Security of payment in Victoria: payment claims, adjudication & court intervention

1. This paper briefly describes some of the key features of the security of payment regime that operates in Victoria. In particular, it:

   (a) identifies the steps required to make a payment claim;

   (b) identifies the steps required to respond to a payment claim;

   (c) explains how disputed payment claims are adjudicated; and

   (d) identifies some of the circumstances where a court will intervene after adjudication.

Security of payment legislation in Victoria

2. Every state in Australia now has "security of payment" legislation. This is designed to provide for progress payments for those who carry out construction work (or provide related goods and services), and a fast track interim adjudication procedure to resolve any dispute about the amount of any progress payment that is due and payable. Because of the interim nature of the prescribed adjudication process, it has been described as a "*pay now, argue later*" regime.[1] This means that the parties' legal rights are preserved and – while a party obliged to make a progress payment after adjudication must (ordinarily) do so – if either party is unhappy with the outcome of the adjudication then that party is entitled to bring court proceedings to finally determine the parties' rights. If court proceedings are initiated after adjudication, then the court will consider the matter afresh and *not* by way of appeal.

3. The *Building and Construction Industry Security of Payment Act 2002* (Vic) (the "**SoP Act**"), came into operation in Victoria on 31 January 2003, and was amended by Act No. 42 of 2006, which came into effect on both 26 July 2006 and 30 March 2007 (with the more substantial amendments coming into effect on this later date). The SoP Act, as amended, applies to construction contracts entered into on or after 30 March 2007.

4. The object of the SoP Act is as follows:

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

---

[1] *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] TCLR 6; [2004] 1 All ER 888, Judge Toulmin CMG QC at [118], citing Lord Ackner at the report stage of the equivalent English legislation, referred to in Jacobs, M, *Security of Payment in the Australian Building and Construction Industry*, 4th ed, Law Book Co, 2012 ("**Jacobs**"), at pp 32-33.

5. The SoP Act is modeled on the NSW *Building and Construction Industry Security of Payment Act 1999*, and the Victorian and NSW Acts are quite similar (although not in all important respects). In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 (24 April 2009), Vickery J noted that a useful insight into the operation of the NSW SoP Act (that applies equally in Victoria) was given by Minister Morris Iemma[2] prior to introducing amendments to the NSW Act in 2002. Minister Iemma said:

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

Payment claims under the SoP Act

6. A payment claim under the SoP Act is a claim for a progress payment made by a person who has carried out construction work under a construction contract, or who has supplied related goods and services under the contract (ss 9(1) and 14)). In essence, the right to make a payment claim under the SoP Act arises on the date on which the contract provides that a progress payment may be made or, if the contract is silent on progress payments, then 20 days from when construction work was first carried out (for the first progress payment), and then every 20 days thereafter.

7. The payment claim must, among other things:

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

   (b) indicate the amount of the progress payment that is claimed (the **claimed amount**); and

   (c) state that the payment claim is made under the Act.

8. The definition of construction work is wide and includes the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not). Similarly, the definition of "*related goods and services*" is wide and covers goods and services connected with construction work and includes, among other things, plant or materials used in connection with the carrying out of construction work, the provision of labour to carryout

---

[2] Second reading speech explaining amendments to the NSW Act, NSW Parliamentary debates, Legislative Assembly, 12 November 2002, 6541 (Morris Iemma), Jacobs at p 29.

construction work and architectural, design, surveying or quantity surveying services in relation to construction work (s 6).

9. However, while the definition is wide, it does have its limits. In *Boutique Developments Ltd v Construction Contract Services Pty Ltd* [2007] NSWSC 1042 (31 August 2007), Gzell J had to consider whether the provision of expert reports on defects in construction work already carried out fell within the definition of "construction work" or "related goods and services".[3] His Honour said at [7]:

> "In my view, the work in question does not fall within the definition of "construction work", or the definition of "related goods and services". The work was not itself repair work. It was the provision of reports to determine what repair work was necessary. The work was not itself construction work. It was the provision of expert reports in relation to the quality of construction work done by others. The work was not architectural, design, surveying or quantity surveying services in relation to construction work. Those services must relate to the actual construction work itself."

Excluded amounts

10. Importantly, a payment claim must **not** include an "excluded amount". Excluded amounts are defined in section 10B. Excluded amounts are amounts relating to:

    (a) non-claimable variations ("claimable variations", on the other hand, can be included in payment claims and these are discussed below);

    (b) latent conditions;

    (c) "time related costs" (delay costs);

    (d) changes in regulatory requirements;

    (e) damages for breach of contract;

    (f) non-contractual claims; and

    (g) any class of claim prescribed by regulation as an "excluded amount" (currently there are none).

11. If a payment claim includes, in error, an excluded amount then on an adjudication (discussed below) the excluded amount must be excised from the payment claim: *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183. That is, the payment claim will remain a valid payment claim to the extent that it includes amounts that are properly claimable, but to the extent that it includes excluded amounts those amounts are not payable.

Claimable variations

[3] The definition of "*construction work*" and "*related goods and services*" is the same in the NSW and Victorian SoP Acts.

12. While excluded amounts are not claimable and must be excluded from a payment claim, "claimable variations" on the other hand, are properly claimable. Claimable variations are defined in section 10A. There are two types of claimable variation: an agreed variation (s 10A(2)) and a disputed variation (s 10A(3)).

13. An agreed variation is one where "*the parties to the construction contract agree*" that: (a) the work has been done; (b) that the work constitutes a variation under the contract; (c) that the work gives rise to an entitlement to a progress payment; and (d) the amount to be paid and when that payment must be made. An amount representing an agreed variation may be included as part of a payment claim.

14. In *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 ("**Seabay**") an interesting question arose as to *when* an agreed variation must be agreed. Galvin, the contractor, claimed, among other things, that it was entitled to payment for a variation it had undertaken and that there was agreement between the parties as to the variation. In other words, Galvin claimed there was an agreed variation pursuant to s 10A(2) of the SoP Act. Galvin relied, among other things, on the payment schedule delivered by Seabay in response to its payment claim, and the position that Seabay took during the adjudication process, as set out in Seabay's adjudication response, to show that there was an agreed variation.

15. In considering whether there was an agreed variation Justice Vickery held that the word *agree* in section 10A(2) was to be given its ordinary and natural meaning, and that it would apply to any agreement whether in writing, oral or to be implied from conduct or any combination of these. However, his Honour also found that the agreement to which s 10A(2) applies must be an agreement which is in place by the time the payment claim is served. That is, an agreed variation cannot be agreed after service of the payment claim. Therefore, any agreement based on a payment schedule or adjudication response could not be an agreement for the purposes of s 10A(2).

16. A disputed variation, on the other hand, is one where the claimant has carried out the work and the respondent directed the carrying out of the work, but the parties do not agree:

    (a) that the work constitutes a variation; or

    (b) that the work gives rise to an entitlement to a progress payment; or

    (c) the value of the work; or

    (d) on the time for payment.

    In addition (and subject to what is said below) the value of the construction contract must be $5M or less.

17. An amount representing a disputed variation, as described above, may also be included in a payment claim. In addition, if the value of the construction

contract is more than $5M and the construction contract does **not** contain a "*method of resolving disputes under the contract*" (ie a dispute resolution clause), then this type of variation may also be claimed as a disputed variation. Put another way, if the contract value is over $5M and there is a dispute resolution clause in the contract, then this does not amount to a disputed variation for the purposes of the Act and the variation may not be included as part of a payment claim: *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183.

Payment Schedules

18. A *payment schedule* is the respondent's response to the payment claim (s 15). The payment schedule must, among other things:

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

    (b) identify any amount that the respondent alleges is an **excluded amount** (which the respondent says is not payable); and

    (c) if the scheduled amount is less than the claimed amount, the payment schedule must indicate why this is so.

19. The definition of "*excluded amounts*" is set out in section 10B of the Act and this is discussed at paragraph 10 above.

20. Importantly, a payment schedule must be served by the respondent on the claimant within 10 business days from when the payment claim was first served (unless the construction contract prescribes a shorter time period). If the respondent does not do so, then it becomes liable to pay the full amount of the payment claim (s 15(4)).

21. If the respondent does not provide a payment schedule and does not pay the amount claimed in the payment claim then the claimant has a number of options (s 16). First, the claimant may institute court proceedings to recover the amount claimed as a debt due. Alternatively, the claimant may institute an adjudication and have the amount of the claim determined by an adjudicator. It is unclear what benefit a claimant would obtain by deciding to have an adjudication in circumstances where that party already has a right to recover the amount claimed as a debt due. As noted by Jacobs at p 176:

> "One wonders what the purpose of this subsection is and why a claimant would go to the trouble of making an application for adjudication where it has the right to recover the amount claimed as a debt due. It does seem to be rather a waste of time, effort and costs to go through the adjudication procedure where a far simpler step is merely to claim the amount claimed in [the] payment claim as a debt."

[and at p 169]

> "…it would be sheer folly for a contractor to be armed with a "statutory debt", and then re-open the whole matter by going to adjudication."

22. In addition to these rights, in the circumstances described above at paragraph 21, the claimant may also suspend carrying out of construction work under the contract (ss 16 and 29). Any suspension of work in these circumstances will *not* constitute a breach of contact by the claimant (s 29(3)).

23. If a party makes an election to proceed one way, for example, by electing to adjudicate rather than electing to recover the amount owed as a debt due, then that election is binding and it is not open to that party after making the election to revert to its other option: *Schokman v Exception Construction Pty Ltd* [2005] NSWSC 297.

Adjudication

24. Adjudication is a process by which an independent adjudicator is appointed to determine the amount payable on a payment claim dispute. A dispute will arise for example, if the claimant alleges, in its payment claim, that an amount is payable and the respondent, in its payment schedule, responds by saying that a lesser amount (or no amount) is in fact payable.

25. Section 18 sets out what an adjudication application comprises. It provides, among other things, that an adjudication application:

    (a) must be in writing;

    (b) must be made to an authorised nominating authority;

    (c) must be made within a short time, namely:

        (i) (if a payment schedule is provided) within 10 business days of receipt of a payment schedule indicating that an amount less than the payment claim will be paid; or

        (ii) (if payment schedule is provided) within 10 business days of a failure to pay the scheduled amount by the due date for payment; or

        (iii) (if no payment schedule is received) within 5 days after giving notice of an intention to proceed to adjudication (which notice must be given within 10 days of the due date for payment of the payment claim), and allowing a further 2 business days to provide a payment schedule.

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

    (e) must be accompanied by the fee (if any) determined by the nominating authority;

    (f) may contain any submissions that the claimant chooses to include; and

    (g) must be served on the respondent.

26. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156 at [130] – [132] Justice Vickery noted that the application could be filed electronically with the nominated authority.[4]

27. There are a number of authorised nominating authorities appointed by the Building Commission pursuant to section 42 of the SoP Act. These nominating authorities are authorised to nominate adjudicators pursuant to the SoP Act and include (among others):

    (a) The Institute of Arbitrators & Mediators Australia;

    (b) LEADR; and

    (c) Building Adjudication Victoria Inc.

28. Section 21 of the SoP Act sets out the requirements of the adjudication response, which may be provided by the respondent, in response to the adjudication application. An adjudication response can only be made if the respondent has provided a payment schedule within time (s 21(2A)).

29. The adjudication response:

    (a) must be provided within 5 business days after receipt of the adjudication application (or 2 days after the adjudicator's acceptance of the adjudication application, whichever time expires later);

    (b) must be in writing;

    (c) must be identify the adjudication application to which it relates;

    (d) must identify any relevant principal of the respondent;

    (e) must identify the amount of any alleged excluded amount;

    (f) must be served on the claimant; and

    (g) may contain submissions.

30. Once the adjudicator is appointed he or she must provide the claimant and respondent with notice of acceptance of the appointment. Once notice is provided the adjudication commences and is conducted quickly and is usually conducted "on the papers". There is no right to legal representation and a decision is to be handed down within 10 days of notice of acceptance (s 22(4)) or within a further 15 days if agreed by the parties.

31. The adjudicator may call for a conference to be conducted, but this will occur informally, and it does not matter if a party does not attend or does not make submissions within time.

---

[4] Vickery J's comments were made in connection with the section prior to the 2006 / 2007 amendments, but should apply equally to the section as amended.

32. In coming to his or her decision, the adjudicator must (s 23):

(a) determine the amount to be paid by the respondent to the claimant;

(b) determine the date when that amount is payable and the interest payable;

(c) consider only:

(i) the SoP Act;

(ii) the construction contract;

(iii) the payment claim and payment schedule;

(iv) any inspection carried out by the adjudicator;

(d) **not** take into account an excluded amount (and to the extent to which it does, the determination is void).

Adjudication review

33. If the adjudicated amount is more than $100,000, and one or both of the parties disagree with the determination, then either party may apply for an adjudication review.

34. An adjudication review is a process whereby another adjudicator is appointed to consider (only) whether either an excluded amount was included (in error) as part of the original adjudication determination; or whether an amount was excluded from the determination in error on the basis that the amount was an excluded amount, when in fact it was not an excluded amount and should have been included in the determination.

35. An application for an adjudication review must be made within 5 business days of receipt of the adjudication determination (s 28D). Each party may make submissions and the respondent to the application has 3 days from receipt of the application for review to serve their submissions.

36. Importantly, if the adjudication review application is made by the respondent to the payment claim, then the respondent must nevertheless pay the adjudicated amount, other than allegedly excluded amounts, to the claimant; and pay the allegedly excluded amounts into trust pending the review application.

The writ of certiorari

37. There is no appeal from a decision of an adjudicator or from an adjudication review. However, in certain circumstances a party unhappy with an adjudication determination may have the adjudication quashed in the Supreme Court of Victoria.

38. Certiorari is a remedy issued by a court to bring before it the decision or determination of a tribunal or inferior court to quash it on the grounds of:

(a) non-jurisdictional error of law on the face of the record; or

(b) jurisdictional error; or

(c) denial of procedural fairness; or

(d) fraud.

39. The writ of certiorari is available in connection with adjudications made under the Victorian SoP Act[5] but not in New South Wales in connection with NSW's SoP Act.[6]

40. A good example of where a party used the writ of certiorari to quash an adjudication determination is the case of *Director of Housing of the State of Victoria v Structx Pty Ltd (trading as Bizibuilders)* [2011] VSC 410 (Vickery J).

41. In this case Structx built 20 residential units for the Director of Housing of the State of Victoria (the "**Director**"). Structx served a payment claim on the Director purportedly under the SoP Act.

42. The adjudicator held in favour of the claimant, Structx, and determined that the Director was liable to pay $293,424.12 on account of the payment claim. Among other things, the adjudicator found for Structx on the basis that the Director's payment schedule was invalid.

43. The Director sought judicial review of the adjudicator's decision by way of certiorari. The Director sought to quash the adjudicator's decision on a number of grounds. First, it argued that the SoP Act did not apply because the Director is not "*in the business of building residences*". This argument was put on the basis of section 7(2) of the SoP Act, which provides that the SoP Act does not apply to domestic building contracts within the meaning given in the *Domestic Building Contracts Act 1975*, except where the builder is "*in the business of building residences*". The Director said it was not in the business of building residences and hence the SoP Act did not apply.

44. The Court accepted the Director's argument and held that the SoP Act did not apply as the Director was not *in the business* of building residences. Accordingly, the adjudicator was acting without jurisdiction.

45. The Director's second ground of attack was that the adjudicator's finding that the Director's payment schedule was invalid, amounted to an error of law on

---

[5] In *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* 2009 26 VR 172, Vickery J held that although displacement of conventional curial intervention (like certiorari) was consistent with attainment of the Act's objective of providing for speedy resolution of progress claim disputes, any implied ouster in the SoP Act of the Supreme Court's jurisdiction to grant prerogative relief was precluded by s 85(5) of the *Victorian Constitution Act 1975* (Vic).

[6] *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421.

the face of the record. The adjudicator found that the person who submitted the payment schedule on behalf of the Director did not have authority to do so, and also that the payment schedule did not contain the "prescribed information". The Director argued, on the other hand, that the person who submitted the payment schedule was properly authorised and that there was no prescribed information.

46. The Court upheld the Director's arguments on these grounds as well. The Court found that there was no evidence to show that the architect who submitted the payment scheduled for the Director was not authorised to do so; and that there was no "prescribed information" to be included in payment schedules because none has been prescribed under the Act. Accordingly, these were further grounds to quash the adjudication determination.

47. Finally, the Director argued that by failing to consider the payment schedule the Director had been denied procedural fairness, because the adjudicator did not take account of matters which he was bound to take account of. The Court also upheld the Director's arguments on this ground.

48. Accordingly, the Director's application for certiorari was successful on these grounds and the adjudication determination was quashed.

Recovery and enforcement

49. Broadly, a claimant may seek recourse to the Courts to obtain an order for judgment in connection with a progress payment in three circumstances:

    (a) first, where the Respondent does not provide a payment schedule (s16);

    (b) second, where a payment schedule is provided but the Respondent does not pay the scheduled amount (or part of it) (s 17); and

    (c) third, where the claimant obtains:

        (i) an adjudication determination against the respondent (s 28R); or

        (ii) a review determination against the respondent (s 28R).

50. In each of these cases the claimant may recover the outstanding amount "*as a debt due to the Claimant*".

51. Further, in each of the circumstances described at paragraph 49 above where a claimant seeks judgment in Court:

    (a) judgment is not to be given for the claimant unless the Court is satisfied that liability for the debt has crystalised under the SoP Act (ie no payment schedule provided and no payment made under s16; or a payment schedule was provided within time but no payment was made under s 17; or there has been a failure to pay an adjudicated / review adjudicated amount under s 28R); and

(b) the respondent is not permitted, in those proceedings, to bring any cross-claim or raise any defence to matters arising under the construction contract.

52. Importantly, if a claimant elects to recover a debt due to it via curial process, an issue arises as to what the claimant needs to prove. Need the claimant prove only the fact that it served a payment claim and the fact that it was not served with a payment schedule, thus crystallising the right to repayment of a debt under the SoP Act, or is something more required?

53. The better view is that simply proving the service of a valid payment claim, and proving that no payment schedule was provided, in circumstances where the other party contests the validity of the claim, will probably **not** be sufficient. The issue was considered in *Builders' Licensing Board v Inglis* (1985) 1 NSWLR 591[7] in relation to legislation that also allowed for recovery of a statutory debt. In that case Kirby P said (at 596-597):

> "[to allow recovery without scrutiny of the underlying debt] … would still be surprising if it meant that an amount paid under such an agreement and in respect of building work could be recovered as a debt without the builder having any entitlement to scrutinise, and have the court scrutinise, the basis of the debt. Such a result would deprive the builder of the opportunity to challenge the claim, to subject it to scrutiny and to rebut it if such scrutiny disclosed defects in it."
>
> "…where, as here, there is a contest, the entitlement to recover as a debt should not, in my view bypass the normal requirement that, when a claim is disputed, he who alleges must particularise and prove."

54. It is submitted that the effect of the SoP Act and *Inglis* is that the respondent has a right to put the claimant to proof of the alleged debt.

Concluding remarks

55. The SoP Act is a powerful tool in the hands of building practitioners and those who supply related goods and services in the construction industry.

56. The time frames in the Act are very short and respondents facing payment claims need to ensure they respond promptly – otherwise they may find themselves liable for a debt without any immediate judicial remedy. Of course the procedures under the Act are interim in nature and the issues can be litigated through the Courts *ab initio* in the fullness of time. Nevertheless, it goes without saying that all parties should take care to obtain the best result possible at the payment claim / payment schedule / adjudication stage. This means obtaining prompt advice and acting swiftly within the confines of the SoP Act.

Adam Rollnik - Barrister

December 2013

---

[7] Quoted in Jacobs M, *Security of Payment in the Australian Building and Construction industry*, 4th ed, 2012, at 168.