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BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENTS ACT 2002 (VIC) GUIDE TO CONSTRUCTION CONTRACT PROFESSIONALS 2025

(INCLUDING PROPOSED BILL AMENDMENTS 17.10.25)

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INDEX

SECTION 1
THE SCHEME OF THE ACT

1.1 Objects of the Act

1. The *Building and Construction **In**dustry Security of Payments Act (Vic) 2002* has operated in Victoria since 2002.

2. The Act applies to any "*construction contract*" or "*related goods and services*", as defined in Sections 5 and 6, including contracts whether written or oral.

3. The Act does not apply to:
   1. construction contracts that form part of a loan contract, contract of guarantee, contract of insurance;
   2. domestic building contracts;
   3. contracts where the consideration does not relate to value of the work;
   4. employment contracts;
   5. construction work outside Victoria.

4. 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 construction 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 provided).

5. The courts have, over the last 10 years, set out a number of general principles as to the matters required (the "basic and essential requirements") for a valid adjudication determination. These Notes set out (in Sections 3 and 4) the payment claim/payment schedule, and adjudication, process.

6. 2007 Amendments to the Victorian Act

7. The *Building and Construction Industry Security of Payments Amendment Act 2007* 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. (The amendments to the Act do not apply to contracts executed before 30 March 2007.)

8. The Act had previously provided that, where the adjudicator determined that the respondent was to pay the claimant, the respondent must, either, pay the amount, or alternatively, provide security for payment to the claimant. (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)). The amendments to the Victorian Act included, importantly, removing the option for the respondent 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.*

9. The Act originally had limited operation, it applied 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

9. The amendments to the Victorian Act, however, went further. In particular, under the (amended) Act, a valid payment claim may not include Variations other than "Claimable Variations" under Section 10A, nor may it include certain types of claims described as "Excluded Amounts" under Section 10B. Certain types of claims, were expressly excluded from the operation of the Act, including claims for:

- "damages"
- delay costs
- latent conditions

(These limits on claims occur only in the Victorian Act, they do not occur in relation to any other state or territory.) These limitations are addressed below in Section 2.

10. The Victorian Act has been substantially less utilized compared to NSW and other states. The numbers of adjudications in Victoria have been as follows:

Victoria

Pre - 2007 Amendments

1 January 2005 to 1 Jan 2007: 94 adjudication applications

(approx 3-4 applications per month)

Post-2007 Amendments (removing right to give security/limiting claims that can be referred)

(1 July 2014 to 30 June 2015: 333 adjudication applications)
approx 28 applications per month

Attachment C is a printout of the Victorian adjudication statistics released by the Victorian Building Authority on its website at: www.vba.vic.gov.au.

13. Similar legislation has now enacted in every state and territory of Australia:

Building and Construction Industry Security of Payment Act 1999 (NSW)
Building and Construction Industry Security of Payment Act 2002 (Vic)
Building and Construction Industry Payments Act 2004 (Qld)
Building and Construction Industry Security of Payment Act 2009 (SA)
Building and Construction Industry Security of Payment Act 2009 (ACT)
Building and Construction Industry Security of Payment Act 2009 (Tas)
Construction Contracts Act 2004 (WA)
Construction Contracts (Security of Payment) Act 2004 (NT)

14. The Purpose and Objects of the Act

15. The objects of the Act appear from the Act itself, the Second Reading speeches (in Victoria, both when the Act was first introduced in 2002, and when being amended in 2005, and in the Second Reading speeches in other states), and have been considered in a number of cases.

16. Section 1 of the Act states the purpose of the Act as follows:

The main purpose of the Act is to provide for entitlements to progress payments.

17. Section 3(1) states the object of the Act as follows:

> *The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*

18. In the Second Reading speech in relation to the *Building and Construction Industry Security of Payment (Amendment) Bill*, the Hon Mr R Hulls, (then) Minister for Planning, said as follows:

> *The main purpose of this bill is to amend the Building and Construction Industry Security of Payment Act 2002 to make it more effective in enabling any person who carries out building or construction work to promptly recover progress payments.*
> *....*
> *The Building and Construction Industry Security of Payment Act 2002 has now been in operation for three years. The act has delivered on the government's commitments to improve protection of the rights of subcontractors and others in the industry to fair and prompt payment and assist them to recover legitimate payment claims against defaulting parties.*
> *The construction industry strongly supports the existing legislation, which has improved payment prospects and cash flow outcomes for many industry participants.*
> *....*
> *The bill expands the application of the legislation to include a wider range of payments, including final payments, single payments and milestone (key event) payments. It will also allow subcontractors to use the adjudication process to access amounts clients or head contractors hold on trust for subcontractors until works are completed.*
> *....*
> *Cash flow is the lifeblood of the construction industry. It is critical that industry participants obtain prompt interim payment, pending a final determination of the matters in dispute.*
> *....*

19. The Second Reading Speech of the New South Wales Act[1] likewise illustrates that parliament intended the Act would have broad application:

> "*With certain exceptions, the bill benefits anyone who is a party to a construction contract, whether written or oral. Construction contracts include contracts for the supply of related goods and services such as the provision of architectural, engineering and surveying services, the supply of building materials or components to form part of a building or structure, and the supply or hire of plant materials for use in construction work. Builders are also able to use the legislation in relation to obtaining payments from their clients".*

20. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156, Vickery J said, in relation to the purpose of the Act:

> *2 The Act has had a substantial effect in shifting the power balance between principals and subcontractors in construction contracts in Victoria and in other*

[1] *Building and Construction Industry Security of Payment Bill 1999* (NSW), *Second Reading Speech* 29 June 1999

States and Territories where legislation in similar terms and with the same objects has been enacted.[1] Project Deedors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which compliments the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act.

....

39 The responsible Minister in introducing the bill stated in the second reading speech:[5]

> *The main purpose of this bill is to provide for an entitlement to progress payments for persons who carry out building and construction work or who supply related goods and services under construction contracts.*
>
> *....*

40 In O'Donnell Griffin Pty Ltd v John Holland Pty Ltd[6] Beech J described the purpose of the like Western Australian legislation in the following terms:[7]

> *In construing the Act it is to be borne in mind that the object of the scheme created by the Act is, as described in the explanatory memorandum and the Second Reading Speech, to "keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted disputes".*

41 Campbell J in Amflo Constructions Pty Ltd v Jefferies[8] made observations to similar effect about the NSW Act, regarding provisions which are mirrored in the Victorian Act, saying:

> *A fundamental feature of the legislation is that, apart from the fact that parties to a construction contract cannot contract out of the rights given by the legislation ... nothing ... affects any of the rights that parties to a construction contract have ... The concern of the Act is with maintaining the cash flow of claimants, by enabling them to recover quickly amounts which the adjudication process says they are entitled to. It is possible for the person who pays the amount of money which an adjudication has found due to seek to reclaim that money, in court proceedings which decide what the ultimate legal rights of the parties are. An evident purpose of the Act is that, if there is to be such litigation, it will start from a position where the claimant has been paid the amount which the adjudication process has decided should be paid. [Specific references to the Sections of the NSW Act omitted]*

42 Campbell J also considered the contents of the second reading speech in introducing amendments to the NSW Act, the Building and Construction Industry Security of Payment Amendment Bill 2002 (NSW).[9] Given the provenance of the Victorian Act, these observations of the New South Wales Minister provide useful insights into the operation of the Victorian Act.[10] In his speech the New South Wales Minister said:

> *The main purpose of the Act is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover progress payments. The Government wanted to stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers by ignoring progress claims, raising spurious reasons for not paying, or simply delaying payment. ...*
>
> *The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid ...*

> *Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act ...*
> *....*
>
> *.....*
> *44 The principle that the respondent to a payment claim for a progress payment "should pay now and argue later" is given full effect under the Act: Multiplex Constructions Pty Ltd v Luikens and Anor.[11] This regime promotes the object of the Act, being to facilitate timely payments between the parties to a construction contract and to provide for the rapid resolution of disputes arising in respect of progress claims under construction contracts.*
> *45 From this analysis, I readily accept the observation made in a number of recent authorities that the Act places the claimant in a privileged position in the sense that it acquires rights that go beyond its contractual rights: Protectavale Pty Ltd v K2K Pty Ltd[12] and Jemzone Pty Ltd v Trytan Pty Ltd.[13]*
> *46 The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality. The Building and Construction Industry Security of Payment Act 1999 (NSW) has led to a spate of litigation in its relatively short life.[14] If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.*
> (emphasis added)

21. In summary, the objects of the Act include:
    1. to provide an entitlement to prompt progress payments for persons who carry out building and construction work or who supply related goods and services under construction contracts;
    2. to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted disputes;
    3. that the respondent to a payment claim for a progress payment should pay now and argue later;
    4. to facilitate timely payments between the parties to a construction contract and to provide for the rapid resolution of disputes arising in respect of progress claims under construction contracts;
    5. freedom from excessive legal formality.

1.2 The Act does not apply to domestic building contracts

22. The Act does not to domestic building contracts (within the meaning of the *Domestic Building Act 1995 (Vic)*). The Act does apply, however, where the building owner is in the "business of building residences".

23. Section 7(2)(b) of the Act provides, so far as relevant, as follows:

> *(2) This Act does not apply to—*
> *....*
> *(b) a construction contract which is a domestic building contract within the meaning of the **Domestic Building Contracts Act 1995** between a builder and a building owner (within the meaning of that Act), for the carrying out of domestic building work (within the meaning of that Act), other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business ....*

24. In *Director of Housing of State of Victoria v StructX Pty Ltd (trading as Bizibuilders)* [2011] VSC 410, Vickery J (the Judge in Charge of the Technology and Construction List in the Supreme Court of Victoria) was considering an adjudication determination and the meaning of "in the business of building residences" (in that case, in relation to the Director of Housing). His Honour reasoned:

> *26 The question then becomes, did the exception provided by s 7(2)(b) apply because the building owner (the Director) is or was at the relevant time in the business of building residences and the contract is or was entered into in the course of, or in connection with, that business?*
> *27 As aforementioned, "business" is not defined in the Act. A glance at the Oxford Dictionary shows that the word has a number of meanings. It is necessary to engage in a process of construction in order to arrive at the meaning of the word as it is used in s 7(2)(b) of the Act. The ordinary and natural meaning in the context of the section must be adopted, having regard to the statutory purpose to be served.*
> *28 The expression "in the business of building residences ..." connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.*
> *29 Reference is made to Hope v Bathurst City Council The appellant before the High Court, was the owner and occupier of certain land known as "Hassall Park", situated at Kelso near Bathurst. He appealed under s 118 (7) of the Local Government Act 1919 (NSW), as amended, against the decision of the respondent Bathurst City Council that his land, the subject of a rate notice for the year 1978, was not rural land, with the consequence that he was not entitled to the benefit of the lower general rate made in respect of rural land. The expression "rural land" was relevantly defined in s 118 (1) of the Local Government Act as:*
>
> > *a parcel of ratable land which is valued as one assessment and exceeds 8,000 square metres in area, and which is wholly or mainly used for the time being by the occupier for carrying on one or more of the businesses or industries of grazing, dairying, pig-farming, poultry farming, viticulture, orcharding, bee-keeping horticulture, vegetable growing, the growing of crops of any kind or forestry.*
>
> *As identified by Mason J, this definition threw up as an issue for determination by the primary judge, the question whether the appellant's land was wholly or mainly used by him for carrying on the business or industry of grazing.*
> *30 Mason J, with whom the other members of the Court agreed said:*
>
> > *I accept, then, that "business" in the sub-section has the ordinary or popular meaning which it would be given in the expression "carrying on the business of grazing". It denotes grazing activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis.*
>
> *31 I accept that the expression "in the business of building residences ....", as it is used in s 7(2)(b) of the Act has a similar meaning.*
>
> (emphasis added)

25. In *Promax Building Developments Pty Ltd v Pcarol & Co Pty Ltd* [2017] VCC 495 (3 May 2017), the County Court (Anderson J) reasoned as follows:

> *16.Generally, section 7(2)(b) of the Act excludes "a construction contract which is a domestic building contract" from the operation of the Act. However, this general rule does not apply to "a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with that business".*
> *17.This provision has been considered by Vickery J in Director of Housing of State of Victoria v. Structx Pty Ltd [2011] VSC 410 ("Structx") and Vinson v. Neerim Properties Developments Pty Ltd [2016] VSC 321 ("Vinson").*
> *18.In Structx, Vickery J considered whether the Director of Housing was involved "in the business of building residences". At [28], Vickery J said that this phase in*

> *section 7(2)(b) "connotes the construction of dwelling houses as a commercial enterprise engaged in for the purpose of profit on a continuous and repetitive basis", and at [37] that the section spoke "in terms of the actual business which the building owner undertakes, not whether a party in the position of the building owner [in that case, the Director of Housing] has the power to undertake the activity".*
> *.....*
> *21.Mr Wilkinson relied upon Vinson. However, in that case Vickery J was dealing with an application made "in chambers" on the basis of conflicting material contained apparently in affidavits and statutory declarations.*
> *22.Part of the material included statutory declarations by Ms Vinson and by the director of Launch Corporation Pty Ltd ("Launch") which described itself as "a dedicated property development company".*
> *.....*
> *24.In the circumstances and in the absence of these statements being tested "by way of oral testimony and cross-examination", Vickery J at [41] said that "it cannot be authoritatively determined whether or not Ms Vinson was, as a matter of fact in the business of building residences".*
> *25.In the present case, the purpose of the PCarol & Co Trust is to make investments in the property market. The sole activity of the Trust has been the purchase and subsequent development of two properties. The legal authorities suggest that it does not matter that both projects may have been unsuccessful. Many businesses are.*
> *26.The properties at Reservoir and Bellfield were purchased to be developed with residences – three at Reservoir and 12 at Bellfield. The Bellfield development followed on from the earlier Reservoir development.*
> *27.The legal authorities suggest that the determination of the question of whether a "building owner is in the business of building residences" does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future.*
> *28. PCarol entered into the building contract with Promax in pursuit of the purpose of the Trust, which was essentially the purchase and redevelopment of land for residences. I am satisfied that PCarol was in December 2016, and thereafter until the termination of the building contract, "in the business of building residences".*
>
> (emphasis added)

26. In *Golets v Southbourne Homes & Anor [2017] VSC 705* (Vickery J), His Honour reasoned as follows:

> *32 ...., the approach adopted for the purposes of the 'in the business of building residences ...' exception in s 7(2)(b), was to consider whether the party concerned was 'in the business of building residences in the course of an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.' For this purpose I accepted that the expression 'in the business of building residences ....', as it is used in s 7(2)(b) of the Act, was materially indistinguishable from the phrase 'carrying on the business of ... 'grazing' as considered in Hope v Bathurst City Council, and I applied the considerations referred to by Mason J in that case.*
> *33 However, it must be accepted that what constitutes being 'in the business of building residences' for the purposes of s 7(2)(b) of the Act is in each case an issue of fact to be determined on a case by case basis.*
> *34 The 'indicia' applied to the facts in Structx must be seen as an aid or guide to the application of the statutory exception, rather than be seen as a prescriptive, comprehensive and exclusive test superimposed on the statutory definition of the exception.*
> *35 In some cases, where at first glance these indicia might appear to operate to render the exception applicable, the particular facts of the case may point in the opposite direction, with the result that the exception is inapplicable, and vice versa.*

36 Ultimately, the only 'test' to be applied to determine whether or not the exception applies is that prescribed by the Act. Application of the exception is to be adjudged by reference to its own language, when applied to the facts of each case. The facts relevant to this issue will vary from case to case. These relevant facts may be referred to as the 'salient features'.

37 In cases where the phrase 'carrying on a business' has been considered, it was recognised that a single joint venture may be sufficient to fall within the concept, in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis. In United Dominions Corp Ltd v Brian Pty Ltd, Dawson J observed:

> *A single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business: Smith v Anderson (1880) 15 Ch D 247 at 277–8; Re Griffin; Ex parte Board of Trade (1890) 60 LJQB 235 at 237; Ballantyne v Raphael [1889] VicLawRp 110; (1889) 15 VLR 538. Whilst the phrase "carrying on a business" contains an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated, the decision of this court in Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd [1974] HCA 22; (1974) 131 CLR 321; 3 ALR 409, suggests that the emphasis which will be placed upon continuity may not be heavy.*

38 A recent example of the application of the s 7(2)(b) exception is provided by the decision of the Victorian County Court in Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd ('Promax'). ....

....

40 .... Judge Anderson focused on the purpose of the trust and its activities:[13]

> *The legal authorities suggest that the determination of the question of whether a "building owner is in the business of building residences" does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future.*
>
> *PCarol entered into the building contract with Promax in pursuit of the purpose of the Trust, which was essentially the purchase and redevelopment of land for residences. I am satisfied that PCarol was in December 2016, and thereafter until the termination of the building contract, "in the business of building residences".*

....

Conclusions and orders

53 In this case I have determined that the Plaintiff has made out Ground 1.

54 The following salient features are relevant:

(a) Dr Golets is a medical practitioner by occupation and his wife is a pharmacist. I infer from this that they are engaged in these professions.

(b) There is no evidence to support the First Defendant's submission that the purpose of the Hawthorn Project was intended to make a 'profit' in the commonly accepted sense of the concept. .... The evidence of the Plaintiff is that the sale of the second unit in the Hawthorn Property was intended to help pay off the debt which had been generated. True it is that by these means the Plaintiff was assisted in securing the asset in the remaining first unit which he and his family intended to occupy. However, if a profit was to be made upon the realisation of the remaining first unit by sale, there is no evidence as to when this was to occur or likely to occur, or the likely extent of any profit, or indeed, whether a profit would be achieved at all.

(c) There is no evidence of any enterprise on a continuous and repetitive basis. ....

(d) There was no vehicle established to structure the construction of dwellings at the Hawthorn property which had as its purpose a commercial enterprise to generate profit for those engaged in it or who had an interest in it.

(e) The primary purpose of the Hawthorn Project was to secure a dwelling house to be occupied by Dr Golets and his family. The sale of the one unit was part of his financial plan to achieve this end.

> *55 Standing back and considering these salient features as a whole, I do not consider that Dr Golets, in undertaking the construction of the Hawthorn Project, was 'in the business of building residences ...' within the meaning of s 7(2)(b) of the Act.*
> *56 As to the reasoning of the adjudicator, I find on the evidence before me that Dr Golets could not be described as a 'commercial developer'. His building activities conducted in 2008–2009 for the Oak Park Project and in 2014 for the Hawthorn Project, when considered in the context described in the evidence before the Court, could not properly be described as being activities where he 'a number of times, bought land and built residences, on a commercial basis'. Further, I do not consider these activities were conducted on a 'continuous and repetitive' basis as found by the adjudicator.*
> *57 In this case I am well satisfied that the Plaintiff has discharged his evidentiary onus under s 7(2)(b) of the Act, in establishing that he, as the building owner, was at all material times not 'in the business of building residences' and the Construction Contract entered into for the Hawthorn Project, was not entered into in the course of, or in connection with, any business.*
> *58 The adjudicator fell into jurisdictional error in determining that the Plaintiff was 'in the business of building residences' at the time of constructing the Hawthorn Project.*
> *.....*

27. In *Saath Pty Ltd v Seascape Constructions Pty Ltd & Anor* [2021] VSC 358, Stynes J reasoned:

> ***C.3 The applicable legal principles***
> ***C.3.1 Jurisdictional fact***
> *……*
> ***C.3.2 "in the business of building residences"***
> *48. ....*
> *49. Whether the exemption in s 7(2)(b) of the SOP Act applies must be assessed at the date the contract was entered into*
> *50. The phrase 'in the business of" is not defined in the SOP Act.*
> *51. A number of authorities have considered the phrase 'in the business of", both within and outside the construction context. The following principles can be extracted:*
> *(a) the expression 'in the business of building residences' connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis;*
> *(b) s 7(2)(b) of the SOP Act 'speaks in terms of the actual business which the builder owner undertakes, not whether a party in the position of the building owner has the power to undertake the activity';*
> *(c) the determination of the question of whether a 'building owner is in the business of building residences' does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future;*
> *(d) 'what constitutes being "in the business of building residences" for the purposes of s 7(2)(b) of the [SOP] Act is in each case an issue of fact to be determined on a case by case basis';*
> *(e) a single joint venture may be sufficient to fall within the concept [of carrying on a business], in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis. In Ian Street Developer Pty Ltd v Arrow International Pty Ltd, Riordan J confirmed that special purpose entities or companies incorporated for a single project may be 'in the business of building residences' even where the entity or company intends to sell the residences through another entity or company. It was considered relevant in Ian Street Developer that a special purpose vehicle was incorporated with the sole purpose of constructing the project and the units in the project being resold to a related corporation for profit.*

C.5 Consideration

55. It is not disputed that the plaintiff has a single purpose, that is, to construct four units. It is not disputed that a single joint venture may be sufficient to fall within the concept of carrying on a business notwithstanding the apparent absence of the element of a going concern conducted on a continuous and repetitive basis.

56. However, the essential feature of a business that is missing from the enterprise engaged in by the plaintiff, assessed at the time the Contract was entered into, was that it was engaged in for the purpose of profit.

57. The plaintiff relies on the affidavits of Mr Zamir and Mr Chempakasseril. Neither were subjected to cross examination. By those affidavits, they describe the purpose of the development being to build four units so that their families could live close to one another. There was no intention on the part of the plaintiff or its directors to profit from the Project.

58. In relation to the other features relied on by the first defendant:

(a) Mr Zamir and Mr Chempakasseril explained that the corporate trustee was employed on the advice of an accountant for personal liability purposes and was not driven by a desire to conduct a business. They were not subjected to cross examination. I accept that evidence;

(b) the fact that the plaintiff was created for a single purpose is entirely consistent with the plaintiff's position that its sole purpose was to build residences for occupation by the two families and that there was no intention that it engage in an enterprise for the purpose of profit on a continuous or repetitive basis;

(c) I do not consider a four unit development for a contract sum of $1,215,000.00 to be such a substantial development to support the proposition that it is in the nature of a professional development; and

(d) in my opinion an inference to be drawn from the collection of factors relied on by the first defendant relating to the creation of a corporate vehicle and the registration for GST is not as persuasive as the direct and uncontested evidence of the plaintiff's directors as to the sole purpose of the plaintiff to build dwellings for the personal use by the directors and their families.

59. For these reasons, I find that the plaintiff was not, at the time it entered into the Contract, in the business of building residences.

60. As a consequence:

(a) the SOP Act does not apply to the Contract;

(b) in determining that the SOP Act applied to the Contract, the Adjudicator has made a jurisdictional error; and

(c) I order that the Adjudication Determination be quashed.

.....

28. The above decisions suggest the following propositions:

1. The test is whether there is a commercial enterprise engaged in for the purpose of profit on a continuous and repetitive basis, in the nature of a going concern.
2. In each case this is an issue of fact to be determined on a case by case basis. The indicia' applied to the facts in *Structx* should be seen as an aid or guide to the application of the statutory exception, rather than as a prescriptive, comprehensive and exclusive test superimposed on the statutory definition of the exception.
3. The application of the exception is to be adjudged by reference to its own language, when applied to the facts of each case. The facts relevant to this issue will vary from case to case (the 'salient features').
4. A single joint venture may be sufficient to fall within the concept, in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis …. single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business.
5. The determination of the question of whether a "building owner is in the business of building residences" does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future.
6. The exemption in s 7(2)(b) of the SOP Act applies must be assessed at the date the contract was entered into.

7. The expression 'in the business of building residences' connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.
8. Section 7(2)(b) of the SOP Act 'speaks in terms of the actual business which the builder owner undertakes, not whether a party in the position of the building owner has the power to undertake the activity.
9. The determination of the question of whether a 'building owner is in the business of building residences' does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future.
10. What constitutes being "in the business of building residences" for the purposes of s 7(2)(b) of the [SOP] Act is in each case an issue of fact to be determined on a case by case basis'.
11. A single joint venture may be sufficient to fall within the concept [of carrying on a business], in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis.
12. An essential feature of a business, assessed at the time the construction contract was entered into, is that it is engaged in for the purpose of profit.

1.3 The payment claim/payment schedule process

24. The Act sets out a detailed process and timetable for payment claims and payment schedules. The regime of payment claim and payment schedule in relation to progress payments under construction contracts is as follows:
    1. Where a party ("the claimant") is entitled to progress payments, it may deliver a "payment claim" to the party ("the respondent") liable to make the payment.
    2. In response to the payment claim, the respondent must deliver a "payment schedule", within 10 business days of receiving the payment claim, failing which the full amount of the payment claim becomes due (albeit only a payment "on account").
    3. Where the payment schedule is for less than the payment claim, the Act provides a system of fast, independent, adjudication.
    4. The entitlement to payment is only "on account" (ie either party still has their existing rights under the construction contract to commence proceedings to recover any such payment).
    5. The Act provides for immediate enforcement to recover the amount due, including a right to judgment.

25. Where a payment claim is made by the claimant, the respondent must deliver a payment schedule within 10 business days, failing which the full amount claimed is due immediately. Where necessary, an unpaid claimant may proceed in court and make an Application for Summary Judgment. (There have been multiple examples where a claimant has obtained summary judgment for the full amount of the payment claim, through inadvertent failure by the respondent to comply with the requirements of the Act to deliver a payment schedule within 10 business days.)

26. Where the payment schedule is delivered, the claimant is entitled to payment of the amount in the payment schedule by the due date under the construction contract, failing which the amount to be paid under the payment schedule is due immediately.

27. Where this payment is not made, the claimant is able to bring an Application for Summary Judgment for the amount. Defences to such Applications for Summary Judgment have generally been unsuccessful (see below).

1.4 Amount Determined under the Act is payable "on account":

28. The entitlement to payment is only "on account".

29. Section 47 of the Act preserves the rights of either party to dispute the amounts payable under the construction contract. In fact, as with all progress payments, the amount owing under the construction contract is, if necessary, to be resolved in accordance with the provisions of the construction contract.

30. In substance, the cash flow position, pre-legislation, is reversed, ie previously, if there was a dispute under the construction contract, the respondent would hold onto the cash while that dispute was being fought out, now, if there is a dispute under the construction contract, the respondent must pay the amount dictated by the Act, and the claimant would hold onto that amount while that dispute was being fought out.

31. The purpose of the payment provisions is, in effect, intended to address, fairly and efficiently, the claimant's cashflow, on account, rather than determine the ultimate entitlements under the construction contract.

32. 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.

1.5 Consequences of failure to provide the payment schedule within 10 business days

33. Where a respondent fails to deliver a payment schedule within the required 10 business days, the respondent is obliged to pay, albeit on account, the full amount of the claimant's claim. (The respondent may, if it chooses, attempt to recover that amount back from the claimant through the traditional dispute resolution procedures under the construction contract).

34. The substantive effect of these sections is that where the respondent does not provide a payment schedule within 10 business days, the claimant is entitled to payment of that amount, on account. This, in effect, is intended to guarantee the claimant's cashflow (rather than alter the position under the construction contract).

35. If the respondent does not pay, the claimant is able to commence a court action, and to seek summary judgment. The Act expressly precludes raising typical construction contract defences to such an action. Section 16(4) of the Act provides that where a claimant commences proceedings to recover the unpaid portion of the claimed amount from the respondent … *the respondent is not, in those proceedings, entitled to bring any cross-claim against the claimant or raise any defence in relation to matters arising under the construction contract.*

36. In addition, where a respondent has not provided a payment schedule within 10 business days, the claimant may, after complying with certain notice requirements, suspend the work under the construction contract.

1.6 Consequences of not paying accordance with the payment schedule

37. Where a respondent fails to pay the claimant in accordance with the payment schedule, the respondent is obliged to pay, albeit on account, the amount proposed to be paid in the payment schedule. (The respondent may, if it chooses, attempt to recover that amount back from the claimant through the traditional dispute resolution procedures under the construction contract).

38. The substantive effect of these sections is that where the respondent does not pay the claimant in accordance with the payment schedule, the claimant is entitled to payment of that amount, on account. This, in effect, is intended to guarantee the claimant's cashflow (rather than alter the position under the construction contract).

39. If the respondent does not pay, the claimant is able to commence a court action, and to seek summary judgment. The Act expressly precludes raising typical construction contract defences to such an action. Section 17(4) of the Act provides that where a claimant commences proceedings to recover the unpaid portion of the claimed amount from the respondent … *the respondent is not, in those proceedings, entitled to bring any cross-claim against the claimant or raise any defence in relation to matters arising under the construction contract.*

40. In addition, where a respondent fails to pay the claimant in accordance with the payment schedule, the claimant may, after complying with certain notice requirements, suspend the work under the construction contract.

1.7 The Adjudication Process

41. Where the claimant disputes the amounts contained in a payment schedule, it may lodge an Application for Adjudication 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.

42. The Application for Adjudication will usually 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, site diaries, meeting minutes, ….)

43. The ANA must then 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.

44. The respondent may respond to the adjudication ("the Adjudication Response") within 5 business days of receiving the copy of the adjudication application, or within 2 business days of receiving the Notice of Acceptance from the adjudicator, whichever is later.

45. Within 10 business days of notifying his/her acceptance, the adjudicator must determine the dispute. (The 10 business days may be extended by up to a further 15 business days by agreement of the claimant.)

46. The adjudicator may:
a) request further written submissions;
b) inspect work;
c) call a conference.

47. The adjudicator must determine:
a) the amount to be paid in respect of the progress payment;
b) the due date for payment;
c) the applicable interest rate on late payments;
d) who is to pay the costs of the adjudication.

48. 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.

49. The detailed referral process is set out in sections 18-22 of the Act. Process in addressed in more detail in Sections 5-7 below.

SECTION 2
PAYMENT CLAIM

2.1 Requirements of a Valid Payment Claim

1. The requirements as to a valid payment claim under the Act are set out in Section 14(2).

2. 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.*

3. 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.

4. The minimum requirement is that the payment claim state that it is made under the Act (this is the trigger, informing the respondent that the Act applies to this payment claim). There is no specific wording required, only that the payment claim must state that it is made under Building and Construction Industry Security of Payment Act 2002 (Vic). For example: *"This payment claim is made under the Building and Construction Industry Security of Payment Act 2002 (Vic)".*

5. Whether payment claim sufficiently identifies the construction work to which the progress payment relates

6. In *Protectavale Pty Ltd v K2K Pty Ltd* ("*Protectavale*"), Finkelstein J was considering a dispute between a principal and a contractor. The Principal had commenced proceedings in relation to construction delays, and the difference between estimated and actual costs of the development. The Contractor had subsequently served a payment claim for monies it claimed under the Contract, then issued a cross-claim, then sought summary judgment on the cross-claim. At paragraphs 10-15:

> *10 It is necessary to decide whether the invoice meets the requirements of s 14. The test is an objective one; that is, it must be clear from the terms of the document that it contains the required information: Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266 at [82]. But the terms must be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment. Those matters are part of the context: Multiplex Constructions [2003] NSWSC 1140 at [76].*
> *11 The manner in which compliance with s 14 is tested is not overly demanding: Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd [2003] NSWSC 1103 at [54] citing Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd [2002] NSWCA 136 at [20] ("[The requirements for a payment claim] should not be approached in an unduly technical manner ... As the words are used in relation to events occurring in the construction industry, they should be applied in a commonsense practical manner"); Multiplex Constructions [2003] NSWSC 1140 at [76] ("[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"); Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) [2007] QSC 333 at [20] ("The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint").*
> *12 Nonetheless a payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim. If a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. That is to say, a payment claim must put the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule: Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)(2005) 64 NSWLR 462, 477; John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd [2004] NSWSC 258 at [18]- [21]. That is not an unreasonable price to pay to obtain the benefits of the statute.*

7. In relation to the tests to be applied in determining whether a particular payment claim complied with Section 14 of the Act, Finkelstein J reasoned as follows:
   1. In deciding whether a payment claim meets the requirements of Section 14, the test is an objective one; that is, it must be clear from the terms of the document that it contains the required information.
   2. The terms must, however, be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment.
   3. The requirements for a payment claim should not be approached in an unduly technical manner. As the words are used in relation to events occurring in the construction industry, they should be applied in a common-sense practical manner.
   4. A payment claim must be produced quickly, in an abbreviated form which may be meaningless to an uninformed reader but understood readily by the parties themselves. The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment claim from an unduly critical viewpoint.
   5. A payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim. A payment claim must put the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule.

8. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor*, Vickery J was considering whether a determination arising from a purported adjudication was valid. His Honour, in considering whether the payment claim was valid, referred with approval to *Protectavale* . At paragraph 52- 53:

> *52 The Act provides a procedure for recovering progress payments. Pursuant to s.14 (1) of the Act, a person referred to in s.9(1) who is or who claims to be entitled to a progress payment, in this case Schiavello, may serve a payment claim ("payment claim") on the person who, under the construction contract, is or may be liable to make the payment. The requirements for a payment claim are set out in s.14(2) as follows:*
> *……*
> *53 The requirements of s.14 of the Act should not be approached in an overly technical manner. Finkelstein J in Protectavale Pty Ltd v K2K Pty Ltd said: .....*

9. In *Gantley Pty Ltd & Ors v Phoenix International Group Pty Ltd & Anor*, Vickery J was considering whether a claim (under the pre-March 2007 Act) by a principal that a payment claim was invalid on the grounds that it failed to sufficiently identify the construction work or related goods or services to which the purported payment claim related. At paragraphs 37-51:

37 The requirement for the description of the work done is thus to "identify the construction work ... to which the progress payment relates".

38 It was submitted by the Plaintiffs in each case that the deficiencies in the description of the work done in each payment claim were such as to render the payment claim in each case invalid because the payment claims failed to satisfy one of the basic and essential elements of the Act. ....

39 The requirement to identify the relevant construction work in the payment claim takes on its meaning from the context of the Act. The payment claim is the pivotal document in the procedure established under the Act for recovering progress payments. It initiates to process under the Act: s.14; it provides a basis for the respondent to the payment claim to reply to the payment claim by providing a payment schedule to the claimant: s. 15; and, if the scheduled amount indicated by a payment schedule is less than the claimed amount indicated in the payment claim, the claimant may initiate the adjudication process provided under the Act: Division 2 of the Act.

40 In determining an adjudication application, the adjudicator is confined to considering the matters prescribed under s.23(2) of the Act, which provides:
……..
Thus, the payment claim to which the adjudication application relates is one of the documents to which the adjudicator must have regard in determining the adjudication application.

41 Reasonable specificity of the work done which is the subject of the payment claim is therefore required for two principal purposes:
(a) to enable a respondent to a payment claim to consider and respond to it, either by accepting the claim in full or in part, or rejecting the claim totally; and
(b) to define the issues in dispute between the parties which the adjudicator is to resolve, and to enable an adjudicator, if appointed, to determine the adjudication application……

44 Failure adequately to set out in a payment claim an identification of the work undertaken to which the claim relates would be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant set out the basis of the claim with a proper identification of the work to which the claim related in submissions subsequently put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material, he or she is not appropriately satisfied of the claimant's entitlement…..

49 However, it needs to be said that an artificial degree of precision and particularity in the identification of the work done for which payment is claimed is not required for the purposes of s.14(3)(a) of the Old Act, or indeed its successor s.14(2)(c) of the New Act. .....

51 What is necessary is an identification of the work which is sufficient to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is not an overly exacting exercise. It is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively, that is from the perspective of a reasonable party who is in the position of then recipient. In evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information.

10. In summary, in *Hickory* Developments, and in *Gantley*, Vickery J, in considering what is required of a payment claim under the Act in relation to describing the work the subject of the particular payment claim, expresses the following:

1. The requirement for the description of the work done is to identify the construction work to which the progress payment relates.
2. Reasonable specificity of the work done which is the subject of the payment claim is required for two principal purposes, both to enable a respondent to a payment claim to consider and respond to it, and to define the issues in dispute between the parties which the adjudicator is to resolve.
3. Where a payment claim fails the requirement to identify the work undertaken to which the progress payment relates, the payment claim will be invalid because one of the basic and essential requirements of the Act have not been met, at least insofar as the claim relates to work claimed for which is not identified for the purposes of Section 14(3)(a). Any adjudication founded upon such an invalid payment claim, will itself be invalid, at least to that extent.
4. However, an artificial degree of precision and particularity in the identification of the work done for which payment is claimed is not required for the purposes of Section 14(3)(a) of the pre-March 2007 Act, or Section 14(2)(c) of the post-March 2007 amended Act.
5. A payment claim will not be a nullity for failure to comply with Section 14(2)(c), unless the failure is patent on its face, and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made.
6. The payment claim must identify the work sufficiently to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively. In evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information.

11. From the cases, the legal authorities seem to be that the test to be applied by an adjudicator in determining whether a payment claim sufficiently identifies the work the subject of that payment claim is that it be sufficient to, within reason, understand the claim and be able to respond to it.

2.2 One Payment Claim for each Reference Date/3 month time limit

12. A payment claim is invalid if multiple payment claims are served in relation to a single reference date, and/or if it made more than 3 months after the relevant reference date.

13. Sections 14(4)-(9) of the Act provide, so far as relevant, as follows:

> *(4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within—*
> *(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or*
> *(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment—*
> *whichever is the later.*
>
> *(5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within—*
> *(a) the period determined by or in accordance with the terms of the construction contract; or*
> *(b) if no such period applies, within 3 months*

> *after the reference date referred to in section 9(2) that relates to that progress payment.*
>
> *(6) Subject to subsection (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.*
>
> *(7) Nothing in subsection (6) prevents a payment claim for a claimed amount in respect of a final, single or one-off payment being served under this Act in respect of a construction contract if—*
> *(a) a claim for the payment of that amount has been made in respect of that payment under the contract; and*
> *(b) that amount was not paid by the due date under the contract for the payment to which the claim relates.*
>
> *(8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.*
>
> *(9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.*

2.3 **"Reference Date"**

14. The Act refers throughout to a single payment claim on each "Reference Date". "Reference Date" is defined in Section 9(2) of the Act, 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 a specific item of related goods and services supplied or to be supplied under the contract; 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 ....*

15. The Reference Date, therefore, is the date on which a claim for a progress payment may be made or date by reference to which the amount of a progress payment is to be calculated.

This may be provided in the relevant construction contract (eg where a payment claim is to be made on the 25th day of each month). Alternatively, where the relevant construction contract does not provide that date, then the Reference Date is the date 20 business days after work was first performed, then the date every 20 business days after that.

16. Section 14(8) provides that only one payment claim may be served for any particular reference date. Section 14(9), however, provides that nothing in section 14(8) prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

17. In *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & ors* [2013] VSC 552 (Vickery J), Justice Vickery, the Supreme Court of Victoria Judge in Charge of the Technology, Engineering and Construction List, was considering whether an adjudication determination was invalid on the grounds that the particular payment claims were served multiple times, in breach of Section 14(8). His Honour held that the payment claim, the subject of the adjudication, had been the subject of an earlier payment claim. Pursuant to Section 14(8), a further payment claim may not be made for the same [progress payment] reference date under the construction contract. His Honour rejected the claimant's argument that, pursuant to Section 14(9), if a previous payment claim had not been made, it could be claimed afresh pursuant to Section 14(9). His Honour concluded:

> *On a plain reading s 14(9) provides that, if another and earlier payment claim has been made, but the amount of that earlier claim has not been paid, the unpaid amount may be included in a later and different payment claim which covers different construction work or the supply of different goods and services, calculated by reference to a different reference date under the construction contract.*

18. In *Jotham*, His Honour preferred this interpretation on the basis that this construction was consistent with Section 14(8), whereas the claimant's argument would render Section 14(8) as serving no practical purpose, and further that this construction of Section 14(8) and 14(9) was consistent with the purpose of the Act.

2.4 Payment Claim must identify the work to which it relates

19. The courts have universally taken a "not too technical" approach to deciding whether the payment claim sufficiently identifies the work to which it relates.

20. In *Protectavale Pty Ltd v K2K Pty Ltd* ("*Protectavale*"), Finkelstein J was considering a dispute between a respondent and a claimant. The Principal had commenced proceedings in relation to construction delays, and the difference between estimated and actual costs of the development. The construction contractor had subsequently served a payment claim for monies it claimed under the construction contract, then issued a cross-claim, then sought summary judgment on the cross-claim. At paragraphs 10-12:

> *10 It is necessary to decide whether the invoice meets the requirements of s 14. The test is an objective one; that is, it must be clear from the terms of the document that it contains the required information: Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266 at [82]. But the terms must be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment. Those matters are part of the context: Multiplex Constructions [2003] NSWSC 1140 at [76].*
> *11 The manner in which compliance with s 14 is tested is not overly demanding: Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd [2003] NSWSC 1103 at [54] citing Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd [2002] NSWCA 136 at [20] ("[The requirements for a payment*

> *claim] should not be approached in an unduly technical manner ... As the words are used in relation to events occurring in the construction industry, they should be applied in a commonsense practical manner"); Multiplex Constructions [2003] NSWSC 1140 at [76] ("[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"); Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) [2007] QSC 333 at [20] ("The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint").*
> *12 Nonetheless a payment claim must be sufficiently detailed to enable the respondent to understand the basis of the claim. If a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. That is to say, a payment claim must put the respondent in a position where he is able to decide whether to accept or reject the claim and, if the respondent opts for the latter, to respond appropriately in a payment schedule: Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) 64 NSWLR 462, 477; John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd [2004] NSWSC 258 at [18]- [21]. That is not an unreasonable price to pay to obtain the benefits of the statute.*

21. In summary, in relation to whether a particular payment claim complies with Section 14 of the Act, Finkelstein J reasoned as follows:
    1. In deciding whether a payment claim meets the requirements of Section 14, the test is an objective one; that is, it must be clear from the terms of the document that it contains the required information.
    2. The terms must, however, be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment.
    3. The requirements for a payment claim should not be approached in an unduly technical manner. As the words are used in relation to events occurring in the construction industry, they should be applied in a common-sense practical manner.
    4. A payment claim must be produced quickly, in an abbreviated form which may be meaningless to an uninformed reader but understood readily by the parties themselves. The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment claim from an unduly critical viewpoint.
    5. A payment claim must be sufficiently detailed to enable the respondent to understand the basis of the claim. A payment claim must put the respondent in a position where he is able to decide whether to accept or reject the claim and, if the respondent opts for the latter, to respond appropriately in a payment schedule.

22. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor*, Vickery J was considering whether a determination arising from a purported adjudication was valid. His Honour, in considering whether the payment claim was valid, referred with approval to *Protectavale* . At paragraph 52- 53:

> *52 The Act provides a procedure for recovering progress payments. Pursuant to s.14 (1) of the Act, a person referred to in s.9(1) who is or who claims to be entitled to a progress payment, in this case Schiavello, may serve a payment claim ("payment claim") on the person who, under the construction contract, is or may be liable to make the payment. The requirements for a payment claim are set out in s.14(2) as follows:*
> *……*
> *53 The requirements of s.14 of the Act should not be approached in an overly technical manner. Finkelstein J in Protectavale Pty Ltd v K2K Pty Ltd said: .....*

23. In *Gantley Pty Ltd & Ors v Phoenix International Group Pty Ltd & Anor*, Vickery J was considering whether a claim (under the pre-March 2007 Act) by a respondent that a payment claim was invalid on the grounds that it failed to sufficiently identify the construction work or related goods or services to which the purported payment claim related. At paragraphs 37-51:

> *37 The requirement for the description of the work done is thus to "identify the construction work ... to which the progress payment relates".*
> *38 It was submitted by the Plaintiffs in each case that the deficiencies in the description of the work done in each payment claim were such as to render the payment claim in each case invalid because the payment claims failed to satisfy one of the basic and essential elements of the Act. ....*
> *39 The requirement to identify the relevant construction work in the payment claim takes on its meaning from the context of the Act. The payment claim is the pivotal document in the procedure established under the Act for recovering progress payments. It initiates to process under the Act: s.14; it provides a basis for the respondent to the payment claim to reply to the payment claim by providing a payment schedule to the claimant: s. 15; and, if the scheduled amount indicated by a payment schedule is less than the claimed amount indicated in the payment claim, the claimant may initiate the adjudication process provided under the Act: Division 2 of the Act.*
> *40 In determining an adjudication application, the adjudicator is confined to considering the matters prescribed under s.23(2) of the Act, which provides:*
> *……..*
> *Thus, the payment claim to which the adjudication application relates is one of the documents to which the adjudicator must have regard in determining the adjudication application.*
> *41 Reasonable specificity of the work done which is the subject of the payment claim is therefore required for two principal purposes:*
> *(a) to enable a respondent to a payment claim to consider and respond to it, either by accepting the claim in full or in part, or rejecting the claim totally; and*
> *(b) to define the issues in dispute between the parties which the adjudicator is to resolve, and to enable an adjudicator, if appointed, to determine the adjudication application……*
> *44 Failure adequately to set out in a payment claim an identification of the work undertaken to which the claim relates would be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant set out the basis of the claim with a proper identification of the work to which the claim related in submissions subsequently put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material, he or she is not appropriately satisfied of the claimant's entitlement…..*
> *49 However, it needs to be said that an artificial degree of precision and particularity in the identification of the work done for which payment is claimed is not required for the purposes of s.14(3)(a) of the Old Act, or indeed its successor s.14(2)(c) of the New Act. .....*
> *51 What is necessary is an identification of the work which is sufficient to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is not an overly exacting exercise. It is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively, that is from the perspective of a reasonable party who is in the position of then recipient. In evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information.*

24. In summary, in *Hickory Developments* and *Gantley*, as to what is required of a payment claim in describing the work the subject of that payment claim, Vickery J reasoned as follows:

1. The requirement for the description of the work done is to identify the construction work to which the progress payment relates.
2. Reasonable specificity of the work done which is the subject of the payment claim is required for two principal purposes, both to enable a respondent to a payment claim to consider and respond to it, and to define the issues in dispute between the parties which the adjudicator is to resolve.
3. Where a payment claim fails the requirement to identify the work undertaken to which the progress payment relates, the payment claim will be invalid because one of the basic and essential requirements of the Act have not been met, at least insofar as the claim relates to work claimed for which is not identified for the purposes of Section 14(3)(a). Any adjudication founded upon such an invalid payment claim, will itself be invalid, at least to that extent.
4. However, an artificial degree of precision and particularity in the identification of the work done for which payment is claimed is not required for the purposes of Section 14(3)(a) of the pre-March 2007 Act, or Section 14(2)(c) of the post-March 2007 amended Act.
5. A payment claim will not be a nullity for failure to comply with Section 14(2)(c), unless the failure is patent on its face, and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made.
6. The payment claim must identify the work sufficiently to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively. In evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information.

25. From the cases, therefore, it seems that the test to be applied by an adjudicator in determining whether a payment claim sufficiently identifies the work the subject of that payment claim is that it be sufficient to, within reason, for the respondent to understand the claim and be able to respond to it.

2.5 Limits on Payments Claim in Victoria: Claimable Variations/Excluded Amounts

19. The 2007 amendments to the Victorian Act, introduced substantial limitations on what may be included in a valid payment claim.

20. Under the (amended) Act, a valid payment claim may not include Variations other than "Claimable Variations" under Section 10A, nor may it include certain types of claims described as "Excluded Amounts" under Section 10B.

13. These limits on claims occur only in the Victorian Act, they do not occur in relation to any other state or territory.

14. Section 10 provides, so far as relevant, as follows:

> ***10 Amount of progress payment***
> *(1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—*
> *(a) the amount calculated in accordance with the terms of the contract; or*
> *(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of—*
> *(i) construction work carried out or undertaken to be carried out by the person under the contract; or*
> *….*
> *as the case requires.*

> ….
> *(3) Despite subsection (1) and anything to the contrary in the construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.*

2.5.1 Section 10A Claimable Variations:

15. The provisions of the Act as to what constitutes a "Claimable Variation" are complex. Under the Act, a variation to a construction contract is defined as "*a change in the scope of the work to be carried out or the goods or services to be supplied, under the contract"*. The Act specifies which variations may be claimed in a payment claim, and which may not. Variations which may be claimed are called 'Claimable Variations'. If Variations claimed in a payment claim are not Claimable Variations within the meaning of Section 10A, then, pursuant to Section 10, an adjudicator is not to take them into account in determining the amount payable in respect of the progress claim.

16. The substantive issues in relation to Section 10A of the Act:
    1. Are Variations within the definition of "Class 1 Claimable Variations"?
    2. Are Variations within the definition of "Class 2 Claimable Variations"?
    3. Does the Contract contain a "dispute resolution clause" for the purpose Section 10A(3)(d)(ii)?

17. Under Section 10A, for a Variation to be a "Class 1 Claimable Variation" there must be "agreement" that:
    a) the work had been performed; and
    b) the scope of the work that had been carried out; and
    c) the doing of that work constituted a variation; and
    d) the value of that work; and
    e) the time for payment of that work.

18. Under Section 10A, a Variation is a "Class 2 Claimable Variation" where there is "agreement" that:
    a) the work has been performed; and
    b) the person requiring the work has requested or directed that the work be performed;

    but there is not agreement:
    c) as to the scope of the work that has been carried out; and/or
    d) that the doing of that work constituted a variation; and/or
    e) the value of that work; and/or
    f) the time for payment of that work.

19. 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".

20. The VBA provides the following summary:

Extract from VBA Security of Payment Fact Sheet 4 – April 2014

Variations on which the parties agree
All agreed variations may be claimed in a payment claim.
*It is an agreed variation if both the claimant and the respondent agree on **all** of the following things:*

- *The claimant has carried out the work or supplied the goods or services*
- *The scope of the work that has been carried out or the goods and services that have been supplied*
- *The work or the supply of goods or services is a variation to the contract*
- *The claimant is entitled to be paid for the variation*
- *The value of the variation or the method of valuation*
- *The time for payment.*

Disputed variations
*Some disputed variations may be claimed in a payment claim if the parties do not agree about **one or more** of the following things:*

- *The work or the supply or goods or services is a variation to the contract*
- *The claimant is entitled to be paid for the variation*
- *The value of the variation or the method of valuation*
- *The time for payment.*

Limits on disputed variations that may be claimed on a payment claim
Contract sum less than $150,000
If the original contract value is less than $150,000, the Act applies to all claims for disputed variations.
Contract sum more than $5 million
If the original contract value is more than $5 million, disputed variations must be resolved by the dispute resolution methods specified in the contract.
If the contract does not specify a method for resolving disputes, the Act applies.
Contract sum between $150,000 and $5 million
If the contract sum is between $150,000 and $5 million, the Act applies to claims for disputed variations up to 10% of the original contract sum.
If the total value of the disputed variations amounts to more than 10% of the original contract sum, the dispute must be resolved by the dispute resolution methods specified in the contract.
If the contract does not specify a method for resolving disputes, the Act applies.

2.5.2 Section 10B "Excluded Amounts":

21. Section 10B of the Act has the effect of excluding, from a payment claim, and the adjudicator is expressly excluded from taking into account, in determining the amount payable by the respondent to the claimant certain categories of claims for damages, on the basis that a claim for damages is an Excluded Amount under Section 10B of the Act.

22. Excluded Amounts would include, for example, the following types of claims:
- "damages" claims
- delay costs/prolongation costs
- latent conditions claims
- non-contract claims (eg claims in misleading and deceptive conduct, restitution/quantum meruit claims, …) …

23. 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.*

24. Liquidated damages: *Seabay v Galvin*

25. In *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183 (6 May 2011), Vickery J (the Judge in Charge of the Victorian Supreme Court Technology and Construction List) was considering whether a claim for liquidated damages was an

"Excluded Amounts" under Section 10B of the Act. His Honour concluded that liquidated damages did constitute an "Excluded Amounts". His Honour reasoned as follows:

> *120 In this context, the purpose behind excluding such matters defined by s.10B becomes clear. Matters such as: claims for non-claimable variations; compensation claimed for events such as latent conditions; time-related costs; changes in regulatory requirements; damages for breaches of the relevant construction contract; or any other claim for damages or claims arising other than under the construction contract, are all "excluded amounts". Experience points to these classes of issues regularly arising in construction disputes. They are often attended with considerable complexity and speedy resolution can be an elusive goal.*
>
> *121 Under the scheme of the Act such issues are removed from the interim payment regime provided for in the legislation. If such matters arise for determination in the course of a construction project to which the Act applies, they are not to be dealt with under the statutory scheme established for the provision of progress payments to the party entitled. Rather, they remain to be resolved under the general law, supported by court or arbitral proceedings. In this way the concept "pay now and argue later" is given full effect.*
>
> *122 If it was that "excluded amounts" as defined in s.10B of the Act were only to apply to claims made by a claimant and not to any set-off or counterclaim raised by a respondent to a payment claim, the operation of the Act in numbers of cases could be seriously compromised. Contentious matters such as claims for damages arising from the construction contract could be raised by a respondent with the result that a claimant could be denied the cash flow which the Act is designed to protect.*
>
> *123 Further, the Act is not designed to accommodate such claims. In the event of a dispute arising between a claimant and a respondent in relation to an entitlement to a progress payment under the Act, the statutory adjudication process may be invoked. Section 22(4) provides for a speedy resolution of an adjudication application. An adjudicator, who must conduct adjudication proceedings armed only with limited statutory powers, and who is directed to complete the adjudication process within an extremely narrow time frame, would be ill-equipped to deal with many of the claims defined as "excluded amounts" if raised by a respondent.*
>
> *124 In my opinion, a proper construction of s.10B of the Act renders the defined "excluded amounts" applicable, not only to the statutory payment claim served by a claimant, but also to amounts claimed by a respondent. Such a construction serves to advance the purposes of the Act. The contrary construction tends to work contrary to those purposes. The construction which I favour, will better promote the operation of the object of the Act to provide a facility for prompt interim payment on account in favour of contractors and subcontractors, pending final determination of any disputes arising under a construction contract. These considerations, the legal authorities suggest that override all of the textual arguments advanced by Seabay which point in the opposite direction.*
>
> *125 Nevertheless, the text of the Act is well able to bear the construction which I prefer. Section 10 of the Act defines the amount of a progress payment to which a person is entitled under a construction contract. Section 10(3) provides that: "Despite subsection (1) and anything to the contrary in a construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of a construction contract". The terms of the Act, therefore, expressly override the operation of the relevant construction contract in relation to "excluded amounts" as those amounts are defined in s.10B.*
>
> *126 Furthermore, pursuant to s.23(1)(a) an adjudicator is directed to determine the amount of the progress payment (if any) to be paid by a respondent to the claimant. This subsection, directs the adjudicator back to s.10(3), and thereby requires an adjudicator to not take into account an excluded amount in calculating the amount of a progress payment.*
>
> *127 Reference is made to s.23(2A)(a) which directs that, in determining an adjudication application, the adjudicator must not take into account any part of*

> *the claimed amount that is an excluded amount. In my opinion, this particular subsection is not intended to confine the excluded amounts, which an adjudicator is directed to ignore, to excluded amounts which are claimed by a claimant in a payment claim. If the subsection was to operate in this way it would bring itself into conflict with ss.23(1)(a) and 10(3).*
> *128 Accordingly, in my opinion, the Adjudicator was correct in determining that Seabay's claim for liquidated damages against Galvin should have been treated as an "excluded amount" and excluded from the adjudication determination made in relation to Galvin's Payment Claim 28 claimed under the Act.*

26. Following *Seabay*, an adjudicator is not, under the Act, to take into account, claims for liquidated damages and/or general damages for delay under the construction contract, in determining the amount payable by the respondent to the claimant, on the basis that such a claim for damages is an Excluded Amount under the Act.

27. Recoupment of liquidated damages?

28. There have been some arguments as to the right of the respondent to deduct an amount in respect of liquidated damages, and the right of the claimant to discount those deducted liquidated damages, in assessing the amount payable in respect of the progress claim under the Act, ie the claimant says that liquidated damages are an Excluded Amount within the meaning of Section 10B, conversely the respondent says that the liquidated damages having been deducted, the claimant's claim to recoup those liquidated damages is a claim for an Excluded Amount within the meaning of Section 10B.

29. In *Shape Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd* the Supreme Court of Victoria (Digby J) was considering whether, in that case, a claim for return of retentions was, in fact, a claim to recoup liquidated damages, and therefore an Excluded Amount within the meaning of Section 10B of the Act. His Honour said:

> ***Ground 2 - Excluded amounts***
> *63 By Ground 2 Shape challenges the Adjudicator's finding that PC-14 was to 'recoup' liquidated damages and the Adjudicator's resultant conclusion that the amount was excluded under s 10B(2) of the SOP Act.*
> *64 I highlight however that because the Adjudicator found that PC-14 was unsupported by a reference date, the Adjudicator's finding in relation to Ground 2 was ultimately not a necessary or dispositive finding.*
> *65 Similarly, although not determinative, given my conclusions as to PC-14 being unsupported by a reference date, I have addressed Ground 2 below principally because of its potential relevance to the plaintiff's claims for remitter, and the exercise of my discretion on those applications.*
> *....*
> ***Considerations on excluded amounts***
> ***There was a claim to recoup liquidated damages***
> *76 The payment schedule shows that Nuance asserted an entitlement to $1,207,500 in liquidated damages. Shape continues to deny its liability for these damages in the underlying contractual dispute between the parties. For present purposes, the salient question is whether Shape sought to pre-emptively 'recoup' Nuance's asserted and earlier adjusted entitlement to liquidated damages through PC-14 and whether in the particular circumstances of this matter the Second Adjudicator was justified in concluding that the PC–14 claim by Shape fell within the terms of s 10B of the SOP Act.*
> *....*
> *80 The Adjudicator inferred that the underlying nature of PC-14 made by Shape was to recoup the liquidated damages claim that had been asserted by Nuance.*
> *....*
> *81 Even so, for the reasons below, the Adjudicator's finding and characterisation of PC-14 as an attempt to recoup liquidated damages was, placing to one side for present purposes his primary finding in relation to the lack of a reference date in*

relation to PC-14, a determination within his jurisdiction and one he was empowered to make on the merits albeit secondary and arguably not dispositive given his decision that PC-14 was invalid because it had no reference date.[117]
82 In its submissions to the Adjudicator, Nuance pointed out that liquidated damages have been periodically levied over the course of the construction project[118] and the other claims comprising the adjusted contract sum in PC-14 have been determined or paid through earlier payment claims.[119] There is no dispute between the parties in this proceeding in relation to this last observation. Indeed, Shape initially characterised PC-14 as a lump sum claim for the reconciliation of the Contract.[120] The Adjudicator accepted that submission.[121]
83 As recognised by the Second Adjudicator, when the individual items of work in PC-14 are adjusted and reconciled, PC-14 equates to the amount of Nuance's asserted entitlement to liquidated damages.[122] I note in this regard that Shape obliquely submitted simply that PC-14 does not contain an express reference to liquidated damages.[123] However, the Second Adjudicator appreciated that the amount of PC-14 can be explained on no other basis, given no new work had been performed and the other claims in PC-14 have been satisfied. Accordingly, the PC-14 claims, in all probability, are in substance in the nature of a claim to recoup Nuance's asserted entitlement to liquidated damages which had been earlier deducted from the Contract Sum by Superintendent effected adjustments from time to time.

The claim to recoup liquidated damages is excluded under s 10B(2)

84 Adjudicators must not take into account 'any part of the claimed amount that is an excluded amount'.[124] In Seabay Vickery J decided:

> *...a proper construction of s 10B of the Act renders the defined excluded amounts applicable, not only to the statutory payment claim served by a claimant, but also to amounts claimed by a respondent.[125]*

85 The decision in Seabay is relevant in two ways to the present case.
The Seabay decision, in part, was to the effect that:
(a) Firstly, the exclusion of certain amounts from payment claims under the SOP Act applies to both claimants and respondents.[126] For example, a respondent cannot 'set-off' its liabilities under a payment claim by asserting a right to an excluded amount.
(b) Secondly, liquidated damages are an excluded amount. This is because (i) liquidated damages are compensatory[127] and (ii) the SOP Act excludes, amongst other things, 'any amount...claimed under the construction contract for compensation due to the happening of an event'.[128]

....
87 The Adjudicator has reasoned that an amount to 'recoup' liquidated damages is to be excluded for analogous reasons to those Vickery J referred to in relation to liquidated damages per se in Seabay.
88 There remains the question argued in this proceeding as to whether the above application of the decision in Seabay accords with the proper meaning of s 10B(2) of the SOP Act. In construing s 10B to answer this question, the Court should prefer a construction of that provision that promotes the purpose or object of the Act.[131]
89 Section 10B(2) of the SOP Act provides:
....
90 In Seabay, Vickery J made the following further observations in relation to the rationale for the 'excluded amounts' provisions of the SOP Act:
(a) the 'excluded amounts' are in construction disputes 'often attended with considerable complexity and speedy resolution can be an elusive goal';[132]
(b) the Act is not designed to accommodate such claims given the timeframes imposed for adjudications,[133] and that these amounts are more suitably determined under the general law, either in Court or via arbitral proceedings, such that the 'pay now argue later' policy of the SOP Act can be given full effect;[134] and
(c) a respondent's ability to raise contentious matters in a proceeding to recover progress payments could deprive a claimant of the cash flow that the SOP Act is designed to protect.[135]

91 In many cases, determining the application of liquidated damages will require a detailed forensic examination of the construction work and its progress. Such an exercise is unsuited to, and undesirable, as part of the fast-tracked proceeding to recover an interim progress payment. The SOP Act promotes the swift determination of progress payment entitlements, with minimal factual and legal complexity, to ensure a cash flow is maintained through the relevant network of contractors.[136] Parliament contemplated that imperfect SOP awards would be adjusted in subsequent civil proceedings between the parties.[137]

92 Furthermore, amounts levied or claimed as liquidated damages are ordinarily juxtaposed to the entitlement asserted by the Contractor in relation to events causing compensable delay and time related costs. That is, the compensation claimed to be due to the proprietor under the construction contract as compensation for events giving rise to time-related costs under the construction contract represents the other side of the same contractual coin.

93 If claims for contractor's delay related costs per se are excluded under s 10B(2) of the Act, there may be a disconformity and potentially an irrational and unfair outcome in relation to time-related costs for events of delay and the application of compensation by way of liquidated damage in respect of the effect of the same events, if claims for compensation by way of liquidated damages were not also excluded. As explained, both claims of the types referred to are often interdependent. To allow recoupment of liquidated damages for events of delay, including liquidated amounts related to time related costs but disallow countervailing claims for compensation for events for which the contractor may claim time related costs may very commonly cause prejudice.[138]

94 However the key issue is whether the language of s 10B(1) and (2) of the SOP Act is broad enough to support the Second Adjudicator's conclusions on this aspect.

95 Section 10B(1) of the SOP Act provides in effect that all excluded amounts are to be ignored in relation to calculating the amount of progress payment to which a person is entitled under the construction Contract. The statutory reference therein to the concept of undertaking the calculation of a progress payment entitlement is in my view very broad and sufficiently broad to take into account the application of any excluded amount which is relevant including by way of set off or allowance in respect of a progress payment.

96 I consider that s 10B(2) of the SOP Act extends to cover claims for compensation due to the happening of an event and extends further to include any amount relating to a claim for time related costs. A claim for compensation for an event including an event giving rise to an asserted entitlement to time related costs in the nature of liquidated damages triggers the operation of that section.

97 For the above reasons, the Adjudicator was, the legal authorities suggest that correct to consider that the Seabay decision supported his findings and was correct to exclude the entirety of PC-14 as an amount calculated to recover earlier Superintendent effected adjustments to the Contract Sum on the basis of Shape's liability to pay or allow liquidated damages.

98 I again point out that this aspect of the secondary basis for the Second Adjudicator's Determinations has been addressed, notwithstanding that this aspect concerning s 10B of the SOP Act is not in my view dispositive in relation to either the Second Adjudicator's Determination or this decision, because I consider that this conclusion by the Second Adjudicator is a matter relevant to the exercise of my discretion in relation to the plaintiff's application to remit the PC-13 adjudication application to the First Adjudicator alternatively some other Adjudicator.

99 In the circumstances, including those referred to in the last preceding paragraph, and because Nuance has succeeded on this aspect, it is unnecessary to address Nuance's alternative submission that Vickery J's treatment of liquidated damages in Seabay was 'plainly wrong'.

Conclusion on Ground 2

100 Accordingly:

(a) PC-14 in substance claimed an amount to recoup earlier Superintendent effected adjustments to the Contract Sum on account of liquidated damages; and

> *(b) That amount is excluded under s 10B(2) of the SOP Act.*
> *101 The findings of the Adjudicator were correct and should be maintained. Ground 2, although not dispositive, also fails.*

30. In summary, His Honour's reasoning in *Shape*:

1. When the individual items of work in the particular payment claim were adjusted and reconciled, that payment claim equated to the amount of that claimant's asserted entitlement to liquidated damages. In that case, the amount of the payment claim could be explained on no other basis, given no new work had been performed and the other claims in that payment claim had been satisfied. Accordingly, the payment claim claims, in all probability, were in substance in the nature of a claim to recoup that respondent's entitlement to liquidated damages which had been earlier deducted from the contract sum by superintendent effected adjustments from time to time.
2. If claims for contractor's delay related costs per se are excluded under s 10B(2) of the Act, there may be a disconformity and potentially an irrational and unfair outcome in relation to time-related costs for events of delay and the application of compensation by way of liquidated damage in respect of the effect of the same events, if claims for compensation by way of liquidated damages were not also excluded. As explained, both claims of the types referred to are often interdependent. To allow recoupment of liquidated damages for events of delay, including liquidated amounts related to time related costs but disallow countervailing claims for compensation for events for which the contractor may claim time related costs may very commonly cause prejudice.
3. The key issue is whether the language of s 10B(1) and (2) of the SOP Act is broad enough to support the Second Adjudicator's conclusions on this aspect. Section 10B(1) of the SOP Act provides in effect that all excluded amounts are to be ignored in relation to calculating the amount of progress payment to which a person is entitled under the construction Contract. The statutory reference therein to the concept of undertaking the calculation of a progress payment entitlement is in my view very broad and sufficiently broad to take into account the application of any excluded amount which is relevant including by way of set off or allowance in respect of a progress payment. s 10B(2) of the SOP Act extends to cover claims for compensation due to the happening of an event and extends further to include any amount relating to a claim for time related costs. A claim for compensation for an event including an event giving rise to an asserted entitlement to time related costs in the nature of liquidated damages triggers the operation of that section.
4. The claim to recoup the earlier superintendent effected adjustments to the contract sum on the basis of a liability to pay or allow liquidated damages was an Excluded Amount within the meaning of Section 10B.

31. In *Goldwind Australia Pty Ltd v ALE Heavylift (Australia) Pty Ltd* [2021] VSC 625 (Stynes J), Her Honour reasoned:

> *50 The two authorities addressed by the parties in some detail were the decisions of Seabay and Shape.*
> ***G.1 Seabay***
> *51 The issue that arose for determination by Vickery J in Seabay, relevant to the determination of this case, was whether liquidated damages claimed by a respondent was an excluded amount for the purpose of s 10B of the SOP Act.*
> *52 A payment claim (**PC-28**) was made under the relevant contract and also concurrently and separately under the SOP Act. The claimant did not make any claim for delay costs under the SOP Act, although it did in its payment claim under the contract.*
> *53 The superintendent assessed PC-28 and provided its payment certificate. The assessment included a deduction for liquidated damages in the sum of $540,150. The claimant did not serve any notice of dispute under the contract challenging the superintendent's certification of the liquidated damages as due and owing.*
> *54 In responding to PC-28 served under the SOP Act, the principal did not rely on the superintendent's assessment. Instead it provided a payment schedule which contained significant differences including a deduction for liquidated damages of $770,250.*

55 The claimant commenced an adjudication challenging the deduction of liquidated damages.
56 The central substantive question put to the adjudicator, as formulated by the parties, was whether the principal's claim for liquidated damages should have been excluded from the calculation as to what was due and payable to the claimant under PC-28.
57 The adjudicator found that the deduction for liquidated damages was an excluded amount.
58 Vickery J agreed with the adjudicator. His Honour found that the amount sought to be deducted fell squarely within the concept of an excluded amount. He did accept that a number of provisions of the SOP Act pointed in favour of the principal's contention that the excluded amounts referred to in s 10B(2) applied only to amounts claimed by the claimant and not to any amount claimed by the respondent. However his Honour noted that s 10B(2) must also be considered in the context of the overall purpose of the SOP Act and the manner in which that purpose is put into effect by the legislative machinery.[14]
59 In that regard his Honour noted the intention of the SOP Act that an adjudicator determine adjudication applications as expeditiously as possible and observed that classes of claims falling within 'excluded amounts' regularly arise in construction disputes and are often attended with considerable complexity and thereby defeat the prospect of a speedy resolution.[15]
60 His Honour also observed that if excluded amounts were only to apply to claims made by the claimant and not to any set-off or counterclaim raised by the respondent to a payment claim, then the operation of the SOP Act in a number of cases could be seriously compromised.[16]
61 For these reasons Vickery J held that, on the proper construction of s 10B of the SOP Act, excluded amounts applies not only to the statutory payment claim served by the claimant but also to amounts claimed by the respondent.[17]
62 The Subcontractor submitted that the facts in Seabay are analogous to the facts in this case. Specifically, the Subcontractor submitted that having regard to PC-13 and the responding payment schedule, it is apparent that the Head Contractor is purporting to deduct an excluded amount.

G.2 Shape

*63 In Shape, a payment claim (**PC-13**) had been the subject of an adjudication determination which was later quashed by Digby J on the basis that the adjudicator failed to perform his basic and essential function as required under the SOP Act.*
*64 The next payment claim (**PC-14**) was then served by Shape on Nuance and included items that had previously been claimed in PC-13.*
65 PC-14 became subject of an adjudication. The adjudicator determined that he did not have jurisdiction to hear the application and in any event determined that a nil amount was payable by Nuance to Shape. The matter came back before Digby J.
66 An issue that arose for consideration by the Court was whether a claim for reimbursement of liquidated damages in PC-14 was an excluded amount and therefore should not be taken into account by an adjudicator. By way of background, Nuance had levied liquidated damages over time and deducted them from sums otherwise due to Shape. Until PC-14, Shape had not pursued any adjudication process or otherwise sought to challenge the deduction of liquidated damages. It is not possible to discern from the decision itself the existence of, or Nuance's compliance with, a contractual basis for its asserted deductions of liquidated damages.
67 Having determined the application on other grounds, it was not necessary for Digby J to go on to consider this issue. Nevertheless, his Honour addressed it because of its potential relevance to Shape's claim for remitter and the exercise of his discretion on those applications.
68 Digby J addressed this issue in two stages. First, he considered whether the claim was properly characterised as a claim to recoup liquidated damages.[18] He then considered whether a claim to recoup liquidated damages is excluded under s 10B(2) of the SOP Act.

69 It was critical to his Honour's reasoning that the claim was characterised as a claim to recoup liquidated damages. Relevant to this characterisation were the undisputed facts that:
(a) liquidated damages had been levied over the course of the construction project; and
(b) other claims comprising the adjusted contract sum on PC-14 had been determined or paid through earlier payment claims.
70 Further, Digby J observed that when the individual items of work in PC-14 were adjusted and reconciled, PC-14 equated to the amount of the asserted entitlement to liquidated damages and could be explained on no other basis given no new work had been performed. His Honour determined that the PC-14 claims were in substance in the nature of a claim to recoup Nuance's asserted entitlement to liquidated damages.
71 Having made that determination, his Honour held that the adjudicator was correct to find that:
(a) Seabay supported his conclusion that claims to recoup liquidated damages that had been earlier levied were to be excluded;[19] and
(b) the language of sub-ss 10B(1) and (2) of the SOP Act is broad enough to support that conclusion.[20]
72 The Head Contractor relies on Shape in support of its case.
73 The Subcontractor, by its counsel, expressly reserved its position as to whether or not the reasoning in Shape was correct and did not go on to identify any error in the reasoning.
74 Instead, the Subcontractor sought to distinguish the decision in Shape. The points of distinction raised are not relevant to my consideration of this matter and therefore I have not addressed them further.

H Consideration

75 It falls to me to determine whether or not the Adjudicator erred by characterising the September 2020 Claim as a claim for work done and consequently taking it into account in determining the adjudication application.
76 More specifically, I am required to determine whether the fact that the Subcontractor failed to challenge the Delay Deduction when it was first applied had the effect of changing the character of the September 2020 Claim from a claim for work done to a claim to recoup the Delay Deduction.
77 The Head Contractor relies on the obiter of Digby J in Shape to submit that a claimant is not permitted to recoup an excluded amount that had been deducted in a prior payment schedule.
78 The practical effect of the Head Contractor's submission and reliance on Shape is that if a claimant fails to challenge an excluded amount in a payment schedule, it will not be able to recoup that amount in a subsequent payment claim. To put it another way, and as submitted by the Head Contractor, if a claimant does not refer the dispute about a deduction to adjudication, then the payment schedule creates a baseline against which the next payment claim will be assessed.
79 I am not bound by the obiter in Shape and I do not propose to apply it. The legal authorities suggest that the application of it to the facts of this case would operate to preclude the Subcontractor from recovering progress payments in relation to work performed in a manner contrary to the text and purpose of the legislation.
80 The obiter in Shape was reasoned on the basis that determining whether a party is entitled to liquidated damages or, juxtaposed to such an entitlement, whether a party is entitled to damages in relation to events causing compensable delay and time related costs, is a complex, time-consuming exercise that is inconsistent with the application of the SOP Act.
81 However, I find that in the circumstances of this case, the Subcontractor's decision to issue a subsequent payment claim for unpaid work previously done does not attract these concerns. In other words, the mischief sought to be addressed by s 10B of the SOP Act does not arise in relation to the September 2020 Claim. The Adjudicator was only required to determine the value of the work done and what remained unpaid.
82 As set out above, the primary purpose of the SOP Act is to ensure that any person who carries out construction work or provides related goods or services is able to promptly recover progress payments.

83 There are no provisions in the SOP Act that preclude a claimant from seeking to recover a progress payment because of a failure to adjudicate a payment dispute arising in relation to an earlier payment claim.
84 To the contrary:
(a) the decision to adjudicate a dispute arising in relation to a particular payment claim is optional;
(b) s 9 permits a claimant to claim for all work done up to and including the relevant reference date regardless of whether or not the work had been performed since the preceding reference date or prior to it; and
(c) s 14(9) preserves a claimant's entitlement to include in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.
85 The suggestion that if the claimant fails to adjudicate a dispute about a payment claim:
(a) the disputed payment schedule will operate to shift the baseline against which subsequent payment claims are to be assessed; and
(b) therefore the claimant's subsequent claim for work done will be re-characterised as a claim to recoup the unchallenged deductions, is entirely inconsistent with these provisions and the purpose of the legislation to ensure that persons who carry out construction work are entitled to receive progress payments in relation to it.
86 For the reasons set out above, I reject the submission that the September 2020 Claim is a claim to recoup the Delay Deduction. Properly understood, the September 2020 Claim is a claim for work done which remains unpaid. Against that claim the Head Contractor asserts an entitlement to the Delay Deduction.
87 The issue remains whether the Delay Deduction should be taken into account for the purpose of determining the amount of the progress payment to be paid under PC-13.
88 There was no dispute that:
(a) applying Seabay, the Delay Deduction was an excluded amount; and
(b) if the September 2020 Claim is to be characterised as a claim for work done, the Delay Deduction should not be taken into account.
89 In any event, and putting to one side the decision of Seabay, I query whether the Delay Deduction has any relevance to the Adjudicator's task of determining the amount and timing of a progress payment because the SOP Act does not provide for deductions of that type to be accounted for in the valuation of the construction work carried out. However, as this matter was not identified or addressed in the submissions, I do not propose to take it further.

32. In summary, Her Honour's reasoning in *Goldwind*:

1. The primary purpose of the SOP Act is to ensure that any person who carries out construction work or provides related goods or services is able to promptly recover progress payments.
2. There are no provisions in the SOP Act that preclude a claimant from seeking to recover a progress payment because of a failure to adjudicate a payment dispute arising in relation to an earlier payment claim.
3. To the contrary:
   a. the decision to adjudicate a dispute arising in relation to a particular payment claim is optional;
   b. Section 9 permits a claimant to claim for all work done up to and including the relevant reference date regardless of whether or not the work had been performed since the preceding reference date or prior to it; and
   c. Section 14(9) preserves a claimant's entitlement to include in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.
   d. The suggestion that if the claimant fails to adjudicate a payment claim dispute claim:
      i. the disputed payment schedule will operate to shift the baseline against which subsequent payment claims are to be assessed; and
      ii. therefore the claimant's subsequent claim for work done will be re-characterised as a claim to recoup the unchallenged deductions,

   is inconsistent with the Act and the purpose of the legislation to ensure that persons who carry out construction work are entitled to receive progress payments.

SECTION 3
PAYMENT SCHEDULE

3.1 Requirements of a Valid Payment Schedule

1. The requirements as to a valid payment claim under the Act are set out in Section 15(2).

2. Section 15 of the Act provides, so far as relevant, as follows:

> *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**); and*
> *(c) must identify any amount of the claim that the respondent alleges is an excluded amount; and*
> *(d) must be in the relevant prescribed form (if any); and*
> *(e) must contain the prescribed information (if any).*

3. The requirements for a valid payment schedule, therefore, are the payment schedule:
   1. identifies the payment claim to which it relates; and
   2. indicates the amount of the payment (if any) that the respondent proposes to make.

4. These requirements were considered in *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor (No 2)* [2015] VSC 500 (Vickery J). His Honour reasoned:

> *The requirements for a payment schedule are set out in s15(1) to (3) of the Act in the following form:*
> *…….*
> *108 No form and no information has as yet been prescribed for the purposes of s 15(2)(d) and (e).*
> *109 A payment schedule does not need to be in any prescribed form. In Façade Treatment Engineering v Brookfield Multiplex[63] the Court, having considered the authorities of Protectavale,[64] Multiplex Constructions Pty Ltd v Luikens and Anor,[65] and Barclay Mowlem v Tesrol Walsh Bay,[66] in concluding that the email in question did satisfy the requirements of a valid payment schedule, said this:[67]*
>
> > *36 In the first place, I think that it is clear from a plain reading of the 5 October email, when read as a whole, that Multiplex did not propose to pay anything to Façade in respect of Payment Claim No 19. In other words, Multiplex proposed to pay nothing to Façade in respect of the payment claim.*
> > *37 As to whether a proposal to pay 'nothing' or 'nil' or 'zero' in a response to a payment claim is 'an amount' for the purposes of s 15(2)(b), in the context of the BCISP Act, I am of the view that it is. I find myself in agreement with the further observations of McDougall J in Barclay Mowlem to the following effect:*
> >
> > > *There is a question as to whether "nothing" or "nil" or "zero" is "an amount" for the purposes of s 14(2)(b). In the context of the Act, and regardless of mathematical and philosophical considerations, I think that it is. That is because a respondent who proposes to pay nothing is clearly proposing to pay less than the claimed amount ...*

> *... A practical approach would include within "the amount" the concept of a nil payment. Some support for this is, I think, obtained from the words "(if any)" that followed the word "amount" in s 14(2)(b).*
>
> *38 In these circumstances, as s 15(3) of the BCISP Act makes clear, the respondent is required to tell the claimant why a nil payment is proposed, for the purpose, inter alia, of enabling the claimant to decide whether to take the matter to adjudication. In this case, Multiplex achieved this by claiming in its email that the Payment Claim No 19 was invalid, and setting out the reasons for the claimed invalidity. As McDougall J said further in Barclay Mowlem in relation to the mirror provision ... of the NSW Act: 'The subsection is not concerned with the adequacy or sufficiency of those reasons'.*

110 In Multiplex Constructions,[68] Palmer J set out the approach that the court should take in considering whether documents purporting to be payment claims or payment schedules complied with the relevant mandatory requirements of the security of payments legislation. His Honour noted that:[69]

> *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 the dispute.*
>
> *A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.*
>
> *Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.*

....

SECTION 4
ADJUDICATION APPLICATION

4.1 Requirements for a Valid Application for Adjudication

1. There are strict requirements in relation to an Application for Adjudication, set out in Section 18.

2. Section 18(1) of the Act gives the claimant the right to make an Application for Adjudication in certain circumstances, so far as relevant, as follows:

> *(1) A claimant may apply for adjudication of a payment claim (an **adjudication application**) if—*
> *(a) the respondent provides a payment schedule under Division 1 but—*
> *(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or*
> *(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or*
> *(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.*

3. A claimant may make an Application for Adjudication in the following circumstances:
   (a) where the payment schedule amount is less that the payment claim amount;
   (b) where the respondent does not pay the payment schedule amount when due;
   (c) where the respondent does not provide a payment schedule, and does not pay the claimed amount when due.

4. 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) in the case of an application under subsection(1)(a)(ii), must be made within 10 business days after the due date for payment; and.....*
> *(e) in the case of an application under subsection(1)(b), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b); and*
> *(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) .....*

5. The Application for Adjudication is made to an Authorised Nominating Authority. In Victoria there are 6 Authorised Nominating Authorities appointed under the Act. (Rialto Adjudications Pty Ltd is an Authorised Nominating Authority under the Act.)

6. The date of delivery of the Application for Adjudication to an Authorised Nominating Authority is critical. The Adjudication Application must be delivered:
   (a) within 10 business days after the claimant received the Payment Schedule; or
   (b) within 10 business days after the due date for payment; or alternatively
   (c) in relation to an optional adjudication (an adjudication made where no payment schedule was received, but the claimant prefers to go to adjudication rather than sue for judgment (referred to as "optional adjudication", see below), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b).

7. The Adjudication Application must identify the Payment Claim and the Payment Schedule to which it relates.

8. Ultimately, the adjudicator will determine whether the adjudication application:
   (a) was in writing;
   (b) was made to an authorised nominating authority chosen by the claimant;
   (c) was made within the relevant period;
   (d) identified the Payment Claim and the Payment Schedule to which it related;
   to determine whether there was a valid Adjudication Application within the meaning of the Act.

4.2 "Optional Adjudication" / Section 18(2) Notice

9. Where the claimant serves a payment claim, and the respondent fails to deliver a payment schedule, the claimant becomes entitled (if not paid) to sue in court for judgment of the full amount claimed.

10. Alternatively, the claimant may, under the Act, prefer to apply for adjudication under Section 18(2). This type of adjudication is sometimes referred to as "optional adjudication".

11. Section 18(2) provides, so far as relevant, as follows:

> *An adjudication application to which subsection (1)(b) applies cannot be made unless—*
> *(a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and*
> *(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.*

12. Section 18(2) requires such a claimant, to first deliver a Section 18(2) Notice, notifying the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and giving the respondent an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's Section 18(2) Notice.

13. The time for giving a Section 18(2) Notice and the time for making an Application for Adjudication where no payment schedule was received, but the claimant prefers to go to adjudication rather than sue for judgment, is extremely complex. The Section 18(2) Notice must be given within 10 business days of the due date for payment of the payment claim. The Application for Adjudication must be made within 5 business days after the end of the 2 day period for the respondent to provide a payment schedule, referred to in subsection 18(2)(b).

4.3 Claimant's Choice of Authorised Nominating Authority (ANA)

14. The claimant may choose any of the 4 Authorised Nominating Authorities appointed under the Act in Victoria.

15. Where, however, 3 or more ANA's are listed in a contract, the claimant must choose from 1 of those listed ANA's. Section 18(4) of the Act provides, so far as relevant, as follows:

> *If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.*

16. The substantive effect of Section 18(4) is that, unless the construction contract expressly provides that the Authorised Nominating Authority shall be on one of 3 or more Authorised Nominating Authorities listed on the construction contract, then the claimant is free to choose any Authorised Nominating Authority.

4.4 Time for making the Application for Adjudication: Delivery by Email

17. From time to time, the claimant will deliver the Application for Adjudication by email. In fact, the Act is silent as to what constitutes delivery/service by email. In Victoria, the Supreme Court has indicated that normal business practice, including email delivery of documents, and receipt of documents out of traditional business hours, will not, of itself, invalidate an Application for Adjudication.

18. The Act expressly provides for "service of notices", and service by fax, in Section 50 (including that service by fax, after 4pm, is to be taken as service on the following day.

19. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] VSC 156 (24 April 2009), Vickery J (the Judge in Charge of the Supreme Court of Victoria Technology and Construction List) was considering whether an Application for Adjudication could be made by email, and whether, in the particular instance, (the Application for Adjudication was delivered by email, on the last day for making it, just after 4pm, some parts of the Application for Adjudication being emailed later that evening). His Honour said, at paragraphs 121-142:

> *……..*
> ***Whether Application Made Within the Prescribed Time***
> *121 Hickory submits that the adjudication application commenced by Schiavello was not commenced within the time prescribed by the Act. ….*
> *122 Section 18(3)(c) of the Act Provides that an adjudication application in the case of an application under subsection (1)(a)(i), which is this case, "must be made within 10 business days after the claimant receives the payment schedule". It was common ground that this provision required Schiavello to make its application on or before 23 February 2009. ….*
> *123 The question then becomes, did the sending of the emails, or any one of them, on 23 February 2008 constitute the making of an adjudication application by Schiavello on the business day of 23 February 2009 in accordance with s.18(3)(c) of the Act?*
> ***Use of Email to Make the Application***
> *124 The operation of electronic mail, which is often abbreviated as "e-mail" or "email", is now so widespread that it falls within common general knowledge. Although no expert evidence was presented on the subject, and there may be a number of, or indeed many, possible variations in the operation of the email system, the Court is in a position to take notice of and act upon the following basic technical understanding of the sequence of events which is in common use, as applied to the uncontroverted facts of this case.*
> *…….*

130 An adjudication application is required to be made under s.18(3)(c) of the Act within the time prescribed. The Act, however, is silent on the question as to what constitutes the making of an application. The paragraph is not expressed in terms of service of the application on the authorised nominating authority,[60] nor is it expressed in terms of notifying the authority,[61] or giving the application to the authority,[62] or that the documents which comprise the application have been physically received by the authority within the time specified.

131 Court procedures now commonly provide for the commencement of a proceeding by electronic filing. …….

132 Accordingly, there appears to be no reason in principle why an adjudication application cannot be commenced by the filing of the appropriate documents electronically with the authorised nominating authority. In such a case the date and time of filing of the application may be determined by the date and time when the email transmission arrives at the authority's server where it may be accessed by its administrators.

Conclusion as to Whether Application Made Within the Prescribed Time

133 In my opinion, under the Act it was open to Adjudicate Today to have the adjudication application lodged by email, and to treat the adjudication application as having been made at the time when it arrived at its server. The previous conduct of Adjudicate Today in accepting such applications as reflected in Mr Dosser's email letter to Ms Djuricin, the general manager of Adjudicate Today, on 23 February 2009; combined with the statements contained in paragraph 9 of its "Vic Adjudication Application Checklist"; and its conduct in accepting Schiavello's adjudication application and treating it as having been lodged by it on 23 February 2009, and within time; and the text of Mr Dosser's emailed letter dated 23 February 2009, which unequivocally demonstrated an intention that his email and attachments would constitute the making of Schiavello's adjudication application; all point to electronic lodging as being the procedure which Adjudicate Today and Schiavello adopted and applied in this case, as they were both entitled to do under the Act.

134 Furthermore, there was no disadvantage caused to either party by Adjudicate Today and Schiavello following this course.

135 In my opinion, Schiavello's adjudication application was made to Adjudicate Today within the time prescribed by s.18(3)(c) of the Act and its application was accordingly made within time, for the reasons which I summarise below

….

138 …., I do not accept that the service provision of the Act, s.50, operates to preclude the making of an adjudication application by email. Although electronic service is not mentioned in s.50, it is well accepted that provisions such as this are facultative, and do not usually provide for a prescriptive code or exclude the possibility that service may validly be effected in some other way. Certainly, this is not the position in this case. I do not construe s.50 to exclude the making of an adjudication application under s.18(3)(c) electronically by email.

…..

140 …., the documents referred to in the submission sent by Schiavello to Adjudicate Today by email at 4:01 on 23 February 2009, although sent at 9:54 pm and 10:00 pm on 23 February 2009, were still sent within the "business day" of 23 February. Although it is doubtful, given the time, that these documents were accessed or opened by Adjudicate Today on that day, in my opinion there was no necessity for them to be sent with the adjudication application. Indeed, there was no mandatory requirement for them to be delivered with the application at all. Section 18(3)(h) of the Act is a permissive not a mandatory provision.

141 There is ample facility in the Act for the appointed adjudicator to receive such documents in the course of his or her deliberations upon adequate notice to the respondent to the application. Neither s.18(3) nor s.43A of the Act preclude the filing of further material by an applicant for the consideration of an adjudicator after the filing of the application. Although it would be usually convenient to do so, and may aid in the expedition of the process, and the ultimate success of the applicant, there is no requirement that the application must contain

everything upon which the applicant intends to rely in support of its claim at the time of it making its application. Still less would a failure to provide everything with the application give rise to an invalidity in the application. If it did, a level of inflexibility would be introduced into the process, contrary to the intended operation of the Act. Further, it would be contrary to the permissive terms of s.18(3)(h) of the Act. Provided the minimum is provided under s.18(3), that is compliance with paragraphs (a), (b), (c), (f) and (g) (if applicable), there will be a valid application under the Act.
142 Further, in accordance with the rules of natural justice, an adjudicator appointed under the Act is obliged to adopt procedures which are appropriately flexible, but which are fair to the parties in the light of the statutory requirements, the interests of the individual parties and the purposes which the Act seeks to advance. In the appropriate case, this would involve permitting a party at its instigation to provide material directly to the adjudicator in order to more fully present its case, provided this is done on proper notice to the opposing party. Such a step may involve delivering documents or submissions to the adjudicator for the first time in the process, or supplementing any submissions which have already been delivered with the application, pursuant to s.18(3)(f) of the Act. Either way, this would be in addition to the powers of an adjudicator expressly provided for in s.22(5) of the Act, which is not an exclusive repository of the procedures which may be employed in an adjudication conducted under the Act to ensure that the principles of natural justice are applied.

20. It seems, therefore, following the decision in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* :

(a) the making of the Application for Adjudication, by email, within the business day, does not require that delivery to occur by 4pm, but rather, within normal business hours;

(b) the delivery of attachments, after the relevant date, would not, in itself, render the Application for Adjudication to be invalid.

SECTION 5
ADJUDICATION RESPONSE

1. Under the Act, and subject to having delivered a payment schedule in accordance with the Act, the respondent is entitled to lodge a response ("the Adjudication Response") to the Application for Adjudication.

2. The time for delivery of the Adjudication Response are set out in Section 21(1), so far as relevant, as follows:

> *(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the **adjudication response**) at any time within—*
> *(a) 5 business days after receiving a copy of the application; or*
> *(b) 2 business days after receiving notice of an adjudicator's acceptance of the application—*
> *whichever time expires later.*

3. The (minimal) requirements of an the Adjudication Response are set out in Section 21(2), so far as relevant, as follows:

> *(2) The adjudication response—*
> *(a) must be in writing; and*
> *(b) must identify the adjudication application to which it relates; and*
> *(c) must include the name and address of any relevant principal of the respondent and any other person who the respondent knows has a financial or contractual interest in the matters that are the subject of the adjudication application; and*
> *(ca) must identify any amount of the payment claim that the respondent alleges is an excluded amount; and*
> *(d) may contain any submissions relevant to the response that the respondent chooses to include.*

4. Section 21(2A) provides that the right to deliver the Adjudication Response is subject to having delivered a payment schedule in accordance with the Act:

> *(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).*

5. The respondent's Adjudication Response in the absence of a payment schedule – natural justice:

6. There is an argument that the respondent should not be permitted to submit an Adjudication Response on the grounds that it failed to deliver a payment schedule. For the reasons set out below, irrespective of the other conclusions I have come to in this determination, as a matter of natural justice, I have preferred to err on the side of allowing that the submissions made by the respondent in its Adjudication Response dated 27 November 2014 to be taken into account, and giving the claimant an opportunity to respond to those matters.

7. Section 21(2A) seems to exclude the respondent from having the right to provide an Adjudication Response where no payment schedule has been provided. Section 21(2A) of the Act provides, so far as relevant, as follows:

> (*1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the **adjudication response**)*
> ...
> *(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).*

8. Section 22(5) provides, however, an ability for the adjudicator to request further written submissions from either party and must give the other party an opportunity to comment on those submissions, set deadlines for further submissions and comments by the parties, call a conference of the parties, and/or carry out an inspection of any matter to which the claim relates.

9. Further, an adjudicator has an absolute requirement that the adjudicator accord the parties natural justice.

10. In an article by McDougall J, a very senior NSW Supreme Court Judge with very substantial experience in relation to security of payment legislation, His Honour expressed the following views:

> *The objects of the Building and Construction Industry Security for Payments Act 1999 (NSW) (Act) are, broadly, twofold:*
> *(i) to give an enforceable right to progress payments; and*
> *(ii) to provide a swift but interim procedure for the resolution of disputes as to progress payments.*
> *.....*
> *The hearing rule .... requires that each of the parties be given a 'reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it'. .. (this) .. rule(s) apply to determinations made under the Act.*
> *...*
> *However, the **cases also recognise that the requirements of natural justice must be fitted within the statutory scheme.** ln particular, the right to be heard is confined by the time restraints on adjudication determinations and the restrictions on what matters may be considered in reaching a determination, The common law rules of natural justice have therefore, to some extent, been circumscribed by the provisions of the Act and moulded to fit within the aims of the Statute.*
> *An adjudication determination made contrary to the principles of natural justice is void, ... Accordingly, adjudicators must be aware of and must comply with, their obligations under the Act and the principles of natural justice to ensure that their determinations are valid.*
> *...*
> *The hearing rule is frequently invoked when an adjudicator decides not to seek further submissions.... The rules of natural justice may also require adjudicators, in appropriate cases, to exercise their discretionary powers under section 21(4) by, for example, seeking further written submissions. However, the principles of natural justice are not applied in a vacuum. They are considered in light of the Act as a whole: in particular the objects of the legislation and the express time constraints on determinations. Similarly, the Act expressly restricts what matters may be considered by an adjudicator in reaching a determination. lt is therefore clear that other provisions of the legislation will mould the content of the rules of natural justice as they apply to adjudication determinations,*

11. In *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor (No 2)* [2015] VSC 500, Vickery J said:

> *128 Section 21(1) of the Act of the Act, which is expressed to be subject to subsection (2A), provides for an entitlement for a respondent to a payment claim to lodge adjudication responses. Subsections 21(1) and (2A) together provide:*
>
> > *(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the "adjudication response") at any time within—*
> > *(a) 5 business days after receiving a copy of the application; or*
> > *(b) 2 business days after receiving notice of an adjudicator's acceptance of the application—*
> > *whichever time expires later.*
> > *...*
> > *(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).*
>
> *129 Section 21(2A) therefore excludes a respondent from the right to provide an adjudication response where no payment schedule has been provided within the time frames set by the Act.*
> *130 However, in the conduct of an adjudication, the adjudicator is bound to afford natural justice to the parties. An adjudication determination made contrary to the rules of natural justice is void.*
> *131 It goes without saying that one strand of the rules on natural justice is the 'hearing rule'. This requires that parties be given a reasonable opportunity to know the case to be met and a reasonable opportunity to put a case in answer.*
> *132 In some cases, in order to satisfy this element of natural justice, in spite of the restriction imposed on a respondent in lodging and relying upon an adjudication response provided by s 21(2A), observance of the duty to give a party a reasonable opportunity to put its case may demand that an adjudicator utilises the procedure contemplated by s 22(5)(a) and (b) of the Act, and requests a respondent to provide further written submissions, in turn giving the claimant an opportunity to comment on those submissions.*
> *133 For this purpose, an adjudicator may, amongst other things, and where appropriate to do so, avail himself or herself of the facility provided by s 22(5)(a) and (b) of the Act. These subsections provide:*
>
> > *(5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator—*
> > *(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and*
> > *(b) may set deadlines for further submissions and comments by the parties; and*
> > *...*
>
> *134 In exercising this important discretion in accordance with the principles of natural justice, the objects of the legislation, and the particular express confinements of the statutory scheme as a whole, must also be considered, requiring as they do, the limits of the matters to be taken into account in making an adjudication determination (s 23) and the time within which the adjudication determination is to be made (s 22(4)).*
> *135 In the end, it is a matter of balance. Application of the common law principles of natural justice, as that application is necessarily curtailed by the particular statutory scheme of this legislation, need to be considered against the procedural fairness demanded by the particular case at hand.*
> *136 This is precisely the approach adopted by the Adjudicator in the present case. In his Adjudication Determination the Adjudicator relevantly said this:[78]*
>
> > *[71] The claimant says that the respondent should not be permitted to submit an Adjudication Response on the grounds that it failed to deliver a payment schedule. For the reasons set out below, irrespective of the other conclusions I have come to in this determination, as a matter of natural*

> *justice, I have preferred to err on the side of allowing that the submissions made by the respondent in its letter dated 10 November 2014 to be taken into account, and giving the claimant an opportunity to respond to those matters.*
> *[76] The legal authorities seem to be that an adjudicator is required to balance the express language of the Act, and the requirement that he/she exercise a discretion to, consistent with those express provisions, ensure that each party is accorded natural justice.*
> *[77] On balance, though the Act provides that a respondent who fails to deliver a payment schedule may not deliver an Adjudication Response, as a matter of natural justice, I would err on the side of allowing the material provided.*
>
> *137 The claimant Contractor was copied with the letter from the respondent Proprietors and was given an opportunity to respond to the matters raised by the respondent.*
> *138 For these reasons, even though I have found that the Adjudicator was in error in determining that no payment schedule had been served, and was also in error in finding that this was a s 18(1)(b) adjudication where no payment schedule had been provided, the outcome of these errors had no material consequence for a valid Adjudication Determination. All necessary submissions from the parties were received and considered by the Adjudicator.*

12. The legal authorities seem to be that an adjudicator is required to balance the express language of the Act, and the requirement that he/she exercise a discretion to, consistent with those express provisions, ensure that each party is accorded natural justice. On balance, though the Act provides that a respondent who fails to deliver a payment schedule may not deliver an Adjudication Response, as a matter of natural justice, I would err on the side of allowing that material to be provided.

13. For that reason, albeit that the respondent did not provide a payment schedule, in this instance, on balance, an adjudicator might still take a respondent's Adjudication Response into account, even if no payment schedule was provided.

SECTION 6
SECTION 21(2B) NOTICE

1. Section 21(2B) provides, so far as relevant, as follows:

> *If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant—*
> *(a) setting out those reasons; and*
> *(b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.*

2. The effect of Section 21(2B) is to require the adjudicator to review the Adjudication Response, when received, compare it with the payment schedule, and notify the claimant, if the adjudicator's opinion, the adjudication response included the reasons for withholding payment that were not included in the payment schedule, identifying those reasons, and giving the claimant 2 business days from the date of service of the notice to lodge a response to those reasons with the adjudicator.

3. The underlying rationale of the Section 21(2B) Notice is to accord natural justice to the claimant, by giving the claimant the chance to answer new reasons contained in the Adjudication Response (not previously contained in the payment schedule).

4. One effect of this requirement in the Act is to make it nearly essential that the adjudicator request, and the claimant agree to, an extension of the time for making the Determination. (In effect, the adjudicator will not have all of the respective submissions until day 7 or 8 of the 10 days available to review the material and make the Determination).

5. A further effect of Section 21(2B) is to enable the respondent to include new reasons in the Adjudication Response. In other states, the cases suggest that the respondent may not include such new reasons.

SECTION 7
ADJUDICATION PROCESS

7.1 The Adjudication Process

1. 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.

2. An Adjudication Application is made to an Authorised Nominating Authority ("ANA") under the Act. There are 6 Authorised Nominating Authorities under the Act in Victoria[2]. The adjudicator is selected by the ANA.

3. 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, ….)

4. 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.

5. 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.

6. 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.)

7. The adjudicator may:
   a) only refer to the written submissions;
   b) inspect work;
   c) call a conference.

8. The adjudicator may not:
   a) hear witnesses or conduct arbitration;
   b) consider late documents.

9. The adjudicator must determine:
   a) the amount to be paid under the construction contract;
   b) the date it was due;
   c) the interest rate on late payments;
   d) who is to pay the costs of the adjudication.

10. 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.

[2] The 4 ANA's are listed on the VBA website at: http://www.vba.vic.gov.au/practitioners/security-of-payment-sop/authorised-nominating-authorities

11. 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.

12. The detailed referral process is set out in sections 18-22 of the Act.

7.2 *Brodyn*: "basic and essential requirements"

13. *Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor*

14. 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 these principles apply 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)).*

15. *Brodyn* has not been adopted in all its respects in Victoria. In *Hickory Developments Pty Ltd v Schiavello* (Vic) Pty Ltd & Anor [2009] VSC 156 (24 April 2009), the Victorian Supreme Court Building Cases Judge, Vickery J, among other things, was considering whether an application for adjudication was made within the time required by the Act and whether the application in substance was in accordance with the Act and, if not, whether the shortcoming rendered the adjudication determination void. Vickery J, however, was not persuaded that the statements of law in *Brodyn*, applied to the (Victorian) Act. At paragraphs 72-75:

> *72 The statements of law enunciated in Brodyn, as applied to the NSW Act, are in substance persuasive. If the NSW Act and its Victorian counterpart are to achieve their objectives in providing for the speedy resolution of progress claims, displacing conventional curial intervention may be seen as a necessary sacrifice. Further, in the context of national building operations being conducted in this country, it is desirable that there be consistency in the regimes for payment under construction contracts in both jurisdictions, particularly where common legislative schemes are in place.*
> *73 However, it does not follow from these observations that the principles stated in Brodyn to which I have referred can or should be adopted in Victoria, and in significant part, The adjudicator will determine whether myself unable to do so. I am compelled to this course having undertaken a close examination of the Victorian Act and by application of relevant provisions of the Constitution Act 1975 (Vic). I do so in spite of the position taken by counsel in the case before me that Brodyn should be applied.*
> *74 In Brodyn, the view was taken in relation to the NSW Act that, although there was not an explicit exclusion of the jurisdiction of the Court prior to the obtaining of judgment, an intention was disclosed to exclude curial intervention for errors of law in the adjudicator's determination. It followed that, under the NSW Act properly construed, relief in the nature of certiorari was not available to quash an adjudicator's determination which is not void and merely voidable.*
> *75 In my opinion, this construction is not open under the Victorian Act.*

Vickery J concluded, at paragraph 90:

> *… in my opinion, relief in the nature of certiorari is not excluded either expressly or by implication under the Act. The prerogative writ may be invoked in relation to the determination of an adjudicator under the Victorian Act. In this respect, I do not follow Brodyn.*

16. The substantive effect of *Brodyn* is that an adjudicator must ensure that basic and essential requirements for a valid determination are met, namely:
    1. existence of a contract to which the Act applies;
    2. service by the claimant on the respondent of a valid payment claim;
    3. a valid "adjudication application" within the meaning of the Act;
    4. reference of the application to an eligible adjudicator, who accepts the application;
    5. determination by the adjudicator of this application, by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable and the issue of a determination in writing.

17. Existence of a Contract to which the Act applies:

18. The Act requires that there be a "construction contract" within the meaning of the Act.

19. 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"*

20. The adjudicator will need to determine that there is a "construction contract", within the meaning of the Act.

21. Service by the claimant on the respondent of a Valid Payment Claim:

22. The Act requires that there be a valid "payment claim" within the meaning of the Act.

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

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

24. 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.*

25. There is no form prescribed for payment claims under the Act.

26. The Payment Claim must specify the amount claimed to be due.

27. The Payment Claim must describe the construction work to which the progress payment relates.

28. The Payment Claim must include words to the effect: "*This is a payment claim under the Building and Construction Industry Security of Payment Act 2002"*.

29. In summary, the adjudicator needs to make the following findings:

a) the Payment Claim complies with the requirement for form (there is no prescribed form);
b) contains the prescribed information;
c) identifies the construction work or related goods and services to which the progress payment relates;
d) indicates the amount of the progress payment that the claimant claims to be due;
e) states that it is made under the Act.

30. On that basis, the adjudicator will determine whether that the Payment Claim complies with the requirements of Section 14(2).

31. Valid Adjudication Application:

32. The Act requires that there be a valid "adjudication application" within the meaning of the Act, made by the claimant to an Authorised Nominating Authority.

33. 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) in the case of an application under subsection(1)(a)(ii), must be made within 10 business days after the due date for payment; and…..*
> *(e) in the case of an application under subsection(1)(b), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b); and*
> *(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) .....*

34. The Adjudication Application must be in writing.

35. The Application for Adjudication must be made to an Authorised Nominating Authority. In Victoria there are 6 Authorised Nominating Authorities appointed under the Act. (Rialto Adjudications Pty Ltd is an Authorised Nominating Authority under the Act.)

36. The date of delivery of the Application for Adjudication to an Authorised Nominating Authority is critical. The Adjudication Application must be delivered:
a) within 10 business days after the claimant received the Payment Schedule; or alternatively
b) within 10 business days after the due date for payment; or alternatively
c) in relation to an optional adjudication (an adjudication made where on payment schedule was received, but the claimant prefers to go to adjudication rather than sue for judgment ((see below)), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b).

37. The Adjudication Application must identify the Payment Claim and the Payment Schedule to which it relates.

38. The adjudicator will determine whether the adjudication application:
a) was in writing;
b) was made to an authorised nominating authority chosen by the claimant;
c) was made within the relevant period;
d) identified the Payment Claim and the Payment Schedule to which it related;

to determine whether there was a valid Adjudication Application within the meaning of the Act.

39. Reference of the application to an eligible adjudicator, who accepts the application:

40. The Act requires that an Authorised Nominating Authority refer the adjudication to an eligible adjudicator within the meaning of Section 19 of the Act, referring the adjudication application to me. In fact there are no particular requirements specified in the Victorian legislation. (Ultimately, to date, the Act currently places the responsibility for ensuring that the adjudicator is competent upon the relevant ANA's.)

41. Determination by the adjudicator of this application, by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable and the issue of a determination in writing:

42. The Act requires that the adjudicator issue a determination in writing, and determine the following:
    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.

7.3 Principles to be followed by an adjudicator in assessing a payment claim

43. Pursuant to Section 23(1)(a) of the Act, an adjudicator is required to assess: …. *the amount of the progress payment (if any) to be paid by the respondent to the claimant*.

44. In *SSC Plenty Road v Construction Engineering (Aust) & Anor* [2015] VSC 631 (13 November 2015) (Vickery J), His Honour set out, at paragraph 101, the principles to be followed by an adjudicator in assessing a payment claim under the Act in Victoria:

> *Summary of the Work of an Adjudicator*
> *101 Drawing the threads together, the following may be said of an adjudicator's assessment of a payment claim under the Act in Victoria:*
> *(a) The adjudicator is required to determine and apply what the adjudicator considers to be the true construction of the Act in the light of the current case law.*
> *(b) The adjudicator is required to determine and apply what the adjudicator considers to be the true construction of the construction contract.*
> *(c) In addition to the matters to be determined and considered under ss 23(1) and (2), and excluded under s 23(2A) of the Act, an adjudication requires, as a minimum, the following critical findings to be made (the "critical findings"):*
> *(i) a determination as to whether the construction work the subject of the claim has been performed (or whether the relevant goods and services have been supplied); and*
> *(ii) the value of the work performed (or the value of the goods and services supplied).*
> *(d) Construction work carried out or related goods and services supplied are to be valued in accordance with the terms of the construction contract (if the contract contains such terms) pursuant to ss 11(1)(a) and 11(2)(a).*
> *(e) In the absence of any express provision in the construction contract providing a mechanism for an adjudicator to undertake the assessment of value, the valuation assessment is to be undertaken in accordance with s 11(1)(b) (for work) and s 11(2)(b) (for goods and services), having regard to the matters set out in those sub-sections, namely:*
> *(i) the contract price for the work or the goods and services;*
> *(ii) any other rates set out in the contract;*

(iii) *if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and*

(iv) *if the work or goods are defective, the estimated cost of rectifying the defect.*

(f) *If a construction contract contains a binding schedule of rates within the meaning of s 11(1)(b)(ii) (for work) and s 11(2)(b)(ii) (for goods and services), the adjudicator is required to have regard to the schedule in assessing value if s 11(1)(b) or s 11(2)(b) apply. Further, the adjudicator should state in the adjudication determination whether and how the schedule of rates was applied in the assessment of value, if it in fact was applied, or state why the schedule of rates was not applied.*

(g) *However, without measures, evidence or submissions being provided to the adjudicator in a coherent fashion in respect of defined categories of work (or goods and services) the subject of a contractual schedule of rates, in most cases it would not be possible for an adjudicator to safely apply the schedule in assessing the value of the claim. In such circumstances the adjudicator may have regard to a schedule of rates, but would not be remiss in not applying it.*

(h) *The adjudicator is obliged to make the critical findings on the whole of the evidence presented at the adjudication.*

(i) *The adjudicator, having decided that the respondent's submissions and material should be disregarded, cannot simply adopt the amount claimed by the claimant (for example, in the payment claim or in the adjudication application).*

(j) *The adjudicator must proceed to make the critical findings by:*

(i) *fairly assessing and weighing the whole of the evidence which is relevant to each issue arising for determination at the adjudication;*

(ii) *drawing any necessary inferences from the evidence, or from the absence of any controverting material provided by the respondent, including an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may be considered in the context of the evidence as a whole;*

(iii) *arriving at a rational conclusion founded upon the evidence;*

(iv) *in so doing, is not called upon to act as an expert; and*

(v) *is not entitled to impose an onus on either party to establish a sufficient basis for payment or a sufficient basis for withholding payment.*

Pursuant to s 23(3) of the Act, the adjudicator must include in an adjudication determination both the reasons for the determination and the basis upon which any amount or date has been decided. In providing these reasons the adjudicator must summarise the central reasons for the making of the critical findings in the adjudication determination with as much completeness as the time permitted under the Act will allow.

45. The key principles identified in SSC Plenty Road to be followed by an adjudicator in assessing a payment claim under the Act:

1. the adjudicator is to determine and apply what the adjudicator considers to be the true construction of the Act in the light of the current case law;
2. the adjudicator is to determine and apply what the adjudicator considers to be the true construction of the construction contract;
3. the adjudicator is to determine whether the construction work the subject of the claim has been performed;
4. the adjudicator is to determine the value of the work performed;
5. If a construction contract contains a binding schedule of rates, the adjudicator is to have regard to the schedule in assessing value, and to state in the adjudication determination whether and how the schedule of rates was applied in the assessment of value, or why the schedule of rates was not applied;

6. the adjudicator is to make the critical findings on the whole of the evidence presented at the adjudication;
7. the adjudicator is to make the critical findings by fairly assessing and weighing the whole of the evidence drawing any necessary inferences from the evidence (or absence of controverting evidence), arriving at a rational conclusion founded upon the evidence;
8. the adjudicator is not called upon to act as an expert;
9. the adjudicator is not entitled to impose an onus on either party to establish a sufficient basis for payment or a sufficient basis for withholding payment;
10. the adjudicator is to include in an adjudication determination both the reasons for the determination and the basis upon which any amount or date has been decided, and in providing these reasons the adjudicator must summarise the central reasons for the making of the critical findings in the adjudication determination with as much completeness as the time permitted under the Act will allow.

7.4 Date adjudicated amount payable under the construction contract

46. 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.

47. 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.*

7.5 Interest rate on Adjudicated Amount:

48. The adjudicator is required pursuant to Section 23(1)(c) of the Act to determine the rate of interest payable on the adjudicated amount.

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

> *An adjudicator is to determine .....the 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**[3]; or .... the rate specified under the construction contract.*

7.6 Determination of the party to pay the adjudicator's fees

50. The adjudicator is required to determine the appropriate allocation, between the claimant and the respondent, of the adjudicator's fees.

[3] The rate prescribed under the section 2 of the *Penalty Interest Rates Act 1983 (Vic)*, as at 1 June 2016, is 10.5% per annum.

51. The adjudication process can be expensive, because the parties must pay (in addition to their own costs) the fees of the adjudicator.

52. 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).

53. The fees/hourly rates of the adjudicator will be set out in the adjudicator's Notice of Acceptance.

54. 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 fees.

7.7 Matters Regarded in Making the Determination

53. The adjudicator, in making the determination, will take into account the following:
    a) Application for Adjudication
    b) Adjudication Response (if any);
    c) response to Section 21(2B) Notice (if any);
    d) any other materials provided with those documents.

54. In making the determination the adjudicator will also have regard to the provisions of *Building and Construction Industry Security of Payment Act (Vic) 2002*.

55. The Application for Adjudication will usually include the following:
    1. Application for Adjudication
    2. Submissions on behalf of the claimant
    3. The Payment Claim
    4. The Payment Schedule
    5. The construction contract

    and well prepared Applications for Adjudication may also include any or all of the following relevant to/in support of the amount claimed by the claimant should be paid in relation to the payment claim:
    6. Supporting correspondence (emails, letters, invoices, file notes, ……), relevant to the amount to be paid in relation to the payment claim
    7. Statutory declarations in support
    8. …….

7. 8 Preparing an Application for Adjudication - Material that might be Included

56. 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, ….)

57. 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.

58. Generally, the claimant should, therefore, include, 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)
- loss of productivity

59. In fact, in Victoria, it has become possible, in practice, for a respondent to include some new material in an Adjudication Response. It is nonetheless a risky process to rely upon this. Far better that the claimant include all relevant material in each payment claim, and the respondent include all relevant material in each payment schedule.

60. Within 10 business days (this can be extended by a further 15 business days by agreement of the claimant), the adjudicator is required to decide the amount that is to be paid in respect of the progress claim. In fact, this is likely to be a substantive task (to be decided on both construction contract and legal bases, without witness evidence, based on written material).

62. It makes sense, therefore, when preparing the payment claim, and again when preparing the Application for Adjudication, to include as much supporting material as possible.

63. The current practice is to include (though this is not required under the Act) supporting statutory declarations. As a matter of practice, a statutory declaration is always compelling evidence to an adjudicator as to the truth of the submissions made on behalf of either party.

64. In some cases, one or both of the parties may request that the adjudicator have a site inspection.

7.9 Corrections to Determination

65. Under Section 24, the adjudicator has the power to correct mistakes in the Determination.

66. Section 24 of the Act provides, so far as relevant, as follows:

> ***24 Correcting mistakes in determinations***
> *(1) An adjudicator may correct a determination made by him or her if the determination contains—*
> *(a) a clerical mistake; or*
> *(b) an error arising from an accidental slip or omission; or*
> *…..*

67. Usually this occurs after one of the parties has reviewed the Determination, found a mistake, and requested the adjudicator to exercise the Section 24 power to correct the mistake.

68. The ambit of Section 24:

69. In *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2012] QSC 373 the Queensland Supreme Court (Ann Lyon J) said as follows, in relation to the Queensland equivalent of Section 24:

> *[63] Counsel for Warren Brothers, however, pursuant to its application argues that the final amount adjudicated by the decision can, however, be corrected by a 'slip rule' as essentially foreshadowed by Atkinson J in James Trowse.*
> *.....*

[65] Counsel for Warren Brothers submits that the evidence of Mr Sive shows that he made an error arising from an accidental omission and that s 28 permits the adjudicator to correct the decision. He argued therefore that s 28 plainly contemplates that adjudicators may make mistakes. Counsel for Warren Brothers conceded that this is not a clerical error or a clerical mistake, pursuant to s 28(1), but submitted that this is a case falling within subsection (1)(b) which is an error arising from an accidental slip or omission. This is on the basis that it is contended that the adjudicator essentially said "I understood the point. I intended to follow it and I forgot".

[66] Counsel for Warren Brothers also submitted that rule 388 of the Supreme Court Rules 1999 (Qld)would also allow correction and does not depend on inadvertence. In particular, reliance is placed on the decision of Court of Appeal in Queensland Pork P/L v Lott ("Queensland Pork"),[21]where a judgment amount was able to be corrected pursuant to rule 388:

> *[13] The learned District Court Judge, having decided to grant the judgment, gave judgment in the respondent's favour on 21 November 2002 in the sum of $59,861.93.*
>
> *[14] It is not clear where His Honour obtained this figure from but it is clear that it was based upon a mistaken belief that the parties had agreed that in the event of the applicant succeeding, and after taking into account certain monies which were to be offset against the price of the pigs sold and a payment which had not been allowed for in the schedule to the pleading, the judgment amount should be $59,861.93.*
>
> *...*
>
> *[17] The effect then of what His Honour did was to correct the earlier judgment he had given by giving judgment for the figure that he was satisfied the respondent was entitled to on the evidence before him.*
>
> *[18] The appellant contends that His Honour had no power to alter the original judgment, the matter not falling within any of the powers of the court to correct the judgment whether under the slip rule (Rule 388) or the power conferred by Rule 667(2) or in the court's inherent jurisdiction.*
>
> *[19] It is said that His Honour's first judgment was the result of a deliberate decision and not inadvertence. Given that His Honour's judgment was based upon a plain misunderstanding of what the position was, I think this meets the language of the slip rule found in Rule 388(1)(b), namely "mistake or error (which) resulted from an accidental slip or omission". Furthermore I think that the contention of senior counsel for the respondent that the matter falls within Rule 667(2)(d) is also correct. This permits a court to set aside an order if the order does not reflect the court's intention at the time the order was made. Here it seems clear that His Honour at all times intended that judgment would be entered for the respondent in the sum for which the respondent had made out an entitlement after taking into account the credit and off-sets to which I have referred and was under the mistaken belief that the parties had agreed upon what that entitlement was and for reasons which cannot be now known arrived at the figure for which judgment was first pronounced."*

[67] The legal authorities seem to be that for the reasons I have previously set out, I consider that the Adjudicator came to a conclusion after a deliberate decision where he accepted the number of loads initially put forward by Warren Brothers and from that accepted a calculation based on a formula which changed according to the number of loads in each particular category of load.

[68] I do not consider that this was a mistake or error which resulted from an accidental slip or omission. Significantly, the correction of the error involves the acceptance of a different number of loads and a different mathematical formula as the relevant rate has now changed. This is not a case where a different final figure simply needs to be inserted as in Queensland Pork but rather the Adjudicator needs to accept that the methodology underlying the change to the final figure also needs to change. In any event I am not satisfied

that the amount sought to be transposed pursuant to the declaration is in fact actually correct.

[69] In this regard I consider this case is indeed analogous to the decision of Uniting Church in Australia Property Trust (Qld) v Davenport & Anor[22] and that the Adjudicator here also proposes "upon further reflection, to adopt a completely different method of making the calculations of the amounts". Daubney J held that where an adjudicator has a complete change of reasoning that cannot be a 'miscalculation', as follows:

> *[26] It seems to me that the second respondent's attempt to draw an analogy between s 28 of the BCIPA and the slip rule under UCPR 388 is inapt. I have set out the terms of s 28 above. Rule 388 provides:*
>
> *.....*
>
> *[27] Section 28(1) prescribes, in disjunctive terms, four discrete circumstances, any one of which may found an exercise of the adjudicator's discretion under s 28(2). Rule 388(1), on the other hand, contains two subparagraphs which must be read conjunctively such that, to the extent that there is similarity in wording between Rule 388 and s 28, the slip rule applies if "there is a clerical mistake in an order ... of the Court ... and ... the mistake ... resulted from an accidental slip or omission." In Cawood v Infraworth Pty Ltd [1990] 2 Qd R 114 , Macrossan CJ, with whom Kelly SPJ agreed, said at 122:*
>
> > ***Inadvertence, as distinguished from an error or mistake resulting from deliberate decision, is the basis of the jurisdiction to correct under the slip rule**.*
>
> *[28] When one looks at s 28 of the BCIPA, however, the only one of the discrete elements referred to in s 28(1) which imports the notion of inadvertence is that mentioned in s 28(1)(b), namely "an error arising from an accidental slip or omission".*
>
> *[29] It was not suggested that the mistake which the adjudicator would seek to correct in each decision was a "clerical mistake"; on the common understanding of that term, it clearly was not, and is not sought to be painted as such. Nor were the adjudicator's mistakes suggested to be, nor could they sensibly be seen to be, defects of form. The questions, therefore, are whether:*
>
> > *(a) The adjudicator's original decisions contain errors arising from an accidental slip or omission, i.e. inadvertent errors; or*
> > *(b) Material miscalculations of figures or material mistakes in the description of a person, thing or matter mentioned in the decision.*
>
> *[30] I observe that the adjudicator himself, by the terms of the letter of 2 February 2009, seems to consider that he "made a material miscalculation".*
>
> *[31] The answers to these questions come, it seems to me, from a review of the adjudicator's process of reasoning under his original decisions and the process of reasoning which he has advertised he would now seek to adopt for the purposes of correcting his "material miscalculation"...*
>
> *[36] The juxtaposition of the original methodology adopted by the adjudicator and that which he has indicated he proposes to adopt makes clear, the legal authorities seem to be that that it cannot sensibly be said in this case either that:*
>
> > *(a) he made an inadvertent error in his original calculations, or*
> > *(b) his original calculations involved any sort of "miscalculation", let alone a "material miscalculation".*
>
> *[37] Rather, it seems to me that the adjudicator proposes, upon further reflection, to adopt a completely different method of making the calculations of the amounts of the over-budget preliminaries which are attributable to the subject RFIs under each of Contracts 1 and 2 respectively. True it is, as the second respondent submits, that the*

> *adjudicator has not changed any of his substantive findings as to the length of delay attributable to the contracts either collectively or individually. Rather, the adjudicator proposes to apply a completely different chain of reasoning and calculation to those substantive findings to reach results which are quite different from those calculated under his original decisions.*
>
> *[38]* ***My characterisation of what is proposed to be done by the adjudicator as a complete change of reasoning also points to a conclusion that there is no question of 'miscalculation' here; rather, the adjudicator proposes to substitute new calculations for his original calculations.***
>
> *[70] Accordingly, I do not consider that s 28 or r 388 have any applicability.*

7.10 Review Applications

70. The Act provides for a review of an Adjudication Determination, but only in relation to Claimable Variations and/or Excluded Amounts wrongly included or excluded by the adjudicator.

71. Sections 28B and 28C provide, so far as relevant, as follows:

> ***28B Application for review by respondent***
> *(1) Subject to this section, a respondent may apply for a review of an adjudication determination (an **adjudication review**).*
> *(2) An application under this section may only be made if the respondent provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2).*
> *(3) An application under this section may only be made on the ground that the adjudicated amount included an excluded amount.*
> *(4) An application under this section may only be made if the respondent has identified that amount as an excluded amount in the payment schedule or the adjudication response.*
> *(5) An application under this section may only be made if the respondent has paid to the claimant the adjudicated amount other than the amounts alleged to be excluded amounts.*
> *(6) An application under this section may only be made if the respondent has paid the alleged excluded amounts into a designated trust account.*
>
> ***28C Application for review by claimant***
> *(1) Subject to this section, a claimant may apply for a review of an adjudication determination (an **adjudication review**).*
> *(2) An application under this section may only be made on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount.*

72. There is a minimum threshold adjudicated amount of $100,000 for a review adjudication, and the party making the application is required to deposit the sum in dispute in trust.

73. The process:

An Application for Review of Adjudication may only be made by the **Respondent** when:

1. The Adjudicated Amount exceeds $100,000.00
2. The Respondent provided a Payment Schedule to the Claimant within the time specified in Section 15(4) or 18(2)
3. On the ground that the Adjudicated Amount included an Excluded Amount
4. If the Respondent identified that amount as an Excluded Amount in the Payment Schedule or the Adjudication Response
5. If the Respondent has paid to the Claimant the Adjudicated Amount, other than the amounts alleged to be Excluded Amounts
6. The Respondent has paid the amounts alleged to be Excluded Amounts into a designated Trust Account

An Application for Review of Adjudication may only be made by the **Claimant** when:

1. The adjudicator failed to take into account a relevant amount in making an Adjudication Determination because it was wrongly determined to be an Excluded Amount

An Application for Review of Adjudication may only be made to the ANA which the Application for Adjudication was made.

SECTION 8
ESTIMATED COST OF RECTIFICATION OF DEFECTS

1. Pursuant to Section 11(1)(b)(iv) of the Act, an adjudicator is to take into account, in assessing the amount to be paid in respect of the progress claim, the estimated cost of rectifying any defective work.

2. Section 11(1)(b)(iv) of the Act makes express provision in valuing work for deducting an amount in respect of the estimated cost of rectifying defects:

> ***Valuation of construction work and related goods and services***
> *(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued—*
> *(a) in accordance with the terms of the contract; or*
> *(b) if the contract makes no express provision with respect to the matter, having regard to—*
> *(i) the contract price for the work; and*
> *(ii) any other rates or prices set out in the contract; and*
> *(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and*
> *(iv) if any of the work is defective, the estimated cost of rectifying the defect.*
> *.....*

3. In *Maxstra Constructions Pty Ltd v Gilbert & Ors* [2013] VSC 243 (10 May 2013), Vickery J, the Supreme Court Judge in Charge of the Technology Engineering and Construction List, quashing the determination, found that the adjudicator (wrongly) concluded that the particular defect claim was an Excluded Amount pursuant to Section 10A of the Act, and not to be taken into account. The court quashed the determination on that basis.

4. Vickery J reasoned that any conflict between Section 10A and Section 11(1)(b)(iv) was to be resolved by a close examination of the text. His Honour reasoned, at paragraphs 57-70:

> *57 ..... in this case I do not find it necessary to resolve the apparent conflict between s 10B(2)(c) with s 11(1)(b)(iv) of the Act by adopting a hierarchical analysis involving a determination as to which is the leading provision and which the subordinate provision. This is not a case where the only way to give effect to the language and purpose of the Act, while at the same time maintaining the integrity of the statutory scheme, is by determining the hierarchy of the provisions which are in apparent conflict. In this case, the apparent conflict is to be resolved by a close examination of the text of the relevant provisions.*
> *58 The starting point in this analysis is s 10B(2)(c). For the purposes of s 10B, an "excluded amount" which cannot be taken into account in calculating the amount of a progress payment includes: "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". [Emphasis added] The fulcrum of the provision is a "claim for damages".*
> *59 The concept of "damages" has a particular meaning at law where there is a failure to discharge a contractual obligation. The objective in contract law is to place the party who has suffered loss caused by the breach in the position which he or she would have occupied had the other party performed the obligation breached….*
> *60 The same principles apply in relation to damages resulting from the breach of a construction contract. Commonly, damages are awarded arising from a breach of the contractual warranty of "good workmanship". With the object of placing the principal in the position in which it would have been had the contract been performed, damages may include an award for rectification of the defective work. However, consequential losses, for example arising from delay in contract*

completion and losses arising from liabilities incurred to third parties arising from such delay, may also be the subject of damages for breach of a contract.
61 On the other hand, ***the compensation in contemplation in s 11(1)(b)(iv) of the Act is of quite a different character. It is a purely statutory concept, providing that, in the event of any work being defective, the estimated cost of rectifying the defect is to be taken into account in valuing the construction work.*** *Two elements serve to differentiate the statutory concept from a "claim for damages" within the purview of s 10B(2)(c). The first is that under s 11(1)(b)(iv) it is only the "cost of rectifying the defect" which is to be taken into account. Other elements which may be included in a claim for damages arising from breach of a contractual warranty or a fundamental failure to perform the contract as a whole, such as compensation for consequential losses arising from delay, do not fall within s 11(1)(b)(iv). Second, the appointed decision-maker in considering the application of s 11(1)(b)(iv), is only required to undertake an "estimate" of the costs of the rectification, and this can only be done by an Adjudicator considering the matters defined in s 23(2) of the Act, and no other matters. The assessment of a claim for damages is quite different. Damages are not amenable to a determination based upon a mere "estimate". Rather, they are founded upon a claimant for damages proving its case to the usual civil standard, on the balance of probabilities based on the admissible evidence adduced.*
62 ***The construction I have placed on s 10B(2)(c) and s 11(1)(b)(iv) of the Act resolves the apparent conflict between the provisions. They both have quite different tasks to perform.*** *Claims for "damages" under s 10B(2)(c) are quite rightly treated as "excluded amounts", and are to be disregarded in calculating the amount of a progress payment. The forensic enquiry involved in assessing damages, and the potentially wide scope of any such claim is avoided, thereby reinforcing the limited ambit of the adjudication process contemplated under the Act and its objective of expedition. On the other hand, the enquiry to be conducted under s 11(1)(b)(iv) of the Act, properly confined as it is, as I have found it to be, would not be likely to defeat the objectives of the Act.*
63 On the other hand, if a construction was given to s 10B(2)(c) and s 11(2)(b)(iv) of the Act which involved treating claims for damages as including claims for the rectification of defects, and these were treated as "excluded amounts" and therefore not taken into account in assessing a progress payment, with the result that the decision-maker was also precluded from estimating the cost of rectifying the defect and taking this into account in the valuation exercise contemplated by s 11, then s 11(2)(b)(iv) would in this circumstance have no work to do and would be reduced to superfluity.
64 The same would follow if the matter was to be considered by taking s 11(2)(b)(iv) as the starting point. If the estimated cost of rectifying a defect under the sub-section was to be regarded as damages for the purpose of s 10B(2)(c), it would become an "excluded amount" under s 10 and as such could not be taken into account, thereby defeating the clear words and intention of the valuation regime set up under s 11 which does quite the opposite.
…….
68 However, given that the equivalent s 11(1)(b) of the Victorian Act applies, as it does in this case, the relevant decision-maker, which was here the Adjudicator, was obliged by the section to "have regard to" each of the matters listed in sub-paragraphs (i) to (iv) of s 11(1)(b) to the extent that they were applicable. This was a mandatory obligation.
69 However, arising from the construction given to s 10B(2)(c) of the Act, and its relationship with s 11(1)(b)(iv), which I have found to be incorrect, the Adjudicator did not embark upon an assessment of, nor did he make any determination as to:
(a) whether any of the work the subject of the progress payment in question was in fact defective; and
(b) the estimate cost of rectifying any such work.
70 Accordingly, the Adjudicator put it beyond his reach to consider the matters which arose for determination under s 11(1)(b)(iv) and make the necessary preliminary findings on those issues, one way or the other. If he determined that

> *there was defective work, and if he was in a position to estimate the cost of rectification, he was obliged to give weight to the matter in arriving at his valuation. On the other hand, if he found that there was no defective work, or that he was not in a position to estimate the cost of rectification, he would be entitled to disregard the matter. Either way, he was obliged to make findings on these issues.*
> *71 This being the case, the Adjudicator, in my respectful opinion, fell into error and did not satisfy a basic and essential requirement of the Act for a valid determination, resulting in jurisdictional error.*
> *(emphasis added)*

5. In the *Maxstra* case, the adjudicator had (wrongly) concluded that the particular defect claim was an Excluded Amount, and not to be taken into account. The court quashed the determination on that basis. His Honour noted, however, that if the adjudicator found that was no defective work, or that he was not in a position to estimate the cost of that defective work, he would be entitled to disregard the matter.

SECTION 9
CASH RETENTION

9.1 Claims for return of cash retention:

1. In Victoria, it has been argued that retention can/cannot be claimed in a Payment Claim under the Act. The current position seems to be that retention can be claimed. (The Victorian parliament may be about to clarify this.)

2. *Punton's Shoes Pty Ltd (ACN 004 133 751) v Citi-Con (Vic) Pty Ltd*

3. In *Punton's Shoes Pty Ltd (ACN 004 133 751) v Citi-Con (Vic) Pty Ltd* [2020] VSC 514 & Anor (24 August 2020), the Victorian Supreme Court Judge in Charge of the Technology, Engineering and Construction List, Mr Justice Digby, was considering, among other things, whether a progress claim for retention is based on a contractual entitlement giving rise to a reference date. His Honour said:

> ***Security by way of retention***
> *104 Pursuant to cl 5.2, Annexure Part A Item 13, of the Contract the first defendant was obliged to provide security in the amount of 5% of the Contract Sum in the form of cash retention.*
> *105 The Contract provides that any retention shall be in accordance with cl 42.1 and Item 15 of Annexure Part A.*
> *106 Under cl 5.5 and Item 15 of Annexure Part A that retention money shall be deducted progressively and as certified under cl 42.1 of the Contract. The Contract provides for this deduction to 10% of the value of the Works incorporated into the Works, until 5% of the Contract Sum is reached.*
> *107 Accordingly, the retention moneys the subject of the November 2019 Adjudication Determination were progressively provided by way of security under the Contract, from time to time by means of allowances in the nature of deductions made under cl 42.1 of the Contract, in the percentage stated in Annexure Part A, Item 15, and pursuant to cl 5.5 of the Contract.*
> *108 The retention moneys so deducted pursuant to cl 5.5, under cl 42.1 and Item 15 of Annexure A of the Contract, were in respect of the certified value of work incorporated into the Works assessed in relation to the Contractor's periodic payment claims under cl 42.1 of the Contract.*
> *109 By this agreed contractual mechanism a discrete fund in the nature of retention moneys was established and accumulated to ensure due and proper performance of the Contract by the Contractor.*
> *110 Under the scheme of the Contract the retention moneys progressively deducted formed a separate and distinct security fund to ensure performance by the Contractor. The separate and distinct character of the contractual security fund created by the deduction of retention moneys is apparent from the terms and operation of cls 5.1, 5.2, 5.5, 5.6 and 42.8 of the Contract which establish the purpose of that security fund, the contractual mechanism for its accumulation and reduction and the bases upon which recourse may be had to that security fund by the Principal. The Contract makes no provision for a claim in respect of, or for payment to the Contractor in relation to the security fund. Accordingly, any implied right or entitlement there may be in the Contractor to return of a portion of retention moneys is different in character and distinct from either a claim under the Contract for the value of work carried out or an entitlement under the SoP Act for the value of construction work carried out and related goods and services.[49]*
> *111 In distinction to a payment claim entitlement, the Contract does provide a mechanism to adjust the parties' entitlements in relation to moneys deducted by way of retention. Any sum held by way of retention is to taken into account in the Final certification process under cl 42.6 of the Contract and thereby accounted for in the amount ultimately payable as between the Contractor and the Principal on the final reconciliation of each parties entitlements under the Contract. The*

> *retention deduction, reduction, recourse and security related provisions of the Contract do not contemplate or accommodate payment claims by the Contractor for contract work undertaken or related goods and services supplied.*
> *112 For the above reasons, and in particular because the Contract, including the progress payment provisions in cl 42.1 of the Contract make no provision for the return or payment of retention moneys, any implied entitlement to return of retention moneys upon the issue of the Certificate of Practical Completion under the Contract, or adjustment under cl 42.6, is not in the nature of a progress payment entitlement in relation to work carried out by the Contractor in the performance of the Contract.*
> *113 Neither, for the same above reasons, is the first defendant's September 2019 Payment Claim under the Contract for return or payment of half retention moneys in the nature of a payment claim under the SoP Act for construction work or related goods and services undertaken and provided under the Contract. This is so irrespective of whether the first defendant was able to establish a valid reference date, and any implied or other foundation for its claim to be paid half the deducted retention moneys.*
> *114 Further, it follows from the conclusions in the last three preceding paragraphs that there can also be no relevant reference date under s 9 the SoP Act because a relevant reference date under the Act is determined on the basis of a progress payment entitlement in respect of construction work undertaken or the supply of related goods and services under the construction contract. The September 2019 Payment Claim does not make a claim for an entitlement of this type.*
>
> (emphasis added)

4. In summary, His Honour's reasoning in *Punton's Shoes* (albeit that the terms of the particular construction contract may or may not apply in a particular case) is as follows:
   1. Through the respective deductions of cash retention, a discrete fund in the nature of retention moneys was established and accumulated to ensure due and proper performance of a construction contract by the construction contractor.
   2. The construction contract made no provision for a claim in respect of, or for payment to the construction contractor in relation to that security fund.
   3. The construction contractor's right to return of a portion of retention moneys was different in character and distinct from either a claim under the construction contract for the value of work carried out or an entitlement under the SoP Act for the value of construction work carried out and related goods and services.
   4. In distinction to a payment claim entitlement, the construction contract did provide a mechanism to adjust the parties' entitlements in relation to moneys deducted by way of retention. Any sum held by way of retention was to taken into account in the final certification process under the construction contract and thereby accounted for in the amount ultimately payable as between the construction contractor and the principal on the final reconciliation of each parties entitlements under the construction contract.
   5. The retention deduction, reduction, recourse and security related provisions of the Contract do not contemplate or accommodate payment claims by the Contractor for contract work undertaken or related goods and services supplied.
   6. Any implied entitlement to return of retention moneys upon the issue of the Certificate of Practical Completion under the Contract, or adjustment under cl 42.6, is not in the nature of a progress payment entitlement in relation to work carried out by the Contractor in the performance of the Contract.
   7. Similarly, any implied entitlement to return of half retention moneys, is not in the nature of a progress payment entitlement in relation to work carried out by the Contractor in the performance of the Contract, irrespective of whether a claimant is able to establish a valid reference date, and any implied or other foundation for its claim to be paid half the deducted retention moneys.
   8. Further, there can also be no relevant reference date under s 9 the SoP Act because a relevant reference date under the Act is determined on the basis of a progress payment entitlement in respect of construction work undertaken or the supply of related goods and

services under the construction contract.

5. In *Watpac Constructions Pty Ltd (ACN 010 469 282) v Collins & Graham Mechanical Pty Ltd (ACN 097 469 282)* [2020] VSC 637, the Supreme Court of Victoria Supreme Court (Digby J) was considering whether a security clause in a construction contract created a reference date. His Honour said:

> ***First defendant's July 2019 Payment Claim did not make a claim for return of retention money***
> *16 The first defendant's July 2019 Payment Claim was for contract work and the provision of associated goods and services; no claim was made by the first defendant for any reduction or return of security by way of cash retention under the Subcontract.*
> *17 The plaintiff's August 2019 Payment Schedule[19] responding to the July 2019 Payment Claim included a deduction item in the sum of $530,000.00 described in Appendix 3 of the Payment Schedule as follows: '$530,000.00 is the maximum retention that can be held on this Payment Claim for the purpose of a retention calculation for this Payment Claim'.*
> *18 Accordingly, the issues raised by the plaintiff in relation to the September 2019 Adjudication Determination, including the Adjudicator's decision that the plaintiff was not entitled to deduct the sum of $530,000.00 in respect of retention under the Subcontract, were not in respect of any claim by the first defendant for recovery of retention moneys. Rather the first defendant's payment claim was for the value of construction work and associated goods and services and in response the value of that payment claim was reduced by the plaintiff to the extent of $530,000.00 on the basis of the plaintiff's asserted right to effect that deduction on account of retention under the Subcontract.*
> *.....*
> *171 Assuming that the first defendant's claims for release and return of security comes within the SoP Act (which below I have separately concluded it does not), the first defendant's claimed entitlement to payment of security based on cl 5.6 and Schedule 1 of the Contracts (Schedule 1 'Date for final release and return of security') makes no provision for the time at or within which any claim based on an express or implied cl 5.6 entitlement is to be made. This contrasts with the Contracts' 'Timing of Payment Claims' stipulations in cl 36.1.*
> *172 For the above reasons, I reject the first defendant's assertion that cl 5.6 of the Contracts gives rise to a separate and distinct reference date in relation to a 'payment claim' under the Contracts for reduction, or release and return, of security under the Contracts. No provision of the Contracts expressly so provides, and in my view the first defendant has made out no persuasive case that such a reference date can be implied.*
> *173 The sole express provision in the Contracts in relation to claims for progress payment and the determination of reference dates for claims for progress payment for Work completed under the Contracts is to be found in cl 36. Clause 36 of the Contracts is concerned, as is the SoP Act, with payment claims for the value of work under the Subcontract performed by the subcontractor.[100] These express provisions of cl 36 of the Contracts in my view preclude the implication sought to be established by the first defendant because such an implication would be inconsistent with the scheme of the Contracts, and in particular cl 36; neither is it necessary or reasonable given the scheme and express terms of the Contracts.*
> *174 There is an unresolved issue between the parties as to when the Date of Substantial Completion was achieved under the Contracts. That dispute is submitted by the plaintiff to be immaterial because, even on the first defendant's case as to the correct date of Substantial Completion, there was no further Progressive Payment Claim Reference Date or Final Payment Reference Date which could have accrued, and on the first defendant's submissions these unresolved issues are immaterial as to whether or not the Payment Claims are valid, or timely, for the purposes of the SoP Act.[101]*
> *175 In my view the Dates of Substantial Completion of the Contracts is both relevant and, even accepting the first defendant's asserted dates, fatal to any*

progress payment claim in relation to a Progressive Payment Claim Reference Date, or Final Payment Reference Date because:

(a) the latest of the disputed dates for Practical Completion (on the first defendant's case) is 'middle January 2018' for the Bannockburn Contract;

(b) cl 1.1 of the Contracts includes in its definition of Progressive Payment Claim Reference Date a stipulation that date is as specified in Schedule 1 of the Contracts, 'up until to the Date of Substantial Completion';

(c) the 'Final Payment Reference Date' arises on the later of the events in (a), (b) and (c) of the cl 1.1 definition of that reference date, all of which events have occurred, or at least are not contested as having occurred, by about the end of January 2018;

(d) the first defendant's payment claims of 18 March 2019, were made over a year after the latest asserted Date of Substantial Completion in 'middle January 2018'.

176 This is because on either the first defendant's or the plaintiff's assertions as to the time of achievement of the Date of Substantial Completion under the Contracts, the first defendant's purported Payment Claims were issued in excess of one year after the Date of Substantial Completion which is stipulated as the end date for any progress payment claim under the Contracts, as provided in the definitions of Progressive Payment Claim Reference Date and Final Payment Claim Reference Date in the definitions of these dates in cl 1.1 of the Contract.

177 Further, the argument that the first defendant's claims for release and return of security can be supported by a reference date arising under s 9(2) of the SoP Act, is also met by the plaintiff's argument that such claims would, in any event be out of time pursuant to s 14(4) or s 14(5)(b) of the Act which requires such a payment claim to be made within three months of a relevant reference date.

178 In this matter and on the evidence as to the Dates of Substantial Completion outlined above, I also consider that the plaintiff has a real prospect of success in establishing that the first defendant's Payment Claims have been made well after three (3) months of the Dates of Substantial Completion[102] under both Contracts, and therefore are out of time. This is because the relevant Contract cl 1.1 Definitions referred to above limit the time for such claims, by reference to the Date of Substantial Completion in relation to either the Contract's Progressive Payment Claim Reference Date provision or Final Payment Reference Date.

179 Further, in my view the 18 March 2019 Payment Claims are not valid claims for progress payment under the SoP Act.

180 ***I consider that the first defendant's Payment Claims are claims which do not come within the scope of the SoP Act because the claims made by the first defendant in its 18 March 2019 Payment Claims are not claims in relation to construction work or related supply of goods and services undertaken under the Contracts, but rather are claims in each case for reduction of security pursuant to cl 5.6 of the Contracts.[103]***

181 Consequently I am satisfied that, for this further reason, that no reference date was available under the SoP Act to found the first defendant's Payment Claims as required by s 9 of the SoP Act.

(emphasis added)

6. In *Watpac Construction v CGM*, Digby J determined (consistent with Punton's Shoes) that the Payment Claims in that case did not come within the scope of the SoP Act because the claims were not claims in relation to construction work or related supply of goods and services undertaken under the relevant construction contracts , but rather were claims in each case for reduction of security pursuant to cl 5.6 of the those construction contracts.

29. *Hunters Green Retirement Living Pty Ltd v J.G. King Project Management Pty Ltd:*

30. In *Hunters Green Retirement Living Pty Ltd v J.G. King Project Management Pty Ltd* [2023] VSC 536 (8 September 2023), the Supreme Court of Victoria (Attiwill J) considered, among other things, claims for retention moneys under the Act. His Honour said:

82 I have concluded that the Payment Claims are claims for the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts.

83 Firstly, the Payment Claims claim the unpaid amounts for the construction work. This is set out in the schedule of the Payment Claims.[142] The Payment Claims are each stated to be a 'Final Payment Claim'. A final payment claim is a "final balancing of account between the contracting parties".[143] I also refer to the matters I set out earlier in this judgment concerning the process followed by the parties concerning payment for the construction work and the deduction of retention moneys.[144] Hunters Green did not pay JG King the full amount for the construction work. This is because amounts were deducted for retention moneys. As a result, I do not accept Hunters Green's submissions that:[145]

> *(a) the parties followed the process in clause 37.2 of the Contracts and that Hunters Green paid the full amount for the construction work as the retention moneys were set off against the amounts Hunters Green owed JG King for construction work; and*
>
> *(b) the Payment Claims are claims to "reverse that set-off" and not claims for the amounts unpaid for the construction work.*

84 For the same reasons, I do not accept Hunters Green's submissions that the Payment Claims "are made solely to recover retention moneys".[146] The reference in clause 5.4 of the Contracts to a party's obligation to 'release and return' the security is not inconsistent with the retention moneys being unpaid amounts for the construction work.[147] I do not accept Hunters Green's submission that JG King 'separately provided' the retention moneys to Hunters Green.[148]

85 I also refer to my conclusion and reasons later in this judgment that the Payment Claims are for 'construction work' for the purposes of the Act.[149]

86 Secondly, the Payment Claims also claim the amounts retained by Hunters Green as security in the form of retention moneys under the Contracts. There is a direct and obvious relationship between the unpaid amounts for the construction work and the amounts held by Hunters Green as security in the form of retention moneys under the Contracts. I refer to and repeat the matters I set out earlier in this judgment concerning the process followed by the parties concerning payment for the construction work and the deduction of retention moneys.[150] The retention moneys are amounts payable to JG King for construction work retained by Hunters Green as security in the form of retention moneys under the Contracts until:[151]

> *(a) Hunters Green has recourse to them pursuant to clause 5.2 of the Contracts;*
>
> *(b) the retention moneys are substituted by another form of security pursuant to clause 5.3 of the Contracts; or*
>
> *(c) the retention moneys are released and returned by Hunters Green to JG King pursuant to clause 5.4 of the Contracts.*

87 The Payment Claims are in the precise amounts of the retention moneys. As submitted by JG King:[152]

> *So the fact that the gap between what had been paid to date and what's now being claimed was an equivalent amount to the amount of retention that had been retained, I don't think that was lost on the parties.*

....

111 I have concluded that the Payment Claims are for 'construction work' for the purposes of the Act.

112 This is because, as I have already said, the Payment Claims are claims for the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts.[234]

113 Upon a proper construction of the Act, a payment claim under the Act for unpaid amounts for construction work retained by a respondent as security in the form of retention moneys under a contract, is a payment claim for 'construction work' for the purposes of the Act.

....

134 I refer earlier in this judgment to the separate and distinct nature of the retention moneys as security.[261] The Contracts make provision for the release and return of the final 50% of the retention moneys within 14 days of the issue of a final certificate

> *upon a final payment claim under clause 37.4 of the Contracts.[262] JG King had no contractual entitlement to the retention money as part of its entitlement to a final payment under clause 37.4 of the Contracts.[263] I do not accept, however, Hunters Green's submissions that, as a result of these matters, "... JG King's entitlement to receive the retention moneys cannot be conflated with its entitlement to receive payment for the construction work it performed."[264] Similarly, I do not accept Hunters Green's submission that JG King's entitlement to receive the retention moneys is not an entitlement under the Act to receive payment for the value of construction work.[265] This is because, as I have already said, there is a direct and obvious relationship between the unpaid amounts for the construction work and the amounts held by Hunters Green as security in the form of retention moneys under the Contracts. The absence of a contractual entitlement of JG King to make a claim for the retention money as part of its claim for a final payment under clause 37.4 of the Contracts does not mean that the Payment Claims are not for construction work. The absence of such a contractual entitlement does not alter the nature of the Payment Claims as claims for the unpaid amount for construction work retained by Hunters Green as security in the form of retention moneys under the Contracts. In Punton's Shoes and Watpac, Digby J expressed a contrary view.[266] For the reasons I have just given, I do not agree, with respect, with Digby J on this matter. The absence of such contractual entitlement is relevant, in the present case, to the calculation of the payment claim under the Act. I address that issue later in this judgment.[267]*
> *135 In conclusion, in my view, for the reasons I have just addressed in this judgment, the Payment Claims are for 'construction work' within the meaning of the Act.*
> *....*

31. I take *Hunter Green* to be authority for the proposition that a construction contractor may claim, under the Act, in respect of unpaid monies that represent construction work but for which payment has been retained pursuant to the construction contract. His Honour reasoned:
    1. The Payment Claims claim the unpaid amounts for the construction work. A final payment claim is a "final balancing of account between the contracting parties".
    2. The Payment Claims also claim the amounts retained by Hunters Green as security in the form of retention moneys under the Contracts. There is a direct and obvious relationship between the unpaid amounts for the construction work and the amounts held by Hunters Green as security in the form of retention moneys under the Contracts.

32. Hopefully, the Victorian parliament will soon clarify this.

9.2 Return of retention – pay when paid

1. Section 13 of the Act provides, so far as relevant, as follows:

> ***Effect of pay when paid provisions***
> *(1) A pay when paid provision of a construction contract has no effect in relation to any payment for—*
> *(a) construction work carried out or undertaken to be carried out under the contract; or*
> *(b) related goods and services supplied or undertaken to be supplied under the contract.*
> *(2) In this section—*
> ***money owing**, in relation to a construction contract, means money owing for—*
> *(a) construction work carried out under the contract; or*
> *(b) related goods and services supplied under the contract;*
> ***pay when paid provision** of a construction contract means a provision of the contract—*
> *(a) that makes the liability of one party (the **first party**) to pay money owing to another party (the **second party**) contingent on payment to the first party by a further party (the **third party**) of the whole or any part of that money; or*

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or
(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

(emphasis added)

2. In *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 (14 February 2018), the High Court (Keiffel CJ, Bell, Keane, Nettle and Gordon) said as follows:

16. As we have seen, s 12(2)(c) of the Security of Payment Act provides that a pay when paid provision of a construction contract is a provision that "makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract" (emphasis added).
17. Thus, the issue was and remains whether the retention provisions made the liability of Maxcon to pay money owing to Mr Vadasz, or the due date for payment of that money, contingent or dependent on the operation of another contract.
18. That issue first directs attention to the provisions of the subcontract. The terms of the relevant provisions have been set out above. In general terms, the subcontract permitted Maxcon to retain, by way of security, a retention sum corresponding to five per cent of the contract sum. As we have seen, cl 11(e) and Item 8 of Sched E to the subcontract further provided that 50 per cent of the retention sum was to be released "90 days after CFO [was] achieved", with the remaining 50 per cent to be released "365 days after date of CFO".
19. "CFO" was defined to mean "the certificate of occupancy and any other Approval(s) required under Building Legislation which [were] required to enable the Works lawfully to be used for their respective purposes in accordance with [Maxcon's] Project Requirements". "Project Requirements" was defined as the "design intent and intended application and use of the design and its equipment's [sic] and facilities".
20. There was no dispute that "the Works" in the definition of "CFO" referred to the entire project, being the apartment development as a whole, not merely the piling work to be performed by Mr Vadasz. There was also no dispute that the phrase "Building Legislation" in the definition of "CFO" included the Development Act 1993 (SA) and the Development Regulations 2008 (SA).
21. Section 67(1) of the Development Act relevantly provides that a person must not occupy a building on which building work is carried out unless an appropriate certificate of occupancy has been issued for the building. A certificate of occupancy is issued by a council[14] and, in general terms, the council must issue the certificate if it is satisfied that the relevant building is suitable for occupation and complies with requirements prescribed by the regulations[15].
22. Regulation 83(2)(a) of the Development Regulations provides that, to obtain a certificate of occupancy, a statement of compliance duly completed in accordance with the requirements of Sched 19A must be submitted. Those requirements include a statement by the owner that the documents issued for the purposes of the building work (referred to in these reasons as "the issued documents") are consistent with the relevant development approval as well as a statement by the builder that the building work has been performed in accordance with the issued documents. The issued documents include, among others, all contract documents.
23. Under the subcontract, the release of the retention sum was contingent or dependent on "CFO" being "achieved". The retention provisions expressly provided that the due dates for release of the retention sum were tied to the provision of a "certificate of occupancy and any other Approval(s) required under Building Legislation which [were] required to enable the Works lawfully to be used for their respective purposes in accordance with [Maxcon's] Project

Requirements". That is, before the due dates for the release of the retention sum could be calculated under the retention provisions, a certificate of occupancy had to be issued under s 67 of the Development Act.
24. The issue of that certificate of occupancy was dependent upon certification by the builder, Maxcon, that the building work had been performed in accordance with the issued documents, including the head contract between Maxcon and the owner of the land. It necessarily follows that the issue of the certificate depended on completion of the whole project in accordance with the provisions of the head contract. Until that certificate was issued on completion of the project, the retention sum was not to be released.
25. And that certificate had not been, and could not have been, issued on 25 February 2016 when Mr Vadasz served on Maxcon a payment claim pursuant to s 13 of the Security of Payment Act. The due dates for payment of the retention sum were dependent on something unrelated to Mr Vadasz's performance[16]. They were dependent on the operation of another contract – namely, the completion of the head contract, which in turn would have enabled a certificate of occupancy to be issued. Accordingly, the retention provisions were pay when paid provisions within the meaning of s 12(2)(c) of the Security of Payment Act and Maxcon was not entitled to deduct the retention sum from the progress payment.
26. The Full Court found that Maxcon's Project Requirements were to be ascertained from the head contract and that the head contract provided for Maxcon to construct a building in accordance with those requirements and to achieve practical completion, at which point a certificate of occupancy would be issued[17]. However, the Full Court concluded that cl 11(e) and Item 8 of Sched E to the subcontract did not make the due dates for payment of the retention sum "contingent or dependent on the operation" of the head contract; rather, the retention provisions made "payment of the retention sum contingent on an independent event which was exogenous to both the [subcontract] and the head contract"[18]. The Full Court reasoned that the issue of a certificate of occupancy was an "independent event" because it depended "not upon any contract that may have been entered into between owner and builder" but upon the completion of the building in accordance with the plans and specifications in the relevant development approval[19]. That conclusion should be rejected.
27. As the preceding analysis demonstrates, s 12(2)(c) focuses on a provision of a contract and asks whether, on its proper construction, the provision "makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract". Here, the retention provisions did just that: they made the due dates for payment contingent or dependent on "CFO". And for "CFO" to be achieved, there had to be issued a certificate of occupancy and "any other Approval(s) required under Building Legislation which [were] required to enable the Works lawfully to be used for their respective purposes in accordance with [Maxcon's] Project Requirements". Those Project Requirements were to be ascertained from the head contract. "CFO" required satisfactory completion of the head contract before the dates for the release of the retention sum could be calculated, let alone for the retention sum to be released. Accordingly, there was no error of law on the part of the adjudicator.
That analysis answers Maxcon's argument that, in circumstances where the head contract was not in evidence, there was no sufficient basis for a finding that the head contract contained an obligation to procure a certificate of occupancy. Such a finding was and remains unnecessary. The subcontract made release of the retention sum contingent on obtaining a certificate of occupancy, and obtaining that certificate depended on works being done in accordance with the issued documents, including the head contract. The conclusion that the due dates for payment of the retention sum were contingent or dependent on the operation of the head contract does not turn on whether the head contract itself contained an obligation to obtain a certificate of occupancy.

(emphasis added)

3. The legal authorities are to the effect that to the extent that a construction contract makes return of cash retention dependant upon the expiry of a provision of another contract (eg expiry of a Defects Liability Period under a head contract) that pre-condition will be invalid as a “pay when paid” clause within the meaning of Section 13.

SECTION 10
FAILURE TO COMPLY WITH CONTRACT REQUIREMENTS

1. The legal authorities suggest that an adjudicator is required to valuing the amount of the progress payment (if any) to be paid by first determining the work that was don**e.** The legal authorities suggest that (in the adjudicator's assessment of the amount payable) a contractor is not denied the right to make a claim merely because a condition precedent is not satisfied. The failure to comply with a pre-condition may, however, depending upon the particular circumstances, be such as to affect the valuation of the particular claim under the Act.

2. In *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor* [2008] NSWCA 279, NSW Court of Appeal (per Hodgson JA) at [53] – [54]:

> *53 I adhere to the view I expressed in Transgrid v Siemens Limited [2004] NSWCA 395, (2004) 61 NSWLR 521 at [35] and John Holland Pty Limited v Road and Traffic Authority of New South Wales [2007] NSWCA 19 at [38], to the effect that "calculated in accordance with the terms of the contract" in s 9(a) of the Building and Construction Industry Security of Payment Act 1999 (the Act) does not engage contract mechanisms determining what is due under the contract, independently of calculations referable to the work performed.*
> *54 This means that contractors are not deprived of entitlement to payment under the Act because a condition precedent, such as the obtaining of a superintendent's certificate, has not been satisfied; and it means equally that contractors are not ipso facto entitled to payment because of the operation of a deeming provision such as cl 37(2) of the contract in this case.*

3. In *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, at [52] and [53], the NSW Supreme Court (Nicholas J) accepted the reasoning of Macready AJ in *Beckhaus v Brewarrina*[4] and rejected submissions that no entitlement arose until a certificate was provided:

> *In Beckhaus v Brewarrina Council, Macready, AJ, considered a submission with reference to s 13(1) of the Act that unless a progress payment under a contract is due and payable in accordance with the terms of the contract there is no statutory entitlement under the Act. After detailing relevant provisions of the Act he expressed his conclusions as follows …. I respectfully agree with his Honour's analysis and conclusion. They are consistent with the opinion of Heydon JA in Fyntray Constructions Pty Ltd v Macind Drainage and Hydraulic Services Pty Ltd (2002) NSWCA 238 at para 51).*

4. In *Beckhaus v Brewarrina Council*, Macready AJ had reasoned:

> *60 The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss 3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s 12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words "person who is entitled to a progress payment under a construction contract" in s 13(1) refers to a contractual entitlement.*
> *61 The trigger that commences the process that leads to the statutory rights in s 15(2) is the service of the claim under s 13. That can only be done by a person*

[4] (2003) NSWCA 4

who "is entitled to a progress payment under a construction contract". The words "progress payment" are a defined term in the Act. It means a payment to which a person is entitled under s 8. That section fixes the time of the "entitlement" given by the section by reference to the contractual dates for making claims or, if there is no contractual provision, for making claims by reference to a four week period. Section 9 deals with the amount of such a statutory progress payment. Importantly, s 9 uses similar words to s 13 in that it refers to "a progress payment to which a person is entitled in respect of a construction contract" and then directs determination of that amount by reference to both contractual amounts or if no contractual amount on the basis of the value of the work done.
62 Section 11 then deals with the due date for payment in respect of "a progress payment under a construction contract". It does it also by reference to contractual due dates and if no such provision then by reference to a two-week period. One thus has a series of sections which create a statutory right to a progress payment by fixing entitlement, the date for making claims, amount of claims and due date for payment of claims. The statutory right to claim is for both situations, namely, where a contract provides for such claims and where it does not.
63 Thus s 13 merely continues on the statutory procedure and the opening words must be a reference to the statutory entitlement created in the previous sections not the contractual entitlement submitted by the defendant. If the defendant's submission were correct it would mean that in respect of contracts which do not provide for progress payments there is no ability to recover the statutory right to progress claims in Division 3. This consequence makes otiose the earlier provisions of the Act and defeats its express object which is to:-

> *"ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services."*

64 In my view the submissions of the defendant are simply not arguable.
65 As under 42.1 the plaintiff is entitled to progress payments there is no reason why he cannot make the statutory claim at the same time as his contractual claim. The statutory claim must comply with Section 13(2). On its face the document appears to do this and there was no submission to the contrary".

5. In *Age Old Builders Pty Ltd v John Arvanitis & George Arvantitis* [2006] VCC 1827, Judge Shelton (then the County Court Building Cases Judge) said:

17. I am of the view that there was no obligation upon the plaintiff to show compliance with the provisions of the Contract for making progress claims prior to making a Payment Claim. I have set out my reasons for so concluding in Blueview Constructions Pty Ltd (trading as WRS Constructions) v Vain Lodge Holdings Pty Ltd (2005) VCC 1325, a judgment delivered on 15 November 2005. In brief, section 4 defines "progress payment" as a "payment to which a person is entitled under section 9". Section 9 then provides that:

> *"(1) On and from each reference date under a construction contract, a person -*
> *(a) who has undertaken to carry out construction work under the contract . . .*
> *. . . is entitled to a progress payment under this Act, calculated by reference to that date."*

18 It will be noted that the wording "entitled to a progress payment" is then picked up in section 14(1).

19 Section 9(2)(a)(1) defines "reference date" for the purposes of sub-section (1) as "a date on which a claim for a progress payment may be made". Under the terms of the Contract this is the 15th day of each month. In coming to the

> *conclusion in Blueview Constructions that there was no obligation upon the plaintiff to show compliance with the terms of the Contract in relation to the making of a progress claim, I relied upon comments made in Beckhaus Civil Pty Ltd v Council of the Shire of Brewarrina (2002) NSWSC 960 at paragraphs 52 and 60 – 64 per Macready A.J., which were followed in Walter Construction Group Ltd v CPL (Surry Hills Pty Ltd) (2003) NSWSC 266, particularly at paragraphs 52 and 53 per Nicholas J., and Okaroo Pty Ltd v Vos Construction & Joinery Pty Ltd (2005) NSWSC 45 at paragraph 46, again per Nicholas J.*

6. In *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd* [2012] VSC 235 (Vickery J), His Honour said:

> *45 In Metacorp the Court was called upon to consider the validity of a payment claim that had been served prematurely, that is before the appointed "reference date" as defined in s 9(2) of the Act. In the course of considering the issue I observed:*
>
> > *... under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons "who claim to be entitled" to a progress payment, in addition to those who may actually be so entitled. The legal authorities suggest that provided that a person makes a claim to be entitled to a progress payment, and that claim is made bona fide, the claimant is permitted to serve its payment claim pursuant to s 14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served.*
>
> *46 In the light of the authorities I have cited in these reasons, which were not referred to the Court in Metacorp, on reflection and with the benefit of full argument on the matter, I am persuaded that I was wrong insofar as it is said in that case that a payment claim, whether served prematurely before the due reference date or served on and from each reference date, must be made bona fide in order to be valid, and I decline to follow myself.*
>
> *47 There is no implied precondition to the making of a valid payment claim under s 14 of the Act that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed or that otherwise the claim is made in good faith.*

7. The position is (at the moment) that, in valuing the work the subject of the progress claim under the Act, the failure to comply with certain provisions of a construction contract is a matter that an adjudicator is to take into account. The adjudicator is also to take into account the provisions of the Act. The legal authorities are to the effect an adjudicator is not, in determining the amount of the progress payment (if any) to be paid by the respondent to the claimant, to deprive the claimant of its entitlement to payment under the Act, solely because a condition precedent, such as compliance with notice provisions in the construction contract, or provision of a statutory declaration as a precondition to payment, has not been satisfied. Having taken all of those matters into account, the adjudicator is then required, pursuant to Section 23(1)(a) of the Act, to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount).

SECTION 11
ENFORCEMENT

1. The provisions for enforcement of an adjudicated amount are set out in Division 2B of the Act.

2. The obligation on the respondent to pay the Adjudicated Amount is set out in Section 28M(1):

> *Subject to sections 28B and 28N, if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.*

(The relevant date is, unless the adjudicator determines differently, the date that is 5 business days after the date on which a copy of the adjudication determination is given to the respondent.)

3. The consequences of failing to pay the Adjudicated Amount is that the claimant may:
   (a) request an Adjudication Certificate; and/or
   (b) serve notice that the claimant intends to suspend work under the contract.

4. Under Section 28R, where the claimant has received an Adjudication Certificate from the Authorised Nominating Authority, the claimant may recover the amount in the certificate, in court, as a debt due. Section 28R(1) provides, so far as relevant, as follows:

> *(1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.*

5. Section 28R(5) limits the defences that may be raised by the respondent where the claimant has commenced such proceedings, as follows:

> *(5) If a person commences proceedings to have the judgment set aside, that person—*
> *(a) subject to subsection (6), is not, in those proceedings, entitled—*
> *(i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or*
> *(ii) to raise any defence in relation to matters arising under the construction contract; or*
> *(iii) to challenge an adjudication determination or a review determination; and*
> *(b) is required to pay into the court as security the unpaid portion of the amount payable*

6. The Adjudication Certificate enable the claimant to obtain an Order for the amount in the Certificate by simple lodging with an affidavit in support.

7. For smaller amounts, the Magistrates Court of Victoria Practice Direction No 9/2008 sets out the process to obtain judgment. In brief, the process is as follows:
   1. The party seeking judgment lodge with the registrar, the adjudication certificate and affidavit in support.

2. The registrar may make an order when satisfied by affidavit that the adjudication certificate produced by the party was issued by an authorised nominating authority and that the amount or part of the amount payable under sections 28M or 28N of the Act remains unpaid.
3. In determining the amount of the order, the registrar is to add all amounts set out in the certificate as a total sum and make the order for that sum less any amount that has been paid.
4. An order made under the Act is enforceable in the same way as any other order of the Court and interest accrues on the amount of the order under the provisions of the *Magistrates' Court Act 1989 (Vic)*.

SECTION 12
DOCUMENTATION: ESTABLISHMENT OF CONSTRUCTION WORK/VARIATIONS

12.1 Material that might be included in Payment Claims/Payment Schedules/Application for Adjudication/Adjudication Response

1. If there is ultimately a dispute between the claimant and the respondent, both parties will ultimately wish that they had included all relevant and/or helpful material in the payment claim and/or payment schedule.

2. In Victoria, Section 21(2B) permits a respondent to include new material in an Adjudication Response that was not previously included in a Payment Schedule. (In fact, the better course is for the claimant to include all relevant material in each payment claim, and the respondent to include all relevant material in each payment schedule.)

3. The key principles identified in *SSC Plenty Road* to be followed by an adjudicator in assessing a payment claim under the Act:
    1. the adjudicator is to determine and apply what the adjudicator considers to be the true construction of the Act in the light of the current case law;
    2. the adjudicator is to determine and apply what the adjudicator considers to be the true construction of the construction contract;
    3. the adjudicator is to determine whether the construction work the subject of the claim has been performed;
    4. the adjudicator is to determine the value of the work performed;
    5. If a construction contract contains a binding schedule of rates, the adjudicator is to have regard to the schedule in assessing value, and to state in the adjudication determination whether and how the schedule of rates was applied in the assessment of value, or why the schedule of rates was not applied;
    6. the adjudicator is to make the critical findings on the whole of the evidence presented at the adjudication;
    7. the adjudicator is to make the critical findings by fairly assessing and weighing the whole of the evidence drawing any necessary inferences from the evidence (or absence of controverting evidence), arriving at a rational conclusion founded upon the evidence;
    8. the adjudicator is not called upon to act as an expert;
    9. the adjudicator is not entitled to impose an onus on either party to establish a sufficient basis for payment or a sufficient basis for withholding payment;
    10. the adjudicator is to include in an adjudication determination both the reasons for the determination and the basis upon which any amount or date has been decided, and in providing these reasons the adjudicator must summarise the central reasons for the making of the critical findings in the adjudication determination with as much completeness as the time permitted under the Act will allow.

4. In assessing claims for Variations, an adjudicator should make findings in relation to:
    1. a determination as to whether the construction work the subject of the claim has been performed;
    2. the value of the work performed;
    3. absent any express provision in the construction contract providing a mechanism for an adjudicator to undertake the assessment of value, the valuation assessment is to be undertaken in accordance with Section 11(1)(b) (for work) having regard to the matters set out in those sub-sections, namely:
        a. the contract price for the work or the goods and services;
        b. any other rates set out in the contract;
        c. if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and
        d. if the work or goods are defective, the estimated cost of rectifying the defect.

5. The claimant and the respondent will, each, separately, hope to persuade the adjudicator that:

1. the completeness of construction work (usually by reference to a detailed spreadsheet, breaking down the total construction work by trade, total value, and % complete)
2. whether variation work was requested by the respondent;
3. the completion of that variation work
4. the value of that variation work
5. whether there is defective work
6. the estimated cost of rectifying any such defective work

12.2 Systems for recording/establishing construction work, variations , defects, estimated cost of rectification, ….

The material to establish the above might include any or all of the following types of relevant documents in support of the payment claim (and, potentially, in support an Application for Adjudication if there is a dispute as to the payment claim):

- emails, letters, re work contained in the payment claim
- Inspection records
- invoices from suppliers
- measurements
- test results
- quality assurance certificates
- meeting minutes
- site diaries
- photographs
- …….

The material might be presented in any or all of the following methods:

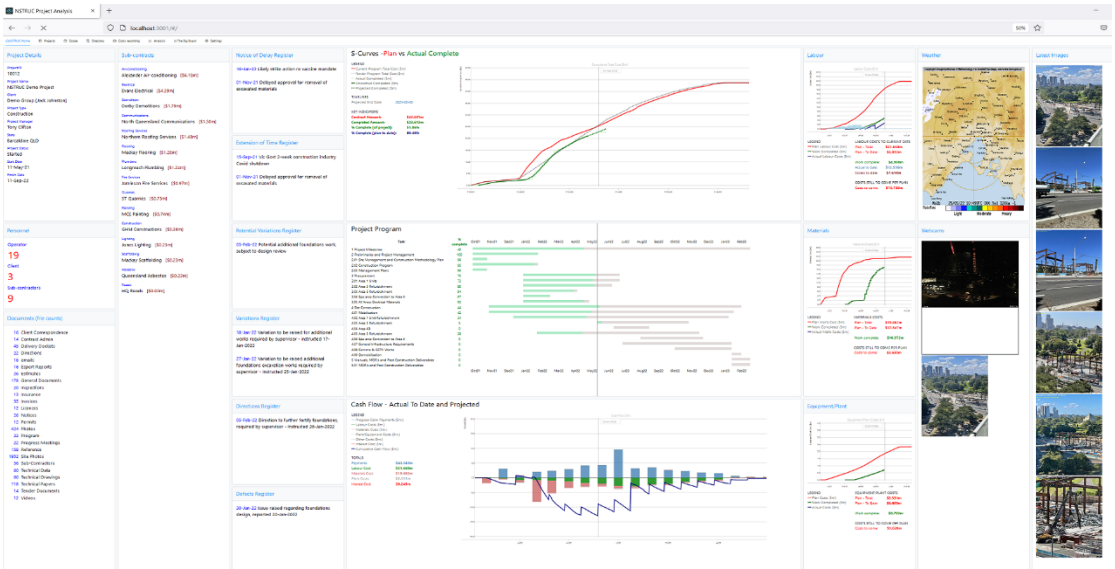

Figure 1 – Sample Project Management Information System [‘PMIS’] Dashboard

212					117,295.12	
Materials					34,604.60	
Equipment					3,516.37	
Labor					79,114.15	
		Units	EOM	Rate	Cost	
Materials	RFGVENTT	9.00	GL	17.250	155.25	RFGVENTT Roof vent - turtle type - metal 9.00 EA @ 15.000 135.00
Materials	SCREW#10/2	0.42	GL	9.280	3.90	SCREW#10/2 Wood screw - #10 x 2", 1 lb box 0.42 BX @ 8.070 3.40*
Materials	SCREW#10/3	0.11	GL	13.170	1.45	SCREW#10/3 Wood screw - zinc plated - #10 x 3", 100 count box 0.11 BX @ 13.448 1.20*
Materials	SDG13FBFC	53.55	GL	1.380	73.90	SDG13FBFC Fiber cement trim board - 1" x 4" 53.55 LF @ 1.396 64.05
Materials	SDGFCLAP<	152.17	GL	1.040	158.26	SDGFCLAP< Fiber cement lap siding - 8.25" wide - primed 152.17 LF @ 0.900 136.95
Materials	SDGFLI	2.94	GL	0.580	1.71	SDGFLI Siding - joint flashing 2.94 EA @ 0.500 1.48*
Materials	SFGFACWB	413.68	GL	1.550	638.10	SFGFACWB Fascia - wood, 1" x 6" 413.68 LF @ 1.350 555.77
Materials	SFGSFTFC	1.160	GL	24.150	38.64	SFGSFTFC Vented soffit - fiber cement panel - 16" x 12' 1.60 EA @ 21.000 33.65*
Materials	SFGSVENT	61.45	GL	2.210	135.80	SFGSVENT Soffit vent - 4"x12" screened metal 61.45 EA @ 1.920 117.99*
Materials	SFGVENTL	25.56	GL	4.030	103.01	SFGVENTL Soffit vent - linear 25.56 LF @ 3.580 89.47*
Materials	STLL3.5	22.59	GL	7.290	164.68	STLL3.5 Steel angle - L 3 1/2"x 3 1/2"x 1/4" 22.59 LF @ 6.337 143.12*
Materials	STRDIS	1.00	GL	182.850	182.85	STRDIS Stairway - disappearing (folding) 1.00 EA @ 159.000 159.00
Materials	WDVP1++	1.00	GL	149.880	149.88	WDVP1++ Vinyl window - picture, 3-11 sf - High grade 1.00 EA @ 130.330 130.33
Materials	WDVR36	1.00	GL	337.340	337.34	WDVR36 Vinyl window - Round/Octagon, 36" 1.00 EA @ 293.340 293.34
EQUIPMENT/PLANT						
Equipment	CLNOZ	2.36	GL	138.000	298.08	CLNOZ Ozone machine 2.16 OA @ 120.000 259.68*
Equipment	CLNPW	2.21	GL	89.040	196.78	CLNPW Pressure washing machine - variable pressure 2.21 OA @ 77.430 170.76*
Equipment	DMODUMP	1.00	GL	576.150	576.15	DMODUMP Dumpster - Approx. 20 yds, 4 ton of debris 1.00 LO @ 501.000 501.00
Equipment	DMODUMP>	2.00	GL	660.670	1,320.94	DMODUMP> Dumpster - Approx. 30 yds, 5-7 ton of debris 2.00 LO @ 574.323 1,148.68*
Equipment	DMOFEE	1.38	GL	64.400	75.99	DMOFEE Landfill charge - per ton 1.18 TN @ 56.000 65.94*
Equipment	DRYSPRAY	1.43	GL	59.800	85.51	DRYSPRAY Drywall texture spray machine 1.43 DA @ 52.000 74.36
Equipment	FCCP1	1.58	GL	33.350	52.69	FCCP1 Carpet power stretcher 1.58 DA @ 29.000 45.75*
Equipment	FCCSEAMER	1.58	GL	15.380	24.30	FCCSEAMER Carpet seaming iron 1.58 DA @ 13.374 21.09*
Equipment	FCWEDGE	0.28	GL	21.570	6.04	FCWEDGE Hardwood flooring edge sander 0.28 DA @ 27.450 7.70*
Equipment	FCWNAILER	0.32	GL	41.750	13.36	FCWNAILER Hardwood flooring nailing tool 0.32 DA @ 36.300 11.59*
Equipment	FCWSAND	0.28	GL	63.630	17.81	FCWSAND Hardwood flooring drum sander 0.28 DA @ 55.317 15.51*
Equipment	FCWSCREEN	0.28	GL	44.140	12.36	FCWSCREEN Hardwood floor sander - screen 0.28 DA @ 38.380 10.75
Equipment	INSBLOWER	4.73	GL	82.800	391.64	INSBLOWER Insulation blower 4.73 DA @ 72.000 340.28*
Equipment	SCFGRPW	32.00	GL	1.730	55.36	SCFGRPW Scaffold guardrail post rental - per week 32.00 WK @ 1.500 48.00
Equipment	SCFGRW	32.00	GL	0.580	18.56	SCFGRW Scaffold guardrail rental, per rail - per week 32.00 WK @ 0.500 16.00
Equipment	SCFRNTLW	8.00	GL	46.000	368.00	SCFRNTLW Scaffold - section per week (2 ends/2 x-braces/2 catwalks 8.00 WK @ 40.000 320.01
LABOR						
Labor	CARP-FNC	24.99	GL	60.790	1,519.14	CARP-FNC Carpenter - Finish, Trim/Cabinet 24.99 HR @ 52.86 1,320.96*
Labor	CARP-FRM	179.04	GL	68.590	12,280.35	CARP-FRM Carpenter - General Framer 179.04 HR @ 59.64 10,678.21*
Labor	CARP-MECH	2.36	GL	52.060	122.86	CARP-MECH Carpenter - Mechanic 2.36 HR @ 45.27 106.75*
Labor	CLN	223.72	GL	31.180	6,975.59	CLN Cleaning Technician 223.72 HR @ 27.31 6,085.06*
Labor	CLN	1.65	GL	31.650	52.22	CLN Cleaning Technician 1.65 HR @ 27.52 45.56*
Labor	CLN-F	6.26	GL	43.160	270.18	CLN-F Floor Cleaning Technician 6.26 HR @ 37.53 235.31*
Labor	DMO	122.70	GL	35.880	4,402.48	DMO Demolition Laborer 122.70 HR @ 31.20 3,828.38*
Labor	DRY	94.94	GL	74.740	7,095.82	DRY Drywall Installer/Finisher 94.94 HR @ 64.99 6,169.96*
Labor	ELE	29.23	GL	97.770	2,857.82	ELE Electrician 29.23 HR @ 85.02 2,484.93*
Labor	FEN	3.38	GL	47.660	150.56	FEN Fencing Installer 3.38 HR @ 41.44 131.76*
Labor	FLR	35.49	GL	47.550	736.55	FLR Flooring Installer 15.49 HR @ 41.35 640.35*
Labor	FLR-W	6.96	GL	70.350	489.64	FLR-W Wood Flooring Installer 6.96 HR @ 61.17 425.74
Labor	HDW	32.93	GL	46.430	600.34	HDW Hardware Installer 12.93 HR @ 40.37 521.88*
Labor	HVC	2.42	GL	101.170	244.83	HVC Heating / A.C. Mechanic 2.42 HR @ 87.97 212.71*
Labor	HVC	51.60	GL	103.180	5,220.89	HVC Heating / A.C. Mechanic 51.60 HR @ 87.98 4,539.54*
Labor	INS	60.49	GL	53.940	3,262.83	INS Insulation Installer 60.49 HR @ 46.90 2,837.21*
Labor	LBR	7.07	GL	29.840	210.97	LBR General Laborer 7.07 HR @ 25.95 183.37*
Labor	MAS	19.11	GL	44.910	858.23	MAS Mason Brick/Stone 19.11 HR @ 39.05 746.28*
Labor	OHD	5.28	GL	72.550	383.06	OHD Overhead Door Installer 5.28 HR @ 63.09 333.41*
Labor	PLM	15.52	GL	105.800	1,642.02	PLM Plumber 15.52 HR @ 92.00 1,428.01*

Figure 2 – Detailed Estimating of Costs

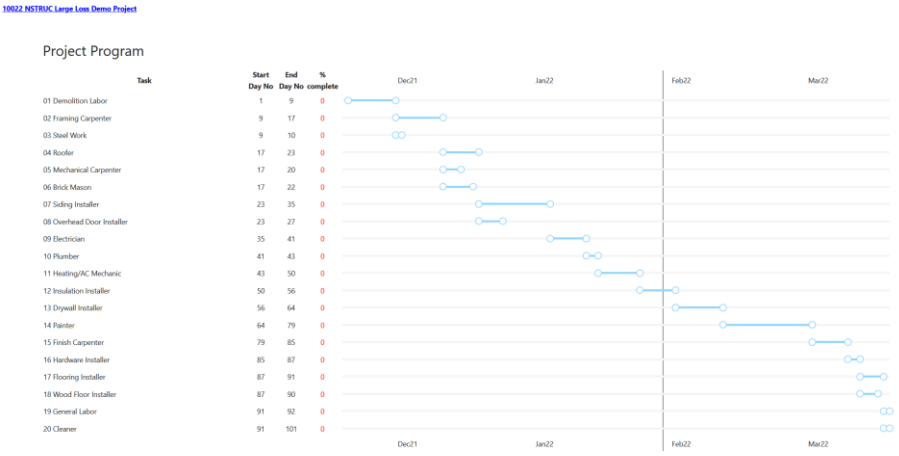

Figure 3 – Editable Programme for High-Level Depiction of Delays and Variations

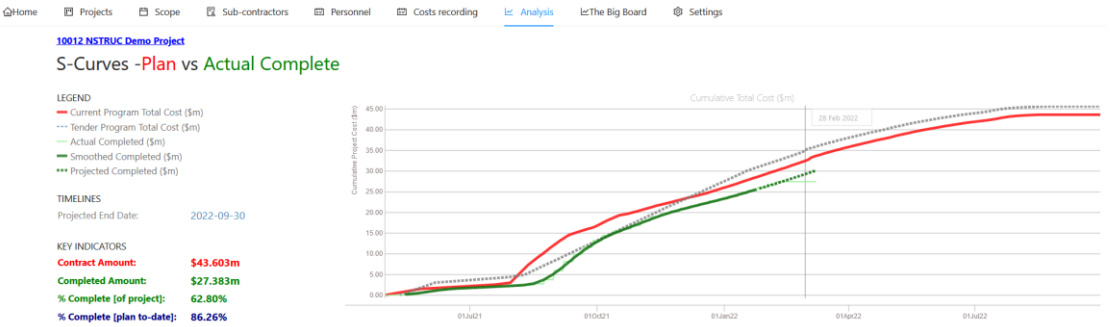

Figure 4 – S-Curve Representation of Programme: Plan vs Percentages Completed

Figure 5 – Labour Costs: Planned Costs vs Completed Work vs Actual Costs

Figure 6 – Cash Flow: Actual to Date and Projected

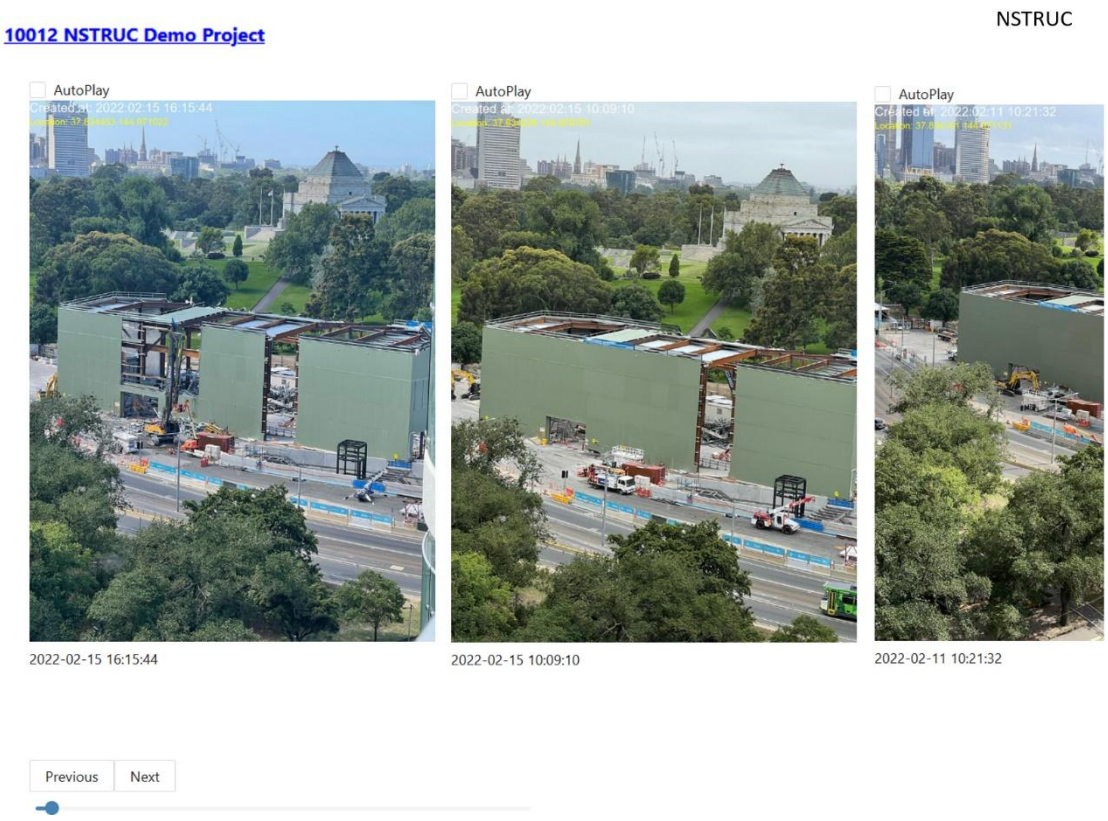

Figure 7 – Sample Imagery – Timestamped webcam images

Figure 8 – Sample Imagery – Car Dashboard Camera and Drone Footage

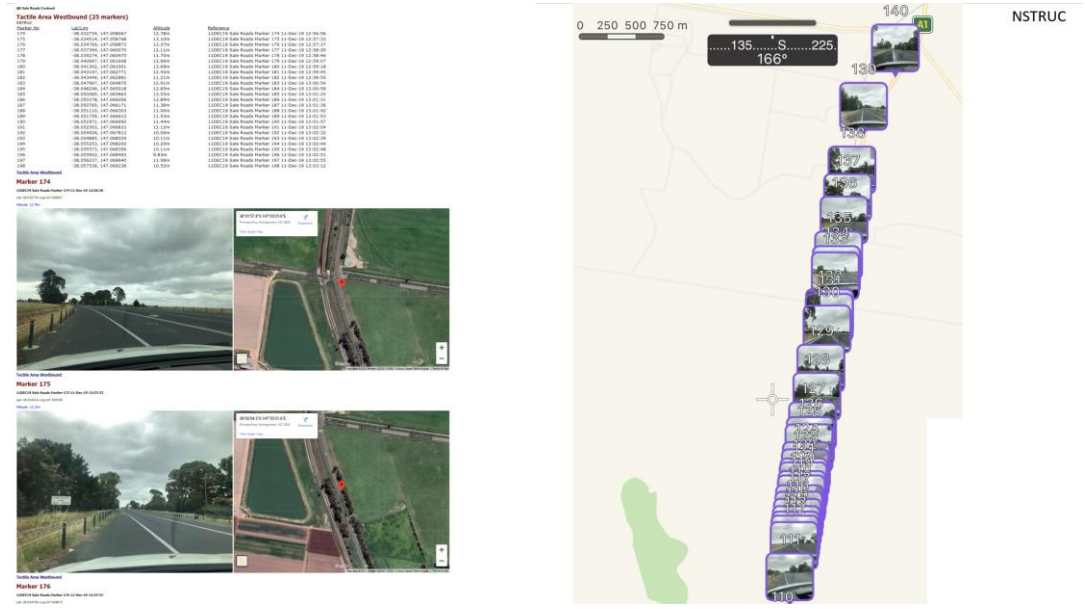

Figure 9 – Sample Imagery – Car Dashboard Camera and Geo-Tagged Presentation

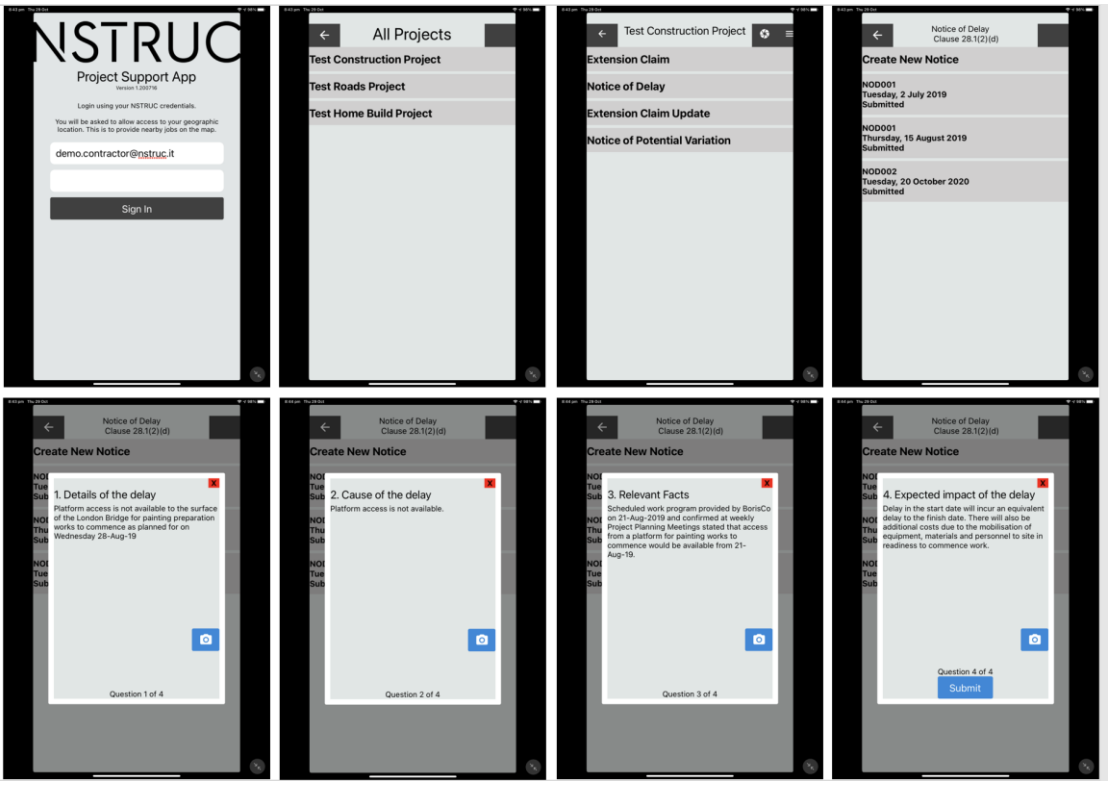

Figure 10 – Capturing Contract Notices using an Onsite App

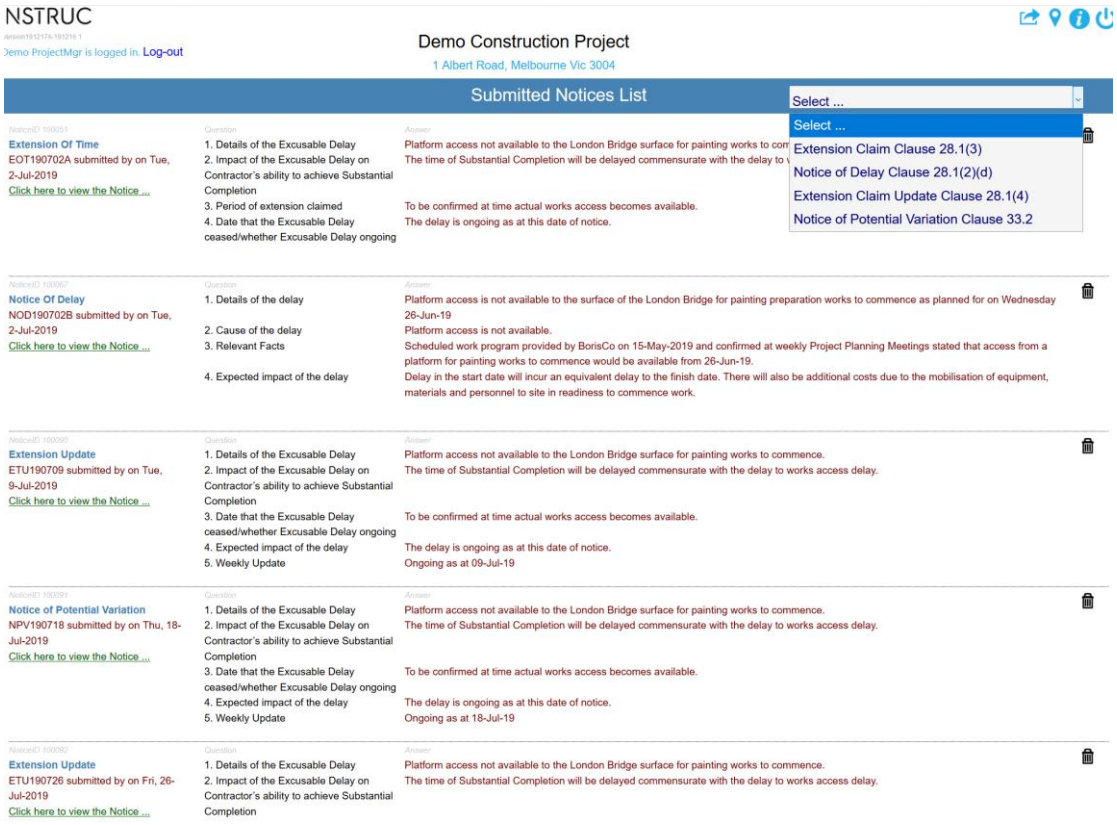

Figure 11 – Sample Register of Notices

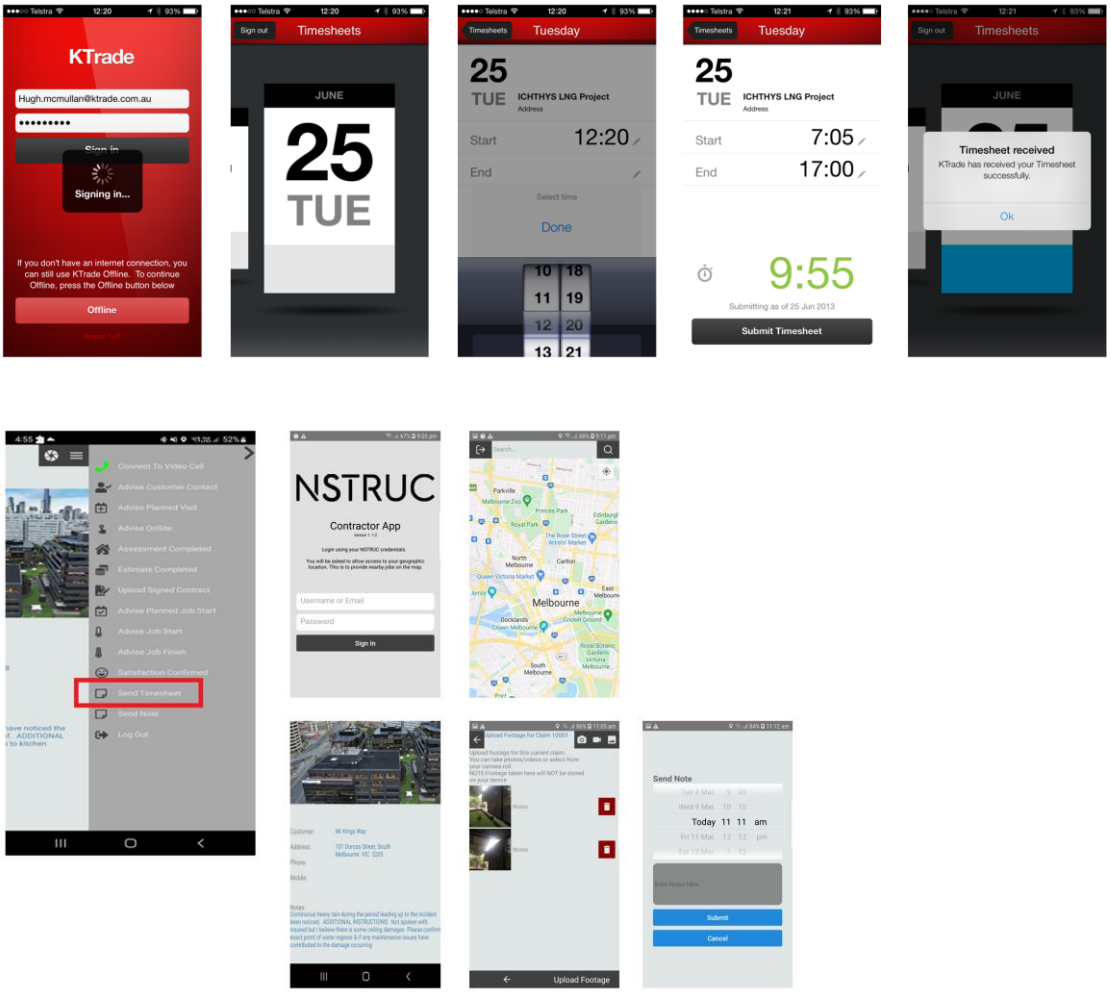

Figure 12 – Capturing Timesheets using Onsite Apps

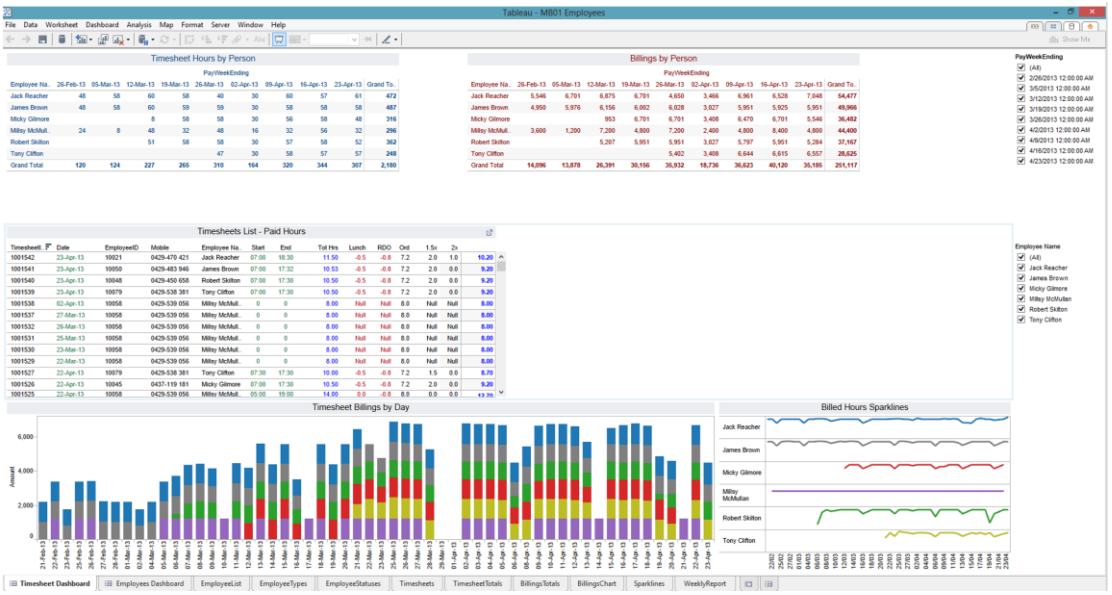

Figure 13 – Monitoring Timesheet Hours using *Tableau* Online Reporting System

SECTION 13
2025 BILL RE PROPOSED MAJOR CHANGES TO THE ACT

The Bill containing the proposed Tranche 1 reforms to the Security of Payment Act passed the Legislative Assembly, and had its Second Reading in the Legislative Council, on 16 October 2025. The Bill is to be debated in the upper house during the 28-30 October 2025 sitting.

The highlights of changes included in the Bill as at 16 October 2025:

1. **The Bill will remove provisions establishing 'reference dates' for the purposes of calculating when a payment claim must be made. A simplified process for determining when payment claims may be made is to replace the current complex and confusing formulae for determining 'reference dates' are replaced with a new, simplified process for determining when payment claims may be made, which will effectively be the last day of each named month in which the work was carried out or the related goods or services were supplied.**

2. **The Bill repeals the 'excluded amounts' and 'claimable variations' regime.**

3. **The Bill will make it clear that parties to construction contracts have a right to claim progress payments including milestone payments, no less frequently than monthly and makes invalid any contractual provision to the contrary.**

4. **The Bill provides for maximum payment terms, capping contractual periods of time for payment at 20 business days and establishing a default 10-business day term for progress payments where a construction contract is silent on this point.**

5. **The Bill provides that termination of a contract does not affect the entitlement of a person to submit a final payment claim. It expands the current Security of Payment Act's absolute limit in which a payment claim can be served from three to six months, to align Victoria's legislation with the legislation of several other jurisdictions.**

6. **The Bill provides that no more than one progress payment claim may be submitted for each month, with certain exceptions.**

7. **The Bill simplifies and expedites the process for enforcing unpaid adjudication determinations in court as a judgement debt.**

8. **The Bill makes several miscellaneous amendments to the Security of Payment Act, including to exclude from the definition of 'business day' the period from 22 December to 10 January during which the construction and building industry typically closes for business.**

9. **The Bill widens the power of the Minister to make guidelines relating to the authorisation of authorised nominating authorities, which are the businesses that recruit and provide the adjudicators, including requiring fee sharing arrangements between an authorised nominating authority and its adjudicators to be made publicly available.**

10. **The Bill expressly requires the Commission to take on a greater educational role by providing information and other materials related to the Security of Payment Act to builders and other building practitioners, authorised nominating authorities and adjudicators and to promote the security of payment laws to the construction and building industry generally.**

THE SECOND READING SPEECH 11 SEPTEMBER 2025

The text of the Second Reading Speech of the current Bill before the Victorian Lower House is set out below:

Second Reading Speech
Thursday 11 September 2025 Legislative Assembly

Danny PEARSON (Essendon – Minister for Economic Growth and Jobs, Minister for Finance) (11:09): I move:

That this bill be now read a second time.

I ask that my second-reading speech, except for the section 85 statement, be incorporated into Hansard.

Incorporated speech as follows, except for statement under section 85(5) of the Constitution Act 1975:

The Bill amends the Building Act 1993 (Building Act), the Building and Construction Industry Security of Payment Act 2002 (Security of Payment Act), the Planning and Environment Act 1987 (Planning and Environment Act), the Heritage Act 2017 (Heritage Act) and the Environment Effects Act 1978 (Environment Effects Act).

The main purpose of the Bill is to deliver a series of important construction, building and housing-related amendments including:

• Amendments to the Security of Payment Act as part of the Government's response to the Parliamentary Inquiry into employers and contractors who refuse to pay their subcontractors for completed works.

• Amendments to the Building Act to improve the effectiveness of the Victorian Building Authority as a regulator. Since 1 October 2025, the Victorian Building Authority has been trading as the Building and Plumbing Commission so for convenience this speech refers to the regulator as the Building and Plumbing Commission (the Commission). The Bill improves the regulator's effectiveness by delivering building surveyor and building inspector registration reforms, by enabling the Commission to create a code of conduct for licensed and registered plumbers, and by making minor changes to the information statement requirements for building surveyors.

The Bill will also deliver a series of planning-related amendments to:

• The Planning and to widen the scope of enforcement orders issued by VCAT to require native vegetation offsets amongst other remedies;

• The Environment Effects Act to enable cost recovery fees to be charged; and

• The Heritage Act to clarify the types of decisions that need not have regard to climate change impacts.

These reforms will improve outcomes for all participants in the building industry, including practitioners, consumers, industry associations and subcontractors. This Bill is part of a broader package of the Allan Victorian Government's reforms to Victoria's regulatory framework for housing, building and construction matters.

BILLS

42 Legislative Assembly – PROOF Thursday 11 September 2025

Amendments to the Security of Payment Act in response to the Parliamentary Inquiry into employers and contractors who refuse to pay their subcontractors for completed works

Security of payment problems in the building and construction industry have been repeatedly acknowledged by Australian governments over the last 100 years. Recent government-initiated reviews have examined systemic poor payment and abusive contracting practices in the building and construction industry. Such practices take advantage of the highly fractured nature of an industry where subcontractors complete over 80 per cent of construction work – reportedly the highest proportion in the world – to pass financial risk down the construction contracting chain. Such practices contribute to high levels of financial insecurity for subcontractors and other participants in the building industry, which are reflected in historically high, insolvency rates in the industry.

Victoria's Security of Payment Act, like its counterparts in other jurisdictions, has two main objectives:

• First, to ensure that the vast majority of persons who carry out construction work or supply related goods and services under a construction contract are entitled to receive, and can recover, progress payments for carrying out that work and for supplying of those goods and services; and

• Second, to provide such persons with access to a quick, inexpensive process for resolving payment disputes that arise without the need for expensive litigation in courts.

An effective security of payment framework is particularly important for the building and construction industry due to unique structural vulnerabilities that characterise it, such as the hierarchical contracting structure for most construction projects.

Although the Security of Payment Act was enacted in 2002 and amended in 2006, it was not reviewed again until 2023. John Murray AM's December 2017 report to the Federal Government noted the need for greater harmonisation of security of payment legislation across Australia.

In November 2022, the Andrews Labor Government committed to launch an inquiry to 'crack down on bosses and contractors who refuse to pay their subcontractors for completed work'. Following through on this commitment, an inquiry was referred to the Legislative Assembly's Environment and Planning Committee (Committee), which examined the Security of Payment Act's effectiveness and its consistency with other jurisdictions' legislation, resulting in a comprehensive report tabled in November 2023.

The Committee's 216-page report included nine factual findings and confirmed the same chronic and persistent problems with larger firms' contracting and payment practices observed in other Australian jurisdictions since 2002. Based on those findings, the Committee provided 28 recommendations for reform, which the Government supported in its October 2024 response. The Government supported in full 16 of the Committee's recommendations for targeted reforms to the Security of Payment Act. These reforms are generally referred to as 'Tranche 1 reforms' and are the subject of the amendments contained in this Bill.

Twelve other Committee recommendations were supported either in principle or in part because they warrant additional consideration or stakeholder consultation. These 'Tranche 2 reforms' which are not contained with this current Bill will seek to further improve conditions in Victoria's construction and building industry and are the subject of ongoing stakeholder consultation.

Making claims for progress payments

To implement the Committee's recommendations 3 and 7, the Bill makes numerous changes to the Act's procedures for claiming progress payments and claiming the release of performance securities. The Bill will remove provisions establishing 'reference dates' for the purposes of calculating when a payment claim must be made. The current Security of Payment Act's complex and confusing formulae for determining 'reference dates' are replaced with a new, simplified process for determining when payment claims may be made, which will effectively be the last day of each named month in which the work was carried out or the related goods or services were supplied. The Bill also repeals the 'excluded amounts' and 'claimable variations' regime to implement recommendations 2 and 19 of the Committee's report.

The Bill will also make it clear that parties to construction contracts have a right to claim progress payments – including milestone payments – no less frequently than monthly and makes invalid any contractual provision to the contrary. The Bill provides for maximum payment terms, capping contractual periods of time for payment at 20 business days and establishing a default 10-business day term for progress payments where a construction contract is silent on this point. This amendment implements recommendation 8 of the Committee's report.

The Bill provides that termination of a contract does not affect the entitlement of a person to submit a final payment claim. It expands the current Security of Payment Act's absolute limit in which a payment claim can be served from three to six months, to align Victoria's legislation with the legislation of several other jurisdictions. The Bill provides that no more than one progress payment claim may be submitted for each month, with certain exceptions.

Creating a clear right to claim release of a performance security

Significantly, the Bill will make it clear that the release of a performance security, such as retention money or a bond or guarantee, provided by contractors' and subcontractors' to ensure the satisfactory completion of their contractual obligations, is a proper subject for claims under the Security of Payment Act and that these claims may also be adjudicated under the Act. This will implement recommendation 9 of the Committee's report.

The Bill sets out the procedures and processes for serving and responding to claims for the release of performance securities given under a construction contract. The Bill also recognises the entitlement of a party holding the benefit of a performance security to have recourse to it. However, the party may do so only after giving at least five business days' notice of the party's intent to exercise that right, which allows the party who provided the security to forestall that action, such as through negotiation or by going to court.

Adjudication of disputed claims and enforcing adjudication determinations

The Bill also improves many of the Security of Payment Act's provisions relating to the process and procedure for adjudicating disputed claims for progress payments and for the release of performance securities.

Significantly, the Bill implements recommendations 15 and 16 of the Committee's Report by repealing or amending provisions in the Act that have allowed respondents to insert new reasons for non-payment of a claim that were not previously identified by the respondent in a payment schedule. This amendment makes it clear that respondents will be given two opportunities to explain, in a payment schedule or in a performance security schedule, the reasons why they are not wholly accepting what is being claimed by a subcontractor. Any reasons not included in a schedule will not be permitted to be raised by a respondent or considered by an adjudicator during an adjudication process. The Bill also gives adjudicators more time to determine adjudicated disputes and gives the parties the chance to give an adequate extension of time for a determination to be made, to facilitate better-reasoned determinations and avoid disputes from 'timing out' if an adjudication is not resolved quickly enough. This amendment implements the Committee's recommendation 17.

Another key amendment is that the Bill will enable adjudicators and other persons presiding over a proceeding to declare that a notice-based time bar provision in a construction contract, after taking into account various matters set out in the Bill, is unfair if compliance with the provision is not reasonably possible or would be unreasonably onerous. The effect of such a declaration is to make the provision of no effect for the purposes of that adjudication or proceeding. The Bill also inserts a power to prescribe in regulations that a type or a class of provision in a construction contract is of no legal effect, which may be in certain prescribed circumstances and may be subject to prescribed exceptions. These amendments will implement the Committee's recommendations 5 and 6.

Finally, the Bill implements the Committee's recommendation 26 to simplify and expedite the process for enforcing unpaid adjudication determinations in court as a judgement debt.

Other amendments

The Bill makes also several miscellaneous amendments to the Security of Payment Act. It will exclude from the definition of 'business day' the period from 22 December to 10 January during which the construction and building industry typically closes for business. This will implement recommendation 4 of the Committee's report. The Bill widens the power of the Minister to make guidelines relating to the authorisation of authorised nominating authorities, which are the businesses that recruit and provide the adjudicators. This will include requiring fee sharing arrangements between an authorised nominating authority and its adjudicators to be made publicly available, as requested in the Committee's recommendation 24.

The Bill also implements recommendation 11 of the Committee's report to expressly require the Commission to take on a greater educational role by providing information and other materials related to the Security of Payment Act to builders and other building practitioners, authorised nominating authorities and adjudicators and to promote the security of payment laws to the construction and building industry generally.

Recommendation 20 of the Committee's report is implemented by the Bill by authorising modern methods of service of all notices and other documents, including by email or other electronic means prescribed by regulations.