

1. THE PURPOSE OF THE LEGISLATION

- 1.1 For the last 30 years sub-contractor lobby groups in Australia have been seeking security for the payment of sub-contractors. As a result, various pieces of legislation have been enacted in several Australian states and in New Zealand. The earliest examples include worker's lien legislation enacted in the Northern Territory¹, South Australia² and New Zealand³ and the Queensland *Sub-Contractors Charges Act* (1974).
- 1.2 In 1999 New South Wales introduced the first comprehensive scheme aimed directly at securing progress payments for contractors, sub-contractors and suppliers in the building and construction industry. The New South Wales *Building and Construction Industry Security of Payment Act* (1999) ("**the NSW Act**") adopts aspects of the United Kingdom *Housing Grants, Construction and Regeneration Act* 1996⁴.
- 1.3 During the two years in which the NSW Act has been operating, other state governments have investigated security for payment regulation. Queensland has recently passed the *Sub-contractors' Charges Amendment Act* 2002 and Western Australia is currently considering a draft bill in similar terms to the NSW Act.
- 1.4 On 14 May 2002 the *Building & Construction Industry Security of Payment Act* 2002 (Vic) ("**the Victorian Act**") was passed. The Victorian Act will come into operation on 31 January 2003⁵, and will apply to all construction contracts (other than those expressly excluded) which are executed on or after this date.
- 1.5 This paper focuses on the Victorian legislation, however key points of differentiation between the Victorian and NSW legislation and the draft Western Australian bill will be discussed. The Victorian Act is closely based on the NSW Act. Following a detailed review and industry consultation after a year of operation⁶, the NSW Act is now the subject of both substantive and minor amendments. The *Building and Construction Industry Security of Payment Amendment Bill* 2002 ("**the NSW Bill**") proposes a range of amendments to the scheme which highlight many of the shortcomings of the Victorian Act.
- 1.6 The Victorian and NSW Acts are directed towards remedying two principal problems in the construction industry.
- 1.7 Firstly, where a developer, without justification, withholds money from a contractor on the basis of an unjustified claim or set-off. Undercapitalised developers (and even developers with a significant capital) may effectively use builders as unpaid bankers by refusing, or otherwise failing, to settle their accounts in a timely fashion.
- 1.8 Secondly, where a contractor withholds money from a sub-contractor or delays payment for periods of 90 to 120 days. Because of the difference in timing between the payment to the contractor and the payment to the sub-contractor, the sub-contractors' money effectively becomes free capital for the contractor.

¹ Workmen's Liens Act (as in force at December 2000) (NT).

² Worker's Liens Act 1893.

³ Wages Protection and Contractors Liens Act 1937; now repealed.

⁴ This came into force in the UK in May 1998.

⁵ Unless it is proclaimed to commence on an earlier date.

⁶ "Review Discussion Paper - Options for Enhancing the *Building and Construction Industry Security of Payment Act*" August 2002, available at www.cpsc.nsw.gov.au/sop

KEY ASPECTS OF THE VICTORIAN LEGISLATION

1.9 In summary, the key aspects of the Victorian legislation are:

- (a) Construction contracts must specify intervals when payments are to be made. If they fail to do so, default periods of 20 business days for making payment claims and 14 days for making payments following a claim will apply.
- (b) When a claim for payment is made and the party required to pay wishes to dispute liability or the amount, that party must give early notice of the dispute.
- (c) Any dispute over the amount of the claim must be submitted to a quick, independent adjudication which (if the claim is submitted within the time frame) will have statutory backing. The adjudicator's decision will be delivered generally within 6 weeks of the dispute.
- (d) If there is no dispute about the adjudicator's decision, then the party from whom the money is claimed must pay the amount claimed.
- (e) If there is a dispute about the adjudicator's decision and the respondent has commenced dispute resolution proceedings, then the party from whom the payment is potentially due must provide security for that disputed sum.
- (f) If the amount determined by the adjudicator is not paid promptly, or security for payment is not given the claimant will be legally able to suspend work and obtain judgment through the courts for that amount. The claimant is required to give 2 days notice of its intention to suspend.
- (g) The security for payment must be either a bank guarantee or a cash deposit in a designated trust account. This security for payment effectively "quarantines" the amount of money determined by the adjudication. Within 2 days following a favourable judgment by a court or an arbitrator, the party claiming unpaid moneys can access the security.
- (h) "Pay When Paid" and "Pay if Paid" clauses will be unenforceable, preventing contractors and sub-contractors from making payment to those lower in the payment chain contingent on their being paid by those above them.
- (i) Access to all processes is contingent upon claims and processes being pursued through a set time frame.
- (j) Once the adjudicator's determination for a progress claim has been enforced by a competent court, the claimant can serve a notice on the principal assigning any debt that the principal may owe the respondent to the claimant in the amount of the respondent's debt to the claimant⁷. This is intended to assist payment of a valid progress claim and is loosely based on the *Contractors' Debts Act 1997* (NSW).

⁷ Division 4 of Part 3 of the Victorian Act

2. WHAT THE VICTORIAN ACT DOES NOT DO

- 2.1 There are a number of things that the Victorian Act does not do.
- 2.2 Firstly, the legislation does not affect the underlying rights of the parties unless:
- (a) those rights may have been determined by reference to "Pay When Paid" or "Pay If Paid" clauses, which are now unenforceable⁸; and
 - (b) any rights under a contract exclude, modify or restrict the operation of the Victorian Act⁹. Any such provision in the contract will be void.
- 2.3 Secondly, notwithstanding the adjudication process, the adjudicator's decision does not determine the entitlement of the claimant to the disputed moneys. The adjudicator's decision simply establishes a default position that such moneys are a debt owed under the Victorian Act¹⁰. The respondent must either pay the amount or commence dispute resolution procedures and provide security for the amount¹¹.
- 2.4 Accordingly, the main legal change is to give contractors and sub-contractors who follow the procedure in the Victorian Act the standing of a "secured creditor" in the event of an insolvency or a refusal to pay the progress claim.
- 2.5 In addition, while the legislation is not directed to cash flow, it is likely to provide cash flow advantages to contractors and sub-contractors. If the steps anticipated by the legislation are taken, the person who has to provide security will either have to:
- (a) put money in a trust account and therefore not be able to use that money; or
 - (b) provide the bank with additional security to support a new bank guarantee.
- 2.6 As a result, on balance, the advantage to the person obliged to make the payment in resisting payment to the contractor will be either:
- (a) lost in its entirety if the money is deposited in a trust account; or
 - (b) partially lost if this person is obliged to obtain a bank guarantee.
- 2.7 However, it is interesting to note that the experience of claimants in NSW has been that respondents are not deterred from disputing (valid) progress claims by having to put the money into a trust fund. As a result, the NSW Bill will repeal the sections of the NSW Act allowing the respondent to provide security for the adjudicated amount¹². Under the Bill the respondent must pay the adjudicated amount as determined. If the respondent fails to pay the adjudicated amount on time, the claimant may request an adjudication certificate which may then be filed as judgment for a debt in a competent court.
- 2.8 The proposed Western Australian bill also reflects this experience and does not include an option to place disputed moneys in a trust fund. Payments determined by an adjudicator are immediately enforceable and can only be recovered via subsequent dispute resolution proceedings as prescribed by the contract or at common law (including court proceedings).

⁸ Section. 13

⁹ See section 48.

¹⁰ Section 27

¹¹ Security can be provided in the form of a deposit into a trust account, or by bank guarantee.

¹² Schedule 1 [37] and [38], replacing sections 23 and 24 of the NSW Act.

- 2.9 The effect of the proposed NSW and Western Australian models is that the unsuccessful respondent in the adjudication process bears the risk of:
- (a) a court or arbitrator subsequently finding that the quick adjudication was in error; and
 - (b) the insolvency of the successful claimant.
- 2.10 However, for the moment anyway, under the Victorian Act claimants must still go through the process of enforcing the determination in court in order to secure the cashflow - a process which is slow and expensive.
- 2.11 Further, it appears that respondents will be able to raise contractual defences and set-offs as a basis for resisting summary judgment for an adjudicated claim, where security is not provided and/or proceedings are not issued by the respondent within the time specified by the Act thereby circumventing much of the intended purpose of the Victorian Act.
- 2.12 Finally, it is arguable that the Victorian Act only extends security to the contract price and agreed variations in that price¹³. It does not extend to:
- (a) disputed claims for variations in price where there is no agreed schedule of rates by which the Variation can be priced; or
 - (b) claims for damages other than claims for defective work which affect the value of work done and act to reduce the value of the work done (including damages for prolongation).

¹³ Refer to section 11 of the Victorian Act.

3. DETAILS OF THE VICTORIAN LEGISLATION

Application of the legislation

3.1 The legislation does not apply to all construction contracts. It excludes the following:

- (a) A construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a *recognised financial institution* undertakes:
 - (i) to lend money or to repay money lent, or
 - (ii) to guarantee payment of money owing or repayment of money lent; or
 - (iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied under the construction contract¹⁴; or
- (b) A construction contract between a builder and building owner for carrying out certain types of domestic building work within the meaning of the *Domestic Building Contracts Act (Vic) 1995*¹⁵. This exclusion has been criticised because:
 - (i) the definition of residential building work in the *Domestic Building Contracts Act* also contains exclusions and thus the drafting is complex and confusing; and
 - (ii) it is unclear whether sub-contractors providing construction work or goods and services under a domestic building contract are able to avail themselves of the protection afforded by the Act. Our view is that such sub-contractors are within the scope of the Act as the claimed progress payment is not itself under a contract between a builder and building owner.

On balance this exclusion will not be significant for commercial builders even though contracts for the construction of home units are characterized by the *Domestic Building Contracts Act* as “residential buildings”. These contracts can be for tens of millions of dollars. However, these large contracts will be covered by the Act as it is clear from section 7(2) that the exclusion from the operation of the Act relates only to a contract for domestic building work:

“the whole of which is carried out on any part of a premises that the building owner resides in or proposes to reside in”.

- (c) A construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under a contract, is to be calculated *otherwise than by reference to the value of the work carried out or the value of the goods and services supplied*¹⁶. This section appears to exclude contracts with sophisticated payment mechanisms such as a right acquired by the contractor to own and operate the facility for a particular period (where payments are made by reference to the value of a service delivered) and contracts which involve milestone payments (i.e. payment according to a schedule of achieved key activities, which may or may not reflect the value of work done).
- (d) A contract whereby a party undertakes to carry out construction work, or supply related goods and services as an employee¹⁷. Unfortunately, the Act does not define “employee” and thus the common law principles for determining whether the relationship between the parties is one of employer/employee will need to be considered.

¹⁴ Section 7(2)(a) and section 7(3)(c).

¹⁵ Section 7(2)(b).

¹⁶ Section 7(2)(c).

¹⁷ Section 7(3).

- (e) The legislation does not extend to mining work¹⁸. Some civil engineering contractors have significant contract mining operations¹⁹. Although very similar to civil engineering construction, these operations are not covered by the legislation.
- 3.2 Further there is a geographic limit to the legislation's operation. It does not apply to construction work performed outside Victoria, even if the contract is expressed to be governed by the law of Victoria²⁰. Notwithstanding this, any construction work or the provision of particular types of goods and services in relation to construction work done within Victoria which otherwise falls within the ambit of the Act will be governed by the legislation even where the proper law of the contract is not the law of Victoria.
- 3.3 The Victorian Act expressly binds the Crown²¹.
- 3.4 Parties involved in the building and construction industry will also need to be aware of the definition of "construction work" and of "related goods and services" in sections 5 and 6 respectively. In particular, services such as interior or exterior decoration, landscape advisory or technical services in relation to construction work fall within the ambit of the Victorian Act. Although this is unlikely to include such services as accounting and marketing, it might extend to financial and legal advice if that could be said to be "technical services in relation to construction work". The scope of related goods and services covered by the Victorian Act remains to be tested in the courts.

Statutory Right to a Progress Payment

- 3.5 Section 9 provides that in each construction contract the person performing construction work will be entitled to a progress payment. Absent this section of the Act, a party doing construction work would not be entitled to any progress payment until all of the work had been completed²². Section 9 amends the common law in this regard.
- 3.6 The provision goes on to provide that progress payments will generally be made in accordance with the contract, but if the contract makes no provision for progress payments, progress claims may be made every 4 weeks.
- 3.7 This raises the issue of what type of progress payment provisions can be drafted into a contract without breaching the "no contracting out" provisions of section 48 and the right to progress payments accorded by section 9. This is not immediately apparent under the terms of the Victorian and NSW Acts and this point has not yet been tested. Arguably a token payment schedule would not offend either act and would be sufficient to avoid the default time-lines for making progress claims, calculating the amount of payment due, and making progress payments.
- 3.8 Contractors need to be aware that, although not expressly stated in the Victorian Act, it appears that the right to make a progress claim under the Act extends to cumulative claims. According to the NSW Court of Appeal, if the contract entitles the contractor to make a progress claim which includes in it amounts due and unpaid under previous progress claims, then a single payment claim under the Act can also be for that amount²³.

¹⁸ Section 5(2).

¹⁹ Although these are not common in Victoria.

²⁰ Section 7(4).

²¹ Section 8.

²² This is because a construction contract which is silent about progress payments would generally be interpreted as an entire contract.

²³ *Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd* [2002] NSWCA 238.

- 3.9 However, most contracts draw a distinction between payment claims and final payment claims and the Act does not apply to final payment claims (unless the contract itself draws no distinction between a progress payment and a final payment)²⁴.

Amount of Progress Payment

- 3.10 Section 10 of the Victorian Act provides that in cases where the contract makes no express provision, the amount of the progress payment is to be determined by reference to the value of the construction work carried out.

- 3.11 It is important to note that section 10 of the Victorian Act refers to the amount payable pursuant to the contract. It is clear that the amount payable is the value of the construction work and related goods and services that have been provided. The concept of "value" implies that the Act is not dealing with any rights which the Contractor may have as a consequence of other claims such as (for example):

- breach of Contract;
- damages for negligence;
- breaches of the Trade Practices Act.

2. It is also arguable that a claim for prolongation pursuant to a term of the Contract (i.e. not based on breach) is not part "of the value of the Construction Work, or related goods and service".

It is apparent from the definition of "Construction Work" that the term is intended to relate to the work involved in construction. This is capable of narrow construction such that additional costs incurred in delay are not costs of the work involved in the construction²⁵.

If this is right, it will be necessary to see whether delay costs could be part of the value of the related "goods and services". The definition of "goods" includes:

"plant or materials ... for use in connection with carrying out of construction work."

This seems to be wide enough to allow section 10 to be read to cover stand by and other costs associated with delay. However, non-site specific costs such as the opportunity costs associated with the head office and losses of profit do not seem to fit within the language of the clause.

A further hurdle is section 11 which stipulates how value is to be assessed. The relevant provisions stipulate that value is to be determined:

- (a) in accordance with the Contract;
- (b) if there is no express provision by having regard to:
 - (i) the Contract Price,
 - (ii) any other rates of prices set out in the Contract
 - (iii) any Variation to the Contract agreed by the parties to the Contract; and
 - (iv) the cost of rectifying any defects.

²⁴ *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395; *De Martin & Gasparini Pty Ltd v Energy Australia* [2002] NSWCA 330.

²⁵ See by analogy *Tuta Production Pty Limited v Hutchinson Bros Pty Ltd* [1972] 46 ALR 549 at 556.

It is questionable whether the provisions in section 11 are wide enough to deal with changes in price which are not the subject of agreement, for example as a consequence of a change in scope of work. If the legislation is construed narrowly, it can be argued that the intention is to secure the Contractor in respect of all agreed price components, but not the unagreed portions arising from (say) a contested variation. If this were a correct interpretation then the builder may have 3 classes of claim (for example):

- (i) for work done in respect of the original scope set out in the Contract;
- (ii) for agreed variations;
- (iii) for variations or other matters which give rise to an entitlement to further payment pursuant to the Contract where there is a contest as to whether any additional money is due; and
- (iv) damages.

Under the narrow construction (i) and (ii) would be covered but not (iii) and (iv). Section 11 is not clear. It reads:

- "11. ***Valuation of construction work and related goods and services***
- (1) Construction work carried out under a construction contract is to be valued -
 - (a) in accordance with the terms of the contract or;
 - (b) if the contract makes no express provision with respect to the matter, having regard to -
 - (i) the contract price for the work; and
 - (ii) any other rates or process set out in the contract; and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.
 - (2) Related goods and services supplied under a construction contract are to be valued -
 - (a) in accordance with the terms of the contract; or
 - (b) if the contract makes no express provision with respect to the matter, having regard to -
 - (i) the contract price for the goods and services; and
 - (ii) any other rates or prices set out in the contract; and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and
 - (iv) if any goods are defective, the estimated cost of rectifying the defect.
 - (3) For the purposes of sub-section (2)(b), the valuation of materials and component that are to form part of any building, structure or work arising from construction work is to be on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out."

It can be argued that paragraphs (a), (b)(i), and (b)(ii) of section 11, sub-sections (1) and (2) are directed to valuing progressively the original scope, whereas (1)(b)(iii) is intended to deal with changes in scope. This is because it is arguable that subsection (1)(b)(iii) qualifies subsections (1)(b)(i) and (1)(b)(ii) so that the early provisions should only be read as relating to variation in the contract (including scope) where the price is agreed. If this is correct then all that will be governed by the legislation will be questions of the progressive entitlement to be paid an agreed sum, rather than the contractor's entitlement to an adjustment to the agreed sum.

Obviously section 11 is capable of wider interpretation so that the issue of contested variations falls within the ambit of the Act (and therefore any adjudicator's jurisdiction). However, whether this is the case will have to await authoritative determination.

- 3.12 Claims for agreed variations and some delay costs calculated in accordance with provisions of the contract seem to fall within the ambit of the payments which are to be afforded protection under this legislation²⁶. However, as is plain from the drafting, such additional costs can under the contract be taken out of the immediate payment cycle until agreed between the parties and thus may be drafted out of the legislative ambit²⁷.

When does the money become payable?

- 3.13 Pursuant to section 12 of the Victorian Act, the progress claim becomes payable at the time stipulated in the contract. If the contract makes no express provision in this regard, it becomes payable 10 business days after receipt of a payment claim.

What invokes the legislation?

- 3.14 The Victorian Act only applies if the contractor, sub-contractor or supplier invokes its provisions by delivering a claim in accordance with the Act. To be applicable, the contractor serving a progress claim must do so pursuant to section 14(3). That section provides that the progress claim must:
- (a) identify the construction work (or related goods and services) to which the progress payment relates, and
 - (b) indicate the amount of the progress payment that the claimant claims is due for the construction work done (or related goods and services supplied) to which the payment relates (the Claimed Amount); and
 - (c) state that it is made under the Victorian Act.

²⁶ See section 9(2) and section 10.

²⁷ See also Wallis, A. (2001) "Security of Payment - Challenges and Changes" *Building and Construction Law* 17(2) pp. 78-85.

- 3.15 Generally progress claims issued in the industry will comply with paragraphs (a) and (b). Therefore most contractors, sub-contractors or suppliers will only need to add to their usual progress claim form a statement that the progress claim made is under the Victorian Act. The courts in NSW have indicated that whilst minor errors in the details of a progress claim will not disentitle a claimant to the protection afforded by the Act²⁸ the court will not cure²⁹ defects in the claim documents.
- 3.16 There is no restriction on when the claimant may lodge a progress claim under the Victorian Act³⁰. Thus, a claimant can prepare a detailed case prior to lodging the claim and the respondent will nevertheless be subject to the tight time line that is activated by the lodging of the claim (rather than upon the completion of the relevant work). Respondents could be significantly disadvantaged by a wily claimant undertaking this course of action under the current scheme.
- 3.17 Section 14(2) of the Victorian Act provides that only one payment claim may be lodged in respect of a specific progress payment. This is intended to overcome problems with "adjudicator/determination shopping" experienced under the existing NSW Act.

Payment Schedules

- 3.18 On receipt of a payment claim in accordance with the contract and/or the Victorian Act, the person receiving the claim (either a principal or contractor) has a choice to either:
- (a) pay the Claimed Amount in full; or
 - (b) dispute part or whole of the claim.
- 3.19 In either case, section 15 requires the respondent to issue a "payment schedule" to the claimant which must:
- (a) identify the payment claim to which it relates,
 - (b) indicate the amount of the payment (if any) that the respondent proposes to make (the Scheduled Amount), and
 - (c) where the Scheduled Amount is less than the Claimed Amount, the schedule must indicate why it is less and the respondent's reasons for withholding payment.

For the reasons set out above, it appears that the payment claim is limited to the value of the work done. Therefore claims for breach of contract or duty (including pursuant to a statute) do not fall within the ambit of the claims which can be made under the Act.

²⁸ See *Hawkins Constructions (Aust) v Mac's Industries Pipework* (2001) 162 FLR 18.

²⁹ In the case of *Jemzone Pty Ltd v Trytan Pty Ltd* above, n 24, Justice Austin of the NSW Supreme Court commented that it must be clear on the face of the document that it purports to be a payment claim under the Act. Accordingly, a payment claim which stated "this invoice is subject to the Building and Construction Industry Security of Payment Act 1999, No 46" would not satisfy the statutory requirements. He further stated that "while the court should not take an unduly strict approach to the construction of the claim, it ought not cure defects in the claim document by reference to extraneous circumstances or previous circumstances." (at 50).

³⁰ In contrast, there is a claim period of 20 days under the WA Bill and Schedule 1 [24] to the NSW Bill provides that a payment claim can only be served within 12 months from when the construction work to which the claim relates was last carried out. (See also discussion in *Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd*, above, n 23).

However, there are no similar limiting words in relation to the payment schedule. Does this mean that the respondent is entitled to raise such claims by way of set-off? If so, the following observations need to be made:

- (a) it appears unfair that the claimant can not raise claims such as a breach of contract in its payment claim yet claims of this nature can be raised against it;
- (b) such claims usually involve significant conflict in the evidence which may require resolving issues of credit. However, adjudicators are not given the power to administer an oath and it seems unlikely that the legislative intention was that such conflicts would be resolved after cross-examination. The legislation seems to be directed primarily to determining the value of work done progressively in a similar manner to that expected in a "sniff and smell" arbitration.

For these reasons there is much to be said for the view that the Victorian Act should be read so as to limit the matters which can be raised in the payment schedule to questions of measurement and a valuation of defective work. However, the words are clearly capable of a wider meaning.

3.20 With the above comments in mind it must also be noted that under the Victorian Act there is currently no express restriction on the matters that may be raised in an adjudication response³¹ and thus the substantive content of payment schedule is not critical. This is not the case under the terms of the NSW Bill which limits the adjudication matters to those raised in the payment schedule³². Whether there is any implied limitation on matters that can be raised in the payment schedule (and adjudication response) remains to be seen.

3.21 The time for delivering the payment schedule is either:

- (a) the time stipulated in the contract; or
- (b) 10 business days after the payment claim is served, whichever time expires *first*³³. If the respondent does *not* issue a payment schedule within the required time, it will be obliged to pay the whole of the Claimed Amount³⁴. In most cases the payment schedule must be issued within 10 business days or the respondent will be obliged to pay the claim in full.

Consequence of Not Paying Claimant Where No Payment Schedule Issued

3.22 When no payment schedule is issued, the unpaid contractor or sub-contractor is owed a debt by the respondent under the Victorian Act and may:

- (a) sue in court for the amount unpaid (see later discussion); and
- (b) serve a notice on the respondent advising of its intention to suspend the carrying out of construction work³⁵.

³¹ See section 21(2)(d).

³² Schedule 1 [32].

³³ Section 15(4).

³⁴ Section 16.

³⁵ Section 16(2). Note that Schedule 1 [25] of the NSW Bill provides that the claimant either take legal action to recover the claimed amount or it may make an adjudication application in relation to the claim.

- 3.23 Pursuant to section 29, where notice is given to suspend the carrying out of work, the contractor or sub-contractor may suspend works 2 business days after the giving of such notice. This should operate as a significant incentive to ensure payment. It is important to note that in any proceedings brought in these circumstances it will not be relevant³⁶ whether:
- (a) the claimant was entitled to the Claimed Amount; or
 - (b) there is defective work which may have been otherwise relevant to the valuation of the work done.
- 3.24 All that the claimant is required to prove is that³⁷:
- (a) a progress claim has been given pursuant to the Act;
 - (b) the defendant has not provided a payment schedule within 10 days;
 - (c) the defendant has not paid the Claimed Amount.
- 3.25 Where these things are made out the claimant is entitled to the unpaid balance of the progress claim. This outcome is unaffected by the fact that the defendant can prove that the claim is misconceived or otherwise incorrect.
- 3.26 However, such a judgment only provides the claimant with the cashflow. The defendant is still entitled to argue in subsequent proceedings³⁸ that it has overpaid the claimant and seek a refund. However, in the meantime, it seems that the claimant is entitled to the benefit of the overpayment.

Consequence of Not Paying Claimant in Accordance with Payment Schedule

- 3.27 Where the respondent to a claim has agreed in the payment schedule that it does not dispute a certain amount, but nonetheless fails to make payment then the claimant is entitled to:
- (a) recover the unpaid portion in a court (see later discussion);
 - (b) issue a notice of intention to suspend the works³⁹.
- 3.28 Two days after the delivery of such notice of suspension the claimant can stop work on site⁴⁰.
- 3.29 The statutory right to suspend work is far superior to the normal common law position which prevails in most construction contracts. The authorities indicate⁴¹, absent special conditions of contract, that a failure to pay a particular progress payment is not a fundamental breach of contract which would entitle the contractor to terminate the contract.
- 3.30 Further, there is no principle at common law which would entitle a contractor to suspend work pending payment. Suspending work under common law may constitute a fundamental breach of contract entitling the party who has failed to pay to terminate the contract and sue the claimant.

³⁶ (and evidence will not be admissible in respect of)

³⁷ Section 16(4).

³⁸ whether litigation or arbitration. Depending on the terms of the relevant contract the respondent to the claim may be able to adjust the overpayment during the course of subsequent progress payment, provided that a payment schedule is issued and the Act otherwise followed.

³⁹ Section 17(2). Note that the NSW Bill will give the claimant the option of proceeding to an adjudication in relation to the claim. Refer to footnote 35.

⁴⁰ Section 29.

⁴¹ *Mersey Steel and Iron Co v Naylor Benzon & Co* (1884) 9 App Cas 434; *Corwall v Henson* [1900] 2 Ch 298; *Cassidy v Engwirda Construction Co (No 2)* [1968] Qd R 159.

- 3.31 However, section 29(3) of the Victorian Act expressly provides that a suspension of work in accordance with the requirements of the Act does not constitute a breach of contract. The NSW Act provides a broader immunity in relation to suspension under the Act. It provides that the claimant:
- "is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension."⁴²
- 3.32 The significance of the narrower protection under the Victorian Act will depend on the particular circumstances. However, it seems that it will take special circumstances for the claimant to be liable to the respondent.
- 3.33 Once a claimant has validly exercised his or her right to suspend work under the Victorian Act, it seems that not only are they protected from liability for breach of contract, but they will normally be entitled to an extension of time and delay costs in accordance with the contract (where the delay was the principal/contractor's fault). Failure or refusal to honour such claims under the contract in relation to a valid suspension may result in:
- (a) a breach of section 48 prohibiting contracting out of the Act by reason of the claimant effectively suffering a penalty for exercising his or her rights under the Act; and
 - (b) the date for completion being "at large".
- 3.34 The Victorian Act does not specify when work must recommence once the reason for the suspension has concluded. There appears to be no provision accommodating reasonable mobilization and preparation time which may be necessary after long periods of suspension. The NSW Bill inserts a new clause 27(2) which expressly provides that the right to suspend exists until 3 days after the date on which the claimant receives payment for the amount payable.
- 3.35 Whilst the changes to the common law and the provisions identified above are a significant step forward for claimants, there remain some risks for a contractor intending to suspend work under the Victorian Act. Before exercising the right to suspend the contractor should consider whether:
- (a) the works in question are covered by the Act;
 - (b) the contract contains provisions which place it outside the statutory scheme;
 - (c) the pre-conditions for the legislation to operate have been met; and
 - (d) extrinsic factors make the option of suspension impracticable for the claimant.

Adjudication Applications

- 3.36 A major and unattractive flaw in all the statutory regimes existing prior to the NSW Act was that a claim could be made which was unjustified. This was despite the fact that in Queensland there was a requirement that the claim be certified by an independent person. Security was provided to the detriment of the respondent without any real or effective check as to the quantum of the claim. In this way, commercial pressure could be brought to bear upon the respondent because a lien had been placed on land or, worse still, money had been frozen until the final determination of the claimant's rights had been made in court. As such final determination might take years, the effect was to place significant commercial pressure on the respondent to settle the claim.

⁴² Section 27(3) of the NSW Act.

- 3.37 The adjudication process required by the NSW and Victorian legislation is designed to limit the amount of security (or payment only in NSW if the Bill becomes law) which the respondent must provide to an amount which is reasonable having regard to the ultimate merits of the claim. The adjudication process is not intended and does not finally determine the validity of the disputed claim. It merely fixes the amount of the security or payment to be provided.
- 3.38 The adjudication process arises under the Victorian Act where:
- (a) the claimant has made a payment claim in accordance with the legislation; and
 - (b) the respondent has issued a payment schedule, indicating that it will not pay all of the claim within 10 business days after the claimant receives the payment schedule; and
 - (c) pursuant to section 18(1), the claimant applies for adjudication of the progress payment claim. Such application must be made within 5 business days after the claimant receives the payment schedule.
- 3.39 These requirements for progressing to adjudication are subject to a number of amendments under the NSW Bill⁴³.
- 3.40 Section 18(2) of the Victorian Act states that an adjudication application:
- (a) must be in writing;
 - (b) must state that it is made under the Act;
 - (c) must identify the payment claim and the payment schedule to which it relates; and
 - (d) may contain submissions relevant to the application.
- 3.41 The adjudicator will be either a person:
- (a) agreed to by the parties to the dispute⁴⁴; or
 - (b) if agreement cannot be reached, appointed by an "authorised nominating authority".
- 3.42 Section 18(6) states that the provisions for adjudication of payment claims under the Victorian Act are not intended to limit the operation of any provision of the construction contract in relation to the resolution of disputes between the claimant and respondent. This may result in a claimant having to participate in two different dispute resolution regimes simultaneously in order to protect his or her rights under the contract and the Act.

Response to an Adjudication Application

- 3.43 If the claimant issues an adjudication application then the respondent must provide its response within either⁴⁵:
- (a) 5 business days after receiving a copy of the application; or
 - (b) 2 days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later.

⁴³ One important amendment is that where the respondent has failed to provide a payment schedule, the claimant can elect to have the claim adjudicated under the Act. This is intended to give the claimant the option of rapid adjudication under the Act's scheme in the hope of resolving the dispute at that stage. Under this option the claimant can only make an adjudication application if the respondent is, within 20 days after the due date for payment, notified of the claimant's intention to proceed to adjudication and given a further 5 business days from the date of that notice opportunity to provide a payment schedule.

⁴⁴ Agreements must be reached after receipt of the disputed payment claim; agreements prior to this day are of no relevance. This option is to be removed under Schedule 1 [29] of the NSW Bill.

⁴⁵ Section 21(1).

- 3.44 The response⁴⁶:
- (a) must be in writing; and
 - (b) must identify the adjudication application to which it relates; and
 - (c) must include the name and address of any relevant principals of the respondent; and
 - (d) may contain such submissions relevant to the response as the respondent chooses to include.
- 3.45 Note that there is currently no statutory limit on what can be included in the adjudication response under the Victorian or NSW schemes. The NSW Bill will, if enacted, tighten the regime in that State in relation to defences and cross-claims by prohibiting respondents from including reasons for withholding payment that were not raised in the payment schedule.
- 3.46 If the response is not lodged within the set time-frame, the adjudicator is prevented from considering the response⁴⁷.

Adjudication Procedure

- 3.47 Section 22 provides that the adjudication application must be determined by the adjudicator:
- (a) within 10 business days after the date on which the adjudicator notifies the claimant and the respondent as to his or her acceptance of the application; or
 - (b) within such further time as the claimant and respondent may agree.
- 3.48 The adjudicator has the following powers pursuant to section 22(5):
- (a) request further written submissions and comments;
 - (b) set deadlines for further submissions and comments;
 - (c) call a conference of the parties; and
 - (d) carry out an inspection of any matter to which the claim relates.
- 3.49 Section 23(2) of the Victorian Act sets out the matters that the adjudicator may consider in determining an adjudication application.
- 3.50 There is no provision in the Victorian Act expressly prohibiting the parties from bringing legal advisors with them to adjudication proceedings, however, arguably it is within the adjudication power to permit or refuse the presence of lawyers or other third parties. The NSW Bill will insert a new section 21(4A) prohibiting legal representation at adjudication conferences.
- 3.51 Under the NSW and Victorian Acts, the adjudicator has no express power to consider or determine a cross-claim by the respondent, other than insofar as claims for defective work reduced the value of work (as expressly anticipated by section 11). However, the legislation is not clear in this regard and such a power may be implied. Therefore the scope of the Adjudicator's power will need to be tested.
- 3.52 The determination of the adjudicator is to be in respect of:
- (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the Adjudicated Amount); and
 - (b) the date on which any such amount became or becomes payable⁴⁸.

⁴⁶ Section 21(2).

⁴⁷ Section 22(3).

⁴⁸ Section 23.

- 3.53 The determination must be in writing and must (if requested by either party) state:
- (a) the reasons for the determination; and
 - (b) the basis on which any amount or date has been decided⁴⁹.

Respondent's Obligations Following Adjudicator's Determination

- 3.54 Once the adjudicator has made a determination requiring the respondent to pay the claimant some money (in respect of the disputed sum) then section 25 states that the respondent must either:
- (a) pay the amount to the claimant; or
 - (b) if the respondent has commenced some form of dispute resolution proceedings against the claimant in relation to a dispute under the contract, the respondent may then give security for payment of that money.
- 3.55 The security required by the provision may be given in one of three forms, being:
- (a) an unconditional promise by a recognised financial institution to pay to the claimant, on demand, the adjudicated amount; or
 - (b) payment of the adjudicated amount into a designated trust account; or
 - (c) such other form as may be agreed between the claimant and the respondent⁵⁰.
- 3.56 The security may be enforced two business days after any matters in dispute between the parties in connection with the progress payment to which the security relates have been finally determined⁵¹. This provision is intended to guarantee the availability of funds the subject of the claim and also remove any cash-flow benefits that contractors and principals may see in resisting a legitimate progress claim. However, there are two main flaws to this aspect of the regime.
- 3.57 First, any respondent seeking to avoid or delay payment could commence dispute resolution proceedings in relation to any matter under the contract, whether such "dispute" was genuine or not and thereby defer paying the claimant⁵².
- 3.58 Secondly, once some form of dispute resolution proceedings have commenced it can be, and often is, years until the issue is finally determined. Such delay is far more likely to be detrimental to the claimant than the respondent. The effects of this cash-flow imbalance have been seen under the NSW Act where large respondent companies have been content to provide security until all possible avenues have been exhausted.
- 3.59 Again, if the respondent fails to comply with the adjudicator's decision then, pursuant to section 27, the claimant may:
- (a) recover the unpaid amount plus interest in a court; and
 - (b) serve a notice of its intention to suspend the carrying out of construction work (in which case the suspension can take effect two business days thereafter).

⁴⁹ Section 23(3).

⁵⁰ Section 25(3). Note that alternative forms of security are acceptable under clause 25(4) where the respondent is the Crown.

⁵¹ Section 25(5).

⁵² Although security for the amount must still be provided.

Failure of Adjudicator to Comply With the Timetable

- 3.60 If a claimant does not receive an adjudicator's notice of acceptance of an adjudication within 4 days after the application is made, or an adjudicator accepts an adjudication application and fails to determine the application within the time allowed, section 28 allows the claimant to:
- (a) withdraw the application; and
 - (b) make a new application at any time within five business days after the claimant become entitled to withdraw the previous adjudication.
- 3.61 An adjudicator who fails to make a decision on the application within the time allowed⁵³ is not entitled to be paid any fees or expenses.

Payment of Adjudicator's Fees

- 3.62 Section 45 of the Act contains the provisions relating to the adjudicator's fees. The amount of the adjudicator's fees are determined by agreement between the claimant and respondent and adjudicator or, if no amount is agreed, the amount that is reasonable having regard to the work done and expenses incurred by the adjudication. Both parties are jointly and severally liable in equal proportions for the adjudicator's fees.
- 3.63 However, where the adjudicator determines that the adjudication application or the adjudication response was wholly unfounded, then the adjudicator may apportion his costs between the parties as he or she considers appropriate.

Enforcement of an Adjudicator's Determination

- 3.64 An adjudicator's determination that all or part of the claimed amount is payable constitutes a debt owed under the Victorian Act and is enforceable by application to a court⁵⁴. Section 27(1) provides that if the respondent fails to pay any part of the adjudicated amount or fails to give security on or before the relevant date, the claimant may recover the amount unpaid or unsecured, together with interest as a debt due to the claimant. The claimant may also notify of an intention to suspend work under the construction contract⁵⁵. To enforce this debt by way of summary judgment the claimant must establish that:
- (a) the respondent has failed to:
 - (i) pay the whole or any part of the Adjudicated Amount; or
 - (ii) give security for payment of the whole or any part of the Adjudicated Amount to the claimant; and
 - (b) the procedure laid down in the Act has been complied with⁵⁶.
- 3.65 There are thus limited grounds for dispute. Any dispute should in most (if not all) cases be capable of determination by reference to the relevant documents. Therefore, it should be possible in the vast majority of cases for a claimant to obtain summary judgment (i.e. judgment without the usual interlocutory steps, such as discovery or a trial).
- 3.66 However, it is arguable that under the Victorian Act a respondent can frustrate the apparent intent of the legislation by claiming a set off. This is discussed in more detail in section 5.

⁵³ Other than because the application is withdrawn or the dispute resolved; see section 45(4).

⁵⁴ Section 27(2).

⁵⁵ Section 27(2)(b).

⁵⁶ Section 27(4).

- 3.67 The NSW Bill proposes amendments which make it clear that the set off is not available when enforcing a right to a progress payment pursuant to the legislation (although such claims will continue to be relevant in determining the final entitlement of the contractor or sub-contractor). Under the new section 20(2B) the respondent will not be able to include in the adjudication response any matters which were not also raised in the payment schedule.
- 3.68 Further, sections 15(4), 16(4) and 25(4) to be inserted into the NSW Act, if the Bill is passed, prohibit the respondent from raising a number of types of defence in court proceedings to recover amounts due under the Act. This, it would seem, will serve a number of purposes, namely, to encourage respondents to participate in the adjudication process (with a view to reducing any adjudicated amount which must then be paid by the respondent) and to simplify the enforcement of amounts due under the Act. A respondent will then be forced to bring a separate action to recover money paid under the Act which is owed to it by reason of a cross-claim, or other defence in relation to matters arising under the contract such as a set off. Participation in the adjudication process may be in the interests of both parties in that it may protect the respondent from frivolous or speculative claims.

"Pay When Paid" and "Pay If Paid" Clauses

- 3.69 It is not uncommon in construction subcontracts to have provisions which stipulate that payment of the sub-contractor is either:
- (a) determined by the date upon which the contractor receives payment from the principal; or
 - (b) dependent upon the contractor receiving payment from the principal.
- 3.70 Clauses of the first type are known as "Pay When Paid" clauses. These clauses have been interpreted by the court as stipulating only the time by which the payment is to be made. If the principal does not make payment because (for example):
- (a) it is insolvent; or
 - (b) because the it has exercised rights of set-off etc,
- the courts require payment to be made in a reasonable time, because the provisions in relation to the timing of the payment have wholly failed.
- 3.71 In contrast, a clause of the second type (a "Pay if Paid" clause) makes the obligation to pay the sub-contractor conditional upon payment by the principal to the contractor. If the principal does not pay for any reason, then no debt arises between the contractor and sub-contractor.
- 3.72 So if, for example, the principal fails to make payment because it is insolvent, then the sub-contractor takes the risk of that insolvency to the extent of its entitlement and will not receive any payment.
- 3.73 Section 13 of the Victorian Act outlaws these types of clauses. This is important for contractors because from a cash flow point of view contractors will be obliged to make payment to a sub-contractor, even if payment from the principal has been delayed.
- 3.74 In addition, it is impossible for the contractor to share the risk of the insolvency of the principal with its sub-contractors.
- 3.75 It is therefore important that the contractor:
- (a) takes care to ensure that the principal is solvent and otherwise has sufficient funds to meet its obligations under the construction contract; and

- (b) uses the legislation so that insofar as there are disputes in respect of the amount payable under the contract, it:
 - (i) becomes a secured creditor; or
 - (ii) suspends work under the contract.

Effect of Act on Civil Proceedings

- 3.76 Any attempt by parties to contract out of the provisions by including clauses which have the effect of modifying, excluding or restricting the Victorian Act will be void pursuant to section 48. It is unclear how this provision is intended to operate. Presumably a clause in a contract will only be void to the extent that it has the effect of moderating or restricting the operation of the Victorian Act.
- 3.77 Experience in NSW has been that some contracts included provisions which attempt to discourage or penalise the contractor from exercising any of its rights under the regime. Consequently, the NSW Bill widens the statutory prohibition, rendering void any clause that may reasonably be construed as an attempt to deter a person from taking action under the Act.⁵⁷

Recovery of Debt from Principal

- 3.78 Division 4 of the Victorian Act allows a sub-contractor (in certain limited circumstances) to secure a debt due from a contractor to the sub-contractor, by obtaining a right to be paid by the principal from moneys owed by the principal to the contractor. This security is available after the contractor has served a “notice of claim” pursuant to section 35 of the Victorian Act.
- 3.79 A claimant may only serve such a notice of claim on the principal when the following requirements have been met⁵⁸:
- (a) an adjudicator has determined that an Adjudicated Amount is payable by a respondent to a claimant in respect of a construction contract;
 - (b) on or before the relevant date the respondent fails to:
 - (i) pay the whole or any part of the Adjudicated Amount to the claimant; or
 - (ii) give security for payment of the whole or any part of the Adjudicated Amount to the claimant; and
 - (c) the claimant has received judgment for part or all of the Adjudicated Amount.
- 3.80 For this mechanism to be useful, the rights under the Victorian Act must be exercised early in the course of construction. The later it is exercised the more likely it is that there will be no money due by the principal to the contractor, in particular because of the possibility of delay in securing judgment. Nonetheless, it is likely to be a useful tool for sub-contractors.
- 3.81 Two warnings arise:
- (a) Principals must ensure that they comply with valid notices of claim from sub-contractors. Failure to do so will result in the principal making payments to both the contractor and sub-contractors for the same work. If there is any doubt about the validity of the notice a principal should pay the money into court and ask the contractor and subcontractor to have the dispute between them determined.⁵⁹

⁵⁷ Schedule 1 [48].

⁵⁸ These are set out in section 30.

⁵⁹ That is, by way of an interpleader under Order 12 of the *Supreme Court Rules 1996*.

- (b) If, after the notice of claim, the principal or respondent (rather than the principal) pays an amount on account of the certified debt, the sub-contractor must within 7 days of:
- (i) payment; and
 - (ii) a request to do so,
- give the party making payment a “discharge notice in respect of the payment”⁶⁰. If the sub-contractor fails to do so within 7 days, it must repay the amount so paid.

⁶⁰ Section 40.

4. SHORTCOMINGS OF THE VICTORIAN ACT

- 4.1 The legislation aims to operate so that a contractor or sub-contractor seeking to secure its position should be able to do so at a number of stages throughout the process, namely:
- (a) if there is a failure to produce a payment schedule;
 - (b) if the amount specified in a payment schedule is not paid;
 - (c) if an amount awarded by an adjudicator is not paid.
- 4.2 However, section 47 preserves the rights of the parties to the construction contract, other than those rights which are expressly affected by the Victorian Act.
- 4.3 Rule 13.14 of the Victorian Supreme Court Rules provides:
- “Where a defendant has a claim against a plaintiff for the recovery of a debt or damages, the claim may be relied on as a defence to the whole or part of a claim made by the plaintiff for recovery of a debt or damages and may be included in the defence and set-off against the plaintiff’s claim, whether or not the defendant also counterclaims for that debt or damages”.
- 4.4 Accordingly, where the respondent has failed to provide a payment schedule, failed to pay in accordance with a payment schedule or where an adjudicator has made a positive determination in favour of the claimant and the claimant seeks to enforce that debt in a court, it is probable that the respondent will be entitled to rely on a defence of set off⁶¹. This interpretation is also supported by the amendments proposed to the NSW Act which clarify that cross-claims, other defences under the contract and challenges to an adjudicator's determination cannot be raised in proceedings for enforcement of the debt or determination.
- 4.5 If this is correct in respect of the Victorian legislation, it will effectively mean that the claimant is entitled to no relief from the court (other than security in relation to any adjudicated amount which is contested) until the cross claim or other defence such a set off claim has been determined. This may take years to resolve. Curiously, however the right to suspend works would continue.
- 4.6 This outcome does not appear to be consistent with the intention of the legislation to provide a scheme whereby:
- (a) an interim fast award can be made by an adjudicator which will give rise to a right to either payment or security; and
 - (b) the determination of the adjudicator can be “overturned” in a subsequent more detailed proceeding.
- 4.7 If it is correct that a set-off can be used at the enforcement stage the advantages of the legislation are severely restricted , unless the contractor is prepare to suspend.
- 4.8 We will have to await the outcome of court decisions before this uncertainty is resolved.

⁶¹ In *Jemzone Pty Ltd v Trytan Pty Ltd* above, n 24 Justice Austin set aside the claimant's statutory demand issued following the respondent's failure to pay an adjudicated amount, holding that the respondent's cross-claims for variation credits and loss of revenue satisfied the test of a "genuine dispute" pursuant to section 459H of the *Corporations Act*.

5. CONTRAST - SCHEMES IN OTHER STATES

Western Australia

- 5.1 The Western Australia draft security of payment bill is similar to the NSW and Victorian Acts, with several key differences.
- (a) It does not create a statutory right to progress payments where such right does not already exist within the contract.
 - (b) It also covers building and construction contracts between owners and contractors in the domestic/residential industry and contains a more comprehensive definition of contract and work. For example, offshore contracts are included (although the extraction of gas and minerals is still excluded).
 - (c) Its provisions relating to rapid adjudication of payment disputes under a construction contract extend to security or retention moneys owed under the contract.
 - (d) It empowers the adjudicator to make a prima facie *enforceable* determination which entitles the payee to not only suspend work under the contract (in the event of failure to abide by the determination), but also place a lien or charge over any *assets* of the respondent to secure any unpaid amount.
 - (e) It does not allow a respondent to provide security for moneys the subject of a determination which the respondent intends to dispute. Instead the money must be paid to the claimant and may only be recoverable later if the determination is overturned.

Queensland

- 5.2 Queensland has recently amended the Sub-contractors' Charges Act. This act operates differently from the NSW, Victorian and (proposed) Western Australian regimes because it allows sub-contractors to lodge a charge on money owed by a principal/contractor:

- (a) under any contract; or
- (b) as retention money

including any such moneys owed under any superior contract to a superior contractor.

Therefore, curiously, a sub-sub-contractor can “charge” money owed by the principal to the contractor even where the contractor has paid its sub-contractor for the work done by the sub-sub-contractor.

- 5.3 The recent amendments also broaden the scope of work performed to which the act applies, and enables a contractor to claim a charge in respect of money which has not yet been finally determined through the dispute resolution procedures in the contract. The amendments also contain further provisions regarding how the principal/contractor may use moneys which are the subject of a charge.
- 5.4 Despite the recent amendments, the current Queensland scheme is not as prescriptive or far-reaching as the new scheme in Victoria and NSW. However the Security of Payment Discussion Paper prepared by the Queensland Building Services Authority has recommended that Queensland implement the NSW model, incorporating the proposed Western Australian enhancements through the introduction of a separate piece of legislation. It is likely that a Bill in that form will be tabled before the Queensland parliament some time in 2002/2003.

6. CONCLUSION

- 6.1 The *Building and Construction Industry Security of Payment Act 2002* (Vic) establishes a comprehensive right to progress payments and a statutory means for securing and claiming such payments in the building and construction industry. This represents a significant step forward for Victoria where previously there has been no regulation in this area.
- 6.2 The Act substantially mirrors the NSW Act and although some problems with the legislation are carried through as a result of this, hopefully the relatively uniform nature of the schemes will assist all parties involved to incorporate the requirements into their work practices and exercise and observe their new rights and responsibilities accordingly.

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CLAYTON UTZ

**BUILDING & CONSTRUCTION INDUSTRY
SECURITY OF PAYMENT ACT 2002 (VIC)**

**McCONNELL DOWELL
December 2003**

Andrew Stephenson
Partner

Brianna Harrison
Solicitor

If you have any questions about the details of this document
please contact Andrew Stephenson on + 61 3 9286 6000

Clayton Utz Lawyers
Level 18 333 Collins Street Melbourne VIC 3000 Australia
DX 38451 333 Collins VIC
T + 61 3 9286 6000 F + 61 3 9629 8488

www.claytonutz.com