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BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002 (VIC)
GUIDE TO CONSTRUCTION CONTRACT PROFESSIONALS 2026

INCLUDING AMENDING ACT CHANGES
ASSENTED TO 13 NOVEMBER 2025)
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13. SUMMARY OF 2025 CHANGES TO THE ACT

The *Building and Construction Industry Security of Payment Act 2002* containing the proposed Tranche 1 reforms to the Victorian Security of Payment Act was given royal assent on 13 November 2025. The amending Act has not yet been brought into operation.

The highlights of the changes to the Act include:

1. **The amended Act removes 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 amended Act repeals the 'excluded amounts' and 'claimable variations' regime.**

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

4. **The amended Act introduces a parallel right to claim the return of performance securities (cash retention and/or performance bonds).**

5. **The amended Act 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 Payment where a construction contract is silent on this point.**

6. **The amended Act 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.**

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

8. **The amended Act simplifies and expedites the process for enforcing unpaid adjudication determinations in court as a judgement debt.**

9. **The amended Act 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.**

The amended Act widens the power of the Minister to make guidelines relating to the authorisation of authorised nominating authorities

SECTION 1
THE SCHEME OF THE ACT

1.1 Objects of the Act

1. The *Building and Construction Industry Security of Payment 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.

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 Payment.*

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 Payment 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 Payment.*
> ….
> *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 Payment, including final Payment, single Payment and milestone (key event) Payment. 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 Payment 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 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 Payment 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]*

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

> *The main purpose of this bill is to provide for an entitlement to progress Payment 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 Payment. 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 Payment 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 Payment 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 Payment 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. <u>There was no intention on the part of the plaintiff or its directors to profit from the Project.</u>*
> *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

29. 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 Payment under construction contracts is as follows:
    1. Where a party ("the claimant") is entitled to progress Payment, 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.

30. Where a payment claim is made by the claimant, the respondent must deliver a payment schedule within 10 business days, (unless the construction contract specifies a lesser time), 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.)

31. 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.

32. 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":

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

34. 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 Payment, the amount owing under the construction contract is, if necessary, to be resolved in accordance with the provisions of the construction contract.

35. 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.

36. 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.

37. 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

38. Where a respondent fails to deliver a payment schedule within the required 10 business days, (unless the construction contract specifies a lesser time), 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).

39. 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).

40. 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.*

41. 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

42. 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).

43. 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).

44. 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.*

45. 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

46. 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.

47. 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, ….)

48. 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.

49. 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.

50. Within 10 business days from the time that an Adjudication Response is due, (which time can be extended by up to a further 20 business days with the agreement of both parties), the adjudicator must determine the dispute.

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

52. 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 Payment;
d) who is to pay the costs of the adjudication.

53. 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.

54. 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 Payment. 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 <u>The requirements of s.14 of the Act should not be approached in an overly technical manner</u>. 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 <u>requirement for the description of the work done is thus to "identify the construction work ... to which the progress payment relates</u>".*
> *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 Payment. 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 Month/6 month time limit

12. Unless the construction contract provides otherwise, a payment claim is invalid if multiple payment claims are served in relation to a single month.

13. Section 14 is broad:

a) the original requirements for a payment claim remain:

> ***14 Payment claims in respect of progress Payment***
>
> *(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the **claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.*
>
> *(2) 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) The claimed amount may include any amount that the other person is liable to pay the claimant under section 29(4)*

b) certain provisions have no effect:

> ***14B Certain provisions in construction contract have no effect***
>
> *(1) A provision of a construction contract has no effect to the extent that it—*
>
> *(a) provides that the earliest day for service of a payment claim in respect of any type of progress payment must be on a day that is later than the last day of each named month in which the construction work was carried out or the related goods and services were supplied; or*
> *(b) provides that a payment claim for a milestone payment (within the meaning of paragraph (c) of the definition of **progress payment**) must be served less frequently than once a month.*

(2) The claimed amount may include any amount that the other person is liable to pay the claimant under section 29(4).

c) the earliest time that a payment claim may be served:
(Note Section 14A(5) provides that where a payment claim is served early, the payment claim is not invalid, the payment claim is taken to be served on the earliest day, and the time within a payment schedule must be served does not commence until the earliest day.

14A Earliest time at which a payment claim may be served

(1) A payment claim may be served on a person—

(a) on and from the last day of—

(i) the named month in which the construction work was first carried out under a construction contract; and
(ii) each subsequent named month during which any further construction work is carried out under that contract; and

(b) on and from the last day of—

(i) the named month in which any related goods or services were first supplied under a construction contract; and
(ii) each subsequent named month during which any further related goods or services are supplied under that contract.

(2) Despite subsection (1), if a payment claim in respect of a progress payment relates to the carrying out of construction work or the supply of related goods or services—

(a) in the period starting on 1 December and ending on 21 December in any year, the payment claim may be served on a person on and from 22 December of that year; or
(b) in the period starting on 22 December and ending on 31 December in any year, the payment claim may be served on a person on and from 31 January in the following year.

(3) Despite subsections (1) and (2), if a construction contract provides that a payment claim may be served on a person in relation to the carrying out of construction work or supplying related goods or services on and from a day that is earlier than a day permitted under subsection (1) or (2) (as the case may be), the payment claim may be served on and from that day.

(4) Despite subsections (1) and (2), if a notice of termination is served on a party to a construction contract or a construction contract is terminated by agreement, a payment claim may be served on a person on and from the day on which the contract provides is the day on which the contract is terminated.

*(5) If a claimant serves a payment claim on a person before the earliest day that a payment claim may be served under this section (the **earliest day**)—*

(a) the payment claim is not invalid; and
(b) the payment claim is taken to be served on the earliest day; and
(c) the time within which the person may serve a payment schedule on the claimant does not commence until the earliest day.

Note
This subsection is relevant to calculating when a progress payment under a construction contract becomes due and payable under section 12(1)(b).

(6) The claimant's entitlement to serve a payment claim on a person is not affected by the termination, purported termination or expiry of the construction contract under which the person is or may be liable to make the payment.

c) the latest time that a payment claim may be served (unless the construction contract provides otherwise, within 6 months of practical completion):

> ***14C Latest time at which payment claim may be served***
>
> *A payment claim may be served no later than the day before the latest of the following—*
>
> *(a) the date (if any) determined under the terms of the construction contract as the latest day on which the payment claim may be served;*
> *(b) the date that is 6 months after the practical completion of all construction work to be carried out under the construction contract;*
> *(c) the date that is 6 months after the supply of all related goods and services to be supplied under the construction contract.*

d) unless the construction contract provides otherwise, one claim per month;

> ***14D Frequency of payment claims***
>
> *(1) Unless a construction contract provides otherwise, a claimant may not serve on a person more than one payment claim in the named month in which construction work was carried out or undertaken to be carried out or related goods or services were supplied or undertaken to be supplied.*
> *(2) Nothing in subsection (1) prevents the claimant from—*
> *(a) serving a single payment claim on a person in respect of more than one progress payment; or*
> *(b) including in a payment claim any amount that has been the subject of a previous payment claim and that has not been paid before the subsequent payment claim is served; or*
> *(c) serving a payment claim in a named month for construction work carried out or undertaken to be carried out or related goods or services supplied or undertaken to be supplied in a previous named month.*

2.4 Payment Claim must identify the work to which it relates

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

15. 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.*

16. 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.

17. 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 Payment. 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: .....*

18. 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 Payment. 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.*

19. 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.

20. The test to be applied 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.

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(2) 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*
>
> *(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 Payment 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.*
>
> ....

3.2 Consequences of not serving a payment schedule within the time required by the Act

5. Section 15(4) provides that a failure to serve a payment schedule within the earlier of the time under the construction contract or the date 10 business days after the payment claim is served makes the respondent liable to pay the claimed amount to the claimant on the due date for payment of the progress payment:

> *If—*
>
> *(a) a claimant serves a payment claim on a respondent; and*

(b) the respondent does not serve a payment schedule on the claimant—
(i) within the time required by the relevant construction contract; or
(ii) within 10 business days after the payment claim is served;
whichever time expires earlier—
the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

3.3 Consequences of not paying where no payment schedule

6. Section 16 provides that a failure to serve a payment schedule within the earlier of the time under the construction contract or the date 10 business days after the payment claim is served makes the respondent liable to pay the claimed amount to the claimant on the due date for payment of the progress payment:

16 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent—

(a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to serve a payment schedule on the claimant within the time allowed by that section; and
(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

(a) may—

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
(ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and

(b) may serve a notice in the prescribed form (if any) on the respondent of the claimant's intention—

(i) to suspend carrying out construction work under the construction contract; or
(ii) to suspend supplying related goods and services under the construction contract.

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

3.4 Consequences of not paying claimant in accordance with payment schedule

7. Section 17 sets out the consequences of not paying the claimant in accordance with a payment schedule:

> ***17 Consequences of not paying claimant in accordance with payment schedule***
>
> *(1) This section applies if—*
>
> *(a) a claimant serves a payment claim on a respondent; and*
> *(b) the respondent serves a payment schedule on the claimant—*
>
> *(i) within the time required by the relevant construction contract; or*
> *(ii) within 10 business days after the payment claim is served—*
>
> *whichever time expires earlier; and*
>
> *(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant; and*
> *(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.*
>
> *(2) In those circumstances, the claimant—*
>
> *(a) may—*
>
> *(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or*
> *(ii) make an adjudication application under section 18(1)(a)(ii) in relation to the payment claim; and*
>
> *(b) may serve a notice in the prescribed form (if any) on the respondent of the claimant's intention to suspend—*
>
> *(i) carrying out construction work under the construction contract; or*
> *(ii) supplying related goods and services under the construction contract.*
>
> *(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.*
> *(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt—*
>
> *(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and*
>
> *(b) the respondent is not, in those proceedings, entitled—*
>
> *(i) to bring any cross-claim against the claimant; or*
> *(ii) to raise any defence in relation to matters arising under the construction contract.*

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 4 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 5 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 5 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 5 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 5 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 one ANA from the 4 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. Section 50 has been expanded to include a new note as follows:

> ***Note***
> *A document that is sent to a person by email or any other form of electronic communication is taken to be served on a person at the time the email or other form of electronic communication is received by the person. See section 13A of the* ***Electronic Transactions (Victoria) Act 2000****.*

The effect of Section 50 in addition to this Note is to include email as an acceptable method of service.

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.

21. The new Act also introduces an express obligation on a claimant to serve a copy of the Application for Adjudication on the respondent within 3 business days, and, separately, an express obligation on a respondent to serve a copy of the Adjudication Response on the claimant within 3 business days.

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 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 Payment Act 1999 (NSW) (Act) are, broadly, twofold:*
> *(i) to give an enforceable right to progress Payment; and*
> *(ii) to provide a swift but interim procedure for the resolution of disputes as to progress Payment.*
> .....
> *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
NO NEW REASONS IN THE ADJUDICATION RESPONSE

1. Section 21(2B) has a very substantive amendment. The old Act included (only in Victoria) provisions whereby a respondent could include, in an Adjudication Response, reasons that that were not previously included in a payment schedule. That provision is deleted and replaced.

2. Section 21(2B) now provides, as occurs in every other Australian jurisdiction, that a respondent MAY NOT include reasons in an Adjudication Response that were not previously included in a payment schedule.

3. Section 21(2) now provides, so far as relevant, as follows:

> *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*
>
> *(d) may contain any submissions relevant to the response that the respondent chooses to include <u>but may not contain a reason why the respondent did not</u>—*
>
> *(i) include the whole of the claimed amount in the payment schedule served on the claimant under section 15 or 18(2A) <u>if that reason was not set out in the payment schedule</u>; or*
> *(ii) offer to release the whole or part of the performance security in the performance security schedule served on the claimant under section 17E or 18A(3) <u>if that reason was not set out in the performance security schedule</u>.*
>
> (emphasis added)

2. This has been the legal position in all other Australian states, including NSW where the courts have addressed the substantive issue, namely, whether or not a party may include in an Application for Adjudication an issue that was not sufficiently included in an earlier payment schedule. The leading legal authority in relation to this issue is <u>*John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258.</u>

In *John Holland v Cardno ,* the NSW Supreme Court (Einstein J) was considering the extent to which an adjudication response is to limited to reasons previously included in a payment schedule (such that the adjudication response cannot include any reasons for withholding payment unless those reasons have already been included in the payment schedule). His Honour said:

> ***Section 20(2B) of the Act***
> *2 <u>The critical issue which is raised is encapsulated in the following contention by the plaintiff</u>, John Holland Pty Ltd ["John Holland" or "the respondent"] which had entered into an agreement ["the Contract"] with the first defendant, Cardno MBK (NSW) Pty Ltd ["the applicant" or "the defendant"] pursuant to which the latter was to provide design services:*
> *· An applicant is entitled to submit a progress claim and a respondent is entitled to reply to the claim by providing a payment schedule.*
> *· The payment schedule must indicate why the scheduled amount is less and the reasons for withholding Payment.*
> *· If an applicant disputes the payment schedule it can apply for an adjudication.*
> *· <u>In that adjudication a respondent is expressly prevented from including in the</u>*

adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant (s 20(2B) of the Act)[2].
· Given that prohibition an applicant could not, for reasons of procedural fairness or natural justice, raise for the first time in its adjudication application reasons which had not been included in the payment schedule, as a respondent would not have been able to deal with those reasons in its payment schedule and would thus be unable to respond to them in its adjudication response due to the prohibition in section 20 (2B) of the Act.
3 There is no provision to be found in section 17 which deals with adjudication applications equivalent to section 20 [2B]: as for example by providing that the claimant cannot include in the adjudication application, any reasons for claiming payment unless those reasons have already been included in the payment claim. The defendant's stance before this Court has been that the plaintiff's submissions seek to read such a provision into Section 17, which is said to be an impermissible exercise in terms of statutory construction.
4 Whilst logic and the authorities cited in this judgment would tend to suggest that in order to achieve consistency in the four steps [payment claim, payment schedule, adjudication application, adjudication response]:
· the statutory scheme dictates that the adjudication response be relevantly tied to the payment schedule [such that the adjudication response cannot include any reasons for withholding payment unless those reasons have already been included in the payment schedule-section 20 (2B)]
· the adjudication application should also be relevantly tied to the payment claim [such that the adjudication application cannot include reasons supporting the payment claim unless those reasons had been included in the payment claim] the fact is that the Act does not expressly require any form of reasons for the making of a payment claim to be included in the payment claim.
5 This judgment treats with the legislative scheme where in applying that scheme it becomes necessary to cope with these difficulties.
6 As will appear from what follows, the devil will often lie in the detail: what precisely in a given case, can be said to have been "reasons not already [included] in the payment schedule"?
7 The broader issues which arise are as follows:
· whether the adjudication application made by the adjudicator contains submissions which were not duly made in support of the defendant's payment claim for the purposes of 17(3)(h) and 22(2)(c) of the Act;
· whether the adjudicator relied on submissions of the defendant in the adjudication application which were not duly made in support of the payment claim contrary to section 22(2)(c) of the Act;
· whether the adjudicator committed a jurisdictional error or otherwise committed an error justifying an order in the nature of certiorari quashing the determination;
· whether the plaintiff was denied natural justice in the adjudication.
The stance taken by the defendant
8 The defendant:
· denies that it made submissions in the adjudication application on new claims which were not raised in the payment claim;
· asserts that the matters alleged to be new matters in the defendant's adjudication submissions were in fact claims included in the payment claim and/or were further submissions made in response to the plaintiff's payment schedule and says that no claims were made in the adjudication submission that had not been incorporated in the payment claim;
· in the alternative, asserts that it was entitled to include in its adjudication application any such further submissions relevant to the adjudication application as the first defendant chooses to include in accordance with section 17(3)(h) of the Act.
....

[2] Section 20(2B) is the NSW equivalent of (the recently amended) Section 21(2B) of the Victorian Act.

The principles more particularly going to issue definition

11 Standing back from the particular wording of the sections the propositions thus far which are supported by final stance authorities are as follows:
· the only issues which the respondent is entitled to agitate in the adjudication response are those issues squarely dealing with reasons for withholding payment which have been indicated in the payment schedule in accordance with section 14 (3) [Multiplex, Palmer J at paragraph 67];
· the purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to require the parties to define as early as possible what are the issues in dispute between them [Multiplex, Palmer J supra];
· the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22. [Multiplex, Palmer J supra];
· where an adjudicator determines an adjudication application upon a basis not notified by either party to the other and not contended for and not notified by the adjudicator to the parties, the requirements of natural justice are not satisfied [Musico, McDougall J at 108].
12 To be more precise Palmer J in Multiplex expressed the principle as follows:

> *"67 The evident purpose of s.13(1) and (2), s.14(1), (2) and (3), and s.20(2B) is to require the parties to define clearly, expressly and as early as possible what are the issues in dispute between them; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s.22. It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing. In my opinion, the express words of s.14(3) and s.20(2B) are designed to prevent this from happening.*

68 Section 14(3) requires that if the respondent to a payment claim has "any reason" for "withholding payment", it must indicate that reason in the payment schedule. To construe the phrase "withholding payment" as meaning "withholding payment only by reason of a set-off or cross claim" is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means "withholding payment of all or any part of the claimed amount in the payment claim". If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s.14(3) requires that that reason be indicated in the payment schedule and s.20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule.
Correspondingly, s.22(d) requires the adjudicator to have regard only to those submissions which have been "duly made" by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s.14(3)."
13 McDougall J in Musico put the matter as follows:

> *"107 ... It may readily be accepted that the Act provides for a somewhat rough and ready way of assessing a builder's entitlement to progress claims. It may also be accepted that the procedure is intended not only to be swift, but also to be carried out with the minimum amount of formality and expense. Nonetheless, what an adjudicator is required to do is to decide the dispute between the parties. Under the scheme of the Act, that dispute is advanced by the parties through their adjudication application and adjudication response (which, no doubt, will usually incorporate the antecedent payment claim and payment schedule). If an adjudicator is*

> *minded to come to a particular determination on a particular ground for which neither party has contended then, in my opinion, the requirements of natural justice require the adjudicator to give the parties notice of that intention so that they may put submissions on it. In my opinion, this is a purpose intended to be served by s 21(4) of the Act (although the functions of s 21(4) may not be limited to this).*
>
> *108 It follows, in my opinion, that where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have "a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it". (See Lord Diplock in O'Reilly at 279)"*

The content of payment claims

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

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

Proper approach to statutory construction

15 It is trite to note that the Court approaches the question of statutory construction by looking at the words of the statute which are to be interpreted in accordance with their ordinary meaning and that the endeavour is a purposive one whereby the Court pays close attention to the particular legislative scheme in place. Resort may be had to the second reading speech although this will not of itself be determinative: cf Brambles Australia Ltd v Davenport [2004] NSWSC 120 at 16.

16 Further, as put by McHugh J in Newcastle City Council v GIO General Ltd [1997] HCA 53; [1997] 191 CLR 85 [at 109]:

> *"In applying a purposive construction, "the function of the court remains one of construction and not legislation". When the express words of a legislative provision are reasonably capable of only one construction and neither the purpose of the provision nor any other provision in the legislation throws doubt on that construction, a court cannot ignore it and substitute a different construction because it furthers the objects of the legislation."*

17 A difficulty which arises concerns the fact that section 13 of the Act does not, at least expressly, require the payment claim to include reasons for the claimed entitlement to a particular progress payment. The sole requirements provided for in subsection 2 are that a payment claim:

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

(b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount);

(c) must state that it is made under the Act.

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

an essential condition thereof that the document by which the payment claim is put forward, include, whether in shorthand or in longhand and whether by one means or another, sufficient information to identify what the claim is.
19 There is a powerful argument that this effectively means that the statutory regime requires that the claim to be valid must be comprehensible by the respondent. The argument is supported by reference to the whole of the statutory scheme and most particularly by reference to the following considerations:
· section 22(2)(c) clearly suggests (as does the whole of the environment being dealt with) [cf McDougall J in Multiplex supra at 76] that there will have been relevant documentation provided by the claimant in support of its claim;
· the requirement stipulated for in section 14 (3) for the respondent to indicate why the scheduled amount is less than the claimed amount [and if it is less because the respondent is withholding payment for any reason, then to give the respondents reasons for withholding payment], can only be justified by the proposition that the payment claim will identify in a fashion comprehensible to a respondent, just what the claim is;
· the statutory scheme is for an application [called an adjudication application]. The application must "relate to the payment claim" [section 22(2)(c)]. The application is for the adjudication of no more and no less than the payment claim as contradicted/traversed by the payment schedule.
20 However, as earlier observed, there are no words within section 13 (1) which require the claimant to do otherwise than:
· to identify the subject construction work to which the progress payment relates [subsection (1) (a)];
· to indicate the amount of the progress payment that the claimant claims to be due [subsection (1) (b)];
· to state that the claim is made under the Act. [subsection (1) (c)].
21 Ultimately it seems to me that the accepted principles of statutory construction simply do not permit the Court to take the further step of holding that in order to be valid, a payment claim must be comprehensible by the respondent in terms of its supporting materials [cf especially the abovementioned citation from McHugh J in Newcastle City Council v GIO General].
Approaching the question in terms of section 20 (2B)
22 The primary touchstone it seems to me, is section 20 (2B). Whilst a claimant which provides the most minimal amount of information in its payment claim may even so, be seen to technically comply with section 13, such a claimant will expose itself to an abortive adjudication determination if it be that:
· the respondent is simply unable to discern from the content of the payment claim, sufficient detail of that claim to be in a position to meaningfully verify or reject the claim: hence not then being in a position to do otherwise than to reject the whole of the claim on the basis of its inability to verify any part of the claim;
· the claimant then elects to include the missing detail in the adjudication application with the inexorable consequence that the respondent is barred by section 20 (2B) from dealing with that detail/matter in its adjudication response;
· the adjudicator relies in determining the adjudication application upon the detail supportive of the payment claim which first emerged as part of the adjudication application
23 For those reasons whilst it is not permissible to construe section 13 as providing that in order to be a valid payment claim, such a claim must do more than satisfy the requirements stipulated for by subsection 2 (a), (b) and (c), the consequence to a claimant which does not include sufficient detail of that claim to be in a position to permit the respondent to meaningfully verify or reject the claim, may indeed be to abort any determination.
Approaching the question in terms of the adjudicator's power
24 The matter may also be analysed by reference to the power of an adjudicator. An adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application which go outside [ie fall outside the ambit or scope of] the materials which were provided in the payment claim, for the reason that the adjudicator only has power to make a determination based upon:

· The payment claim [together with the claimant's submissions (and relevant documentation) in the adjudication application, which submissions have to have been "duly made by the claimant in support of the (payment) claim": see section 22 (2) (c)].
· The payment schedule (if any) [together with the respondents submissions (and relevant documentation) in the adjudication response, which submissions have to have been "duly made by the respondent in support of the (payment) schedule": see section 22 (2) (d)].
· The provisions of the Act: see section 22 (2) (a).
· The provisions of the construction contract from which the application arose: see section 22 (2) (b).
· The results of any inspection carried out by the adjudicator of any matter to which the claim relates: see section 22 (2) (e).
25 The emphasis upon submissions "duly made" makes clear that the scheme really addresses the issues which have been thrown up once the payment claim has been served and the responsive payment schedule then served. The steps which follow generally concern the materials to be exchanged and most particularly furnished to the adjudicator. The adjudication application will relate to a particular payment claim and payment schedule [section 17 (3) (f)]. The central significance of the entitlement of the applicant to include submissions as part of its adjudication application is because those submissions have to be supportive of the payment claim. Those submissions cannot constitute a payment claim or part of it. The central significance of the entitlement of the respondent to include submissions as part of its adjudication response is because those submissions have to be supportive of the payment schedule. Those submissions cannot constitute a payment schedule or part of it.
Section 21 (4) - additional submissions
26 Whether or not any of these problems may be addressed by the adjudicator requesting further written submissions from either party may become the subject of curial examination on another occasion. However it would seem unlikely that the legislature would have intended the provisions of section 21 (4) (a) and (b) to permit a radical departure from the statutory scheme described above. Rather it seems likely that these sub-sections are to be read as permitting no more than additional submissions which clarify earlier submissions: those earlier submissions being constrained in the manner above described.

(emphasis added)

3. An issue that comes out of this limitation is whether a party who included a reason for withholding payment in a payment schedule, albeit in a more general way, is able to expand on that reason (for example, by making more substantive legal arguments, or by including further, new, expert report material, in support of that earlier reason. The likelihood is that an adjudicator, where a respondent looks to include a reason for withholding payment that was included in an earlier payment schedule, but only in a more general way, who wishes to expand upon that reason in an Application for Adjudication, will turn to principles of natural justice to decide if, and/or on what terms, that party is to be permitted to expand on that earlier reason.

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[3]. 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 Payment;
   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.

[3] 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 4 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 5 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**[4]; 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.

[4] 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:*
>
> *b(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.

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
CLAIMS FOR RELEASE OF PERFORMANCE SECURITIES

8.1 The new right to claim for return of a performance security:

1. The amended Act introduces an all-new right for a party to a construction contract to make a claim, under the Act, for the return of performance security, including, for the avoidance of doubt, a claim for return of cash retention, and/or a claim for release of a performance bond.

2. The claim is made by a person who claims to be entitled to the release of the whole or a part of a performance security on the person who, under the construction contract concerned, is or may be liable to release the performance security.

3. Section 17A provides:

> ***Division 1A—Claims for release of performance securities***
>
> ***17A Claims for release of performance securities***
>
> *(1) A person referred to in section 9(2) who is or who claims to be entitled to the release of the whole or a part of a performance security (the **claimant**) may serve a claim on the person who, under the construction contract concerned, is or may be liable to release the performance security.*
>
> *(2) A claim for the release of the whole or part of a performance security must—*
>
> *(a) be in the prescribed form (if any); and*
>
> *(b) identify the construction work or related goods and services to which the performance security and the claim relates; and*
>
> *(c) specify the type and amount of performance security claimed; and*
>
> *(d) state that it is made under this Act; and*
>
> *(e) contain any other prescribed information.*
>
> *(3) The claimant's entitlement to serve a performance security claim on a person is not affected by the termination, purported termination or expiry of the construction contract under which the person is or may be liable to release the performance security.*
>
> ***Note***
> *Section 9(2) provides that a person is entitled to the release of the whole or part of a performance security.*

3. This is a substantive change from the old Act. In Victoria, it had been argued that retention could not be claimed in a Payment Claim under the Act. 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. 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 return of cash retention under the Act. This is now addressed in the amended Act, and is extended to include not only claims for return of cash retention, but also, claims for release of performance bonds (cash retention and performance bonds are defined, collectively, as "*performance security*".)

3. Sections 17B-17C mirror the timing provisions in respect of the earliest time and latest time that a claim for release of a performance security may be made:

17B Earliest time a performance security claim may be served

(1) A claim for the release of the whole or part of a performance security may be served on a person no earlier than the earliest of the following—

(a) a day that is at least 20 business days after the end of the relevant defects liability period for the construction work carried out or related goods or services supplied under the construction contract to which the performance security relates;

(b) on or after a day, or on or after the day of the occurrence of an event (if any), specified in the construction contract.

*(2) If a claimant serves a performance security claim on a person before the earliest day that a performance security claim may be served under this section (the **earliest day**)—*

(a) the performance security claim is not invalid; and

(b) the performance security claim is taken to be served on the earliest day; and

(c) the time within which the person may serve a performance security schedule on the claimant does not arise until the earliest day.

Note
Subsection (2) is relevant to calculating when a performance security under a construction contract becomes due to be released under section 12(1A)(b).

17C Latest time at which a performance security claim may be served

A performance security claim may be served no later than the latest of—

(a) the day (if any) determined under the construction contract as the latest day on which the performance security claim may be served; or

(b) the last day of the named month following the named month in which the last defects liability period set out in the construction contract (if any) ends.

4. Section 17D provides any provision of a construction contract that purports to override the right of a claimant to serve a performance security claim under section 17A and/or affects the earliest or latest time that a performance security claim may be served is of no effect:

17D Overriding contract provisions have no effect

A provision of a construction contract that purports to do any of the following has no effect—

(a) override the right of a claimant to serve a performance security claim under section 17A;

(b) provide that the earliest day on which a performance security claim may be served is before the earliest day referred to in section 17B;

(c) provide that the latest day on which a performance security claim may be served is after the latest day referred to in section 17C.

3. Section 17E makes provision for a Performance security schedule (mirroring a payment schedule in relation to claims for payment of payment claims Applications for Adjudication):

17E Performance security schedules

*(1) A person on whom a performance security claim is served (the **respondent**) may serve a performance security schedule on the claimant.*

(2) A performance security schedule—

(a) must identify the performance security to which it relates; and

(b) must identify the amount of the performance security that is proposed to be released if it is not the same amount of the performance security that relates to the performance security claim; and

(c) must indicate when the respondent proposes to release the performance security, or any part of the performance security; and

(d) must be in the relevant prescribed form (if any); and

(e) must contain the prescribed information (if any).

(3) If the respondent proposes to release less than the amount of the performance security that relates to the performance security claim, the schedule must indicate why the amount to be released is less, and the respondent's reasons for this.

(4) The respondent becomes liable to release the amount of the performance security that relates to the performance security claim on the due date for the release of the performance security if—

(a) a claimant serves a performance security claim for that amount of the performance security on the respondent; and

(b) the respondent does not serve a performance security schedule on the claimant within whichever of the following times expires earlier—

(i) the time required by the relevant construction contract; or

(ii) 10 business days after the performance security claim is served.

5. Sections 17F-17G mirror the provisions that apply to consequences of not releasing whole or part of performance security, where there is no performance security schedule, or where there is a performance security schedule, along the lines of the provisions applying to claims for payment of payment claims Applications for Adjudication.

6. Finally, Section 17H introduces pre-conditions to a party having recourse to a performance security:

17H Entitlement to have recourse to a performance security

(1) A party to a construction contract is not entitled to have recourse to the whole or a part of a performance security under a construction contract unless—

(a) the party has served the party who provided the performance security under the contract with a notice of intention to have recourse to the performance security; and

(b) at least 5 business days have passed since the party served that notice or, if the contract provides for a longer period, that period has passed.

(2) A notice of intention to have recourse to a performance security must—

(a) be in writing in the prescribed form (if any); and

(b) identify the construction contract and the provisions of the contract that the party relies on to have recourse to the performance security; and

(c) if the intention is not to have recourse to the whole of the performance security, state the amount of the performance security to which the party intends to have recourse; and

(d) describe the circumstances that entitle the party to have recourse to the performance security.

(3) The requirements in subsections (1) and (2) are taken to form part of every construction contract and are to have effect despite any other provision of the contract that purports to override these requirements.

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
***SECTION 13* "PAY WHEN PAID" PROVISION IN A CONSTRUCTION CONTRACT HAS NO EFFECT**

1. Section 13 of the Act has been expanded in relation to the pre-existing provision prohibiting "pay when paid" clauses, as follows:

13 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 any of the following contingent or dependent on the operation of another contract—

(i) the liability to pay money owing;
(ii) the due date for payment of money owing;
(iii) a person's right to claim money owing;
(iv) a person's right to claim the release of a performance security.

SECTION 11
***SECTION 13A* NOTICE-BASED TIME BAR PROVISION MAY BE DECLARED UNFAIR**

1. This is a substantive change to the new Act. It emerges from the Murray Report (to date, this provision applies only in WA and Victoria). Section 13A provides:

13A Notice-based time bar provisions

(1) A notice-based time bar provision may be declared under this section to be unfair in relation to a particular entitlement under the contract if compliance with the provision—

(a) is not reasonably possible; or
(b) would be unreasonably onerous.

(2) A notice-based time bar provision may be declared to be unfair by—

(a) an adjudicator for the purposes of adjudicating matters under Part 3 in relation to the contract; or
(b) a court for the purposes of a proceeding for the recovery of money, the release of a performance security or the enforcement of other rights under the contract; or
(c) an arbitrator for the purposes of an arbitration proceeding under the contract or under any separate agreement between the parties to that contract; or
(d) an expert appointed by the parties to the contract for the purposes of a proceeding to determine a matter under the contract.

(3) A notice-based time bar provision, which is declared to be unfair under this section—

(a) has no effect on the particular entitlement that is the subject of an adjudication or proceeding in which it was declared to be unfair; and
(b) continues to have effect in other circumstances or proceedings arising under the contract or a related contract.

(4) The party in an adjudication process or proceeding who alleges that a notice-based time bar provision is unfair bears the onus of establishing that it is unfair.

(5) In determining whether a notice-based time bar provision is unfair, the adjudicator, court, arbitrator or expert must take the following matters into account—

(a) when the party required to give notice would reasonably have become aware of the last day on which notice could be given;
(b) when and how notice is required to be given;
(c) the relative bargaining power of each party in entering into the contract;
(d) if compliance with the provision is alleged to be unreasonably onerous—whether the matters set out in the notice are final and binding;
(e) that the parties to the contract have read and understood the terms of the contract;
(f) that the party required to give notice has the commercial and technical competence of a reasonably competent contractor;
(g) any matter prescribed by the regulations for the purposes of this subsection.

(6) In determining whether a notice-based time bar provision is unfair, the adjudicator, court, arbitrator or expert must not take into account the provisions of any related contract or the things that happened under any related contract.

(7) For the purposes of subsection (5)—

(a) it is conclusively presumed that the parties to the contract have read and understood the terms of the contract; and
(b) it is presumed that the party required to give notice has the commercial and technical competence of a reasonably competent contractor.

(8) In this section—

***notice-based time bar provision** means a provision of a construction contract that makes any of the following contingent or dependent on the provision of notice by a party to the contract—*

(a) an entitlement to be paid for—

(i) construction work carried out or undertaken to be carried out; or
(ii) related goods and services supplied or undertaken to be supplied, under the contract;

(b) an extension of time for doing a thing that affects an entitlement referred to in paragraph (a);
(c) the release of a performance security;

***notice** includes any of the following—*

(a) notice of the actual or estimated time of doing a thing;
(b) notice of the actual or estimated cost of doing a thing;
(c) notice of intention to do a thing;
(d) notice of the description of a thing;
(e) notice of a prescribed matter.

2. The substantive change introduced by Section 13A is to give, to adjudicators pursuant to the Act, (and, separately, to courts, arbitrators, experts (in expert determination processes, see below), the ability to declare to be unfair, in relation to a particular entitlement under the contract, certain notice-based time bar provisions.

3. Section 13A(1) gives an adjudicator under Part 3 of the Act the power to declare a provision unfair pursuant to Section 13A:

> *A notice-based time bar provision may be declared under this section to be unfair in relation to a particular entitlement under the contract if compliance with the provision …. is not reasonably possible; or …. would be unreasonably onerous. ….*

4. Section 13A(1) sets out the subjective test (*if compliance with the provision …. is not reasonably possible; or …. would be unreasonably onerous*). This seems likely to be the subject of future judicial challenge. The effect is substantive (it goes directly against the traditional time bar legal authorities to date).

5. Section 13A(2) extends the power to declare a notice-based time bar provision to be unfair, in addition to adjudicators making a Determination "on account"), to:
   (a) a court for the purposes of a proceeding for the recovery of money, the release of a performance security or the enforcement of other rights under the contract; or
   (b) an arbitrator for the purposes of an arbitration proceeding under the contract or under any separate agreement between the parties to that contract; or
   (c) an expert appointed by the parties to the contract for the purposes of a proceeding to determine a matter under the contract;

   each of whom is a position to make a final, binding resolution of the particular matters in dispute. This is a far-reaching provision introduced into the new Act.

6. Section 13A(5) articulates the factors to be taken into account in determining whether a particular notice-based time bar provision is unfair, namely:
   (a) when the party required to give notice would reasonably have become aware of the last day on which notice could be given;

(b) when and how notice is required to be given;
(c) the relative bargaining power of each party in entering into the contract;
(d) if compliance with the provision is alleged to be unreasonably onerous— whether the matters set out in the notice are final and binding;
(e) that the parties to the contract have read and understood the terms of the contract;
(f) that the party required to give notice has the commercial and technical competence of a reasonably competent contractor;
(g) any matter prescribed by the regulations for the purposes of this subsection; but not the provisions of any related contract or the things that happened under any related contract.

For this purpose, in determining whether a notice-based time bar provision is unfair:
(a) it is conclusively presumed that the parties to the contract have read and understood the terms of the contract; and
(b) it is presumed that the party required to give notice has the commercial and technical competence of a reasonably competent contractor.

6. In addition, though in relation to adjudicators under the Act, any Determination is, “on account”, Section 13A goes further, and applies also to courts and other decision-making bodies in circumstances where the decision would be binding, a final resolution of the matters in dispute. Section 13A(2) provides that

SECTION 11
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*[5] 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 Payment 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*

[5] (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 Payment 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 Payment 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 Payment 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 13
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 14
DOCUMENTATION: ESTABLISHMENT OF CONSTRUCTION WORK/VARIATIONS

14.1 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

14.2 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:

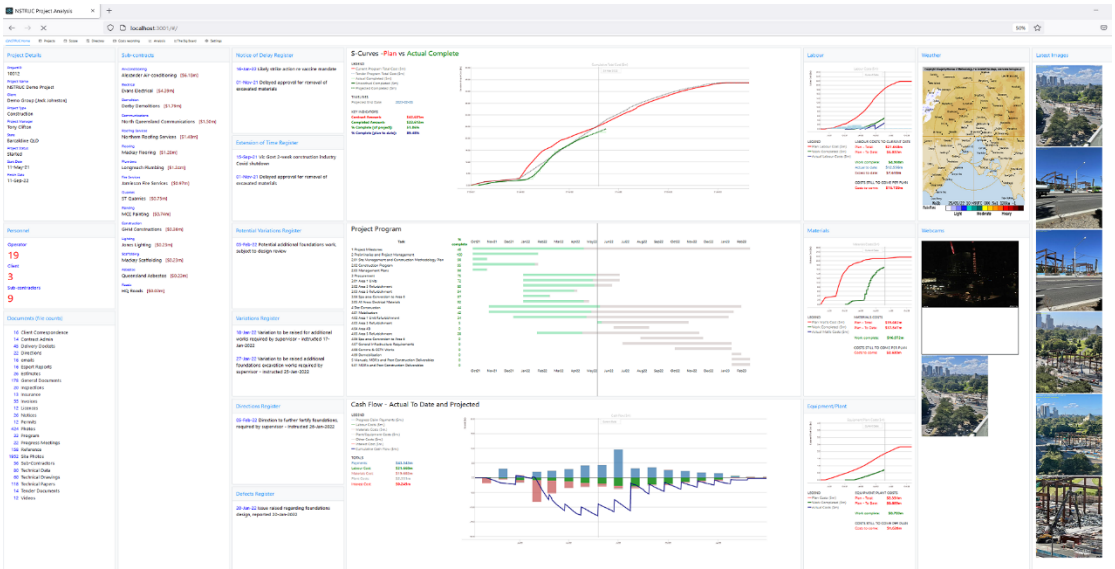

Figure 1 – Sample Project Management Information System ['PMIS'] Dashboard

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	SDG13SRFC	53.55	GL	1.380	73.90	SDG13SRFC 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 @ 0.580 1.68*
Materials	SFGFACWB	415.68	GL	1.550	638.30	SFGFACWB Fascia - wood, 1" x 6" 413.68 LF @ 1.350 555.77
Materials	SFGSFTFC	3.68	GL	24.150	88.64	SFGSFTFC Vented soffit - fiber cement panel - 16" x 12' 3.68 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 @ 3.500 89.47*
Materials	STL13.5	22.59	GL	7.290	164.68	STL13.5 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	WDVP++	1.00	GL	169.880	169.88	WDVP++ 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 2.36 DA @ 120.000 259.68*
Equipment	CLNPW	2.21	GL	89.040	196.78	CLNPW Pressure washing machine - variable pressure 2.21 DA @ 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	FCCPS	1.58	GL	33.350	52.69	FCCPS 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	31.570	8.84	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 end/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 @ 63.00 333.41*
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

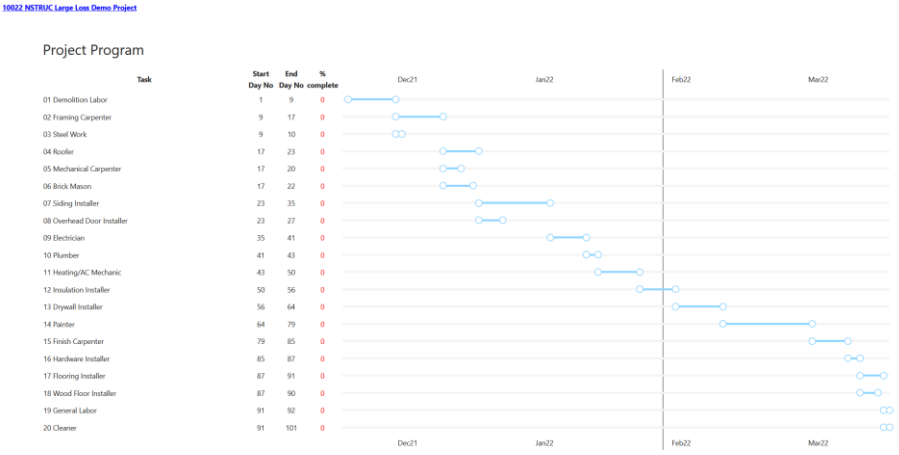

Figure 3 – Editable Programme for High-Level Depiction of Delays and Variations

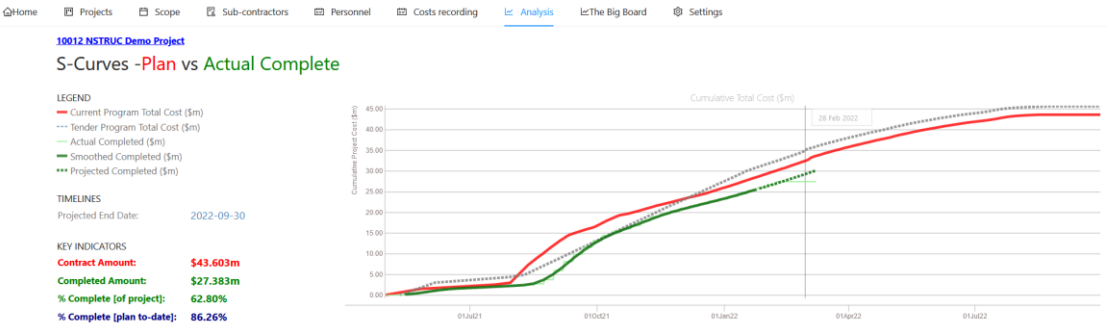

Figure 4 – S-Curve Representation of Programme: Plan vs Percentages Completed

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

Figure 6 – Cash Flow: Actual to Date and Projected

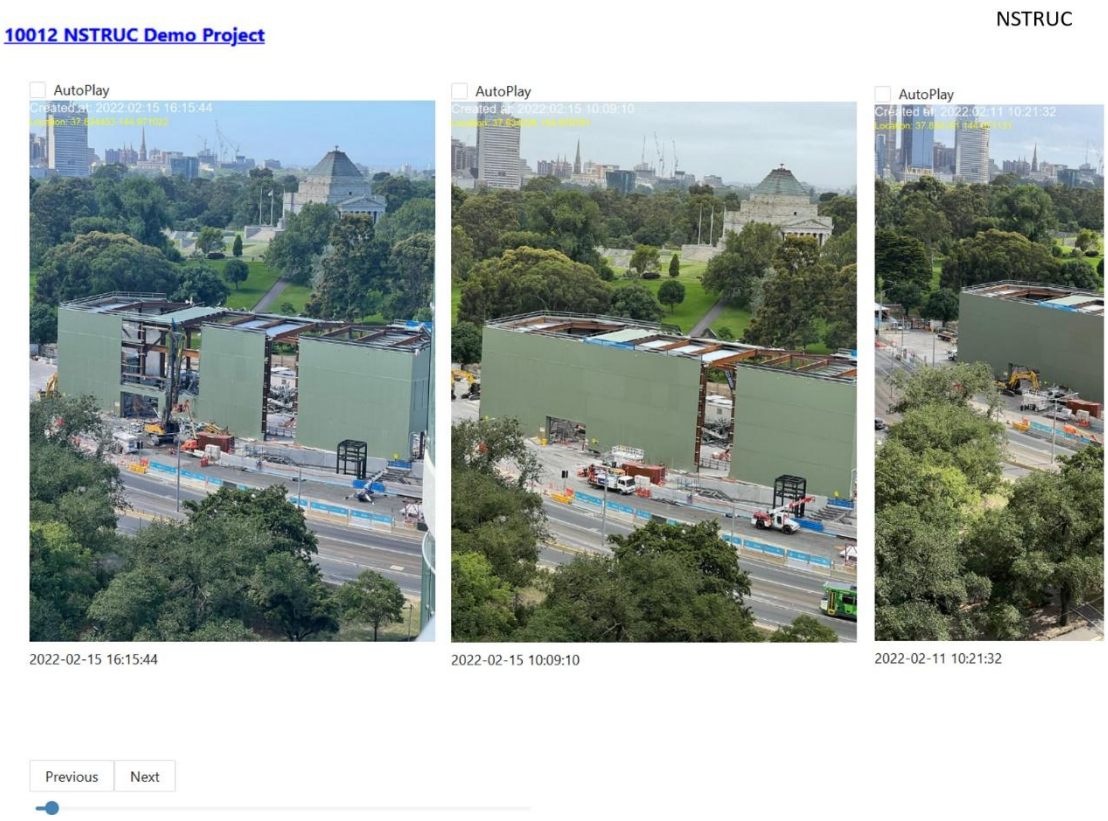

Figure 7 – Sample Imagery – Timestamped webcam images

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

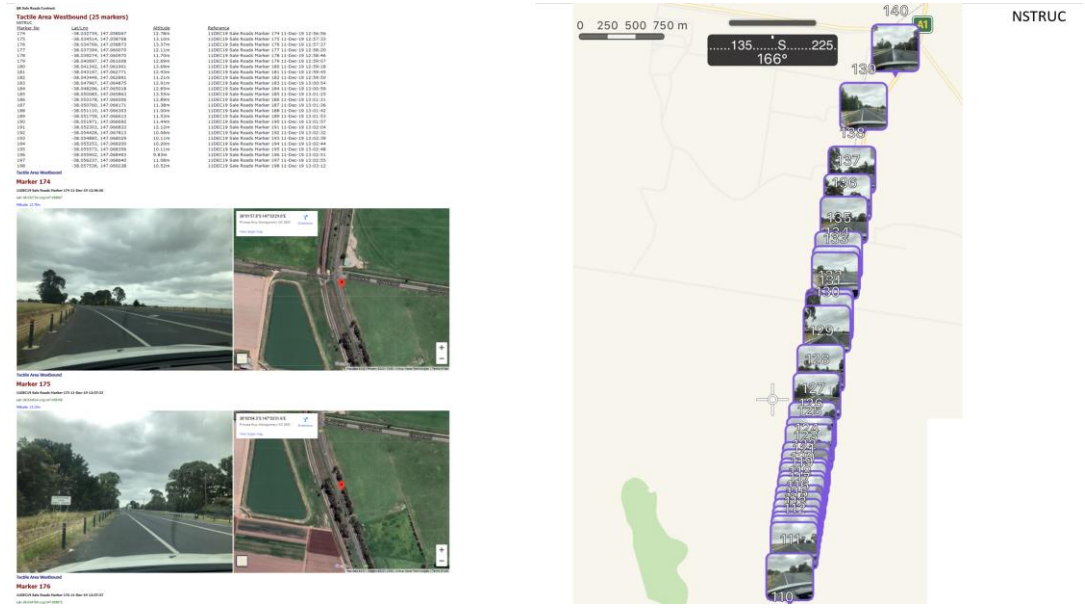

Figure 9 – Sample Imagery – Car Dashboard Camera and Geo-Tagged Presentation

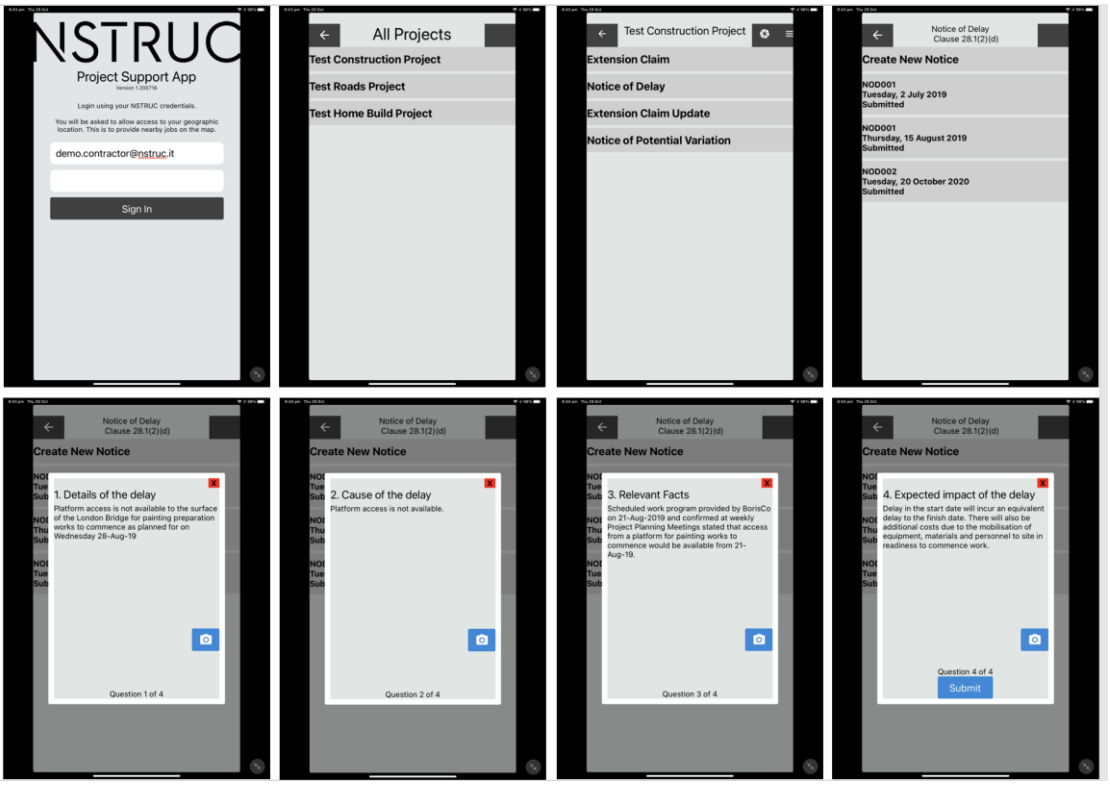

Figure 10 – Capturing Contract Notices using an Onsite App

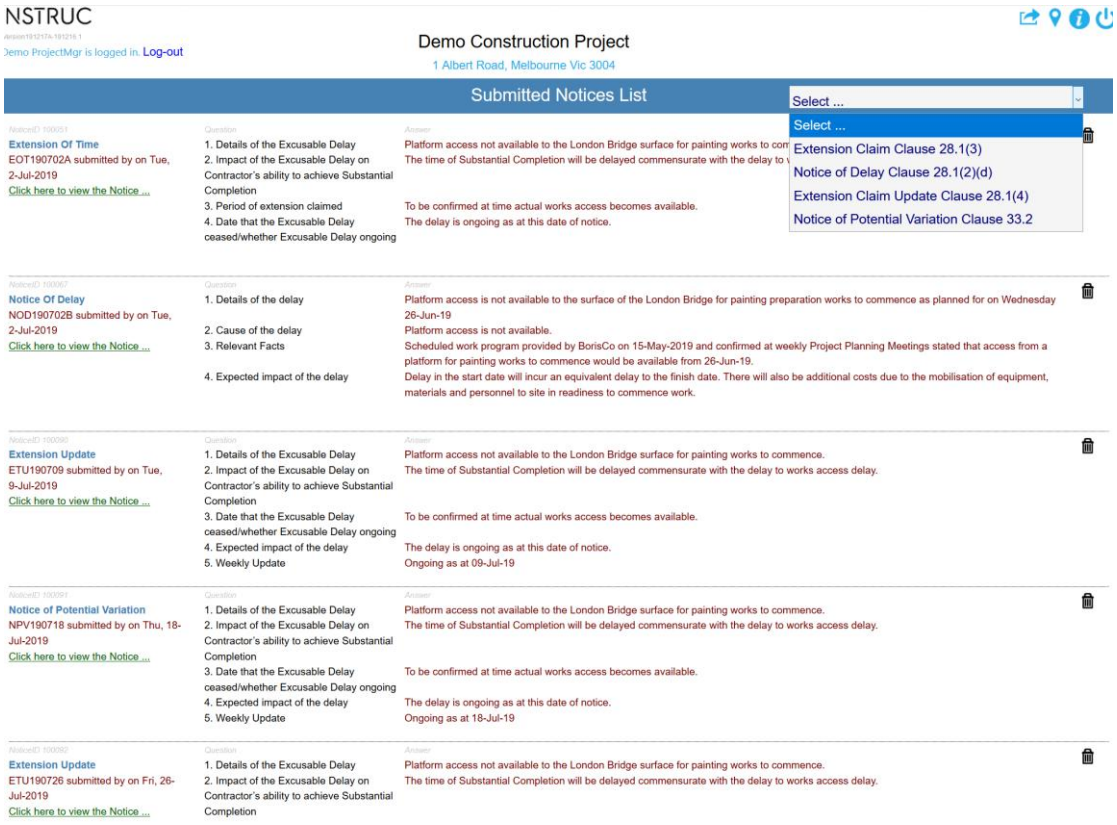

Figure 11 – Sample Register of Notices

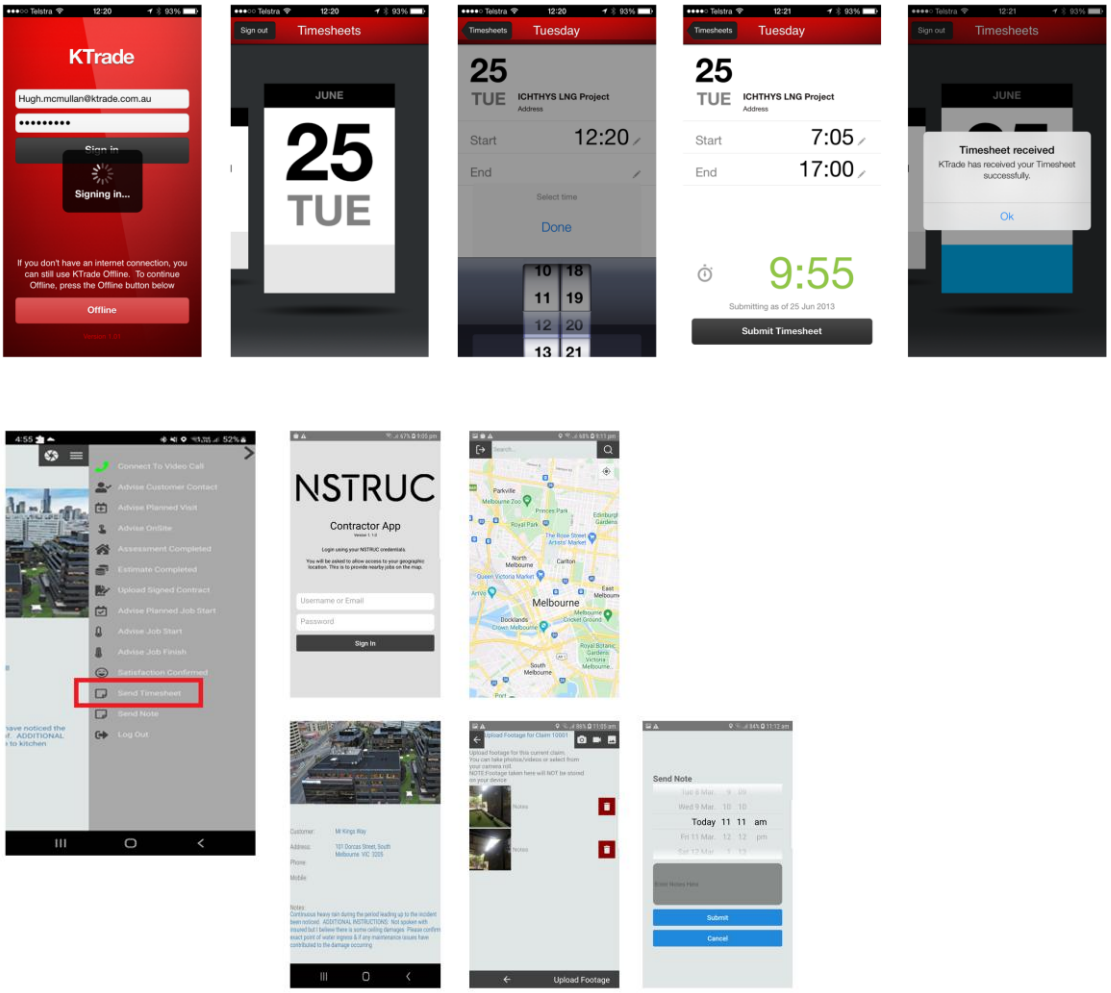

Figure 12 – Capturing Timesheets using Onsite Apps

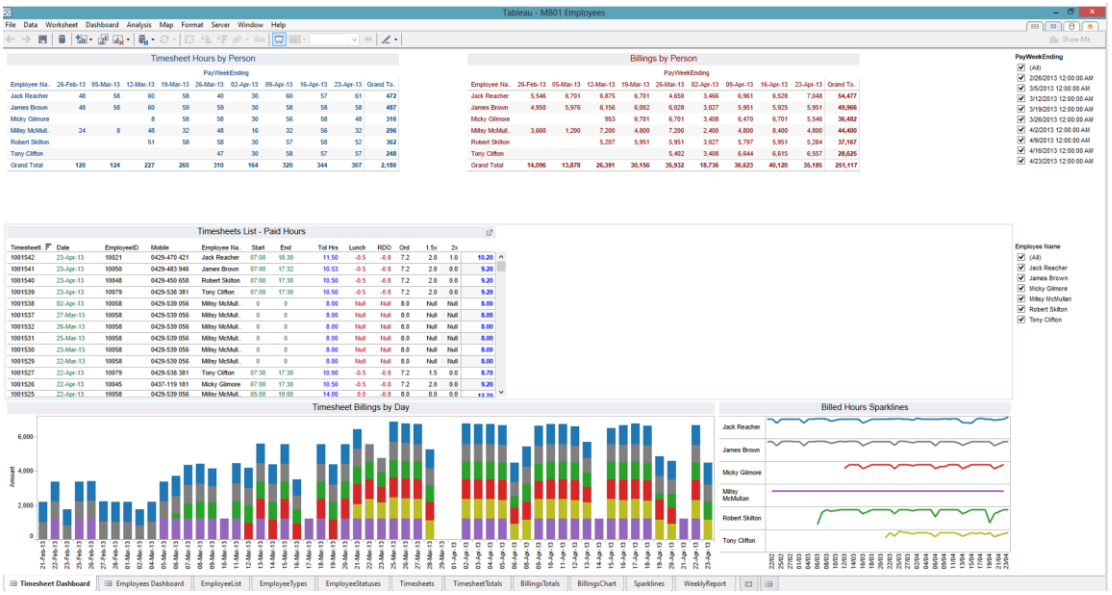

Figure 13 – Monitoring Timesheet Hours using *Tableau* Online Reporting System