

MEMORANDUM

Building and Construction Industry Security of Payments Act (Vic) 2002

J McMullan, 6 October 2009

Summary

1. The *Building and Construction Industry Security of Payments Act (Vic) 2002* has operated in Victoria since 2002. Substantive amendments to the Act came into force on 1 March 2007. The Victorian legislation closely follows similar legislation introduced in 1999 in New South Wales¹. The NSW Act was amended in important aspects in 2002², and similar amendments have now been made to the Victorian Act, with some important additions, which came into force on 30 March 2007.
2. The substantive measures introduced by the Act in 2002 (for the purpose of this note) were as follows:
 - a) to require delivery of a payment schedule with 10 business days of receiving a progress payment claim, failing which the full amount of the payment claim becomes due (albeit only a payment “on account”, which can be challenged under the Contract);
 - b) to introduce a quick system of independent adjudication where the parties dispute the amount of any progress claim;
 - c) to require immediate payment to be made (or alternatively security to be provided³).
3. In NSW there have been a substantive number of adjudications under the NSW Act, and the New South Wales Supreme Court has considered the NSW Act on a number of occasions. In addition, there have been a substantial number of adjudications in Queensland. In Victoria, however, to date, the Act has been little used. There have been few adjudications, due, principally, it seems, to the option for principals to provide security rather than make payment to contractors (prior to the 2007 amendments), and since then, due to the critical limitations contained in Section 10A (Claimable Variations) and 10B (Excluded Claims).
4. I set out below the payment claim/payment schedule, and adjudication, process.
5. The courts have generally concluded that where a principal fails to deliver a payment schedule within the required 10 business days, the principal has been ordered (subject to the limited exceptions below) to pay, on account, the full amount of the contractor’s claim, and then attempt to recover that amount back from the contractor, (by commencing a further court action).
6. The courts have set out a number of general principles as to the matters required (the “basic and essential requirements”) for a valid adjudication determination.

¹ *Building and Construction Industry Security of Payments Act 1999 (NSW)*

² *Building and Construction Industry Security of Payments Amendment Act 2002 (NSW)*

³ This was the substantive aspect of the proposed reforms contained in the 2006 Amending Act, contractors were not greatly assisted by security being provided, to the point where the process was hardly worth the effort. The ability to provide security rather than make payment, is removed in the 2006 Amending Act.

1. Background to the Act

2. This note is intended to address some aspects of the *Building and Construction Industry Security of Payments Act (Vic) 2002*, and the amendments to the Act introduced on 30 March 2007.
3. The Victorian legislation closely follows similar legislation introduced in 1999 in New South Wales⁴. The NSW Act was amended in important aspects in 2002⁵, and similar amendments have now been made to the Victorian Act, with some important additions, which came into force on 30 March 2007.
4. The substantive reforms introduced by the Act in 2002 (for the purpose of this note) were as follows:
 - a) to require delivery of a payment schedule with 10 business days of receiving a progress payment claim, failing which the full amount of the payment claim becomes due (albeit only a payment “on account”, which can be challenged under the Contract);
 - b) to introduce a quick system of independent adjudication where the parties dispute the amount of any progress claim;
 - c) to require immediate payment to be made (or alternatively security to be provided⁶).
5. In NSW there have been a substantive number of adjudications under the NSW Act, and the New South Wales Supreme Court has considered the NSW Act on a number of occasions. In addition, there have been a substantial number of adjudications in Queensland. In Victoria, however, to date, the Act has been little used. There have been few adjudications, due, principally, it seems, to the option for principals to provide security rather than make payment to contractors (prior to the 2007 amendments), and since then, due to the critical limitations contained in Section 10A (Claimable Variations) and 10B (Excluded Claims).
6. **The payment claim/payment schedule process**
7. The Act sets out a detailed process and timetable for payment claims and payment schedules. Sections 14-15 of the Act provides, so far as relevant, as follows:

14. Payment claim

(1) A person who is entitled to a progress payment under a construction contract (the “claimant”) may serve a payment claim on the person who under the contract is liable to make the payment.

(2) A claimant may serve only one payment claim in respect of a specific progress payment.

(3) A payment claim-

(a) must identify the construction work or related goods and services to which the progress payment relates; and

⁴ *Building and Construction Industry Security of Payments Act 1999 (NSW)*

⁵ *Building and Construction Industry Security of Payments Amendment Act 2002 (NSW)*

⁶ This was the substantive aspect of the proposed reforms contained in the 2006 Amending Act. Contractors were not greatly assisted by security being provided, to the point where the process was hardly worth the effort. The ability to provide security rather than make payment, is removed in the 2006 Amending Act.

- (b) must indicate the amount of the progress payment that the claimant claims to be due for the construction work done or related goods and services supplied to which the payment relates (the "claimed amount"); and
- (c) must state that it is made under this Act.

15. Payment schedules

- (1) A person on whom a payment claim is served (the "respondent") may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule-
- (a) must identify the payment claim to which it relates; and
- (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the "scheduled amount").
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If-
- (a) a claimant serves a payment claim on a respondent; and
- (b) the respondent does not provide a payment schedule to the claimant-
- (i) within the time required by the relevant construction contract; or
- (ii) within 10 business days after the payment claim is served; whichever time expires earlier-
- the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

8. The Act expressly requires that a payment claim must state that it is made under this Act.
9. Where a payment claim is made by the contractor, the principal must deliver a payment schedule within 10 business days, failing which the full amount claimed is due immediately. (In both NSW and Victoria, there have been Applications for Summary Judgment by the contractor, where there has been inadvertent failure to comply with requirement to deliver the payment schedule within 10 business days, see below.)
10. Where the payment schedule is delivered, the contractor is entitled to payment of the amount in the schedule by the due date under the Contract.
11. The contractor becomes entitled, under the Act, to payment of the amount in payment schedule (or, if no payment schedule was delivered within 10 business days, the full amount claimed in the payment claim), by the due date under the Contract.
12. Where this payment is not made, the contractor is able to bring an Application for Summary Judgment for the amount. Defences to such Applications for Summary Judgment have generally been unsuccessful.
13. The entitlement to payment is only "on account". Section 47 of the Act preserves the rights of either party to dispute the amounts payable under the Contract. In fact, as with all progress payments, the amount owing under the Contract is, if necessary, to be resolved in accordance with the provisions of the Contract.

14. The purpose of the payment provisions is, in effect, intended to address, fairly and efficiently, the contractor's cashflow, rather than determine the ultimate entitlements under the Contract.
15. The Act originally had limited operation, it applies only to work the subject of "progress claims". The 2007 amendments expanded the application of the legislation to include a wider range of payments, including:
- final payments
 - single payments and milestone (key event) payments
 - subcontractors entitlements to amounts clients or head contractors hold on trust for subcontractors until works are completed
16. Some claims, however, are now expressly excluded from the operation of the Act as "Excluded Amounts" (see below), including claims for:
- "damages"
 - delay costs
 - latent conditions
- Further, the Act now limits claims for variations to "Claimable Variations" (see below).
- 17. Defences to Claims where failure to provide the payment schedule within 10 business days**
18. Where the principal fails to deliver a payment schedule within the required 10 business days under to the *Building and Construction Industry Security of Payments Act (Vic) 2002* ("the Act"), the principal is potentially exposed to the obligation to pay, on account, the full amount of the contractor's claim, and then attempt to recover that amount back from the contractor, (by commencing a Supreme Court action).
19. The contractor submits a "payment claim" under section 14 of the Act. That payment claim must be expressed (under the Act) to be a payment claim under the *Building and Construction Industry Security of Payments Act (Vic) 2002*.
20. The effect of this is to require the principal to deliver to the contractor, within 10 business days, a "payment schedule" within the meaning of the Act. Failing delivery of that payment schedule within that time, the full amount claimed by the contractor in the payment claim is due and payable as from that date.
21. The substantive effect of these sections is that where the principal does not provide a payment schedule within 10 business days, the contractor is entitled to payment (in fact, as with all progress payments, payment on account, the true amount owing under the Contract still to be resolved in accordance with the provisions of the Contract). This, in effect, is intended to guarantee the contractor's cashflow (rather than alter the position under the Contract).
22. No Payment Schedule: The *Jemzone* Defence
23. There have been a number of unsuccessful defences raised in earlier New South Wales cases, where the principal failed to comply with the provisions of *Building and Construction Industry Security of Payments Act (Vic) 2002*.

24. This defence succeeded in one case in New South Wales (Jemzone), and in a Victorian Supreme Court Application for Summary Judgment last December (we appeared for the defendant in that Application).
25. In *Jemzone v Trytan* [2002] NSWSC 395 (7 May 2002), Austin J was considering a contract between a hotel and motel developer principal (the plaintiff), and a builder (the defendant). His Honour considered the effect of the *Building and Construction Industry Security of Payment Act (NSW) 1999*:

34 The contract draws a distinction between progress payments, which are assumed to be payments requested in respect of work carried out before practical completion, and the "payment on practical completion" to which the marginal heading to clause 20 refers. The distinction can be seen, for example, in clause 17 (f), which states that both progress payments and the final payment bear interest if payment is not made within 20 days. The drafter thought it appropriate to refer to the final payment as well as progress payments. A request for payment of all moneys due and payable under the contract under s 20 is not a request for a progress payment, as a matter of construction of the contract.

35 The provisions of the Act which give the contractor the statutory right to recover money by issuing a claim (especially ss 8 and 13) apply to a "progress payment" under a construction contract. Those provisions will apply to the "Final Account" issued by the defendant on 14 March 2001 if it is a claim to a "progress payment" for the purposes of the Act, notwithstanding its classification under the contract.

36 Section 4 of the Act defines "progress payment" to mean a payment to which a person is entitled under s 8. Section 8 (1) provides (for present purposes) that on and from each "reference date", the builder is entitled to a progress payment under the Act, calculated by reference to that date. In the present case the reference date, as defined by s 8 (2), is the date determined in accordance with the construction contract as "a date on which a claim for a progress payment may be made". Under clause 17, the reference date for a payment which is a "progress payment" under the contract, is the date of the request for payment. If, for the purposes of the Act, the payment on practical completion is a "progress payment", the reference date is the date of practical completion.

37 The definition of "progress payment" is unhelpful, because s 8 confers an entitlement to payment only for a "progress payment", without further defining or explaining those words. In my opinion the words "progress payment" when used in s 8 and other parts of the Act should therefore be given the meaning that they have under the construction contract. That accords with the structure of the Act itself, which generally leaves it to the construction contract to define the rights of the parties but makes "default provisions" to fill in the contractual gaps (see Second Reading Speech, at 1013). It also accords with the stated object of the Act. If the Act was intended to apply in the case of the final payment on practical completion, it would have been a simple matter for the drafter of the statement of the object of the Act in s 3 (1) to refer to the entitlement to receive all payments due under the construction

contract, rather than only "specified progress payments". The Minister's concern with the cash-flow of subcontractors (Second Reading Speech, at 1012 and 1013) also suggests that attention was focused on progress payments rather than the final balancing of account between the contracting parties.

38 Section 13 (1) confers the right to serve a payment claim on "a person who is entitled to a progress payment under a construction contract". In view of my construction of the words "progress payment", the defendant did not have the statutory right to serve a payment claim under s 13 in this case. Consequently, the provisions of the Act for the plaintiff to reply by providing a payment schedule (s 14 (1)) and for the amount of the claim to be recoverable as a debt due by the plaintiff if, as in fact happened, no payment schedule was provided (ss 14 (4) and 15), have no application to the present case.

39 It follows that, in my view, the Act does not give the defendant the entitlement to recover the amount demanded in the "Final Account" of 14 March 2001 regardless of any genuine dispute or offsetting claim.

26. This defence was also enough to defeat, in an early case in Victoria, an Application for Summary Judgment before the Hon Mr Justice Gillard in the Victorian Supreme Court in December 2003⁷.
27. The legislation has since been amended to address this difficulty.
28. No Payment Schedule: Other (Unsuccessful) Defences
29. There have been a number of recent cases in New South Wales where the principal has attempted, unsuccessfully, to avoid making payment for the full amount of the payment claim, where, for whatever reason, it had failed to deliver a payment schedule at all, within the 10 business days. (The New South Wales legislation has differences to the Victorian legislation, but the cases are still instructive.)
30. In each of these cases, the principal raised technical defences. In each instance, those technical defences failed. The court, each time, held that the Act did have the effect of compelling the principal to pay the full amount of the payment claim, despite the principal disputing that this was owing under the relevant contract.
31. For example, in *Beckhaus v Brewarrina Council* [2002] NSWSC 960 (18 October 2002), the plaintiff was a builder, carrying out, for the defendant, construction of levees and associated works. The contract incorporated AS 2124-1992. On 27 March 2002 the plaintiff issued progress claim number 6 pursuant to the contract. The contract required the superintendent to assess that claim within 14 days and issue a payment certificate stating the amount of the payment which in the opinion of the superintendent was to be paid by the principal to the contractor or by the contractor to the principal. The plaintiff's progress claim was for an amount of \$465,437.25 and the superintendent assessed the amount of the claim (out of time) at nil.. A progress claim was submitted on 26 April 2002 (claim number 7) in a covering letter expressed to be a claim under the contract and also carrying an endorsement required by the *Building and Construction*

⁷ Supreme Court Action No 8659/2003, unreported, 12 December 2003.

Industry Security of Payments Act 1999. The superintendent issued a payment certificate in respect of progress claim number 7 on 28 May 2002 assessing a nil payment.

32. The defences to payment raised by the defendant were:
- (i) the progress claim was not supported by such information as the Superintendent reasonably required, and therefore no entitlement to payment arose under clause 42.1;
 - (ii) the progress claim was not made in conformity with the contract because such claims could only be made monthly, whereas this claim was not;
 - (iii) no contractual entitlement arose in the absence of a statutory declaration required by clause 43;
 - (iv) most of the items comprising the claim had previously been claimed in progress claim no. 6, and rejected by the Superintendent;
 - (v) the progress claim was ambiguous, uncertain and of no effect by reason of the endorsement thereon of the words: “This claim is made under the Building and Construction Industry Security of Payments Act 2002 .
33. His Honour (Acting Justice Macready) observed that the contractual position did not prevent the operation of the Act, and, further, that the parties’ respective rights under the contract were not affected by the statutory process (in effect, the payment was no more than a payment on account).
34. The NSW Supreme Court rejected each of these defences, and ordered the defendant to pay the whole amount of the payment claim.

35. The Adjudication Process

36. Where the claimant disputes the amounts contained in a payment schedule, he may lodge an adjudication application with an Authorised Nominating Authority (ANA), appointed under the Act, within 10 business days of receiving the payment schedule, with a copy to the respondent.
37. The adjudication application should include:
- a copy of the contract
 - a copy of the payment claim
 - a copy of the payment schedule
 - submissions in relation to the adjudication application
 - any other relevant documents (eg invoices from suppliers, measurements, test results, quality assurance certificates, statutory declarations, proof of insurance, legal advices and expert reports,)
38. The ANA must refer the application to an adjudicator “as soon as practicable”, who must notify both parties that he is willing to adjudicate by serving a Notice of Acceptance.
39. The respondent may make submissions to the adjudicator within 2 business days of receiving the Notice of Acceptance from the adjudicator, or within 5 business days of receiving the copy of the adjudication application, whichever is later.

40. Within 10 business days of notifying his/her agreement to adjudicate, the adjudicator must determine the dispute. (The 10 business days may be extended by agreement of the parties.)
41. The adjudicator may:
- a) only refer to the written submissions;
 - b) inspect work;
 - c) call a conference.
42. The adjudicator may not:
- a) hear witnesses or conduct arbitration;
 - b) consider late documents.
43. The adjudicator must determine:
- a) the amount to be paid under the Contract;
 - b) the date it was due;
 - c) the interest rate on late payments;
 - d) who is to pay the costs of the adjudication.
44. If the respondent fails to pay, the claimant may:
- a) stop work after giving 2 business days warning in writing;
 - b) apply for judgment on the amount;
 - c) commence bankruptcy or wind up proceedings.
- In addition, the claimant is also entitled to penalty interest.
45. The parties pay the adjudicator equally. The adjudicator may vary this if he decides that either the claim for payment or the reasons for not paying are wholly unfounded.
46. The detailed referral process is set out in sections 18-22 of the Act.
- 47. Preparation for an Adjudication: Submissions**
48. The dates are extremely tight once the payment schedule is referred to adjudication by the Claimant.
49. The process is generally as follows:
1. the claimant forwards an application for adjudication to an authorized nominating authority (ANA) appointed under the Act, with a copy to the respondent;
 2. the ANA must refer the application to an adjudicator “as soon as practicable”, who must notify both parties that he is willing to adjudicate by serving a Notice of Acceptance;
 3. the respondent may make submissions to the adjudicator within 2 business days of receiving the Notice of Acceptance from the adjudicator, or within 5 business days of receiving the copy of the adjudication application, whichever is later;
 4. the adjudicator determines the claim within 10 business days of notifying his/her agreement to adjudicate, including:
 - a) the amount to be paid under the Contract;
 - b) the date it was due;
 - c) interest rate on late payments;

d) who is to pay the costs of the adjudication.

5. The claimant, in making the adjudication application, might include any or all of the following:
 - copy of relevant adjudication materials (contract, payment claim, payment schedule)
 - submissions in support of claimant's claim
 - other relevant documents (eg invoices from suppliers, measurements, test results, quality assurance certificates, statutory declarations, proof of insurance, legal advices and expert reports,)
6. The respondent, in responding to the claimant's adjudication application, might include any or all of the following:
 - submissions in support of respondent's arguments
 - other relevant documents
7. The Act provides that the adjudicator may only refer to the written submissions, inspect work, and/or call a conference (all within 10 business days). It seems to me that the task of the adjudicator will usually be detailed, complex, and fast. The adjudicator may request further information from the parties, and/or call a conference, inspect the site, and/or request the parties' agreement to extend the time for the determination.
8. Generally, the claimant should, therefore, have included, in the payment claim, (because it will be extremely likely that he will be unable to amend the payment claim for the purpose of the adjudication), all items claimed, including, for example, items comprising:
 - direct costs (eg sub-claimants, suppliers, equipment, labour, ...)
 - job-related overheads (eg site shed hire, supervisor salaries, site security, electricity and other services, crane usage, ..)
 - non-job related overheads (share of organisation-wide overheads which should be allocated to each claim on a particular project)⁸
 - loss of productivity⁹
9. Within 10 business days (this can be extended by agreement, I anticipate, however, that claimants would usually insist that the adjudication be limited to the 10 business days), the adjudicator is to decide the amount that is to be paid under the Contract. In fact, this is likely to be a substantive task (to be decided on both construction and legal bases, without witness evidence, based on the written submissions). Further, the decision is only as to the amount to be paid on account, ie the parties could still, if they chose¹⁰, take their dispute to court or arbitration, or other dispute resolution processes under the Contract.

10. Basic and essential requirements of an adjudicator's determination

⁸ The 2006 Amending Act expressly excludes certain types of claims (delay costs, latent conditions, ...).

⁹ Again, the 2006 Amending Act expressly excludes certain types of claims (delay costs, latent conditions, ...).

¹⁰ ie, if the contractor believed that the amount adjudicated was so far below the proper amount, or if the principal believed that the amount adjudicated was so far above the proper amount, and the wrong would not be rectifiable in the next progress claim....

11. In *Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor* [2004] NSWCA 394 (3 November 2004), Hodgson JA laid out the basic and essential requirements of an adjudicator's determination (albeit in relation to the NSW Act, I respectfully adopt these principles here). At paragraph 53, His Honour reasoned:

53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

- 1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).*
- 2. The service by the claimant on the respondent of a payment claim (s.13).*
- 3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).*
- 4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).*
- 5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).*

12. “Construction contract”:

13. It is a basic and essential requirement of the Act that there be a “construction contract” within the meaning of the Act.

14. Section 4 of the Act provides, so far as relevant, as follows:

"construction contract" means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party"

15. “Payment claim”:

16. It is a basic and essential requirement of the Act that there be a valid “payment claim” within the meaning of the Act.

17. Section 4 of the Act provides, so far as relevant, as follows:

"payment claim" means a claim referred to in section 14

Section 14(2) of the Act provides, so far as relevant, as follows:

A payment claim—

- (a) must be in the relevant prescribed form (if any); and*
- (b) must contain the prescribed information (if any); and*
- (c) must identify the construction work or related goods and services to which the progress payment relates; and*
- (d) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"); and*
- (e) must state that it is made under this Act.*

18. In summary, the Payment Claim must:
- a) comply with the requirement for form (there is no prescribed form);
 - b) contain the prescribed information;
 - c) identify the construction work or related goods and services to which the progress payment relates;
 - d) indicate the amount of the progress payment that the Claimant claims to be due;
 - e) state that it is made under the Act.
19. A Valid Adjudication Application :
20. It is a basic and essential requirement of the Act that there be a valid “adjudication application” within the meaning of the Act, made by the Claimant to an Authorised Nominating Authority. Section 18(3) of the Act provides, so far as relevant, as follows:
- An adjudication application—*
- (a) *must be in writing; and*
 - (b) *..... must be made to an authorised nominating authority chosen by the claimant; and*
 - (c) *in the case of an application under sub-section (1)(a)(i), must be made within 10 business days after the claimant receives the Payment Schedule;*
 - (d) *.....*
 - (e) *.....*
 - (f) *must identify the Payment Claim and the Payment Schedule (if any) to which it relates; and*
 - (g) *must be accompanied by the application fee (if any) determined by the authorised nominating authority; and*
 - (h) *.....*
21. Reference to an Authorised Nominating Authorities :
22. An Adjudication Application is made to an Authorised Nominating Authority (“ANA”) under the Act. There are 6 Authorised Nominating Authorities under the Act in Victoria¹¹.
23. For there to be a valid Adjudication Application within the meaning of the Act, the adjudication application:
- f) must be in writing (there is no prescribed form);
 - g) must be made to an authorised nominating authority chosen by the Claimant;
 - h) must be made within the relevant period;
 - i) must identify the Payment Claim and the Payment Schedule to which it relates.
24. Determination by the adjudicator:
25. For there to be a valid Adjudication determination within the meaning of the Act, the adjudicator must, under the Act, determine:

¹¹ The 6 ANA’s are listed on the BCV website: www.buildingcommission.com.au

- a) the amount of the progress payment;
- b) the date on which the progress payment becomes or became due; and
- c) the rate of interest payable.

26. “Reference Date”

27. The adjudicator is required to determine the “Reference Date” under the Act. Section 9(2) of the Act provides, so far as relevant, as follows:

In this section, "reference date", in relation to a construction contract, means -

- (a) *a date determined by or in accordance with the terms of the contract as—*
 - (i) *a date on which a claim for a progress payment may be made; or*
 - (ii) *a date by reference to which the amount of a progress payment is to be calculated –*
 - in relation to a specific item of construction work carried out or to be carried out; or*
- (b) *subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after—*
 - (i) *construction work was first carried out under the contract; or*
 - (ii) *....*
- (c) *.....*
- (d) *in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following—*
 - (i) *the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless sub-paragraph (ii) applies; or*
 - (ii) *.....*
 - (iii) *if neither sub-paragraph (i) nor sub-paragraph (ii) applies, the day that—*
 - (A) *construction work was last carried out under the contract;*

28. Date adjudicated amount payable under the Contract:

29. The adjudicator is required pursuant to Section 23(1)(b) of the Act to determine the date upon which the adjudicated became or becomes payable.

30. Section 23(1)(b) of the Act provides, so far as relevant, as follows:

An adjudicator is to determine the date on which that amount became or becomes payable ...

Section 12(1) of the Act provides, so far as relevant, as follows:

A progress payment under a construction contract becomes due and payable on the date on which the payment becomes due and payable in accordance with the terms of the contract; or if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment

claim is made under Part 3 in relation to the payment.

31. Interest rate on Adjudicated Amount:
32. The adjudicator is required pursuant to Section 23(1)(c) of the Act to determine the rate of interest payable on the adjudicated amount.
33. Section 23(1)(c) of the Act provides, so far as relevant, as follows:

An adjudicator is to determinethe rate of interest payable on that amount in accordance with section 12(2) ...

Section 12(2) of the Act provides, so far as relevant, as follows:

*Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with sub-section (1) at the greater of the following rates the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983**¹²; or the rate specified under the construction contract.*

34. Determination of the Adjudicator's Costs:
35. The adjudicator is required to determine the appropriate allocation, between the Claimant and the Respondent, of costs of the adjudicator's fees.
- 36. Cost of the Adjudication Process**
37. The adjudication process can be expensive, because the parties must pay (in addition to their own costs) the fees of the adjudicator.
38. An Adjudication Application is made to an Authorised Nominating Authority ("ANA") under the Act. There are 6 Authorised Nominating Authorities under the Act in Victoria¹³. The adjudicator is selected by the ANA.
39. The hourly rate of the adjudicator will vary depending on the adjudicator's seniority and qualifications. For example, the adjudicator could be a senior counsel, at an hourly rate of \$600-700 per hour or more, plus GST. The total cost of the adjudicator could, in complex adjudications, be of the order, for example, of \$60-70,000 (depending upon the extent of the work required of the adjudicator in the particular Adjudication Application).
40. The fees of the adjudicator will be set out in the adjudicator's Notice of Acceptance.
41. The adjudicator, in the determination, is required to determine the appropriate allocation, between the Claimant and the Respondent, of costs of the adjudicator's fees. The release of the determination will usually be made conditional upon payment of the adjudicator's

¹² The rate prescribed under the section 2 of the **Penalty Interest Rates Act 1983**, as at 1 July 2009, is 10.0% per annum simple.

¹³ The 6 ANA's are listed on the BCV website: www.buildingcommission.com.au

fees.

42. Limits on submissions that may be put before the adjudicator

43. There are limits on the submissions that may be put before the adjudicator by the parties.
44. The adjudication process has been reviewed several times in the NSW Supreme Court: (for example, *Musico v Davenport* [2003] NSWSC 977, *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019, *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, *Transgrid v Walter Construction Group Ltd* [2004] NSWSC 21, *Transgrid v Siemens Ltd* [2004] NSWSC 87, *Paynter Dixon Constructions Pty Ltd v J F & C G Tilston Pty Ltd* [2004] NSWSC 85). A discussion of these cases is beyond this note. In brief, the Supreme Court will, if it believes the adjudicator has gone wrong, review his determination.
45. The NSW Supreme Court has held that (in relation to similar sections) the adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application which go outside (ie fall outside the ambit or scope of) the materials which were provided in the payment claim.
46. In *John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors* [2004] NSWSC 258 (20 April 2004), Einstein J set aside the Adjuicator’s determination on the basis that the material referred to the adjudicator went beyond the material contained in the payment claim. His Honour reasoned:

14 Some attention has been given in the authorities to the content of payment claims, usually at the same time as dealing with the content of the payment schedule. Hence McDougall J observed in Multiplex Constructions v Luikens, op cit, at [76]:

“A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant’s payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in dispute.”

.....

18 As will be seen from what follows below, my own view is that one commences with identifying what the statutory scheme puts forward as constituting a payment claim. A payment claim clearly is a claim to an entitlement to be paid a progress payment. The whole notion of a payment claim, it seems to me, requires as an essential condition thereof

that the document by which the payment claim is put forward, include, whether in shorthand or in longhand and whether by one means or another, sufficient information to identify what the claim is.

.....

whilst it is not permissible to construe [section 13](#) as providing that in order to be a valid payment claim, such a claim must do more than satisfy the requirements stipulated for by [subsection 2](#) (a), (b) and (c), the consequence to a claimant which does not include sufficient detail of that claim to be in a position to permit the respondent to meaningfully verify or reject the claim, may indeed be to abort any determination.

.....

24 The matter may also be analysed by reference to the power of an adjudicator. An adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application which go outside [ie fall outside the ambit or scope of] the materials which were provided in the payment claim, for the reason that the adjudicator only has power to make a determination based upon:

- The payment claim [together with the claimant's submissions (and relevant documentation) in the adjudication application, which submissions have to have been "duly made by the claimant in support of the (payment) claim": see [section 22](#) (2) (c)].*

- The payment schedule (if any) [together with the respondents submissions (and relevant documentation) in the adjudication response, which submissions have to have been "duly made by the respondent in support of the (payment) schedule": see [section 22](#) (2) (d)].*

.....

New contractual basis

29 The first situation seems to me to generally be quite plain. The abortive adjudication determination likely to result from the advancing [, within the adjudication application] of a new contractual basis for a payment claim, has already been explained.

Supporting documentation

30 The deploying for the first time in the adjudication application, of supporting documentation will require careful attention and becomes a matter of degree and detail. However in the main I do not see that a respondent which, by reason of insufficient information supplied with the payment claim, is unable to verify that claim, and says as much in the payment schedule [only later to receive as part of the adjudication application, the supporting documentation which should have been earlier supplied in order to permit a meaningful payment schedule

response], will be otherwise than barred by [section 20 \(2B\)](#) from including in its adjudication response reasons for withholding payment arising by reference to the later supporting documentation. It could not be said that those reasons were already included in the payment schedule provided to the claimant. A complaint about inability to verify a claim because of insufficient information is not synonymous with reasons for dealing with a properly supported claim.

47. There is no express prohibition on further material, rather the adjudication submission go outside (ie fall outside the ambit or scope of) the materials, provided this does not have the effect of denying the respondent natural justice. This will, however, require: *careful attention and becomes a matter of degree and detail.*

48. The cases suggest, in summary, that the contractor should only sparingly put new material before the adjudicator.

49. Amendments to the Victorian Act : Contracts executed after 30 March 2007

50. General

51. The *Building and Construction Industry Security of Payments Bill* was introduced into the Victorian parliament on 7 February 2006, the second reading speech was delivered by the Minister for Planning Rob Hulls on 9 February 2006. The substantive amendments came into effect on 30 March 2007.

52. The Act previously provided that, where the adjudicator determined that the principal was to pay the contractor, the principal must, either, pay the amount, or alternatively, provide security for payment to the contractor. (The option for principals to provide security rather than make payment to contractors had, there seems little doubt, been the reason that there were few adjudications in Victoria prior to the amendments (as had occurred in NSW between 1999 and 2002)).

53. The amendments to the Victorian Act included, importantly, removing the option for the principal to provide security rather than make payment. This was addressed by the Minister in the Second Reading Speech:

The bill reinforces this principle by providing that after an adjudicator has made a determination, the respondent must pay the adjudicated amount. The existing legislation allows respondents to provide security for payment (such as placement of the amount in a trust fund) rather than money. This has been removed because the NSW experience demonstrated that some parties delayed payment by providing security and failing to take prompt action to resolve the dispute.

54. The amendments to the Victorian Act, however, went further. In particular, the Act does not apply to Variations other than “Claimable Variations” under Section 10A, and does not apply to certain types of claims described as “Excluded Amounts” under Section 10B. (These limits on amounts occur only in the Victorian Act, they do not occur, for example, in the NSW Act, or the Queensland Act.)

55. The effect of the amendments to the Victorian Act, therefore, has been that adjudication had been substantially less utilized in Victoria, compared to NSW, and Queensland (the Queensland Act is substantially similar to the NSW Act). The numbers of adjudications have been as follows:

NSW

- Pre - 2002 Amendments (removing right to give security)
 (March 2000 to December 2003: 116 adjudication applications)
 approx 3-4 applications per month
 Post - 2002 Amendments (removing right to give security)
 (1 January 2006 to 30 June 2006: 509 adjudication applications)
 approx 80 applications per month

Victoria

- Pre - 2007 Amendments (removing right to give security/limiting claims that can be referred)
 approx 3-4 applications per month
 Post - 2002 Amendments (removing right to give security/limiting claims that can be referred)
 approx 3-4 applications per month

56. Claimable Variations

57. The Act does not apply (the adjudicator may not take into account) claims for Variations other than “Claimable Variations” under Section 10A.

58. Section 10A of the Act provides, so far as relevant, as follows:

10A Claimable variations

- (1) This section sets out the classes of variation to a construction contract (the **claimable variations**) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.*
- (2) The first class of variation is a variation where the parties to the construction contract agree—*
- (a) that work has been carried out or goods and services have been supplied; and*
 - (b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and*
 - (c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and*
 - (d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and*
 - (e) as to the value of that amount or the method of valuing that amount; and*

(f) as to the time for payment of that amount.

(3) The second class of variation is a variation where—

(a) the work has been carried out or the goods and services have been supplied under the construction contract; and

(b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

(c) the parties to the construction contract do not agree as to one or more of the following—

(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;

(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

(iii) the value of the amount payable in respect of the work or the goods and services;

(iv) the method of valuing the amount payable in respect of the work or the goods and services;

(v) the time for payment of the amount payable in respect of the work or the goods and services; and

(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into—

(i) is \$5 000 000 or less; or

(ii) exceeds \$5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to "\$5 000 000" were a reference to "\$150 000".

59. In summary:

1. Agreed variations

The parties agree about the variation, the claimant's entitlement to a progress payment for it, the amount claimed or the method of valuing it, and when payment is due.

2. Disputed variations

The parties agree that the work has been carried out, or the goods and services supplied, at the respondent's request, but disagree about one or more of the following:

- Whether a progress payment can include an amount for the work, goods or services
- The value of the amount or how it was valued
- The time for payment of that amount.

Limits apply on the amount of disputed variations that may be claimed.

Limits on disputed variations

Limits apply, depending on the amount of the contract sum.

• Contracts over \$5 million

The parties must use the dispute resolution provisions in the contract. If there are no dispute resolution provisions in the contract, the disputed variations may be claimed under the Act.

• Contracts up to \$150,000

All disputed variations that fall within the description of 'disputed variations' above may be claimed under the Act.

• Contracts between \$150,000 and \$5 million

The Act applies to disputed variations that fall within the description of 'disputed variations' above, up to 10% of the value of the contract. Otherwise, the dispute resolution provisions in the contract (if any) must be used.

60. "Excluded Amounts"

61. The Act does not apply to certain types of claims described as "Excluded Amounts" under Section 10B.

62. Section 10B of the Act provides, so far as relevant, as follows:

10B Excluded amounts

(1) This section sets out the classes of amounts (excluded amounts) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.

(2) The excluded amounts are—

- (a) any amount that relates to a variation of the construction contract that is not a claimable variation;*

- (b) *any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to—*
 - (i) *latent conditions; and*
 - (ii) *time-related costs; and*
 - (iii) *changes in regulatory requirements;*
- (c) *any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;*
- (d) *any amount in relation to a claim arising at law other than under the construction contract;*
- (e) *any amount of a class prescribed by the regulations as an excluded amount.*