

# Adjudication Forum



Submissions in relation to the Environmental and Planning  
Committee Inquiry into Employers and Contractors Who  
Refuse to Pay their Subcontractors for Completed Works

By Robert Sundercombe



## A. Introduction

- The Adjudication Forum (the **Forum**) and its members provide day-to-day support to a very broad range of representatives of the building and construction industry.
- This submission mainly revolves around identifying the changes that could be made to the *Building and Construction Industry Security of Payment Act 2002* (the **Victorian Act**) which would make it more effective in securing progress payments for subcontractors and indeed contractors.
- Prior to continuing, before any changes to the Victorian Act are considered, the Forum recommends the report titled 'Review of Security of Payment Laws: Building Trust and Harmony' by John Murray AM.



- Further, the Forum strongly recommends that if any changes are to be made to the Victorian Act, Authorized Nominating Authorities (**ANAs**) be maintained.
- The changes made in Queensland, when the *Building Industry Fairness (Security of Payment) Act 2017* was introduced and ANAs no longer utilised has seen a reduction in the number of decisions and a general perception that the act does not assist contractors and subcontractors.



## B. The Areas that the Victorian Act could be improved to assist Contractors and Subcontractors

- i. **Items that can be determined at Adjudication**
- ii. Reference Dates
- iii. When a payment claim can be served
- iv. Residential Contracts
- v. Due date for Payment
- vi. Times to apply for Adjudication
- vii. **Time to make a determination**
- viii. **New Reasons in an Adjudication Response**
- ix. Review Adjudications
- x. Service of Notices
- xi. Restrictions of Selection of ANAs
- xii. Recovering Adjudication Fees in an Adjudication Certificate
- xiii. Statutory indemnity of adjudicators/ANA's



## i. Items that can be determined at Adjudication

- Under the Victorian Act, a claimant can claim payment for construction work carried out (or for goods and services supplied), but the claimed amount must not include any 'excluded amounts'.
- These 'excluded amounts' include:
  - Disputed 'non-claimable variations';
  - Time-related costs;
  - Costs related to latent conditions; and
  - Costs due to changes in regulatory requirements:

Plus, claims for damages.

- Additionally, since the decision in *Punton's Shoes v Citi-Con [2020] VSC 514* claims for retention cannot be made under the Victorian Act.
- The Victorian Act should be amended so that a claimant is entitled to claim and be paid for any item that it is entitled to be paid for under its contract.
- Additionally, the Victorian Act should expressly provide that a claimant is entitled to claim its retention when it is due and if disputed, have this entitlement determined at adjudication.



## vii. Time to make a determination

- S 22 of the Victorian Act 'Adjudication procedures' at s 22(4)(a) allows an adjudicator 10 business days to determine an adjudication application, commencing when the parties are advised of the adjudicator's appointment.
- S22(4)(b) provides that the time can be extended by a maximum of 5 business days. Regardless of the parties' positions on the matter.
- In other states the adjudicator's 10 business days commences when they receive the respondent's adjudication response. This immediately provides the adjudicator with a further 2 business days, or at least means that 2 business days are not lost waiting for the adjudication response.
- Additionally, in other states the time to provide the determination can be extended by more than 5 business days with both parties' agreement.



- Adjudicators practicing under the Victorian Act are further disadvantaged because respondents can include 'reasons for withholding payment' in an adjudication response that were not included in the payment schedule.
- The process contemplated in s 21(2B) of the Victorian Act whereby the adjudicator must advise the claimant of these new reasons and allow the claimant 2 business days to respond to these new reasons takes a least 3 business days and cannot commence until the adjudication response has been received. Meaning that at least 4 to 6 business days are used up during this process.
- The Victorian Act should be amended so that adjudicators are provided with more time to make their adjudication determinations.



## vii. New Reasons in an Adjudication Response

- As outlined above s 21 of the Victorian Act 'Adjudication responses' allows respondents to include 'new reasons for withholding payment' in an adjudication response that were not included in the payment schedule.
- An adjudicator is then required to indicate these new reasons to the claimant who then has 2 business days to respond to what could be a significant amount of complex new reasons.
- This disadvantages contractors and subcontractors who initially had 10 business days or 5 business days (depending on whether a notice pursuant to s 18(2) of the Act had been provided) to make their adjudication application.





- Respondents should not be entitled to ambush claimants, in the adjudication response.
- Upon receipt of the payment schedule claimants should be able to understand the respondent's position and determine whether it is worthwhile making an adjudication application.
- The Victorian Act should be amended so that respondents are not entitled to include reasons for withholding payment that were not included in the payment schedule.
- If it is considered that respondents require additional assistance, the time to provide payment schedules could be increased to say 15 business days.



## C. Conclusion

- This submission was made with input from members of the Adjudication Forum.
- Are there any questions?

