

MEMORANDUM

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

1. Background

2. The ***Building and Construction Industry Security of Payments Act (Vic) 2002*** (“the Act”) has operated in Victoria since 2002. Substantive amendments to the Act came into force on 1 March 2007. The Victorian legislation closely follows similar legislation introduced in 1999 in New South Wales¹. The NSW Act was amended in important aspects in 2002², and similar amendments have now been made to the Victorian Act, with some important additions, which came into force on 30 March 2007.
3. The substantive measures introduced by the Act in 2002 (for the purpose of this note) were as follows:
 - a) to require delivery of a payment schedule with 10 business days of receiving a progress payment claim, failing which the full amount of the payment claim becomes due (albeit only a payment “on account”, which can be challenged under the Contract);
 - b) to introduce a quick system of independent adjudication where the parties dispute the amount of any progress claim;
 - c) to require immediate payment to be made (or alternatively security to be provided³).
4. In NSW there have been a substantive number of adjudications under the NSW Act, and the New South Wales Supreme Court has considered the NSW Act on a number of occasions. In addition, there have been a substantial number of adjudications in Queensland. In Victoria, however, to date, the Act has been little used. There have been few adjudications, due, principally, it seems, to the option for respondents to provide security rather than make payment to claimants (prior to the 2007 amendments), and since then, due to the critical limitations contained in Section 10A (Claimable Variations) and 10B (Excluded Claims).
5. The Act creates a regime of payment claim and payment schedule in relation to progress payments under construction contracts as follows:
 1. Where a claimant (“the claimant”) is entitled to progress payments, it may deliver a “payment claim” to the respondent (“the respondent”) liable to make the payment.
 2. In relation to progress claims relating to construction work, 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”, which can be challenged under the Contract).
 3. Where the payment schedule is for less than the payment claim, the Act provides a system of fast, independent, adjudication.

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

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

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

4. The Act provides for enforcement of the amount due, and judgment in favour of the claimant if required.

I set out below the payment claim/payment schedule, and adjudication, process.

6. In NSW, the first jurisdiction to introduce the legislation (in 2000), and the first to remove the previous restriction permitting the respondent to provide security rather than payment (in 2002), there have been a substantive number of adjudications under the NSW Act, and the New South Wales Supreme Court has considered the NSW Act on a number of occasions. In addition, there have been a substantial number of adjudications in Queensland. In Victoria, however, to date, the Act has been little used. There have been few adjudications, due, principally, it seems, to the option for respondents to provide security rather than make payment to claimants (prior to the 2007 amendments), and since then, due to the critical limitations contained in Section 10A (Claimable Variations) and 10B (Excluded Claims).
7. The courts have generally concluded⁴ that where the respondent fails to deliver a payment schedule within the required 10 business days, or where the claimant has obtained an adjudication determination in its favour, the respondent must pay (subject to the limited exceptions below), on account, the amount due, and, if necessary, has given summary judgment to enforce that obligation. The respondent, in effect, is forced to make the payment immediately, then, if the respondent disputes that payment, proceed under the Contract to recover that payment. (This is the opposite cash flow position to what occurred pre-legislation.)
8. The courts have, further, set out a number of general principles as to the matters required (the “basic and essential requirements”) for a valid adjudication determination.
9. **The payment claim/payment schedule process**
10. The Act sets out a detailed process and timetable for payment claims and payment schedules.
11. The claimant (the claimant) submits a “payment claim” under section 14 of the Act. That payment claim must be expressed (under the Act) to be a payment claim under the *Building and Construction Industry Security of Payments Act (Vic) 2002*.
12. The effect of this is to require the respondent to deliver to the claimant, within 10 business days, a “payment schedule” within the meaning of the Act. Failing delivery of that payment schedule within that time, the full amount claimed by the claimant in the payment claim is due and payable as from that date.
13. 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 immediate payment (albeit, as with all progress payments, payment is merely “on account”, and the final amount owing under the Contract may still be disputed in accordance with the provisions of the Contract). These provisions are directed cashflow (rather than the final resolution of monies owing under the Contract).
14. Sections 14-15 of the Act provides, so far as relevant, as follows:

⁴ Though see *Schiavello*, referred to below.

14. Payment claim

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

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

(3) A payment claim-

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

(b) must indicate the amount of the progress payment that the claimant claims to be due for the construction work done or related goods and services supplied to which the payment relates (the "claimed amount"); and

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

15. Payment schedules

(1) A person on whom a payment claim is served (the "respondent") may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule-

(a) must identify the payment claim to which it relates; and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the "scheduled amount").

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If-

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not provide a payment schedule to the claimant-

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

(ii) within 10 business days after the payment claim is served; whichever time expires earlier-

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

The key points from Sections 14-15:

1. The payment claim must be in writing and must state that it made under the Act.
2. The payment claim must identify the work the subject of the payment claim.
3. The respondent must deliver a payment schedule within the time specified in the Act.
4. The payment schedule must specify what the respondent proposes to pay, and reasons why that amount is less than the amount in the payment claim.
5. If no payment schedule within the specified time, the claimant may recover the whole amount claimed.
6. The time to deliver a payment schedule is 10 business days after receiving the payment claim.

15. Where a payment claim is made by the claimant, the respondent must deliver a payment schedule within 10 business days, failing which the full amount claimed is due immediately. (In both NSW and Victoria, there have been Applications for Summary Judgment by the claimant, where there has been inadvertent failure to comply with

requirement to deliver the payment schedule within 10 business days, see below.)

16. Where the payment schedule is delivered, the claimant is entitled to payment of the amount in the schedule by the due date under the Contract.
17. The claimant becomes entitled, under the Act, to payment of the amount in payment schedule (or, if no payment schedule was delivered within 10 business days, the full amount claimed in the payment claim), by the due date under the Contract.
18. 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.
19. The entitlement to payment is only “on account”. Section 47 of the Act preserves the rights of either party to dispute the amounts payable under the Contract. In fact, as with all progress payments, the amount owing under the Contract is, if necessary, to be resolved in accordance with the provisions of the Contract.
20. The purpose of the payment provisions is, in effect, intended to address, fairly and efficiently, the claimant’s cashflow, rather than determine the ultimate entitlements under the Contract.
21. The Act originally had limited operation, it applies only to work the subject of “progress claims”. The 2007 amendments expanded the application of the legislation to include a wider range of payments, including:
 - final payments
 - single payments and milestone (key event) payments
 - subcontractors entitlements to amounts clients or head claimants hold on trust for subcontractors until works are completed
22. Some claims, however, are now expressly excluded from the operation of the Act as “Excluded Amounts” (see below), including claims for:
 - “damages”
 - delay costs
 - latent conditions
 Further, the Act now limits claims for variations to “Claimable Variations” (see below).
23. **Defences to Claims where failure to provide the payment schedule within time**
24. There were a number of early cases in New South Wales where the respondent had attempted, unsuccessfully, to avoid making payment for the full amount of the payment claim, where, for whatever reason, it had failed to deliver a payment schedule at all, within the 10 business days. In each of these cases, the respondent raised technical defences. In each instance, those technical defences failed. The court, each time, held that the Act did have the effect of compelling the respondent to pay the full amount of the payment claim, despite the respondent disputing that this was owing under the relevant contract.
25. For example, in *Beckhaus v Brewarrina Council* [2002] NSWSC 960 (18 October 2002), the plaintiff was a builder, carrying out, for the defendant, construction of levees

and associated works. The contract incorporated AS 2124-1992. On 27 March 2002 the plaintiff issued progress claim number 6 pursuant to the contract. The contract required the superintendent to assess that claim within 14 days and issue a payment certificate stating the amount of the payment which in the opinion of the superintendent was to be paid by the respondent to the claimant or by the claimant to the respondent. The plaintiff's progress claim was for an amount of \$465,437.25 and the superintendent assessed the amount of the claim (out of time) at nil. A progress claim was submitted on 26 April 2002 (claim number 7) in a covering letter expressed to be a claim under the contract and also carrying an endorsement required by the *Building and Construction Industry Security of Payments Act 1999*. The superintendent issued a payment certificate in respect of progress claim number 7 on 28 May 2002 assessing a nil payment.

26. The defences to payment raised by the defendant were:
- (i) the progress claim was not supported by such information as the Superintendent reasonably required, and therefore no entitlement to payment arose under clause 42.1;
 - (ii) the progress claim was not made in conformity with the contract because such claims could only be made monthly, whereas this claim was not;
 - (iii) no contractual entitlement arose in the absence of a statutory declaration required by clause 43;
 - (iv) most of the items comprising the claim had previously been claimed in progress claim no. 6, and rejected by the Superintendent;
 - (v) the progress claim was ambiguous, uncertain and of no effect by reason of the endorsement thereon of the words: "This claim is made under the Building and Construction Industry Security of Payments Act 2002 .
27. His Honour (Acting Justice Macready) observed that the contractual position did not prevent the operation of the Act, and, further, that the parties' respective rights under the contract were not affected by the statutory process (in effect, the payment was no more than a payment on account). His Honour rejected each of the above defences, and ordered the defendant to pay the whole amount of the payment claim.
28. In *Jemzone v Trytan* [2002] NSWSC 395 (7 May 2002), however, Austin J was considering a contract between a hotel and motel developer respondent (the plaintiff), and a builder (the defendant). His Honour distinguished, under the (then) NSW Act, between progress payments, which are assumed to be payments requested in respect of work carried out before practical completion, and the "payment on practical completion". This has now been resolved by the inclusion of one off payments, etc, under the various state Acts.

29. **Adjudication**

30. Application for Adjudication

31. Where the claimant disputes the amounts contained in a payment schedule, he/she 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. The detailed referral process is set out in sections 18-22 of the Act.

32. 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,)
33. 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.
34. Adjudication response
35. 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.
36. The adjudication proceedings
37. 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.)
38. The adjudicator may:
- a) only refer to the written submissions;
 - b) inspect work;
 - c) call a conference.
39. The adjudicator may not:
- a) hear witnesses or conduct arbitration;
 - b) consider late documents.
40. The adjudicator must determine:
- a) the amount to be paid under the Contract;
 - b) the date it was due;
 - c) the interest rate on late payments;
 - d) who is to pay the costs of the adjudication.
41. 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.
42. 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.
43. The dates are extremely tight once the payment schedule is referred to adjudication by the claimant. The process is generally as follows:

1. the claimant forwards an application for adjudication to an authorized nominating authority (ANA) appointed under the Act, with a copy to the respondent;
 2. the ANA must refer the application to an adjudicator “as soon as practicable”, who must notify both parties that he is willing to adjudicate by serving a Notice of Acceptance;
 3. the respondent may make submissions to the adjudicator within 2 business days of receiving the Notice of Acceptance from the adjudicator, or within 5 business days of receiving the copy of the adjudication application, whichever is later;
 4. the adjudicator determines the claim within 10 business days of notifying his/her agreement to adjudicate, including:
 - a) the amount to be paid under the Contract;
 - b) the date it was due;
 - c) interest rate on late payments;
 - d) who is to pay the costs of the adjudication.
44. 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,)
45. The respondent, in responding to the claimant’s adjudication application, might include any or all of the following:
- submissions in support of respondent’s arguments
 - other relevant documents
46. 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.
47. Generally, the claimant should, therefore, have included, in the payment claim, (because it will be extremely likely that he will be unable to amend the payment claim for the purpose of the adjudication), all items claimed, including, for example, items comprising:
- direct costs (eg sub-claimants , suppliers, equipment, labour, ...)
 - job-related overheads (eg site shed hire, supervisor salaries, site security, electricity and other services, crane usage, ..)
 - non-job related overheads (share of organisation-wide overheads which should be allocated to each claim on a particular project)⁵
 - loss of productivity⁶

⁵ The 2006 Amending Act expressly excludes certain types of claims (delay costs, latent conditions, ...).

48. Within 10 business days (this can be extended by agreement, I anticipate, however, that claimants would usually insist that the adjudication be limited to the 10 business days), the adjudicator is to decide the amount that is to be paid under the Contract. In fact, this is likely to be a substantive task (to be decided on both construction and legal bases, without witness evidence, based on the written submissions). Further, the decision is only as to the amount to be paid on account, ie the parties could still, if they chose⁷, take their dispute to court or arbitration, or other dispute resolution processes under the Contract.

49. “Reference Date”

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

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

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

51. Date adjudicated amount payable under the Contract:

52. 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.

⁶ Again, the 2006 Amending Act expressly excludes certain types of claims (delay costs, latent conditions, ...).

⁷ ie, if the claimant believed that the amount adjudicated was so far below the proper amount, or if the respondent believed that the amount adjudicated was so far above the proper amount, and the wrong would not be rectifiable in the next progress claim....

53. 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.

54. Interest rate on Adjudicated Amount:

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

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

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

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

*Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with sub-section (1) at the greater of the following rates the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983**⁸; or the rate specified under the construction contract.*

57. Determination of the adjudicator's Costs:

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

59. **Review by the Courts of the adjudicator's determination**

60. The adjudication process has been reviewed several times in the NSW Supreme Court: (for example, *Musico v Davenport* [2003] NSWSC 977, *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019, *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, *Transgrid v Walter Construction Group Ltd* [2004] NSWSC 21, *Transgrid v Siemens Ltd* [2004] NSWSC 87, *Paynter Dixon Constructions Pty Ltd v J F & C G Tilston Pty Ltd* [2004] NSWSC 85). A discussion of these cases is beyond this note. In brief, the Supreme Court will, if it believes the adjudicator has gone wrong, review his determination.

⁸ The rate prescribed under the section 2 of the **Penalty Interest Rates Act 1983**, as at 1 July 2009, is 10.0% per annum simple.

61. Brodyn
62. The NSW Court of Appeal decision in *Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor* [2004] NSWCA 394 (3 November 2004) has been referred to with approval in many Australian decisions.
63. Hodgson JA reasoned that as long as the basic and essential requirements laid down by the Act had been complied with, the determination was not open to challenge, in the absence of any denial of natural. Hodgson JA, further, identified a number of “basic and essential requirements” for an adjudication determination to be valid. 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)).*

64. Schiavello
65. 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.
66. Vickery J noted the substantive change that this type of legislation has made to the power balance between principals and contractors. At paragraph 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] Subcontractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which compliments the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act.....

67. Vickery J also noted that the Australian courts have tended towards preferring a less formal approach in the interpretation of provisions relating to payment claims and payment schedules. For example, in *Protectavale Pty Ltd v K2K Pty Ltd*, Finkelstein J reasoned⁹:

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].

The manner in which compliance with s 14 is tested is not overly demanding: Leighton claimants 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").

(emphasis added)

This approach (the common sense, less formal) seems, to me, likely to be followed in all Australian states.

68. 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.

⁹ [\[2008\] FCA 1248](#) at [\[10\]](#) – [11], cited by Vickery J in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] VSC 156

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, I find 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.

69. 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

70. His Honour eventually declined to strike down the adjudicator's determination (on the basis argued by the respondent, to the effect that Application for Adjudication had been lodged out of time).

71. The likelihood, to me, is that Australian courts are likely to be less inclined to uphold legal challenges to determinations of the adjudicator on the basis of technical failures to comply with the Act.

72. Cost of the Adjudication Process

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

74. An Application for Adjudication is made to an Authorised Nominating Authority ("ANA") under the Act. There are 6 Authorised Nominating Authorities under the Act in Victoria¹⁰. The adjudicator is selected by the ANA.

75. 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).

76. The fees of the adjudicator will be set out in the adjudicator's Notice of Acceptance.

¹⁰ The 6 ANA's are listed on the BCV website: www.buildingcommission.com.au

77. 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.

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

79. There are limits on the submissions that may be put before the adjudicator by the parties.

80. The adjudication process has been reviewed several times in the NSW Supreme Court: (for example, *Musico v Davenport* [2003] NSWSC 977, *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019, *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, *Transgrid v Walter Construction Group Ltd* [2004] NSWSC 21, *Transgrid v Siemens Ltd* [2004] NSWSC 87, *Paynter Dixon Constructions Pty Ltd v J F & C G Tilston Pty Ltd* [2004] NSWSC 85). A discussion of these cases is beyond this note. In brief, the Supreme Court will, if it believes the adjudicator has gone wrong, review his determination.

81. The NSW Supreme Court has held that (in relation to similar sections) the adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application which go outside (ie fall outside the ambit or scope of) the materials which were provided in the payment claim.

82. In *John Holland Pty Limited v Cardno MBK (NSW) Pty Limited & Ors* [2004] NSWSC 258 (20 April 2004), Einstein J set aside the Adjuicator’s determination on the basis that the material referred to the adjudicator went beyond the material contained in the payment claim. His Honour reasoned:

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

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

.....

18 As will be seen from what follows below, my own view is that one commences with identifying what the statutory scheme puts forward as

constituting a payment claim. A payment claim clearly is a claim to an entitlement to be paid a progress payment. The whole notion of a payment claim, it seems to me, requires as an essential condition thereof that the document by which the payment claim is put forward, include, whether in shorthand or in longhand and whether by one means or another, sufficient information to identify what the claim is.

.....

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

.....

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

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

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

.....

New contractual basis

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

Supporting documentation

30 The deploying for the first time in the adjudication application, of supporting documentation will require careful attention and becomes a matter of degree and detail. However in the main I do not see that a respondent which, by reason of insufficient information supplied with the payment claim, is unable to verify that claim, and says as much in the

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

83. There is no express prohibition on further material, rather the adjudication submission go outside (ie fall outside the ambit or scope of) the materials, provided this does not have the effect of denying the respondent natural justice. This will, however, require: *careful attention and becomes a matter of degree and detail.*
84. The cases suggest, in summary, that the claimant should only sparingly put new material before the adjudicator.
- 85. Amendments to the Victorian Act : Contracts executed after 30 March 2007**
86. General
87. The *Building and Construction Industry Security of Payments Bill* was introduced into the Victorian parliament on 7 February 2006, the second reading speech was delivered by the Minister for Planning Rob Hulls on 9 February 2006. The substantive amendments came into effect on 30 March 2007.
88. The Act previously provided that, where the adjudicator determined that the respondent was to pay the claimant, the respondent must, either, pay the amount, or alternatively, provide security for payment to the claimant. (The option for respondents to provide security rather than make payment to claimants had, there seems little doubt, been the reason that there were few adjudications in Victoria prior to the amendments (as had occurred in NSW between 1999 and 2002)).
89. The amendments to the Victorian Act included, importantly, removing the option for the respondent to provide security rather than make payment. This was addressed by the Minister in the Second Reading Speech:
- The bill reinforces this principle by providing that after an adjudicator has made a determination, the respondent must pay the adjudicated amount. The existing legislation allows respondents to provide security for payment (such as placement of the amount in a trust fund) rather than money. This has been removed because the NSW experience demonstrated that some parties delayed payment by providing security and failing to take prompt action to resolve the dispute.*
90. The amendments to the Victorian Act, however, went further. In particular, the Act does not apply to Variations other than “Claimable Variations” under Section 10A, and does not apply to certain types of claims described as “Excluded Amounts” under Section 10B. (These limits on amounts occur only in the Victorian Act, they do not occur, for

example, in the NSW Act, or the Queensland Act.)

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

NSW

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

Victoria

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

92. Claimable Variations

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

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

10A Claimable variations

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

(e) as to the value of that amount or the method of valuing that amount; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

95. In summary:

1. Agreed variations

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

2. Disputed variations

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

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

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

Limits on disputed variations

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

• Contracts over \$5 million

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

• Contracts up to \$150,000

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

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

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

96. "Excluded Amounts"

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

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

10B Excluded amounts

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

(2) The excluded amounts are—

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

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

J McMullan
29 March 2010