwork interviewers employed by Acuigen during normal business working hours. Acuigen are accredited to ISO 20252 2012 (market research) standards. No incentives were offered or given for participating within this survey. Respondents were offered the opportunity to respond anonymously, 8 firms requested that their contribution remain anonymous.

The questionnaire and research approach were conducted in line with those set out in Acuigen contract reference 3522 – 1, agreed with the TeCSA committee on 21st June 2015, using questionnaire version 1.4.3.0 which was approved by the TeCSA committee on 1st September 2015

Data weighting

No data weighting has been applied to the results.

Sampling tolerances

Whilst Acuigen seek to maintain the highest of interviewing standards, there will be statistical errors associated with reporting when a sample of respondents have been interviewed and their opinion is used to estimate the opinion of others. Users should note that such errors need to be taken into account when interpreting results. Margins of error are highest when the sample size is small and reduce as the sample size gets larger. For further information and guidance contact Acuigen.

Further information

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