

INTRODUCTION TO THE *BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENTS ACT 2002 (VIC)*

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SECTION 1

THE SCHEME OF THE ACT

1.1 Introduction of the Act

1. The *Building and Construction Industry Security of Payments Act (Vic) 2002* has operated in Victoria since 2002.
2. The Act applies to any “*construction contract*” or “*related goods and services*”, as defined in Sections 5 and 6, including contracts whether written or oral.
3. The Act does not apply to:
 1. construction contracts that form part of a loan contract, contract of guarantee, contract of insurance;
 2. domestic building contracts;
 3. contracts where the consideration does not relate to value of the work;
 4. employment contracts;
 5. construction work outside Victoria.
4. The substantive measures introduced by the Act in 2002 (for the purpose of this note) were as follows:
 - a) to require delivery of a payment schedule with 10 business days of receiving a progress payment claim, failing which the full amount of the payment claim becomes due (albeit only a payment “on account”, which can be challenged under the construction contract);
 - b) to introduce a quick system of independent adjudication where the parties dispute the amount of any progress claim;
 - c) to require immediate payment to be made (or alternatively security to be provided).
5. The courts have, over the last 10 years, set out a number of general principles as to the matters required (the “basic and essential requirements”) for a valid adjudication determination. These Notes set out (in Sections 3 and 4) the payment claim/payment schedule, and adjudication, process.

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

7. The *Building and Construction Industry Security of Payments Amendment Act 2007* was introduced into the Victorian parliament on 7 February 2006, the second reading speech was delivered by the Minister for Planning Rob Hulls on 9 February 2006. The substantive amendments came into effect on 30 March 2007. (The amendments to the Act do not apply to contracts executed before 30 March 2007.)
8. The Act had previously provided that, where the adjudicator determined that the respondent was to pay the claimant, the respondent must, either, pay the amount, or alternatively, provide security for payment to the claimant. (The option for principals to provide security rather than make payment to contractors had, there seems little doubt, been the reason that there were few adjudications in Victoria prior to the amendments (as had occurred in NSW between 1999 and 2002)). The amendments to the Victorian Act included, importantly, removing the option for the respondent to provide security rather than make payment. This was addressed by the Minister in the Second Reading Speech:

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

9. The Act originally had limited operation, it applied only to work the subject of “progress claims”. The 2007 amendments expanded the application of the legislation to include a wider range of payments, including:
- final payments
 - single payments and milestone (key event) payments
 - subcontractors entitlements to amounts clients or head contractors hold on trust for subcontractors until works are completed
9. The amendments to the Victorian Act, however, went further. In particular, under the (amended) Act, a valid payment claim may not include Variations other than “Claimable Variations” under Section 10A, nor may it include certain types of claims described as “Excluded

Amounts” under Section 10B. Certain types of claims, were expressly excluded from the operation of the Act, including claims for:

- “damages”
- delay costs
- latent conditions

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

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

Victoria

Pre - 2007 Amendments

1 January 2005 to 1 Jan 2007: 94 adjudication applications
(approx 3-4 applications per month)

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

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

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

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

Building and Construction Industry Security of Payment Act 1999 (NSW)

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

Building and Construction Industry Payments Act 2004 (Qld)

Building and Construction Industry Security of Payment Act 2009 (SA)

Building and Construction Industry Security of Payment Act 2009 (ACT)

Building and Construction Industry Security of Payment Act 2009 (Tas)

Construction Contracts Act 2004 (WA)

Construction Contracts (Security of Payment) Act 2004 (NT)

14. Attachment D is a Table prepared by Rialto Adjudications comparing the key provisions of the respective Acts in the Eastern states (the WA Act and NT Act are substantially different).

1.2 The Act does not apply to domestic building contracts

15. 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”.
16. 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....*

17. In *Director of Housing of State of Victoria v StructX Pty Ltd (trading as Bizibuilders)* [2011] VSC 410, (Vickery J), the court 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.

1.3 The payment claim/payment schedule process

18. The Act sets out a detailed process and timetable for payment claims and payment schedules.

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

5. The Act provides for immediate enforcement to recover the amount due, including a right to judgment.
19. Where a payment claim is made by the claimant, the respondent must deliver a payment schedule within 10 business days, failing which the full amount claimed is due immediately. Where necessary, an unpaid claimant may proceed in court and make an Application for Summary Judgment. (There have been multiple examples where a claimant has obtained summary judgment for the full amount of the payment claim, through inadvertent failure by the respondent to comply with the requirements of the Act to deliver a payment schedule within 10 business days.)
20. 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.
21. 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”:

22. The entitlement to payment is only “on account”.
23. Section 47 of the Act preserves the rights of either party to dispute the amounts payable under the construction contract. In fact, as with all progress payments, the amount owing under the construction contract is, if necessary, to be resolved in accordance with the provisions of the construction contract.
24. 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.

25. 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.
26. 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

27. Where a respondent fails to deliver a payment schedule within the required 10 business days, the respondent is obliged to pay, albeit on account, the full amount of the claimant's claim. (The respondent may, if it chooses, attempt to recover that amount back from the claimant through the traditional dispute resolution procedures under the construction contract).
28. 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).
29. 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.*
30. 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

31. 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).
32. 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).
33. 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.*
34. 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

35. 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.
36. 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,)
37. 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.
38. 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.
39. Within 10 business days of notifying his/her acceptance, the adjudicator must determine the dispute. (The 10 business days may be extended by up to a further 15 business days by agreement of the claimant.)
40. The adjudicator may:
- a) request further written submissions;
 - b) inspect work;
 - c) call a conference.
41. The adjudicator must determine:
- a) the amount to be paid in respect of the progress payment;
 - b) the due date for payment;
 - c) the applicable interest rate on late payments;
 - d) who is to pay the costs of the adjudication.
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 detailed referral process is set out in sections 18-22 of the Act. Process is 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)"*.

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

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

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

(4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within—
(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or
(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment—
whichever is the later.

(5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within—
(a) the period determined by or in accordance with the terms of the construction contract;
or
(b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

(6) Subject to subsection (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.

(7) Nothing in subsection (6) prevents a payment claim for a claimed amount in respect of a final, single or one-off payment being served under this Act in respect of a construction contract if—
(a) a claim for the payment of that amount has been made in respect of that payment under the contract; and
(b) that amount was not paid by the due date under the contract for the payment to which the claim relates.

(8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

2.3 “Reference Date”

7. The Act refers throughout to a single payment claim on each “Reference Date”. “Reference Date” is defined in Section 9(2) of the Act, so far as relevant, as follows:

*In this section, **reference date**, in relation to a construction contract, means—*

(a) a date determined by or in accordance with the terms of the contract as—

(i) a date on which a claim for a progress payment may be made; or

(ii) a date by reference to which the amount of a progress payment is to be calculated—

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or

(b) subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after—

(i) construction work was first carried out under the contract; or

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

9. Section 14(8) provides that only one payment claim may be served for any particular reference date. Section 14(9), however, provides that nothing in section 14(8) prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.
10. In *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & ors* [2013] VSC 552 (Vickery J), Justice Vickery, the Supreme Court of Victoria Judge in Charge of the Technology, Engineering and Construction List, was considering whether an adjudication determination was invalid on the grounds that the particular payment claims were served multiple times, in breach of Section 14(8). His Honour held that the payment claim, the subject of the adjudication, had been the subject of an earlier payment claim. Pursuant to Section 14(8), a further payment claim may not be made for the same [progress payment] reference date under the construction contract. His Honour rejected the claimant’s argument that, pursuant to Section 14(9), if a previous payment claim had not been made, it could be claimed afresh pursuant to Section 14(9). His Honour concluded:

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

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

2.4 Payment Claim must identify the work to which it relates

12. The courts have universally taken a “not too technical” approach to deciding whether the payment claim sufficiently identifies the work to which it relates.
13. 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.

14. 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.

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

52 The Act provides a procedure for recovering progress payments. Pursuant to s.14 (1) of the Act, a person referred to in s.9(1) who is or who claims to be entitled to a progress payment, in this case Schiavello, may serve a payment claim ("payment claim") on the person who, under the construction contract, is or may be liable to make the payment. The requirements for a payment claim are set out in s.14(2) as follows:

.....

*53 The requirements of s.14 of the Act should not be approached in an overly technical manner. Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd* said:*

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

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

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

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

40 In determining an adjudication application, the adjudicator is confined to considering the matters prescribed under s.23(2) of the Act, which provides:

.....

Thus, the payment claim to which the adjudication application relates is one of the documents to which the adjudicator must have regard in determining the adjudication application.

41 Reasonable specificity of the work done which is the subject of the payment claim is therefore required for two principal purposes:

(a) to enable a respondent to a payment claim to consider and respond to it, either by accepting the claim in full or in part, or rejecting the claim totally; and

(b) to define the issues in dispute between the parties which the adjudicator is to resolve, and to enable an adjudicator, if appointed, to determine the adjudication application.....

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

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

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

17. 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.
18. From the cases, therefore, it seems that the test to be applied by an adjudicator in determining whether a payment claim sufficiently identifies the work the subject of that payment claim is that it be sufficient to, within reason, for the respondent to understand the claim and be able to respond to it.

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

19. The 2007 amendments to the Victorian Act, introduced substantial limitations on what may be included in a valid payment claim.
20. Under the (amended) Act, a valid payment claim may not include Variations other than “Claimable Variations” under Section 10A, nor may it include certain types of claims described as “Excluded Amounts” under Section 10B.
13. These limits on claims occur only in the Victorian Act, they do not occur in relation to any other state or territory.
14. Section 10 provides, so far as relevant, as follows:

10 Amount of progress payment

(1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of—

(i) construction work carried out or undertaken to be carried out by the person under the contract; or

....

as the case requires.

....

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

15. Section 10A Claimable Variations:

16. The provisions of the Act as to what constitutes a “Claimable Variation” are complex. Under the Act, a variation to a construction contract is defined as “*a change in the scope of the work to be carried out or the goods or services to be supplied, under the contract*”. The Act specifies which

variations may be claimed in a payment claim, and which may not. Variations which may be claimed are called 'Claimable Variations'. If Variations claimed in a payment claim are not Claimable Variations within the meaning of Section 10A, then, pursuant to Section 10, an adjudicator is not to take them into account in determining the amount payable in respect of the progress claim.

17. The substantive issues in relation to Section 10A of the Act:
1. Are Variations within the definition of "Class 1 Claimable Variations"?
 2. Are Variations within the definition of "Class 2 Claimable Variations"?
 3. Does the Contract contain a "dispute resolution clause" for the purpose Section 10A(3)(d)(ii)?
18. Under Section 10A, for a Variation to be a "Class 1 Claimable Variation" there must be "agreement" that:
- a) the work had been performed; and
 - b) the scope of the work that had been carried out; and
 - c) the doing of that work constituted a variation; and
 - d) the value of that work; and
 - e) the time for payment of that work.
19. Under Section 10A, a Variation is a "Class 2 Claimable Variation" where there is "agreement" that:
- a) the work has been performed; and
 - b) the person requiring the work has requested or directed that the work be performed;
- but there is not agreement:
- c) as to the scope of the work that has been carried out; and/or
 - d) that the doing of that work constituted a variation; and/or
 - e) the value of that work; and/or
 - f) the time for payment of that work.
20. 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".

21. In summary:

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

Variations on which the parties agree

All agreed variations may be claimed in a payment claim.

It is an agreed variation if both the claimant and the respondent agree on **all** of the following things:

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

Disputed variations

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

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

Limits on disputed variations that may be claimed on a payment claim

Contract sum less than \$150,000

If the original contract value is less than \$150,000, the Act applies to all claims for disputed variations.

Contract sum more than \$5 million

If the original contract value is more than \$5 million, disputed variations must be resolved by the dispute resolution methods specified in the contract.

If the contract does not specify a method for resolving disputes, the Act applies.

Contract sum between \$150,000 and \$5 million

If the contract sum is between \$150,000 and \$5 million, the Act applies to claims for disputed variations up to 10% of the original contract sum.

If the total value of the disputed variations amounts to more than 10% of the original contract sum, the dispute must be resolved by the dispute resolution methods specified in the contract.

If the contract does not specify a method for resolving disputes, the Act applies.

22. Section 10B “Excluded Amounts”:

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

24. Excluded Amounts would include, for example, the following types of claims:

- “damages” claims
- delay costs/prolongation costs
- latent conditions claims

- non-contract claims (eg claims in misleading and deceptive conduct, restitution/quantum meruit claims, ...) ...

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

10B Excluded amounts

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

(2) The excluded amounts are—

- (a) any amount that relates to a variation of the construction contract that is not a claimable variation;*
- (b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to—*
 - (i) latent conditions; and*
 - (ii) time-related costs; and*
 - (iii) changes in regulatory requirements;*
- (c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;*
- (d) any amount in relation to a claim arising at law other than under the construction contract;*
- (e) any amount of a class prescribed by the regulations as an excluded amount.*

24. Liquidated damages: Seabay v Galvin

25. In *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183 (6 May 2011), Vickery J (the Judge in Charge of the Victorian Supreme Court Technology and Construction List) was considering whether a claim for liquidated damages was an “Excluded Amounts” under Section 10B of the Act. His Honour concluded that liquidated damages did constitute an “Excluded Amounts”. His Honour reasoned as follows:

120 In this context, the purpose behind excluding such matters defined by s.10B becomes clear. Matters such as: claims for non-claimable variations; compensation claimed for events such as latent conditions; time-related costs; changes in regulatory requirements; damages for breaches of the relevant construction contract; or any other claim for damages or claims arising other than under the construction contract, are all “excluded amounts”. Experience points to these classes of issues regularly arising in construction disputes. They are often attended with considerable complexity and speedy resolution can be an elusive goal.

121 Under the scheme of the Act such issues are removed from the interim payment regime provided for in the legislation. If such matters arise for determination in the

course of a construction project to which the Act applies, they are not to be dealt with under the statutory scheme established for the provision of progress payments to the party entitled. Rather, they remain to be resolved under the general law, supported by court or arbitral proceedings. In this way the concept “pay now and argue later” is given full effect.

122 If it was that “excluded amounts” as defined in s.10B of the Act were only to apply to claims made by a claimant and not to any set-off or counterclaim raised by a respondent to a payment claim, the operation of the Act in numbers of cases could be seriously compromised. Contentious matters such as claims for damages arising from the construction contract could be raised by a respondent with the result that a claimant could be denied the cash flow which the Act is designed to protect.

123 Further, the Act is not designed to accommodate such claims. In the event of a dispute arising between a claimant and a respondent in relation to an entitlement to a progress payment under the Act, the statutory adjudication process may be invoked. Section 22(4) provides for a speedy resolution of an adjudication application. An adjudicator, who must conduct adjudication proceedings armed only with limited statutory powers, and who is directed to complete the adjudication process within an extremely narrow time frame, would be ill-equipped to deal with many of the claims defined as “excluded amounts” if raised by a respondent.

124 In my opinion, a proper construction of s.10B of the Act renders the defined “excluded amounts” applicable, not only to the statutory payment claim served by a claimant, but also to amounts claimed by a respondent. Such a construction serves to advance the purposes of the Act. The contrary construction tends to work contrary to those purposes. The construction which I favour, will better promote the operation of the object of the Act to provide a facility for prompt interim payment on account in favour of contractors and subcontractors, pending final determination of any disputes arising under a construction contract. These considerations, in my view, override all of the textual arguments advanced by Seabay which point in the opposite direction.

125 Nevertheless, the text of the Act is well able to bear the construction which I prefer. Section 10 of the Act defines the amount of a progress payment to which a person is entitled under a construction contract. Section 10(3) provides that: “Despite subsection (1) and anything to the contrary in a construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of a construction contract”. The terms of the Act, therefore, expressly override the operation of the relevant construction contract in relation to “excluded amounts” as those amounts are defined in s.10B.

126 Furthermore, pursuant to s.23(1)(a) an adjudicator is directed to determine the amount of the progress payment (if any) to be paid by a respondent to the claimant. This subsection, directs the adjudicator back to s.10(3), and thereby requires an adjudicator to not take into account an excluded amount in calculating the amount of a progress payment.

127 Reference is made to s.23(2A)(a) which directs that, in determining an adjudication application, the adjudicator must not take into account any part of the claimed amount that is an excluded amount. In my opinion, this particular subsection is not intended to confine the excluded amounts, which an adjudicator is directed to ignore, to excluded amounts which are claimed by a claimant in a payment claim. If the subsection was to operate in this way it would bring itself into conflict with ss.23(1)(a) and 10(3).

128 Accordingly, in my opinion, the Adjudicator was correct in determining that Seabay's claim for liquidated damages against Galvin should have been treated as an "excluded amount" and excluded from the adjudication determination made in relation to Galvin's Payment Claim 28 claimed under the Act.

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

2.6 Material that might be included in Payment Claims

27. 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. In fact, in Victoria, it has become possible, in practice, for a claimant to include some new material in an the Application for Adjudication, and 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.
28. The claimant, in making a payment claim, might include 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
 -

SECTION 3

PAYMENT SCHEDULE

3.1 Requirements of a Valid Payment Schedule

1. The requirements as to a valid payment claim under the Act are set out in Section 15(2).
2. Section 15 of the Act provides, so far as relevant, as follows:

A payment schedule—

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

*(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**); and*

(c) must identify any amount of the claim that the respondent alleges is an excluded amount; and

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

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

3. The requirements for a valid payment schedule, therefore, are the payment schedule:
 1. identifies the payment claim to which it relates; and
 2. indicates the amount of the payment (if any) that the respondent proposes to make.
4. These requirements were considered in *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor (No 2)* [2015] VSC 500 (Vickery J). His Honour reasoned:

The requirements for a payment schedule are set out in s15(1) to (3) of the Act in the following form:

.....

108 No form and no information has as yet been prescribed for the purposes of s 15(2)(d) and (e).

*109 A payment schedule does not need to be in any prescribed form. In *Façade Treatment Engineering v Brookfield Multiplex*[63] the Court, having considered the authorities of *Protectavale*, [64] *Multiplex Constructions Pty Ltd v Luikens and Anor*, [65] and *Barclay Mowlem v Tesrol Walsh Bay*, [66] in concluding that the email in question did satisfy the requirements of a valid payment schedule, said this: [67]*

36 In the first place, I think that it is clear from a plain reading of the 5 October email, when read as a whole, that Multiplex did not propose to pay anything

to Façade in respect of Payment Claim No 19. In other words, Multiplex proposed to pay nothing to Façade in respect of the payment claim.

37 As to whether a proposal to pay 'nothing' or 'nil' or 'zero' in a response to a payment claim is 'an amount' for the purposes of s 15(2)(b), in the context of the BCISP Act, I am of the view that it is. I find myself in agreement with the further observations of McDougall J in Barclay Mowlem to the following effect:

There is a question as to whether "nothing" or "nil" or "zero" is "an amount" for the purposes of s 14(2)(b). In the context of the Act, and regardless of mathematical and philosophical considerations, I think that it is. That is because a respondent who proposes to pay nothing is clearly proposing to pay less than the claimed amount ...

... A practical approach would include within "the amount" the concept of a nil payment. Some support for this is, I think, obtained from the words "(if any)" that followed the word "amount" in s 14(2)(b).

38 In these circumstances, as s 15(3) of the BCISP Act makes clear, the respondent is required to tell the claimant why a nil payment is proposed, for the purpose, inter alia, of enabling the claimant to decide whether to take the matter to adjudication. In this case, Multiplex achieved this by claiming in its email that the Payment Claim No 19 was invalid, and setting out the reasons for the claimed invalidity. As McDougall J said further in Barclay Mowlem in relation to the mirror provision ... of the NSW Act: 'The subsection is not concerned with the adequacy or sufficiency of those reasons'.

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

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

A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the

construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim. Section 14(3) of the Act, in requiring a respondent to “indicate” its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word “indicate” rather than “state”, “specify” or “set out”, conveys an impression that some want of precision and particularity is permissible as long as the essence of “the reason” for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.

....

3.2 Material that might be included in Payment Claims

5. The respondent, in providing a payment schedule, might include the following types of relevant documents in support of the payment schedule (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
 -

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 than the payment claim amount;
 - (b) where the respondent does not pay the payment schedule amount when due;
 - (c) where the respondent does not provide a payment schedule, and does not pay the claimed amount when due.
4. Section 18(3) of the Act provides, so far as relevant, as follows:

An adjudication application—
(a) must be in writing; and
(b) must be made to an authorised nominating authority chosen by the claimant; and

- (c) *in the case of an application under sub-section (1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule;*
- (d) *in the case of an application under subsection(1)(a)(ii), must be made within 10 business days after the due date for payment; and.....*
- (e) *in the case of an application under subsection(1)(b), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b);
and*
- (f) *must identify the payment claim and the payment schedule (if any) to which it relates; and*
- (g) *must be accompanied by the application fee (if any) determined by the authorised nominating authority; and*
- (h) *.....*

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

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

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

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

4.2 “Optional Adjudication” / Section 18(2) Notice

9. Where the claimant serves a payment claim, and the respondent fails to deliver a payment schedule, the claimant becomes entitled (if not paid) to sue in court for judgment of the full amount claimed.
10. Alternatively, the claimant may, under the Act, prefer to apply for adjudication under Section 18(2). This type of adjudication is sometimes referred to as “optional adjudication”.
11. Section 18(2) provides, so far as relevant, as follows:

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

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

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

14. The claimant may choose any of the 6 Authorised Nominating Authorities appointed under the Act in Victoria.
15. Where, however, 3 or more ANA's are listed in a contract, the claimant must choose from 1 of those listed ANA's. Section 18(4) of the Act provides, so far as relevant, as follows:

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

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

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

17. From time to time, the claimant will deliver the Application for Adjudication by email. In fact, the Act is silent as to what constitutes delivery/service by email. In Victoria, the Supreme Court has indicated that normal business practice, including email delivery of documents, and receipt of documents out of traditional business hours, will not, of itself, invalidate an Application for Adjudication.
18. The Act expressly provides for "service of notices", and service by fax, in Section 50 (including that service by fax, after 4pm, is to be taken as service on the following day).
19. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] VSC 156 (24 April 2009), Vickery J (the Judge in Charge of the Supreme Court of Victoria Technology and Construction List) was considering whether an Application for Adjudication could be made by email, and whether, in the particular instance, (the Application for Adjudication was delivered by email, on the last day for making it, just after 4pm, some parts of the Application for Adjudication being emailed later that evening). His Honour said, at paragraphs 121-142:

.....

Whether Application Made Within the Prescribed Time

121 Hickory submits that the adjudication application commenced by Schiavello was not commenced within the time prescribed by the Act.

122 Section 18(3)(c) of the Act Provides that an adjudication application in the case of an application under subsection (1)(a)(i), which is this case, “must be made within 10 business days after the claimant receives the payment schedule”. It was common ground that this provision required Schiavello to make its application on or before 23 February 2009.

123 The question then becomes, did the sending of the emails, or any one of them, on 23 February 2008 constitute the making of an adjudication application by Schiavello on the business day of 23 February 2009 in accordance with s.18(3)(c) of the Act?

Use of Email to Make the Application

124 The operation of electronic mail, which is often abbreviated as “e-mail” or “email”, is now so widespread that it falls within common general knowledge. Although no expert evidence was presented on the subject, and there may be a number of, or indeed many, possible variations in the operation of the email system, the Court is in a position to take notice of and act upon the following basic technical understanding of the sequence of events which is in common use, as applied to the uncontroverted facts of this case.

.....

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

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

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

Conclusion as to Whether Application Made Within the Prescribed Time

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

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

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

....

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

.....

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

141 There is ample facility in the Act for the appointed adjudicator to receive such documents in the course of his or her deliberations upon adequate notice to the respondent to the application. Neither s.18(3) nor s.43A of the Act preclude the filing of further material by an applicant for the consideration of an adjudicator after the filing of the application. Although it would be usually convenient to do so, and may aid in the expedition of the process, and the ultimate success of the applicant, there is no requirement that the application must contain everything upon which the applicant intends to rely in support of its claim at the time of it making its application. Still less would a failure to provide everything with the application give rise to an invalidity in the application. If it did, a level of inflexibility would be introduced into the process, contrary to the intended operation of the Act. Further, it would be contrary to the permissive terms of s.18(3)(h) of the Act. Provided the minimum is provided under s.18(3), that is compliance with paragraphs (a), (b), (c), (f) and (g) (if applicable), there will be a valid application under the Act.

142 Further, in accordance with the rules of natural justice, an adjudicator appointed under the Act is obliged to adopt procedures which are appropriately flexible, but which are fair to the parties in the light of the statutory requirements, the interests of the individual parties and the purposes which the Act seeks to advance. In the appropriate case, this would involve permitting a party at its instigation to provide material directly to the adjudicator in order to more fully present its case, provided this is done on proper notice to the opposing party. Such a step may involve delivering documents or submissions to the adjudicator for the first time in the process, or supplementing any submissions which have already been delivered with the application, pursuant to s.18(3)(f) of the Act. Either way, this would be in addition to the powers of an adjudicator expressly provided for in s.22(5) of the Act, which is not an exclusive repository of the procedures which may be employed in an adjudication conducted under the Act to ensure that the principles of natural justice are applied.

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

- (a) the making of the Application for Adjudication, by email, within the business day, does not require that delivery to occur by 4pm, but rather, within normal business hours;
- (b) the delivery of attachments, after the relevant date, would not, in itself, render the Application for Adjudication to be invalid.

SECTION 5

ADJUDICATION RESPONSE

1. Under the Act, and subject to having delivered a payment schedule in accordance with the Act, the respondent is entitled to lodge a response (“the Adjudication Response”) to the Application for Adjudication.
2. The time for delivery of the Adjudication Response are set out in Section 21(1), so far as relevant, as follows:

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

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

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

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

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

SECTION 6**SECTION 21(2B) NOTICE**

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

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

2. The effect of Section 21(2B) is to require the adjudicator to review the Adjudication Response, when received, compare it with the payment schedule, and notify the claimant, if the adjudicator's opinion, the adjudication response included the reasons for withholding payment that were not included in the payment schedule, identifying those reasons, and giving the claimant 2 business days from the date of service of the notice to lodge a response to those reasons with the adjudicator.
3. The underlying rationale of the Section 21(2B) Notice is to accord natural justice to the claimant, by giving the claimant the chance to answer new reasons contained in the Adjudication Response (not previously contained in the payment schedule).
4. One effect of this requirement in the Act is to make it nearly essential that the adjudicator request, and the claimant agree to, an extension of the time for making the Determination. (In effect, the adjudicator will not have all of the respective submissions until day 7 or 8 of the 10 days available to review the material and make the Determination).
5. A further effect of Section 21(2B) is to enable the respondent to include new reasons in the Adjudication Response. In other states, the cases suggest that the respondent may not include such new reasons.

SECTION 7

ADJUDICATION PROCESS

7.1 The Adjudication Process

1. Where the claimant disputes the amounts contained in a payment schedule, he may lodge an adjudication application with an Authorised Nominating Authority (ANA), appointed under the Act, within 10 business days of receiving the payment schedule, with a copy to the respondent.
2. An Adjudication Application is made to an Authorised Nominating Authority (“ANA”) under the Act. There are 6 Authorised Nominating Authorities under the Act in Victoria¹. 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.)

¹ The 6 ANA’s are listed on the VBA website at: <http://www.vba.vic.gov.au/practitioners/security-of-payment-sop/authorised-nominating-authorities>

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

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

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

10. If the respondent fails to pay, the claimant may:
 - a) stop work after giving 2 business days warning in writing;
 - b) apply for judgment on the amount;
 - c) commence bankruptcy or wind up proceedings.

In addition, the claimant is also entitled to penalty interest.

11. The parties pay the adjudicator equally. The adjudicator may vary this if he decides that either the claim for payment or the reasons for not paying are wholly unfounded.

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

7.2 Brodyn: "basic and essential requirements"

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

14. In *Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor* [2004] NSWCA 394 (3 November 2004), Hodgson JA laid out the basic and essential requirements of an adjudicator's

determination (albeit in relation to the NSW Act these principles apply here). At paragraph 53, His Honour reasoned:

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

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

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

72 The statements of law enunciated in Brodyn, as applied to the NSW Act, are in substance persuasive. If the NSW Act and its Victorian counterpart are to achieve their objectives in providing for the speedy resolution of progress claims, displacing conventional curial intervention may be seen as a necessary sacrifice. Further, in the context of national building operations being conducted in this country, it is desirable that there be consistency in the regimes for payment under construction contracts in both jurisdictions, particularly where common legislative schemes are in place.

73 However, it does not follow from these observations that the principles stated in Brodyn to which I have referred can or should be adopted in Victoria, and in significant part, The adjudicator will determine whether myself unable to do so. I am compelled to this course having undertaken a close examination of the Victorian Act and by application of relevant provisions of the Constitution Act 1975 (Vic). I do so in spite of the position taken by counsel in the case before me that Brodyn should be applied.

74 In Brodyn, the view was taken in relation to the NSW Act that, although there was not an explicit exclusion of the jurisdiction of the Court prior to the obtaining of judgment, an intention was disclosed to exclude curial intervention for errors of law in the adjudicator's determination. It followed that, under the NSW Act properly construed, relief in the nature of certiorari was not available to quash an adjudicator's determination which is not void and merely voidable.

75 In my opinion, this construction is not open under the Victorian Act.

Vickery J concluded, at paragraph 90:

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

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

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

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

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

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

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

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

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

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

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

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

A payment claim—

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

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

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

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

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

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

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

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

31. Valid Adjudication Application:
32. The Act requires that there be a valid “adjudication application” within the meaning of the Act, made by the claimant to an Authorised Nominating Authority.
33. Section 18(3) of the Act provides, so far as relevant, as follows:
- An adjudication application—*
- (a) must be in writing; and*
 - (b) must be made to an authorised nominating authority chosen by the claimant; and*
 - (c) in the case of an application under sub-section (1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule;*
 - (d) in the case of an application under subsection(1)(a)(ii), must be made within 10 business days after the due date for payment; and.....*
 - (e) in the case of an application under subsection(1)(b), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b); and*
 - (f) must identify the payment claim and the payment schedule (if any) to which it relates; and*
 - (g) must be accompanied by the application fee (if any) determined by the authorised nominating authority; and*
 - (h)*
34. The Adjudication Application must be in writing.
35. The Application for Adjudication must be made to an Authorised Nominating Authority. In Victoria there are 6 Authorised Nominating Authorities appointed under the Act. (Rialto Adjudications Pty Ltd is an Authorised Nominating Authority under the Act.)
36. The date of delivery of the Application for Adjudication to an Authorised Nominating Authority is critical. The Adjudication Application must be delivered:
- a) within 10 business days after the claimant received the Payment Schedule; or alternatively
 - b) within 10 business days after the due date for payment; or alternatively
 - c) in relation to an optional adjudication (an adjudication made where on payment schedule was received, but the claimant prefers to go to adjudication rather than sue for judgment ((see below)), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b).

37. The Adjudication Application must identify the Payment Claim and the Payment Schedule to which it relates.
38. The adjudicator will determine whether the adjudication application:
- a) was in writing;
 - b) was made to an authorised nominating authority chosen by the claimant;
 - c) was made within the relevant period;
 - d) identified the Payment Claim and the Payment Schedule to which it related;
- to determine whether there was a valid Adjudication Application within the meaning of the Act.
39. Reference of the application to an eligible adjudicator, who accepts the application:
40. The Act requires that an Authorised Nominating Authority refer the adjudication to an eligible adjudicator within the meaning of Section 19 of the Act, referring the adjudication application to me. In fact there are no particular requirements specified in the Victorian legislation. (Ultimately, to date, the Act currently places the responsibility for ensuring that the adjudicator is competent upon the relevant ANA's.)
41. Determination by the adjudicator of this application, by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable and the issue of a determination in writing:
42. The Act requires that the adjudicator issue a determination in writing, and determine the following:
- a) the amount of the progress payment;
 - b) the date on which the progress payment becomes or became due; and
 - c) the rate of interest payable.

7.3 Assessment of the amount payable in respect of progress 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* principles 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 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**²; 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.
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.

² 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.

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.

7.10 Review Applications

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

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

28B Application for review by respondent

*(1) Subject to this section, a respondent may apply for a review of an adjudication determination (an **adjudication review**).*

(2) An application under this section may only be

made if the respondent provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2).

(3) An application under this section may only be

made on the ground that the adjudicated amount included an excluded amount.

(4) An application under this section may only be made if the respondent has identified that amount as an excluded amount in the payment schedule or the adjudication response.

(5) An application under this section may only be made if the respondent has paid to the claimant the adjudicated amount other than the amounts alleged to be excluded amounts.

(6) An application under this section may only be made if the respondent has paid the alleged excluded amounts into a designated trust account.

28C Application for review by claimant

*(1) Subject to this section, a claimant may apply for a review of an adjudication determination (an **adjudication review**).*

(2) An application under this section may only be made on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount.

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

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

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

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

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

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

SECTION 8
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)*.

ATTACHMENT A
FORM OF APPLICATION FOR ADJUDICATION

ATTACHMENT B

FLOW CHARTS – PAYMENT SCHEDULE SERVED/ PAYMENT SCHEDULE NOT SERVED

ATTACHMENT C

VBA STATISTICS ON ADJUDICATION - VICTORIA

ATTACHMENT D

SECURITY OF PAYMENT ACTS – TABLE OF KEY PROVISIONS