

Government Response to the  
Parliamentary Inquiry into employers  
and contractors who refuse to pay their  
subcontractors for completed works

October 2024



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## Introduction

The Victorian Government thanks the members of the Legislative Assembly's Environment and Planning Committee (Committee), chaired by Juliana Addison, and Victorians who contributed to the Committee's Inquiry into employers and contractors who refuse to pay their subcontractors for completed works. The Committee's report and recommendations will improve chronically high levels of financial insecurity and insolvency among contractors, subcontractors, and suppliers in the building and construction industry.

The Victorian Government acknowledges that systemic poor payment and other contracting practices within Australia's building and construction industry have allowed financial risk to cascade down the construction contracting chain.

The Government is committed to enabling a more stable and strong construction industry, as these conditions are considered essential support a building and construction industry that is better placed to improve housing supply, consistent with *Victoria's Housing Statement: The decade ahead 2024-2034*.

During its inquiry, the Committee received 44 submissions from 73 submitters representing a broad range of interests, including: building practitioners, construction-related suppliers and consultants, trade associations, legal practitioners, authorised nominating authorities (ANAs), adjudicators, and academics. The Committee also held two public hearings, on 29 May and 8 June 2023, receiving testimony and evidence from 10 witnesses, including the Department of Transport and Planning (DTP) and the Victorian Building Authority (VBA).

The Government has carefully considered the report's nine factual findings and 28 recommendations for reform. As discussed below, the Government broadly supports all 28 of the Committee's recommendations (16 recommendations in full and 12 recommendations in principle or in part).



## Background

Security of payment problems in the building and construction industry have been repeatedly acknowledged over the last 100 years. Since at least 1897, governments around Australia have implemented incremental reforms to address the problem of building contractors and subcontractors, workers and tradespersons, and suppliers of related goods or services who often go unpaid, underpaid, or paid late for their work.

In recent decades, government-initiated reviews have examined systemic poor payment and other contracting practices in the building industry. Such practices take advantage of the highly fractured nature of the industry in Australia (where subcontractors complete over 80 per cent of construction work, the highest proportion in the world), to pass financial risk down the construction contracting chain. These practices contribute to high levels of financial insecurity among subcontractors and other participants in the building industry, which are reflected in historically high, and recently increasing, insolvency rates in the industry.

Starting with New South Wales, every state and territory has introduced security of payment legislation to address these longstanding issues, including Victoria, which enacted its *Building and Construction Industry Security of Payment Act 2002* (SOP Act). The SOP Act, like its counterparts in other jurisdictions, has two main objectives:

- first, to ensure that all persons who carry out construction work or supply related goods and services are entitled to receive, and can recover, progress payments for carrying out of that work or supplying of those goods and services; and
- second, to provide such persons with access to a quick, inexpensive process for resolving payment disputes that arise without the need for expensive litigation in courts.

An effective security of payment framework is particularly important for the building industry due to unique structural vulnerabilities that characterise the industry, such as the hierarchical contracting structure for most construction projects.

Other structural vulnerabilities that have been repeatedly noted as characterising the building industry include:

- a lack of capital held by firms;
- a highly fragmented market structure – particularly among subcontractors – that encourages underquoting to obtain work;
- vulnerability to price increases from input costs due to fixed-price contracts; and
- low levels of business and financial knowledge that put subcontractors at greater risk.

Although the SOP Act was enacted in 2002, and amended in 2006, it has not been reviewed since that time. During the intervening years, other jurisdictions have reviewed – and several have reformed – their security of payment legislation to address persistent problems with payment practices that contribute to financial insecurity among building subcontractors, suppliers, and consultants.

The Committee's inquiry, a consequence of an election commitment to 'crack down on bosses and contractors who refuse to pay their subcontractors for completed work,' afforded a long overdue examination of the SOP Act's effectiveness and its consistency with other jurisdictions' legislation. The Committee's report provides a timely opportunity for the Government to consider enacting reforms to address these issues.



## Summary of Government Response to Inquiry Recommendations

Rec #	Recommendation — That the Victorian Government:	Government response	Responsible agency	Liaison agency
1	Require the Public Construction Procurement Committee (established by 8.4 of the Ministerial Directions for Public Construction Procurement in Victoria) to review the directions, instructions and guidance materials informing public construction procurement	Support in part	Department of Treasury and Finance	Department of Transport and Planning
2	Repeal ss 10, 10A & 10B of the [SOP Act] and insert a new provision to enable contractors to claim a progress payment calculated in accordance with a contract or, if the contract does not provide for the matter, calculated on the basis of the value of construction work carried out.	Support in full	Department of Transport and Planning	Victorian Building Authority
3	Remove the concept of 'reference dates' from the [SOP Act] and insert a statutory entitlement to claim payment modelled on ss 13(1A), (1B) and (1C) of the <i>Building and Construction Industry Security of Payment Act 1999</i> (NSW).	Support in full	Department of Transport and Planning	Victorian Building Authority
4	Amend the definition of business days contained in s 4 of the [SOP Act] to exclude: Saturdays and Sundays, Victorian public holidays, and the period between 22 December and 10 January inclusive.	Support in full	Department of Transport and Planning	Victorian Building Authority
5	Amend the [SOP Act] to insert a provision to provide that notice-based time bar clauses can be declared 'unfair' by an adjudicator, a court, an arbitrator (or other expert appointed by the contracting parties) if compliance with the clause is not reasonably possible or would be unreasonably onerous.	Support in full	Department of Transport and Planning	Victorian Building Authority



Rec #	Recommendation — That the Victorian Government:	Government response	Responsible agency	Liaison agency
6	Amend the [SOP Act] to insert a provision to provide that the <i>Building and Construction Industry Security of Payment Regulations 2023</i> (Vic) may prohibit unfair construction contractual clauses and, in doing so, nullify their effect.	Support in full	Department of Transport and Planning	Victorian Building Authority
7	Amend the [SOP Act] to extend the time limit on claiming payment to six months.	Support in full	Department of Transport and Planning	Victorian Building Authority
8	Amend s 12 of the [SOP Act] to impose maximum time limits on payment terms of no more than 25 business days after the payment claim has been made.	Support in full	Department of Transport and Planning	Victorian Building Authority
9	Amend the SOP Act (s 14) to expressly provide for an entitlement to claim retention money under the [SOP Act] and empower an adjudicator to decide whether, how much, and when retention money is to be returned.	Support in full	Department of Transport and Planning	Victorian Building Authority
10	Engage with the residential building sector to consider amending the SOP Act to encompass construction contracts with homeowners, with amendments to provide that a payment claim made to a homeowner is not validly served unless it is accompanied by standard information (produced by the VBA) explaining security of payment law, statutory timeframes, how to respond to a payment claim, and where to seek assistance and further information.	Support in principle	Department of Transport and Planning  Department of Government Services	Victorian Building Authority
11	Amend the [SOP Act] to task the Victorian Building Authority with ongoing responsibility for promoting and educating the construction sector in relation to Victorian security of payment law.	Support in full	Department of Transport and Planning	Victorian Building Authority



Rec #	Recommendation — That the Victorian Government:	Government response	Responsible agency	Liaison agency
12	Following legislative reform to strengthen the [SOP Act], fund a promotional and educational campaign, led by the Victorian Building Authority to raise the construction sector's awareness of the changes and understanding of Victorian security of payment law.	Support in principle	Victorian Building Authority	Department of Treasury and Finance  Department of Transport and Planning
13	Provide appropriate ongoing funding to the Victorian Building Authority to support its regular promotion and education of the [SOP Act].	Support in principle	Victorian Building Authority	Department of Treasury and Finance  Department of Transport and Planning
14	Insert a provision in the [SOP Act] requiring the Act and any corresponding regulations to be reviewed three years after the recommendations of the report are implemented, should they be taken up.	Support in principle	Department of Transport and Planning	Victorian Building Authority
15	Amend s 21 of the [SOP Act] to: prohibit respondents from including reasons in their response to an adjudicator that was not previously included in the payment schedule; and remove the requirement for adjudicators to identify these reasons and provide claimants with two days to respond to them.	Support in full	Department of Transport and Planning	Victorian Building Authority
16	Amend s 18 of the [SOP Act] to provide respondents with five business days to provide a payment schedule in response to an adjudication notice.	Support in full	Department of Transport and Planning	Victorian Building Authority
17	Amend s 22 of the [SOP Act] to provide that an adjudication determination must be made within 10 business days of receipt of a respondent's adjudication response, the date an adjudication response became due, or if the respondent is not entitled to provide an adjudication response, the date the	Support in full	Department of Transport and Planning	Victorian Building Authority



Rec #	Recommendation — That the Victorian Government:	Government response	Responsible agency	Liaison agency
	adjudicator accepted the adjudication application, and to permit parties to agree to extend the determination deadline for up to 30 business days.			
18	Review the impact of the adjudication review mechanism established by pt 3, div 3 of the <i>Building and Construction Industry (Security of Payment) Act 2021</i> (WA).	Support in principle	Department of Transport and Planning	Victorian Building Authority
19	Repeal div 2A of the [SOP Act] to remove the adjudication review mechanism, which only allows for the review of determinations involving excluded amounts.	Support in full	Department of Transport and Planning	Victorian Building Authority
20	Amend s 50 of the [SOP Act] and the <i>Building and Construction Industry Security of Payment Regulations 2023</i> (Vic) to modernise how notices may be served.	Support in full	Department of Transport and Planning	Victorian Building Authority
21	Amend s 19 of the [SOP Act] and the Ministerial Guidelines issued under s 44 of the SOP Act, to require adjudicators to complete continuing professional development to maintain their eligibility to serve as an adjudicator under the Act.	Support in principle	Department of Transport and Planning	Victorian Building Authority
22	Enable the Victorian Building Authority to update the Authorised Nominating Authorities Conditions of Authorisation to require authorised nominating authorities to ensure that adjudicators undertake continuing professional development.	Support in principle	Victorian Building Authority	Department of Transport and Planning
23	Amend s 46 of the [SOP Act] to extend the protection from civil liability already afforded to adjudicators to authorised nominating authorities for the duties and functions they perform under the Act in good faith.	Support in principle	Department of Transport and Planning	Victorian Building Authority





Rec #	Recommendation — That the Victorian Government:	Government response	Responsible agency	Liaison agency
24	Direct the Victorian Building Authority to update the Authorised Nominating Authorities Conditions of Authorisation it has issued under s 43 of the [SOP Act].	Support in full	Victorian Building Authority	Department of Transport and Planning
25	Amend the [SOP Act] to clarify that adjudication fees may be included in an adjudication certificate as provided for in the adjudication determination.	Support in part	Department of Transport and Planning	Victorian Building Authority
26	Amend div 2B of the [SOP Act] to provide that an adjudication certificate may be filed as a judgement for a debt in any court of competent jurisdiction and is enforceable accordingly.	Support in full	Department of Transport and Planning	Victorian Building Authority
27	Work with the construction sector to review the application of a cascading deemed statutory trust scheme, as outlined in the report, Review of Security of Payment Laws: Building Trust and Harmony (2017).	Support in principle	Department of Transport and Planning	Victorian Building Authority
28	Consider introducing a retention trust scheme to the Victorian construction sector modelled on the retention trust scheme established by the <i>Building and Construction Industry (Security of Payment) Act 2021</i> (WA).	Support in principle	Department of Transport and Planning	Victorian Building Authority



## Response to Inquiry recommendations

The Committee concluded that extensive reforms to Victoria's security of payment framework are required to address problematic contractual and payment practices that contribute to financial insecurity and higher levels of insolvency that characterise the construction industry. The Committee's recommended reforms chiefly consist of amendments to the SOP Act.

The Government has reviewed and analysed in depth the Committee's findings and recommendations and generally concurs with the findings, which confirm many of the problems that persist in the building industry observed in other jurisdictions' reviews.

This response focuses on the Committee's recommendations. Many of the recommendations propose to repeal provisions added to the SOP Act in 2006. Most other recommendations propose changes to the SOP Act that modernise aspects of its operation, bring it into closer alignment with other states' and territories' security of payment (SOP) legislation, or propose broader issues for further consideration by the Government.

The proposed responses are grouped and summarised according to the Committee Report's chapters:

- Chapter 2 — Payment practices in the construction industry (Recommendation 1)
- Chapter 4 — Strengthening the statutory right to claim payment (Recommendations 2-14)
- Chapter 5 — Improving the adjudication of payment disputes (Recommendations 15-26)
- Chapter 6 — Insolvency in the construction industry (Recommendations 27-28).

## Payment practices in the construction industry

Chapter 2 of the Committee Report reviews factors underpinning poor payment and contracting practices that characterise Victoria's building industry. Those factors include:

- the hierarchical nature of construction contracting and the extensive use of subcontracting (noting that subcontractors complete 80 per cent or more of construction work in Australia);
- the imbalance of power between principals (developers, builders) and head contractors, on the one hand, and subcontractors, many of whom have fewer than five employees;
- thin profit margins that prevail in the industry and the prevalence of under-capitalised firms and businesses with often negative cash flow;
- the widespread use of protracted payment terms and late payment;
- risk shifting down the contracting chain through often onerous, one-sided contractual terms;
- the impact of requiring fixed price contracts for residential builds and prescribed progress payment schedules that do not reflect current building practices; and
- economic challenges associated with high prices for construction materials, rising inflation, and shortages of skilled labour.

The Committee also examined the role government departments and agencies may play, as public procurement agencies, in improving practices in the building industry.

### Recommendation 1

**That the Victorian Government require the Public Construction Procurement Committee (established by 8.4 of the Ministerial Directions for Public Construction Procurement in Victoria) to review the directions, instructions and guidance materials informing public construction procurement, including, but not limited to:**

- the Ministerial Directions for Public Construction in Victoria
- the Instructions for Public Construction in Victoria, and

**Guidance for Public Construction in Victoria.**

**This review should:**

- identify to what extent these directions, instructions and guidance materials foster collaborative procurement, contracting, fair risk allocation, and best practice payment behaviours;
- identify options for facilitating the more consistent use of standard head- and subcontracts by agencies;
- incorporate appropriate consultation with construction industry stakeholders; and
- examine the guidance materials and enforcement mechanisms informing construction procurement, contracting and risk allocation in other relevant Australian jurisdictions, including New South Wales.

**The findings of the review should inform the modernisation of these guidance materials to foster more collaborative construction procurement, contracting, and risk allocation. An outcome should be that best practice payment behaviours are practiced on government projects. Any updated guidance materials should be accompanied by appropriate public sector education about their application.**

#### **Government response – Support in part**

The Government only supports part of Recommendation 1 of the Committee Report.

The Committee correctly noted that three documents – the Ministerial Directions for Public Construction in Victoria, mandatory Instructions for Public Construction in Victoria, and non-mandatory Guidance for Public Construction in Victoria impose requirements on government departments and agencies in relation to public construction procurement and processes. This includes the use of approved standard form contracts for construction and limits how these contracts can be amended.

This recommendation is supported in part to reflect the fact that:

- a. The Department of Treasury and Finance (DTF) is the appropriate government body to undertake a review as it administers the Ministerial Directions and Instructions for Public Construction Procurement on behalf of the



Victorian Government and is responsible for ensuring they remain effective and fit for purpose. The review will engage the Public Construction Procurement Committee and other relevant stakeholders at key milestones.

- b. Other aspects of the Committee's recommendation will be out of scope considering recent reform work undertaken by DTF. A key objective of that reform work was fostering improved project culture through greater adoption of collaborative and cooperative approaches and procurement models. Consequently, any review will focus on the intersection between the Ministerial Directions and Instructions and the application of the SOP Act in standard form public construction contracts.

The Government notes that the Committee's recommendation does not commit the Government to any particular outcome and it will consider further action when DTF has completed its relevant reviews.

## Strengthening the statutory right to claim payment

In Chapter 4 of its 28 November 2023 report, the Committee canvassed several key issues that impact how effective the SOP Act is in establishing a statutory entitlement to claim payment for construction work completed or related goods and services supplied. Some issues examined by the Committee included:

- how the concept of ‘claimable’ versus ‘non-claimable’ contract variations and various amounts excluded from consideration as part of a payment claim impacts the SOP Act’s operation;
- the concept of reference dates and business days in facilitating the presentation of payment claims and lodgement of applications for the adjudication of disputed payment claims;
- the proliferation of unfair or onerous contractual clauses that impact on subcontractors’ and others’ claims for payment;
- the impact of short time limits for claiming payment;
- protracted payment terms that negatively affect both the presentation of payment claims and subsequent applications for adjudication in the event of a dispute; and
- practices around the return of retention money posted by contractors and subcontractors to secure performance of their obligations under construction contracts.

Many of these issues arose as the result of amendments to the SOP Act enacted in 2006.

In addition, the Committee examined other ways in which the statutory right to claim payment for construction work or supplied goods and services could be facilitated by other amendments to the legislation. These included considering whether the SOP Act’s scheme for the adjudication of payment disputes should be extended to payment disputes between residential homeowners and builders, which are dealt with separately under the *Domestic Building Contracts Act 1995* (DBC Act). Another issue considered by the Committee in Chapter 4 of its report was whether further reviews of the legislation should be mandated but leaving many of the issues associated with such reviews unresolved.

### Recommendation 2

**That the Victorian Government repeal ss 10, 10A & 10B of the [SOP Act] and insert a new provision modelled on both s 9 of the Building and Construction Industry Security of Payment Act 1999 (NSW) and s 18 of the Building and Construction Industry (Security of Payment) Act 2021 (WA). The new provision should enable contractors to claim a progress payment calculated in accordance with a contract or, if the contract does not provide for the matter, calculated on the basis of the value of construction work carried out.**

#### **Government response – Support in full**

The Government agrees with the Committee’s recommendation and will introduce amendments to the legislation, repealing sections 10-10B of the SOP Act, and making consequential amendments to remove other references to ‘excluded amounts’ elsewhere in the legislation. The ‘excluded amounts’ regime was added to the SOP Act as part of amendments enacted in 2006.

The excluded amounts regime has had a number of consequences that have undermined achievement of the key objects of the SOP Act by, among other things:

- increasing the cost and complexity of adjudication proceedings for determining payment disputes and consequently driving down the number of disputed payment claims that are submitted for adjudication under the SOP Act;
- reducing the overall amount of money that can be recovered through the SOP Act’s adjudication process, which likewise reduces the number of payment claims submitted for adjudication;
- excluding retention monies from consideration in adjudications brought under the SOP Act, which were clearly intended to be part of payment claims that could be recovered through adjudication; and
- jeopardising the recovery of any adjudicated amount as a debt where the adjudication includes any excluded amount, no matter how trivial.

Moreover, the SOP Act’s excluded amount provisions are, without doubt, inconsistent with the security of payment legislation enacted in every other Australian jurisdiction. As such, they are contrary to the goal – long advocated among states, territories, and the Federal Government – of harmonising security of payment legislation across Australia. Repealing the excluded amounts provisions in the SOP Act not only removes much of the difficulty those provisions have

spawned but also serves the goal of making Victoria's SOP Act more consistent with security of payment legislation in other jurisdictions.

### Recommendation 3

**That the Victorian Government remove the concept of 'reference dates' from the [SOP Act] and insert a statutory entitlement to claim payment modelled on ss 13(1A), (1B) and (1C) of the Building and Construction Industry Security of Payment Act 1999 (NSW). The new provisions should:**

- enable at least one payment claim to be made per calendar month;
- expressly provide for a payment claim to be made on or following the termination of a contract, for goods and services provided up to the date of termination; and
- override any contracted dates for payment claims if they are longer than those provided for by the SOP Act.

**Government response – Support in full**

Reference dates play a critically important role in the SOP Act as they determine when:

- a person undertaking construction work or supplying related goods and services becomes entitled to a progress payment (sections 9(1)-(2)); and
- when a payment claim may be served (section 14(4)).

Like excluded amounts, the reference date formulae in the SOP Act were added as part of the 2006 amendments and are, like the excluded amounts provisions, unique to Victoria. Many submitters to the Committee complained that calculating the reference date is difficult, that claimants often must obtain legal advice to identify the correct reference date, and that the correct date is one of the most litigated issues in adjudications under the SOP Act. In addition, the SOP Act's reference date formulae apparently facilitate unfair, unethical practices in Victoria's construction industry, by enabling some builders and head contractors to prevent payment claims from being made by strategically invoking termination clauses under their contract prior to a reference date. Such 'gaming' of the system should not be tolerated.

Accordingly, the Government will amend the SOP Act by repealing the current reference date provisions and enacting provisions identical or substantially like those in New South Wales' legislation, as recommended by the Committee. Not only will this remove the complexity and unfairness associated with the current SOP Act provisions regarding reference dates, but it will also further the goal of making Victoria's legislation more consistent with other jurisdictions' security of payment legislation.

### Recommendation 4

**That the Victorian Government amend the definition of business days contained in s 4 of the [SOP Act] to exclude:**

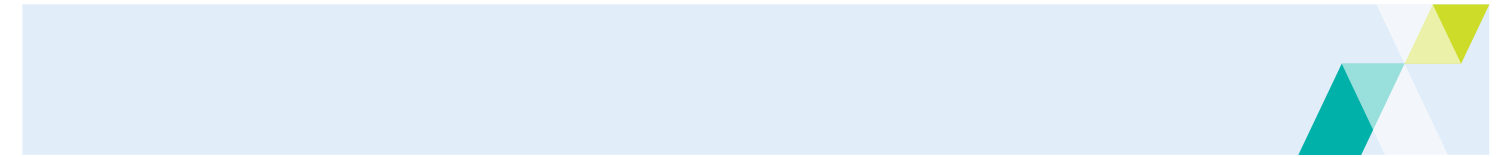
- Saturdays and Sundays;
- Victorian public holidays; and
- the period between 22 December and 10 January inclusive.

**Division 2, s 4 of the Building and Construction Industry (Security of Payment) Act 2021 (WA) provides a suitable model for this reform.**

**Government response – Support in full**

The Government will amend section 4 of the SOP Act to expressly exclude the period between 22 December and 10 January, inclusive, in any calendar year from the definition of 'business day'. The amendment will be based on the definition of 'business day' in section 4 of Western Australia's SOP legislation, as recommended by the Committee.

Submissions to the Committee on this point uniformly noted that the construction industry traditionally shuts down over the Christmas period. Victoria is the only jurisdiction not to exclude the extended Christmas shutdown from the definition of 'business days,' which are used to determine when a payment claim may be made. The exact Christmas shutdown



period excluded varies slightly among jurisdictions, with the period provided in the Queensland and Western Australian legislation being the most extensive. The change recommended by the Committee is uncontroversial, is sensible, and aligns the SOP Act with other states' and territories' SOP legislation and therefore will be adopted.

## Recommendation 5

**That the Victorian Government amend the [SOP Act] to insert a provision modelled on s 16 of the *Building and Construction Industry (Security of Payment) Act 2021 (WA)*. The new section should provide that notice-based time bar clauses can be declared 'unfair' by an adjudicator, a court, an arbitrator (or other expert appointed by the contracting parties to determine a matter under the contract) if compliance with the clause:**

- is not reasonably possible
- would be unreasonably onerous.

**A notice-based time bar provision of a construction contract that is declared to be unfair has no effect in relation to the payment claim that is the subject of the proceedings. However, it continues to have effect in other circumstances arising under the same or a related contract.**

**Government response – Support in full**

As part of its package of amendments to reform the SOP Act, the Government will amend the SOP Act to add provisions modelled on section 16 of Western Australia's legislation, as recommended by the Committee. This provision protects against notice-based 'time bar' clauses in construction contracts that are often imposed by parties with superior bargaining power.

The circumstances that section 16 of the Western Australian legislation permits, or requires, to be considered before declaring such a provision to be unfair, and therefore void, are consistent with Commonwealth legislation, such as the *Competition and Consumer Act 2010 (Cth)* or the *Independent Contractors Act 2006 (Cth)*. They are also consistent with most submissions to the Committee. Giving an adjudicator, court, etc the power to determine, on a case-by-case basis, whether a construction contract's notice-based time bar is unreasonable is preferable to trying to legislate a blanket prohibition. Accordingly, a provision modelled on section 16 of the Western Australian legislation will be adopted as part of the amendments the Government will make to the SOP Act.

## Recommendation 6

**That the Victorian Government amend the [SOP Act] to insert a provision modelled on s 15 of the *Building and Construction Industry (Security of Payment) Act 2021 (WA)*. The new provision should provide that the *Building and Construction Industry Security of Payment Regulations 2023 (Vic)* may prohibit unfair construction contractual clauses and, in doing so, nullify their effect.**

**Government response – Support in full**

For the same reasons as the prior recommendation, the Government will adopt an amendment to the SOP Act, modelled on section 15 of Western Australia's SOP legislation, in accordance with Recommendation 6. Such a provision simply gives the industry notice that the Government may, by amendment to the security of payment regulations, expressly prohibit other contractual clauses and so render them of no effect. As the Committee recognised, such a provision allows Victoria's SOP regulations to keep pace with evolving contractual practices in the construction industry.

## Recommendation 7

**That the Victorian Government amend the [SOP Act] to extend the time limit on claiming payment to six months. Amendments should be modelled on s 23 of the *Building and Construction Industry (Security of Payment) Act 2021 (WA)* which enables:**

- a progress payment to be claimed up to six months after the relevant construction work was completed, or later if provided for in the contract

- a final payment to be claimed before whichever of the following is the latest:
  - six months after the completion of works or supply of goods under the construction contract
  - 28 days after the end of the last defects liability period for the construction contract

the date provided for in the construction contract.

**Government response – Support in full**

Victoria is unique among Australian jurisdictions in having the shortest time frame – three months – for bringing a payment claim under the SOP Act; other states and territories allow payment claims to be made either within six months or twelve months. Bringing the SOP Act into closer conformity with other Australian jurisdictions' SOP legislation is a strong argument for amending the legislation to extend the payment claim period.

The justification for amending the SOP Act becomes even stronger considering the widespread support for a longer payment claim period and the absence of any opposition to it. Extending the time to submit a payment claim also permits the parties more time to 'explore a negotiated outcome' where there is a dispute about the claimed amount, or the work performed. The Government also agrees with the Committee that twelve months may be too long and may risk undermining the procedural fairness afforded respondents under the SOP Act; it also represents a quadrupling of the legislation's current time. Accordingly, the Government will introduce legislation amending the SOP Act in accordance with the Committee's Recommendation 7.

## Recommendation 8

**That the Victorian Government amend s 12 of the [SOP Act] to provide that a payment under a construction contract becomes due and payable:**

- on the date set by the terms of the contract, subject to the payment term not exceeding 25 business days after the payment claim has been made, 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.

**Government response – Support in full**

Concerns about lengthy payment terms being imposed on subcontractors because of unequal bargaining power with building participants higher up the contractual chain have been voiced in government reports since 1994. Those concerns were echoed in submissions to the Committee.

The Government considers a statutory framework that emphasises simplicity and ease of use to be more consistent with the overall objectives of the legislation and for that reason agrees with the Committee to adopt the recommended provision. Standardising payment terms across the construction industry in Victoria – and bringing those payment terms into closer alignment with other Australian jurisdictions' legislation – will benefit virtually all participants in the contractual chain, including head contractors. The time frame recommended by the Committee is also consistent with the Commonwealth's Construction Industry Payment Principles. Accordingly, the Government will introduce legislation amending the SOP Act in accordance with the Committee's Recommendation 8.

## Recommendation 9

**That the Victorian Government amend s 14 of the [SOP Act] to expressly:**

- provide an entitlement to claim retention money under the Act, either as part of a broader payment claim or as a standalone claim
- empower an adjudicator to decide whether retention money is to be returned, the proportion which is owed, and the date on which it is to be returned.

**Government response – Support in full**





Retention monies are monies that, under the parties' construction contract, are deducted from subcontractors' progress payments, up to a specific level, for purposes of securing satisfactory completion of the work.

In accordance with Parliament's intent, retention monies were included within the scope of payment claims subject to the SOP Act from 2006 to at least 2021. A Victorian Supreme Court decision in 2021 has injected considerable uncertainty into the SOP Act's operation with respect to retention monies by determining that they are not included within payment claims subject to the legislation.

As part of other recommendations, the Government has already indicated its intent to remove some of that uncertainty by repealing the excluded amounts provisions in the SOP Act (e.g., sections 10, 10A and 10B) and by making other amendments required because of that repeal. However, given past misconstruction of the SOP Act with respect to retention monies, the Government will amend the legislation in accordance with Recommendation 9 of the Committee's Report to ensure retention monies are appropriately dealt with in the future under the SOP Act.

## Recommendation 10

**That the Victorian Government engage with the residential building sector to consider amending the [SOP Act] to encompass construction contracts with homeowners. Any amendments made should provide that a payment claim made to a homeowner is not validly served unless it is accompanied by standard information (produced by the Victorian Building Authority) explaining security of payment law, the statutory timeframes, how to respond to a payment claim, and where to seek assistance and further information.**

**Government response – Support in principle**

The SOP Act does not apply to contracts between a residential builder and a homeowner. Payment disputes between these parties are dealt with under the provisions of the *Domestic Building Contracts Act 1995* (DBC Act). However, payment claims by a residential builder's subcontractors against the builder are dealt with under the SOP Act. This creates tensions and inconsistencies between the payment dispute adjudication processes that apply to different building practitioners engaged in the construction of a residence. While some jurisdictions have two different payment dispute adjudication schemes in place, like Victoria, others resolve disputes between homeowners and residential builders under their SOP frameworks. Approximately half the Australian jurisdictions now deal with residential building disputes under their SOP legislation, and it appears that the trend is to eliminating separate frameworks for payment disputes between homeowners and residential builders.

The Government supports, in principle, amendments that would eliminate the separate payment dispute resolution process under the DBC Act and bring disputes between homeowners and residential builders within the scope of the SOP Act's framework for dealing with payment claims and disputes. However, additional safeguards should be required, consistent with those in place in Tasmania and/or Western Australia. In any event, this issue – and other related issues – ought to be considered, in the first instance, as part of the Minister for Consumer Affairs' review of the DBC Act and the broader building reform program led by the Minister for Planning.

## Recommendation 11

**That the Victorian Government amend the [SOP Act] to task the Victorian Building Authority with ongoing responsibility for promoting and educating the construction sector in relation to Victorian security of payment law.**

**Government response – Support in Full**

The Government supports the Committee's recommendation and will introduce amendments to the SOP Act to expressly task the VBA with ongoing responsibility for promoting and educating the construction sector in relation to Victorian security of payment law, consistent with the Committee's recommendation and submitter comments.

Submitters to the Parliamentary Inquiry were united in supporting the VBA undertaking greater promotion and education of building practitioners and others about their rights and obligations under the SOP Act.



## Recommendation 12

**That, following legislative reform to strengthen the [SOP Act], the Victorian Government fund a promotional and educational campaign, led by the Victorian Building Authority, and including (but not limited to) trade associations, trade unions, industry bodies, vocational education institutions, municipal councils and community legal centres, to raise the construction sector's awareness of the changes and understanding of Victorian security of payment law.**

**Government response – Support in principle**

The Government supports this recommendation in principle, noting that funding for the VBA's expanded education and outreach role will be subject to future funding considerations, which entails some uncertainty. The VBA should also review its current funding and prioritise its expenditures and regulatory activities as necessary to implement this expanded role.

## Recommendation 13

**That the Victorian Government provide appropriate ongoing funding to the Victorian Building Authority to support its regular promotion and education of [SOP Act].**

**Government response – Support in principle**

The Government supports Recommendation 13 in principle for the same reasons, and subject to the same considerations, that warranted this level of support for Recommendation 12.

## Recommendation 14

**That the Victorian Government insert a provision in the [SOP Act] requiring the Act and any corresponding regulations to be reviewed three years after the recommendations of the report are implemented, should they be taken up. The review should report within 12 months and incorporate consultation with the construction sector to:**

- **identify persistent and emerging poor payment and contracting practices in the construction sector and avenues for addressing these behaviours;**
- **assess whether Victorian security of payment law is achieving its legislated objectives and recommend opportunities to improve its operation; and**
- **consider developments in the security of payment law of other Australian jurisdictions and determine whether similar reform would be beneficial in Victoria.**

**Government response – Support in principle**

The SOP Act has gone seventeen years without a meaningful review. Regular reviews of the SOP Act should ensure that the legislation remains fit for purpose in what is clearly a complex, volatile and rapidly changing construction industry. More consideration about the frequency and nature of the review (e.g., who will undertake it, who will receive the reports) is needed, and whether this process needs to be legislated.



## Improving the adjudication of payment disputes

Chapter 5 of the Committee Report, the Committee examined deficiencies in the operation of the adjudication process and procedures established in the current SOP Act and recommended opportunities for improving adjudications. Other elements of the current legislation that were targeted for improvement by the Committee included:

- the current SOP Act's provision, added in 2006, enabling respondents to inject new reasons for withholding payment that were not included in a payment schedule provided prior to a claimant's seeking to have its dispute adjudicated;
- short time limits (the shortest in Australia) for the lodgement of applications for the adjudication of payment disputes;
- provisions of the SOP Act that provide for an informal review of adjudication determinations by another adjudicator but limiting that review to issues related to 'excluded amounts' such as non-claimable variations; and
- antiquated provisions for the service of documents under the current legislation, which do not recognise modern methods for the electronic service of documents.

The Committee also reviewed issues relating to adjudicators, including claims around perceptions of bias on the part of adjudicators, the maintenance of their professional skills and qualifications, and disclosure of fee sharing arrangements between adjudicators and the ANAs who appoint and monitor the activities of adjudicators.

### Recommendation 15

**That the Victorian Government amend s 21 of the [SOP Act] to:**

- **prohibit respondents from including reasons in their response to an adjudicator that was not previously included in the payment schedule; and**
- **remove the requirement for adjudicators to identify these reasons and provide claimants with two days to respond to them.**

**Government response – Support in full**

Section 21(2B) of the SOP Act was added as part of the 2006 amendments and has proven to be problematic. No other state or territory has a provision that, like section 21(2B), allows a respondent to inject new reasons for non-payment, not identified in a payment schedule in response to a payment claim, into its response to an adjudication application.

Section 21(2B) of the SOP Act was roundly criticised by submitters to the inquiry who complained the provisions unfairly disadvantage claimants. Allowing respondents to submit new reasons for withholding payment during the adjudication process also unnecessarily consumes adjudicator time and attention (discerning 'new' claims and then notifying claimants and providing them two business days to respond) and increases an adjudication's cost.


Finally, section 21(2B) has a further negative impact since incorrectly identifying the respondent's reasons can serve as grounds for a court setting aside an adjudicator's determination. Consequently, section 21(2B) of the SOP Act appears to actively discourage subcontractors and others from seeking adjudication of disputed payment claims submissions for all these reasons. In addition, most other Australian jurisdictions actively prohibit respondents from injecting new reasons in their adjudication responses.

Given the inconsistency of Victoria's SOP Act with SOP legislation around Australia, and for the reasons contained in the Committee's report as well, the Government will introduce amendments repealing section 21(2B) and of the SOP Act and, consistent with some other jurisdictions' legislation, amend the SOP Act to expressly prohibit respondents from providing new reasons in their adjudication responses.

### Recommendation 16

**That the Victorian Government amend s 18 of the [SOP Act] to provide respondents with five business days to provide a payment schedule in response to an adjudication notice.**

**Government response – Support in full**



Related to the Recommendation 15, the Committee also recommended that the SOP Act should be amended to allow respondents five business days to provide a payment schedule in response to an adjudication notice. This amendment would be modelled on section 17 of New South Wales' SOP legislation.

The Government agrees with the Committee's recommendation and will introduce legislation amending section 18 of the SOP Act to allow respondents five business days to provide a payment schedule in response to an adjudication notice where they failed to provide such a schedule in response to the initial payment claim. This provision will ensure that a respondent is afforded natural justice to respond to a payment claim it may have previously overlooked.

## Recommendation 17

**That the Victorian Government amend s 22 of the [SOP Act] to provide that an adjudication determination must be made within 10 business days of:**

- a respondent providing a valid adjudication response;
- the date an adjudication response became due; or
- if the respondent is not entitled to provide an adjudication response, the date the adjudicator accepted the adjudication application.

**However, the claimant and the respondent may agree to extend the time by which an adjudicator must make a determination by up to an additional 20 business days. Reforms should be modelled on s 37 of the *Building and Construction Industry (Security of Payment) Act 2021 (WA)*.**

**Government response – Support in full**

The Government supports the Committee's recommendation in full and will introduce legislation to amend section 22 of the SOP Act in line with section 37 of Western Australia's security of payment legislation. This will align Victoria's legislation with other Australian jurisdictions' SOP acts, achieving the goal of greater national consistency.

The provisions of the SOP Act governing when adjudication applications must be made are complex and do not lend themselves to easy interpretation and application by laypersons in the construction industry. Western Australia has recently rewritten its SOP legislation. In the Government's view, the Western Australian provisions regarding when adjudication applications may be made is more straightforward and clearer than similar provisions in either the SOP Act or New South Wales legislation.

## Recommendation 18


**That the Victorian Government review the impact of the adjudication review mechanism established by pt 3, div 3 of the *Building and Construction Industry (Security of Payment) Act 2021 (WA)*. The review should:**

- consider whether adjudication reviews are being sought in appropriate circumstances and frequency;
- examine the outcomes of adjudication reviews to identify whether they are furthering the objectives of security of payment law; and
- include consultation with the Victorian construction sector to determine the appropriateness of introducing adjudication reviews in Victoria.

**Government response – Support in principle**

Recommendations 18 and 19 in the Parliamentary Committee's report are closely related. As discussed in the next section, the Government supports introducing legislation to repeal the current adjudication review mechanism in Part 3, Division 2A of the SOP Act, effectively eliminating all provisions for seeking review of an adjudication determination within the SOP framework and obliging parties to seek review in the courts.

The Committee noted that Western Australia's recently rewritten SOP legislation now includes a broad, adjudication review mechanism. No other Australian jurisdiction has a review mechanism like the one enacted in Western Australia or proposed in New South Wales. While the Committee noted that there was considerable support among submitters to the inquiry for a broader adjudication review process, it considered introducing such a mechanism to represent 'a significant departure' from other jurisdictions' SOP frameworks. The Committee also expressed concern that an adjudication review



mechanism could further prolong payment disputes, noting that judicial review was still available after the review concluded. Further consultation with industry and consideration of how the Western Australian mechanism worked in practice was recommended before any such mechanism was introduced in Victoria.

The Government sees potential merit in providing a broader adjudication review mechanism in the SOP Act, especially given its decision to introduce amendments repealing the limited right of review provided in the current legislation. However, the Government agrees that more consultation, and consideration of how Western Australia's recently enacted adjudication review mechanism works in practice, is needed before proposing any new legislation on this front. Accordingly, Recommendation 18 is supported in principle to allow further consideration of these issues.

## Recommendation 19

**That the Victorian Government repeal div 2A of the [SOP Act] to remove the adjudication review mechanism, which only allows for the review of determinations involving excluded amounts.**

**Government response – Support in full**

The Government has previously indicated its intention to introduce amendments to the SOP Act repealing the 'excluded amounts' regime established in sections 10 – 10B of the legislation and making consequential amendments to other provisions that deal with excluded amounts. Consistent with its determination to repeal all aspects of the SOP Act related to excluded amounts, the Government will introduce amendments repealing Part 3, Division 2A of the SOP Act, which limits the review of adjudication determinations to matters involving excluded amounts. The Government will take this step notwithstanding that it will necessarily leave the SOP Act without any adjudication review process and that review of adjudicator determinations will, by necessity, be limited to judicial review. However, the result is not inconsistent with most other jurisdictions' SOP legislation, which likewise do not provide for adjudicator reviews at present.

## Recommendation 20

**That the Victorian Government amend s 50 of the [SOP Act] and the *Building and Construction Industry Security of Payment Regulations 2023 (Vic)* to modernise how notices may be served. Reform should be modelled on s 113 of the *Building and Construction Industry (Security of Payment) Act 2021 (WA)* and reg 22 of the *Building and Construction Industry (Security of Payment) Regulations 2022 (WA)*.**

**Government response – Support in full**

As the Committee noted in its report, the SOP Act has not kept pace with modern ways of communicating and doing business. Section 50 of the legislation does not contemplate service documents related to payment claims or disputes to be made electronically, such as by email, which is a standard means of communication for businesses. Several submitters recommended adopting provisions from Western Australia's recently rewritten SOP framework. The Committee accepted the need to modernise the SOP Act with respect to service of notices and concluded that it was sensible to align Victoria's legislation with the Western Australian provisions noted by submitters.

The Government agrees that the SOP Act has failed to keep pace with accepted means of service currently in widespread usage among businesses and courts and will introduce amendments aligning Victoria's security of payment framework with the Western Australian provisions recommended by the Committee.

## Recommendation 21

**That the Victorian Government amend s 19 of the [SOP Act] and the Ministerial Guidelines issued under s 44 of this Act, to require adjudicators to complete continuing professional development to maintain their eligibility to serve as an adjudicator under the Act.**

**Government response – Support in principle**



The Committee received mixed messages about the quality of adjudicators from submitters. Some suggested that the quality of adjudications could be improved if continuing professional development was made a requirement of adjudicators maintaining their eligibility for appointment to payment disputes; others suggested that adjudicators should be required to register with the VBA, with continuing professional development a requirement of maintaining such registration.

The Committee considered improving the calibre of adjudicators and the quality of their determinations to be important. Mandatory professional development, the Committee thought, will help ensure that adjudicators continually update their knowledge and skills in line with contemporary construction industry practices. The Committee noted that such an approach is currently taken by New South Wales and that adoption of a similar approach in Victoria would facilitate adjudicators acting in both jurisdictions. However, the Committee did not consider requiring adjudicators to register with the VBA was merited at present, noting it had not received substantial evidence that adjudications were of poor quality generally.

The Government supports, in principle, the Committee's recommendation and sees merit to considering the adoption of a system of registration for adjudicators, with specific eligibility and continuing professional development obligations and provisions for the cancellation or suspension of registration. Such a system has been established in Western Australia, as noted by the Committee. The Western Australia model represents a substantial departure from the current regulatory framework that applies, lightly, to adjudicators under the SOP Act.

Adoption of that model would also expand the VBA's role and responsibilities with respect to adjudicators. However, such a model offers a straightforward, statutory framework with clear obligations and consequences for non-compliance with those obligations in place of less directory expectations scattered across the SOP Act, VBA conditions and Ministerial Guidelines.

The Government wishes to see further consultation regarding the different approaches recommended by the Committee versus the Western Australia model – before considering further amendments to the SOP Act in relation to this matter. With respect to requiring all adjudicators to comply with annual mandatory continuing professional development (CPD) requirements, the Government is not convinced that this is required at this stage. The Committee acknowledged that there was little evidence that adjudicators in Victoria are lacking in their necessary skills and that submissions to it focused more on the inadequacies of the SOP Act rather than issues related to the qualifications or experience of adjudicators. It is also the case that some categories of adjudicators (e.g., lawyers) already have mandatory annual CPD obligations and it is not clear how new adjudicator-specific CPD obligations would interact with those existing obligations. Accordingly, the Government supports, in principle, Recommendation 21 in the Committee Report.

## Recommendation 22

**That the Victorian Building Authority update the Authorised Nominating Authorities Conditions of Authorisation to require authorised nominating authorities to ensure that adjudicators undertake continuing professional development, modelled on the requirements for adjudicators in New South Wales.**

**Government response – Support in principle**

Consistent with its response to Recommendation 21, the Government supports in principle the Committee's recommendation on this point. However, it is up to the VBA to decide whether to act on the Committee's recommendation and update its ANAs Conditions of Authorisation to address continuing professional development obligations for adjudicators.

## Recommendation 23

**That the Victorian Government amend s 46 of the [SOP Act] to extend the protection from civil liability already afforded to adjudicators to authorised nominating authorities for the duties and functions they perform under the Act in good faith. Section 30 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) provides a suitable model.**

**Government response – Support in principle**



The Committee received several submissions noting that ANAs have been taken to court by disgruntled claimants and respondents, while another submission advised the Committee that the lack of immunity had discouraged an ANA from providing information to the VBA about complaints received against one of its adjudicators.

While the Government agrees with the intent of the Committee's recommendation, it is not clear whether Recommendation 23 is consistent with current Government policy, namely its [Indemnities and Immunities Guidelines](#), or whether that policy is applicable to ANAs or adjudicators performing their functions under Part 3 of the SOP Act (i.e., are they 'Crown officers and agents' when doing so). Until those questions are settled, the Government will limit itself to support in principle for Recommendation 23. If it is subsequently determined that the guidelines do not apply, or that the recommendation is consistent with the guidelines, then the Government would support introducing legislation to amend section 46 of the SOP Act to extend that provision's indemnity protection to ANAs discharging their duties in good faith. Failure to extend such protection to ANAs presumably was an oversight since there was no discussion about excluding ANAs in the legislative history of either the 2002 or 2006 legislation and amending section 46 in the manner recommended would make the SOP Act more consistent with security of payment legislation nationally.

## Recommendation 24

**That the Victorian Building Authority update the Authorised Nominating Authorities Conditions of Authorisation it has issued under s 43 of the [SOP Act]. All registered authorised nominating authorities should be required to clearly disclose their fee sharing arrangements with adjudicators in a de-identified manner on their website, including a general description of the services they provide to adjudicators for these fees.**

**Government response – Support in full**

The Government supports in full the Committee's recommendation. While ANAs publicly disclose adjudicator fee ranges on their websites, they do not publicise their fee sharing arrangements with those adjudicators. The interest of transparency and accountability, in the Government's opinion, warrants requiring a more fulsome disclosure of the fee sharing arrangements ANAs have with adjudicators. However, it is up to the VBA to decide whether to act on the Committee's recommendations and update its ANAs Conditions of Authorisation to require disclosure of ANAs' fee sharing arrangements with adjudicators as well as the services ANAs provide to adjudicators in exchange for their share of the fees. The VBA should also consider whether the share of fees ANAs receive should be capped in any way, either as a percentage or as a monetary maximum.

## Recommendation 25

**That the Victorian Government amend the [SOP Act] to clarify that adjudication fees may be included in an adjudication certificate as provided for in the adjudication determination.**

**Government response – Support in part**

Two related issues are included in the scope of this recommendation:

- a party's recovery of adjudication fees paid as a debt due through the mechanism of an adjudication certificate; and
- an adjudicator's recovery of adjudication fees unpaid after determining a payment dispute or review of an adjudication determination.

With respect to the first issue, some submitters noted the difficulties claimants may experience in recouping the adjudication fees they must pay to have a determination released. According to one submitter, sections 4, 28Q and 45 of the SOP Act interact in such a manner as to prevent adjudication fees from being included in adjudication certificates. This does not appear to the Government to be the case, however. Accordingly, no action to address the first issue appears warranted.

On the second issue, several submitters noted that there is no provision in the SOP Act allowing adjudicators to recover their adjudication fees as a debt due where neither party to a dispute pays the adjudicator's fees. This may occur either after a determination has been made but the parties choose to not pay the fees to have the determination released per



section 45(6) of the SOP Act, or it may occur where the adjudication application is withdrawn before a determination is made. In such circumstances, adjudicators cannot presently recover their fees by way of an adjudication certificate. However, this appears to be the case in all other Australian jurisdictions.

The Government notes that Western Australia's legislation expressly provides for adjudicators' entitlement to their fees for work done up to the time of the application's withdrawal. In addition, the Western Australia legislation provides for ANAs or adjudicators to require the parties to provide a deposit or security of the adjudicator's fees, which is held in trust by the relevant ANA. That state's security of payment legislation also expressly states that adjudication fees payable by a person may be recovered as a debt due to the adjudicator in a court of competent jurisdiction. The Government believes there is merit to amending the SOP Act to incorporate provisions like those in Western Australia's legislation that provide the sort of security against non-payment of adjudicator expenses and fees that was at the heart of submitters' concerns. However, the Government is not prepared to support amending the SOP Act to incorporate provisions such as those enacted in Western Australia at this time but will consider taking up such amendments in later legislation, after further consultation with affected stakeholders. Accordingly, the Government supports Recommendation 25 in part.

## Recommendation 26

**That the Victorian Government amend div 2B of the [SOP Act] to provide that an adjudication certificate may be filed as a judgement for a debt in any court of competent jurisdiction and is enforceable accordingly. Section 25 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) provides a suitable model.**

**Government response – Support in full**

The Committee suggests that compliance with adjudication is low and that some subcontractors remain unpaid at the end of an adjudication process despite obtaining a decision in their favour. To address this, the Committee recommended amending the SOP Act in accordance with section 25 of New South Wales' legislation.

The Government supports the Committee's recommendation in full and will introduce amendments to the SOP Act based on section 25 of the New South Wales legislation. Western Australia, the Australian Capital Territory, South Australia, Tasmania, and Queensland already have a provision like the New South Wales legislation. Giving an adjudication determination the weight of a judgement debt will make it easier for subcontractors to commence enforcement action. The additional authority of a judgement debt may also increase compliance with adjudication determinations.



## Insolvency in the construction sector

In the sixth and final chapter of its report, the Committee examined the prevalence of insolvencies in the Victorian building industry, as well as the financial impacts that flow from business failures – payment delays or non-payment that cascade down the contracting chain, affecting everyone below the failing business and often causing many more flow-on bankruptcies and business failures. The Committee reviewed two widely examined mechanisms for mitigating the impact of insolvency higher up the contracting chain, namely protecting progress payments and retention monies by making the obligation to pay or return such monies a trust obligation, rather than a purely contractual one. The Committee examined trust account models that have been considered in recent years, including:

- the cascading, deemed statutory trust model protecting progress payments recommended in the 2017 report to the Commonwealth Government, authored by John Murray AM (known as the Murray model);
- the project trust accounts model in place in Queensland (referred to as the QLD model); and
- yet another trust account mechanism for retention monies.

Other mechanisms for protecting monies owed to subcontractors and others considered by the Committee in Chapter 6 of its report included such things as compulsory debt insurance and mandating continuing professional development obligations for selected trades, primarily as a means of improving the financial and business acumen of small businesses common in the building industry.

### Recommendation 27

**That the Victorian Government work with the construction sector to review the application of a cascading deemed statutory trust scheme, as outlined by the Review of Security of Payment Laws: Building Trust and Harmony (2017). The review should consider the design and implementation of a cascading deemed statutory trust model which is:**

- **best suited to the Victorian construction sector; and**
- **integrated with the statutory rights and adjudication process established by the [SOP Act].**

**The review should also identify appropriate industry education and support measures to ease the transition to a cascading deemed statutory trust model, should the review identify a model appropriate to adopt.**

#### **Government response – Support in principle**

The Victorian Government agrees that there is a need, widely recognised, to safeguard progress payments and retention monies owed to contractors, subcontractors, and suppliers from being wrongly withheld or misapplied by those higher in the contracting chain. Some form of trust obligation has been proposed since at least 1998 but no single approach has received widespread endorsement. The Government has been advised of the different models of statutory trust accounts schemes in the construction sector to protect subcontractor payments from head contractor misuse or insolvency. There are three models of trust scheme under consideration, or in place, in most Australian jurisdictions:

- a cascading deemed statutory trust (Murray model);
- project trust accounts (also sometimes called project bank accounts) (QLD model); and
- retention trust accounts (operating in NSW and WA and (examined for Recommendation 28)

Another approach, in place in the Northern Territory – at least for retention monies – is for legislation that simply deems monies owing to be held in trust for the benefit of the party to whom they are owed.

The Committee's Report suggested there is broad industry support for the Murray Review trust model due to its potential to simultaneously protect subcontractor funds from misuse and facilitate prompt payment. At present, however, no Australian jurisdiction has adopted the Murray Review model. One jurisdiction, Queensland, has adopted project trust accounts as part of its security of payment legislation but earlier versions of that mechanism have been criticised and it has been but recently revised. Industry stakeholders, oppose the introduction of a cascading deemed statutory trust model, project trust accounts or any similar trust mechanism as adding stress, administrative complexity, and cost to contractors and ultimately impact housing affordability.

More examination is necessary regarding the handling of trust obligations for progress payments and retention monies. The need for detailed specifications on the establishment and upkeep of trust accounts, as seen in Western Australia and Queensland, warrants further consultation and analysis of competing models before legislative amendments can endorse



any particular approach or alternative. Accordingly, the Government supports the Committee's recommendation in principle and will undertake further work toward implementing it through future amendments to the legislation.

## **Recommendation 28**

<p><b>That the Victorian Government consider introducing a retention trust scheme to the Victorian construction sector modelled on the retention trust scheme established by the Building and Construction Industry (Security of Payment) Act 2021 (WA). In the event of the adoption of the cascading deemed statutory trust model outlined in recommendation 27, the scheme outlined in this recommendation would be superseded.</b></p>
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<p><b>Government response – Support in principle</b></p>
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Several industry stakeholders advocated for a retention money trust accounts scheme to secure retention money only but would not apply to outstanding progress payments owed construction work undertaken. The Committee notes stakeholder support for a retention money trust scheme and recommends such a scheme should be adopted as an interim measure until the review contemplated by Recommendation 27 is completed. The Committee considered that such an interim measure would deliver substantial financial relief to subcontractors and assist in familiarising and normalising the concept of trust accounts in the Victorian construction sector in advance of the possible application of a broader scheme.

The Government supports Recommendation 28 in principle for the same reasons it supports Recommendation 27 in principle. The question of trusts, and trust obligations, raises sufficiently complex and controversial issues that no obligation should be imposed at this time. Further consultation with relevant stakeholders needs to be undertaken before any final decision is made with respect to specific amendments to the SOP Act.