Adjudication under the Amended Victorian SOP Act

The Victorian *Building and Construction Industry Security of Payment Act 2002* commenced on 31 January 2003. It was based on the original NSW SOP Act of 1999 but that Act had by then been drastically amended. There have only been about 70 adjudications in the four years of operation of the Victorian Act. By contrast, there are more than 10 times that number of adjudications each year in NSW and there were 216 determinations last year in Queensland, an increase of over 100% on the preceding year. Things will change dramatically in Victoria for construction contracts let after 30 March 2007 when the *Building and Construction Industry Security of Payment (Amendment) Act 2006* commences. The purpose of this article is to explain how adjudication in Victoria will differ from adjudication in NSW and Queensland and to alert adjudicators and parties to peculiarities in the Victorian Act.

Contents

1. Background

In his second reading speech on 9 February 2006 introducing the bill Mr Hulls, the Minister for Planning said, "The main purpose of this bill is to amend the Building and Construction Industry Security of Payment Act 2002 to make it more effective in enabling any person who carries out building or construction work to promptly recover progress payments. … To ensure a balanced response to industry concerns, an industry working group was established … The bill substantially adopts the recommendations of the industry working group. The main thrust of these recommendations was to match the improvements made to similar New South Wales legislation to enhance the effectiveness of the existing Victorian legislation. The bill is modelled on the provisions and processes of the amended New South Wales act and similar recently enacted legislation in Queensland. The changes will benefit building and construction firms with national or interstate operations by improving consistency between payment regimes across all three jurisdictions. The Productivity Commission and key industry associations across Australia strongly support national consistency in building industry legislation".

Despite the objective of consistency, the Victorian scheme is replete with differences. It will be seen that the differences favour lawyers, arbitrators and respondents at the expense of claimants.

Those differences are the focus of this article. A particular problem is the multitude of ambiguities in the Victorian legislation.

In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd* [2005] NSWCA 409, in discussing the object of the NSW Act, Santow JA at [44] said:

> Thus the overall purpose of the Act is in my opinion correctly stated by Basten JA in *Co-ordinated Construction Co Pty Limited v Climatech (Canberra) Pty Limited* [2005] NSWCA 229 at [45]: "… to provide a speedy and efficient means of ensuring that progress payments are made during the course of the administration of a construction contract, **without undue formality or resort to the law**" [emphasis added].

The emphasis was added by Santow JA. It will be interesting to see if Victorian Courts adopt a similar approach to the interpretation of the Victorian Act.

2. Application to existing contracts

The amendments only affect contracts entered into on or after 30 March 2007 [s 53]. Contracts let after 30 January 2003 and before 30 March 2007 are governed by the original Act. Consequently, in Victoria, there will not be the spectacular increase in adjudications that occurred in NSW after its 2002 amendment. The NSW amendment applied to existing contracts [Schedule 2.3]. In Victoria it will be some years before the amendments apply to all construction contracts.

3. Terminology

In this paper, SOP refers to *Security of Payment*, a shorthand term used to describe the *Building and Construction Industry Security of Payment Act 1999* NSW ('the NSW Act'), the *Building and Construction Industry Security of Payment Act 2002* Victoria and the *Building and Construction Industry Payments Act 2004* Qld. ('the Qld Act'). The '2006 Act' refers to the *Building and Construction Industry Security of Payment (Amendment) Act 2006* of Victoria. 'The Act' or 'the amended Act' refers to the Victorian Act as amended by the 2006 Act. The 'original Act' refers to the Victorian Act before that amendment. A reference to a section of the Act refers to the section as it appears in the Act as amended. A section in the amending Act will be referred to a section of the 2006 Act.

The Act, the 2006 Act and other information on SOP in Victoria can be accessed at <www.buildingcommission.vic.gov.au>. The consolidated Act is also available at <www.austlii.edu.au>.

4. Similarities

For an adjudicator at first instance, as distinct from a 'review adjudicator', an adjudication under the Act is almost identical to adjudication under the NSW Act or the Qld Act. Adjudicators under those Acts should have no difficulty adjudicating payment claims under the Victorian Act. There will be some issues unique to Victoria, but the process of deciding is the same.

Just as in NSW and Queensland, a person carrying out construction work or supplying the related goods or services makes a payment claim on or from a reference date. The respondent has 10 business days in which to provide a payment schedule. If there is no payment schedule or the scheduled amount is less than the claimed amount, the claimant has the option of having the amount due determined in adjudication. The claimant can make an adjudication application to an authorised nominating authority who refers the application to an adjudicator. The adjudicator accepts the adjudication application. The respondent has a qualified right to lodge an adjudication response. The adjudicator has a limited time in which to make a determination. The adjudicator determines the amount of the progress payment due, the due date for payment and the rate of interest. If the adjudicated amount is not paid on time, the claimant can apply for an adjudication certificate and register it as a judgment.

In NSW and Queensland the adjudicator can apportion both the adjudicator's fees and the fees paid or payable to the authorised nominating authority (eg the application fee and the fee for an adjudication certificate) but in Victoria the adjudicator can only apportion the adjudicator's fees [s 45(4)]. In Victoria a review adjudicator can apportion his or her fees but although the review adjudicator can substitute a new adjudication determination for the original adjudication determination,

the Act is silent about how, if at all, the review determination can deal with the apportionment of adjudication fees in the original determination.

An important extra and onerous burden that the Victorian Act imposes on adjudicators is in s 21(2B). Unlike NSW and Queensland, Victoria allows a respondent to include in the adjudication response additional reasons that were not included in the payment schedule. If this occurs, the adjudicator must serve a notice on the claimant setting out the additional reasons and giving the claimant two business days to lodge a response to those reasons. For tactical reasons, respondents will probably adopt the practice of including additional reasons in adjudication responses.

It will be important for adjudicators to reproduce the additional reasons and not paraphrase them. It is often very difficult to tell whether a statement in the adjudication response is a new reason or a submission in support of a reason in the payment schedule. It is often difficult to tell how many reasons a respondent has given. It seems that a reason cannot be 'set out' by mere reference to the adjudication response. It seems that the adjudicator's notice must actually include the words in the adjudication response. In practice, it seems that the adjudicator will have to send the claimant again so much of the adjudication response as could be construed as providing any additional reasons and leave it to the claimant to decide whether there are additional reasons and, if so, how many.

5. Time for making a determination

An adjudicator cannot determine the adjudication before the end of the period within which the respondent can lodge an adjudication response [s 22(1)]. That period is usually 5 business days after the respondent receives a copy of the adjudication application [s 21(1)]. But if the respondent has not provided a payment schedule then the respondent cannot lodge an adjudication response [s 21(2A)] and the adjudicator does not have to wait the 5 business days. The NSW Act and the Qld Act have similar provisions. The difference is in the length of time that the adjudicator has to make the decision.

After service of the notice of acceptance on the last party to be served [s 20(2)] the adjudicator has 10 business days to make a determination [s 22(4)(a)]. This is the same as in NSW. Compare the Qld Act s 25(3) which gives the adjudicator 10 business days after the earlier of receipt of the adjudication response or the date on which the adjudicator should have received the response.

Where the NSW Act and the Qld Act allow the parties by agreement to extend the adjudicator's time without limit, the Act provides in s 22(4)(b) that only the claimant can agree to extend the time. The time cannot be extended by more than an extra 5 business days or, on another interpretation of s 22(4)(b), an extra 15 business days. When trying to construe whether it is 5 or 15 extra business days, look at the different wording in s 28I(10). My interpretation is that it is only an extra 5 business days.

The claimant cannot unreasonably refuse an extension (up to the limit of business days) if the extension is requested by the adjudicator [s 22(4A)]. When requesting an extension the adjudicator should give reasons. The Act does not deal with the situation where the claimant unreasonably refuses. If an extension is not given, even unreasonably, the adjudicator has to make his or her determination within the original 10 business days.

As in NSW and Qld, an adjudicator who fails to make a decision in time is not entitled to be paid any fees or expenses [s 45(5)] except where the reason is that the application was withdrawn or the dispute was settled. As in NSW and Qld, the adjudicator has a lien for his or her fees and expenses [s 45(6)]. There are some interesting UK decisions on the validity of a late determination. In *Barnes & Elliott Ltd v Taylor Woodrow Holdings Ltd* [2003] EWHC 3100 (TCC) it was held that delay of a day or two is excusable but in *Epping Electrical v Briggs & Forrester* [2007] EWHC 4 (TCC) it was held that a delay of 7 days rendered the determination void.

While in general there is no time limit on an adjudicator correcting a slip (the 'slip rule'), an adjudicator cannot correct a slip "if an application has been made" for a review adjudication [s 24(4)] but that leaves open the question of whether a slip corrected before the application is made is valid. It seems that the term "if an application has been made" in s 24(4) should be read as meaning "after an application has been made".

6. Review adjudicators

Unlike NSW and Qld, the Act creates two categories of adjudicator. There is the ordinary adjudicator and a 'review adjudicator' who is appointed by an authorised nominating authority [ANA] within 5

business days after receiving an application for review of an adjudication determination [s 28G(1)]. The existence of a mechanism for review should in no way affect the way an adjudicator determines an adjudication application.

An 'adjudication review' can be requested by the claimant or respondent only if the adjudicated amount exceeds $100,000 [s 28A]. It must be requested from the ANA to which the original adjudication application was made [s 28D(1)]. A claimant can request a review adjudication if the claimant claims that the adjudicator has failed to take into account a relevant amount because the adjudicator wrongly determined that is was an 'excluded amount' [s 28C]. In theory, there could be a review application by a claimant and a separate review application by a respondent although those drafting the Act did not provide for this possibility. The applications must go the same ANA so presumably the ANA would appoint the one adjudicator for both reviews. It would be interesting if two review adjudicators were appointed and they arrived at different decisions. Theoretically that possibility exists.

A respondent who, in the payment schedule or the adjudication response has identified an amount (claimed in the payment claim) as an 'excluded amount', can apply for a review adjudication if the respondent claims that the adjudicated amount includes an 'excluded amount'. Before lodging the adjudication review application, the respondent must pay the claimant so much of the adjudicated amount as is not allegedly an 'excluded amount' and must pay the alleged 'excluded amount' into a designated trust account.

The making of these payments is a condition precedent to the validity of the review application but here again is an ambiguity. Take the case where the adjudicated amount is $150,000 made up of:

Alleged excluded amount	$200,000
Other amounts	$100,000
Less paid	$150,000

Must the respondent pay the claimant $100,000 or some other amount or nothing? Must the respondent pay $200,000 or $150,000 or some other amount into a designated trust account?

A respondent can only make an application for review on the ground that the adjudicated amount included an 'excluded amount' [s 28B(4)]. Since an adjudicator's determination is void to the extent that it includes an excluded amount [s 23(2B)], it is not necessary for the respondent to seek a review adjudication when the adjudicated amount includes an excluded amount? The respondent could simply seek a declaration in the Supreme Court. However, it is possible that the Supreme Court would exercise its discretion not to make a declaration when the respondent could have but elected not to make an application for a review adjudication. Nevertheless, if the claimant obtains judgment on an adjudication certificate, the respondent can apply to have the judgment set aside on the ground that the adjudicator or review adjudicator "took into account a variation of the construction contract that was not a claimable variation" [s 28R(6)].

After receiving a copy of the original determination, an applicant for review has 5 business days to make a review application [s 28D(2)] to the ANA. In each instance, the ANA will decide who is an appropriate review adjudicator and can charge an application fee for a review adjudication application. The other party to the review application has 3 business days in which to make a written submission to the ANA. The ANA must appoint a review adjudicator within 5 business days after receiving the application for review [s 28G(1)]. It will be important for ANAs not to appoint a review adjudicator too quickly. Otherwise the review adjudicator may be caught for time.

The review adjudicator is supplied by the ANA with the earlier determination and the documents upon which it was made, plus the submissions of the applicant and respondent to the review. The review adjudicator can confirm the original determination or issue a 'review determination' [s 28I(5)]. The review adjudicator has only 5 business days in which to make his or her review determination and provide it to the ANA [s 28I(10)]. The applicant can agree to extend that period by up to an extra 5 business days and must not unreasonably withhold approval to the extension [s 28I(11)].

For an ANA to comply with these time constraints will not be easy. The ANA has to get back from the original adjudicator all the documents upon which the adjudicator made his or her determination. It will be important for adjudicators to ensure that in making their original

determination they do not mark or make comments on the documents and submissions and that they do not have regard to anything other than the documents provided by the parties. Some adjudicators make the mistake of considering judgments other than those copies of which are included in the submissions of the parties.

If an adjudicator holds a conference or makes an inspection [s 22(5)], the adjudicator will have to consider how the information gleaned from the conference or inspection is to be made available in a form that will enable the ANA to satisfy s 28H(2)(g). The golden rule is don't hold conferences or make inspections. The exception might be an inspection of a document, for example the whole contract when the parties have initially only provided parts of the contract. In that event, the adjudicator must make a copy of the document.

Adjudicators must consider the Act when making their determinations [s 23(2)(a)]. To satisfy s 28H(g), does the ANA have to give the review adjudicator a copy of the Act?

7. Excluded amounts

The industry working party advising the Minister on the amendments was obviously concerned to give claimants in Victoria a much more restricted access to adjudication than exists in NSW and Queensland. This has been done by creating 'excluded amounts'. These are amounts that must not be included in payment claims [s 14(3)(b)] or in the calculation of the amount of a progress payment [s 10(3)] or in determinations [s 23(2A)(a)] or in a review adjudication [s 281(3)(a)]. Excluded amounts must not be included even when the construction contract provides that progress payments must include the amounts. Consequently, there will be many instances where, in Victoria as opposed to NSW and Queensland, the claimant's entitlement to a progress payment under the Act will be less than the claimant's entitlement under the contract.

Section 9 provides when the entitlement to a progress payment arises and s 14 imposes time limits on serving a payment claim under the Act. Section 10 provides how the amount of the progress payment is to be calculated and imposes limits on the amount of the progress payment.

The same time and quantum limits do not exist in NSW and Queensland. The result is that the Victorian amendments do not "match the improvements made to similar New South Wales legislation" as stated by the Minister in his second reading speech. Whereas in NSW and Queensland the legislation ensures that a claimant is entitled to recover whatever progress payments the construction contract allows, the Victorian Act only ensures that a claimant has a right to recover some of the progress payments which may be due under the construction contract.

It seems that in NSW if a respondent wishes to contend that, because a payment claim was served outside the period allowed by the NSW Act, the respondent is not liable to pay the payment claim, the respondent must do so in a payment schedule served within time [see *John Holland v RTA* [2007] NSWCA 19]. In Victoria the respondent could raise that ground in the adjudication response even if the respondent has not raised it in the payment schedule [s 21(2B)]. However, if the respondent does not raise the ground in either the payment schedule or the adjudication response, will the Victorian courts follow the NSW precedent and find that the respondent cannot challenge the adjudication determination on the ground that the payment claim was made too early or too late?

The amounts which, under the Victorian Act are not recoverable are called 'excluded amounts'. The term is defined in s 10B. Excluded amounts are:

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

The reason why the conjunction 'and' has been emphasised is discussed later. The use of the conjunction 'and' instead of 'or' is most important.

That definition of 'excluded amounts' introduces enormous scope for arguments as to its meaning in various situations. These arguments will provide the greatest challenge for adjudicators and review adjudicators and the courts. Although adjudicators and review adjudicators will have to decide whether claimed amounts are 'excluded amounts', their decisions on that issue are not binding. They can be challenged by way of application to the Supreme Court for a declaration or by way of an application to set aside a judgment entered upon an adjudication certificate. Even though s 28R(5)(a)(iii) provides (as do the NSW and Qld Acts) that if a person commences proceedings to have judgment set aside, that person cannot challenge an adjudication determination, Victoria has a unique exemption. Section 28R(6) provides that s 28R(5)(a)(iii) 'does not prevent a person from challenging an adjudication determination or review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a **claimable variation'** [*emphasis added*].

It is not clear why the exemption applies only to some excluded amounts [ie unclaimable variations] and not other excluded amounts. However, in practice, the challenge will usually be that the determination or review determination is only so much thereof as is valid. To the extent that a determination [s 23(2B)(2)] or a review determination [s 28I(4)(b)] includes an 'excluded amount' it is void. Therefore, what cannot be challenged under s 28R(5)(a)(iii) is presumably only so much of the determination as is not void.

The consequence of the existence of s 28R(6) is that many cases where in NSW a claimant could enforce payment by way of summary judgment, such as *Walter Construction Group v CPL (Surry Hills)* [2003] NSWSC 266, will be decided quite differently in Victoria. In Victoria it will be much easier for a respondent to defeat a claim for summary judgment and, consequently, much harder for a claimant to obtain a progress payment.

Claimable and unclaimable variations are discussed below. Now some of the situations that will arise in practise will now be considered.

A respondent may fail to raise in the payment schedule that a claimed amount is an excluded amount but raise the defence in the adjudication response [s 21(2B)]. If the respondent has raised the point in the adjudication response, even though not in the payment schedule, the respondent can make an application for an adjudication review if the adjudicator includes the disputed amount in the adjudicated amount [s 28B(4)].

In NSW and Queensland, a respondent cannot raise in the adjudication response a reason for withholding payment that was not raised in the payment schedule. The importance of this will be seen in *John Holland v RTA* [2007] NSWCA 19. However, it is the opposite in Victoria. A clever respondent may serve a payment schedule giving only one reason for withholding payment and then, in the adjudication response, give many reasons. The claimant will have 10 business days to address the one reason in the payment schedule but only two business days to address the new reasons in the adjudication response. This gives the respondent a major tactical advantage. It is a statutory denial of natural justice.

The reason why NSW and Queensland don't allow additional reasons in the payment schedule is to ensure fairness and natural justice. When the claimant has to decide whether to go to adjudication, the claimant should know all the reasons why payment is being withheld. The claimant goes to adjudication because the claimant thinks that the reasons for withholding payment are not valid. The claimant has no way of knowing whether concealed reasons are valid or not. This is just another example of how biased the Victorian Act is against claimants.

A respondent may fail to serve a payment schedule but make a submission to the adjudicator that a claimed amount is an excluded amount. It seems that the adjudicator must consider whether the claimed amount is an excluded amount even though the respondent is barred by s 21(2A) from lodging an adjudication response. In this case, the respondent could not make an application for review of the adjudicator's determination [s 28B(4)] but could nevertheless challenge the validity of the adjudicator's determination in other proceedings [see above].

A respondent may fail to raise before the adjudicator any argument that a claimed amount includes an excluded amount. It seems that nevertheless the adjudicator must consider the issue, even though it is not an issue raised by the parties. It seems that the adjudicator would have to seek submissions from the parties before making the determination. If the adjudicator did not consider the issue because it was not raised in the adjudication and the respondent sought a declaration as to the

validity of the determination, the Court could, in the exercise of its discretion, refuse to make the declaration, on the ground that the respondent could have raised the issue before the adjudicator. However, the adjudicator's determination is void to the extent that the adjudicated amount includes an excluded amount irrespective of whether the issue was canvassed in the adjudication. For a determination see s 23(2B)(2). For a review determination see s 28I(4)(b). The Victorian Parliament was very intent upon making sure that respondents were protected against claims for excluded amounts.

Here is another example of an important ambiguity. Claimants regularly make progress payment claims under the contract and they are usually paid. It is only when a progress claim is not paid that the claimant makes a progress claim under the Act and submits it to adjudication. Assume that when the value of work including variations (which could be 'excluded amounts') is $100,000 a claimant makes progress claim No.1 for $100,000 and it is paid.

Assume that when the total value of work and variations is $250,000 the claimant makes progress claim No 2 for $150,000. It is made up of

Excluded amounts	$125,000
Other amounts	$125,000
Less progress payment No 1	$100,000

Section 14(3)(b) provides that a claimed amount must not include an excluded amount. How much of the claimed amount of $150,000 is an excluded amount? The Act does not take into account that progress claims are for the cumulative value of work less amounts paid. The Act does not take into account that while excluded amounts cannot be included in progress claims under the Act they can be included in progress claims under the contract. The Act does not take into account that progress payments are on account of all work done and consideration payable and not on account of particular items of work or particular claimed items.

Assume that the adjudicator decides that the claimant is entitled to a progress payment of $150,000. To what extent would the determination be void? The adjudicated amount is $150,000. How much of it is an excluded amount? What are the previous payments to be credited against? To what extent will a court reopen the calculation of the adjudicated amount and the calculation of previous progress payments?

In NSW the Supreme Court initially allowed judicial review of an adjudicator's decision [*Musico v Davenport* [2003] NSWSC 977] until the Court of Appeal decided that that the Supreme Court was wrong [*Brodyn v Davenport* [2004] NSWCA 394]. The Supreme Court of Queensland did not follow NSW and allowed judicial review but this is soon to be changed. When enacted, clause 91 of the *Justice and Other Legislation Amendment Bill 2007* Qld will take away the Queensland Supreme Court's power of judicial review of an adjudicator's decision. That will align the Queensland Supreme Court's powers with those of the NSW Supreme Court. Will the initial mistake of NSW and Queensland be repeated in Victoria?

An interesting issue to be decided by the Victorian courts will be whether, on a challenge to the validity of an adjudication decision on the ground that the adjudicator took into account an excluded amount, the respondent will be confined to the information and submissions which were before the adjudicator or the respondent will be able to produce additional evidence and submissions.

Although s 14(3)(b) states that the claimed amount in a payment claim 'must not include any excluded amount', the fact that it does, does not render it void. Otherwise, there would be no point in providing in s 23(2B)(2) that a determination is void to the extent that it includes an excluded amount. If the payment claim was void, the whole determination would be void. Payment claims are frequently made simultaneously under the contract and under the Act. It is only in the claim under the Act that an excluded amount cannot be included. The Act does not take away a claimant's right to have an excluded amount included in a progress payment under the contract as distinct from a progress payment under the Act.

8. Latent conditions

Under s 10B(2)(b), is an amount (other than an undisputed variation) claimed for 'latent conditions' an 'excluded amount'?

Or is it only 'any amount (other than a claimable variation) claimed under a construction contract for compensation due to the happening of an event including any amount relating to –

(i) latent conditions; **and**
(ii) time-related costs; **and**
(iii) changes in regulatory requirements;

that is an excluded amount?

In other words, must the amount claimed be for an 'event' and, at the same time, relate to all three of a 'latent conditions', 'time-related costs' and 'changes in regulatory requirements' or would it suffice if the amount was for an 'event' relating to any one of these. The conjunction 'and' has been used so presumably Parliament intended that all three would be required. Otherwise the conjunction 'or' would have been used instead of 'and'. Note how often the conjunction 'or' is used in other sections. However, the possibility of an event relating all three at once is so remote that s 10B(2)(b) would, in practice, never create an 'excluded amount'.

In Victorian Adjudicator Accreditation Courses conducted in early 2007 by Adjudicate Today Pty Ltd, an authorised nominating authority under the Act, the adjudicators were evenly divided on whether s 10B(2)(b) should be read as:

> Any amount … relating to:
> latent conditions; **and**
> time-related costs; **and**
> changes in regulatory requirements,

or:

> Any amount … relating to:
> latent conditions; **or**
> time-related costs; **or**
> changes in regulatory requirements.

It seems that Parliament very deliberately used the conjunction 'and' because the conjunction 'or' would be so unfair to claimants that it would be contrary to the object of the Act which is "to ensure that any person who undertakes to carry out construction work … is entitled to receive, and is able to recover progress payments". Maybe Parliament was awake to the attempts of vested interests to destroy the effectiveness of the Act and that is why Parliament used 'and' instead of 'or'. In any event, Parliament ultimately left it to the Executive [the Governor in Council by regulation under s 52] to decide whether to expand the class of amounts which are excluded amounts [s 10B(2)(e)]. Therefore, adjudicators and courts should not assume that Parliament intended 'and' to mean 'or'.

The words 'compensation due to the happening of an event including any amount relating to … latent conditions' are ambiguous. The terms 'event' and 'latent conditions' are not defined in the Act.

It is important to note that it is not 'an amount relating to latent conditions' that is an excluded amount. It is 'compensation due to the happening of an event' that is the excluded amount. Perhaps an 'event' is the equivalent of what is known in law as a *novus actus interveniens*, ie a new intervening act. A pre-existing subsoil condition is often a latent condition but it is not an 'event'. It always existed. The obligation upon the contractor to deal with the latent condition usually exists in the contract. The obligation is not an 'event'. Work is not an 'event'. Perhaps a storm or a flood is an 'event'.

The discovery of a latent condition may be an 'event' but the claim for compensation would be for the additional work or cost involved on account of the latent condition. That work or cost is not an 'event'.

If, after due consideration of the information before him or her, an adjudicator determines that a claim is not for 'compensation due to the happening of an event', will the Victorian courts allow the respondent to reargue the matter or will the courts, like the NSW Supreme Court, decide that it is not open to the court to review that aspect of the adjudicator's determination?

Defining 'latent conditions' for the purpose of a construction contract is very difficult. In clause 12.2 of General Conditions AS2124-1986 'latent conditions' are defined as:

> a. physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions at the Site, which differ materially from the physical conditions which

should reasonably have been anticipated by the Contractor at the time of the Contractor's tender if the Contractor had –

i. examined all information made available in writing by the Principal to the Contractor for the purpose of tendering; and
ii. examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries; and
iii. inspected the Site and its surroundings; and

b. any other conditions which the Contract specifies to be latent conditions.

This definition has been widely adopted in the construction industry but there are many variations of this clause and many different latent condition clauses.

If, in the construction contract, the parties have a definition of 'latent conditions', what regard can be had to that definition in interpreting the term 'latent conditions' in the Act? Can the claimant rightly claim that if a condition does not fall within the definition in the construction contract, it is not a latent condition for the purposes of determining an 'excluded amount' under the Act? Or can the respondent rightly claim that a condition is a 'latent condition' even though it is not a 'latent condition' as defined in the construction contract? In the absence of any definition in the Act, it is reasonable that the parties to a construction contract should be able, within limits, to define what will be a latent condition. In this regard it is significant that the definition in the amending Act will only apply to construction contracts let after the amending Act commences [s 53]. The limit would come when the definition is so expansive that it could be construed as an attempt to contract out of the Act [see s 48].

My dictionary defines 'latent' as 'present but not yet active, developed or visible'. Imagine a contract for excavation that has a rate per tonne of material other than rock and contaminated material and different rates for rock and contaminated material. Assume that rock and contaminated material are not visible at the time the contract is let, even though anticipated under the contract. Could the respondent avoid liability to a progress payment under the Act for rock and contaminated material because the claim is for an amount related to a latent condition? There is nothing in the Act that says that a latent condition must be an unanticipated condition or a condition not apparent to the claimant as distinct from the respondent.

9. Time related costs

Under s 10B(2)(b) 'any amount (other than a claimable variation) claimed under a construction contract for compensation due to the happening of an event including any amount relating to- … (b) time related costs' is an 'excluded amount'. The same ambiguity exists by reason of the conjunction "and" instead of "or" that is discussed with respect to latent conditions. Under s 10B(1) an 'excluded amount' cannot be taken into account in calculating the amount of a progress payment. Section 10B(1) does not distinguish an amount claimed by the claimant as distinct to a cross claim or a claim of set off by the respondent.

The adjudicator cannot take into account any amount claimed by the respondent for liquidated damages under the usual liquidated damages clause which provides that the respondent is entitled to liquidated damages for delay by the claimant in achieving practical completion, or similar liquidated damages clauses. Liquidated damages are not necessarily time related costs. Damages and costs are not the same thing. Whether liquidated damages are excluded by s 10B(2)(b) is not important, because liquidated damages are 'excluded amounts' under s 10B(2)(c).

The term 'time related costs' is extremely ambiguous. For example, imagine a contract for hire of scaffolding. Compensation under such contracts is almost always time related. Very many schedule of rates items are time related. Daywork payments are generally time related costs. Sometimes daywork will fall within the definition of claimable variations but often it is simply a method of calculating cost plus. Milestone payments are usually time related. Did Parliament really intend that any rates based upon time should be 'excluded amounts'?

The better view is that Parliament did not intend to make a time related cost an 'excluded amount' unless the cost is due to the happening of an event that also relates to latent conditions and changes in regulatory requirements. Such an interpretation of s 10B(2)(b) would be consistent with the object of the Act in s 3(1).

Section 10B(2)(b) does not say that time–related costs are excluded amounts. It is an amount claimed for 'compensation due to the happening of an event' that may be the excluded amount. Unless there is an 'event', the existence of time related costs is irrelevant.

10. Damages for breach of contract

Any amount claimed (by the claimant or the respondent) for damages for breach of the construction contract is an 'excluded amount' [s 10B(20(c)]. This makes liquidated damages 'excluded amounts'. Is interest on late payments damages? It seems that interest is not damages. Otherwise, there would be little point in the inclusion of s 12(2) in the amended Act. It provides for interest on the unpaid amount of a progress payment. Interest seems to be part of the consideration payable for the work, goods or services.

Deciding whether an amount is actually damages for breach of contract or part of the consideration payable under the contract for the work, goods or services will not always be clear cut. Hodgson JA in *Coordinated Construction Co v Hargreaves* [2005] NSWCA 228 at [41] said:

> [A]ny amount that a construction contract requires to be paid as part of the total contract price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as 'damages' or 'interest' …

11. Claims not under the contract

Sometimes a claimant includes a claim for damages for misleading or deceptive conduct or a respondent raises, as a defence or cross claim, a claim that the claimant engaged in misleading or deceptive conduct. Sometimes reference is made to the Trade Practices Act or a Fair Trading Act. Sometimes claims are based upon restitution for unjust enrichment. In NSW, Queensland and Victoria such claims are outside the ambit of the respective Acts.

Under s 10B(2)(d) the adjudicator cannot take into account in calculating the amount of a progress payment 'any amount in relation to a claim arising at law other than under the construction contract'. This may go further than the NSW and Queensland Acts. This may exclude a claim by the respondent to set off a debt due under another contract or a cross claim for damages for negligence even when the contract expressly permits the set off. This may present a problem when it comes to an indemnity.

Section 10B(2)(e) allows the creation by regulation of additional classes of excluded amounts. At present no additional classes have been created.

12. Variations defined

It is obvious from the attempt of the 2006 Act to define 'variations' and to create the second class of 'claimable variations' that those responsible for drafting the 2006 Act are not familiar with building and construction contracts. Section 5 provides:

> "variation" in relation to a construction contract, means a change in the scope of the construction work to be carried out, or the related goods and services to be supplied, under the contract.

What is the 'scope of the construction work to be carried out … under the contract'? In this context, it is difficult to envisage a more ambiguous term than 'scope of'. The term could exclude all of what, in the building and construction industry, are commonly called variations. The scope of most building and construction contracts includes the carrying out of variations directed by the respondent.

Take Australian Standard General Conditions AS2124-1986, the most frequently used or copied construction contract for major works. Under clause 3.1 of that contract, the Contractor contracts to "execute and complete the work under the Contract". Clause 2 provides:

> 'work under the Contract' means the work which the Contractor is or may be required to execute under the Contract and includes variations, remedial work, Constructional Plant and Temporary Works.

Surely the scope of the construction work to be carried out under the contract includes variations. It cannot be said that the scope of the construction work to be carried out under the contract does not include carrying out variations directed by the Superintendent under the contract.

It seems that variations can be divided into variations:

- under the contract (ie variations within the scope of the construction work to be carried out under the contract); and
- variations as defined in the Act (ie variations that are not within the scope of the construction work to be carried out under the contract).

This interpretation is consistent with the object of the Act and consistent with practice within the construction industry. It would mean that the ordinary variations that occur regularly under construction contracts are not affected by s 10A.

Clause 40.1 of AS2124-1986 provides:

> The Superintendent may direct the Contractor to –
> (a) increase, decrease or omit any part of the work under the Contract;
> (b) change the character or quality of any material or work;
> (c) change the levels, lines, position or dimensions of any part of the work under the Contract;
> (d) execute additional work;
> (e) demolish or remove material or work no longer required by the Principal.

Is any direction under clause 40.1 a 'variation' within the meaning of the Act? Could some directions under clause 40.1 be said to change the scope of the construction work to be carried out under the contract, but others be said not to change the scope?

Countless examples could be given of the ambiguities and anomalies created by the definition of 'variation'. Following are a few.

Take the case of a contract to paint the whole of a building of 10,000 rooms. Assume that the specification requires the contractor to paint all rooms white. If the Superintendent directs the contractor to change the colour of the door of one room to red, is that a change in the scope of the construction work or related goods to be provided under the contract? Is the scope of the construction work still the painting of the whole building or has the scope of the construction work changed on account of a most minor departure from the original specification?

If the Superintendent directs the contractor to leave on room unpainted, is that a change in the scope of the construction work? In the definition of 'variation' in s 4 of the Act there is no distinction between extra work or work taken out of the contract.

Now assume that the specification requires the contractor to paint the whole building white unless the Superintendent directs the contractor to use another colour in any particular area. In that event, does any direction to adopt a particular colour in a particular area change the scope of the construction work to be carried out under the contract?

Take a contract to build a shop. Is the scope of the construction work the building of the shop or is it every single item, no matter how small, required by the contract as it is originally let. If the respondent requests any minor change, eg that a door be swung from one side instead of the other, is that a change in the scope of the construction work? The answer is important because the question of whether even the most minor change is a variation as defined could decide whether the 10% limit in clause 10A(4) has been reached.

A most minor variation could be the last straw. For example, take a contract for $160,000 which includes a dispute resolution clause. If the sum of claims for disputed variations exceeds $16,000 by so much as one dollar, the claimant forfeits the right to have any disputed variation claims determined in adjudication [s 10A(4)].

While the sum of disputed variation claims does not exceed $16,000 [10%] they are 'claimable variations'. Once they exceed $16,000 all disputed variations cease to be claimable variations. Even those that previously were claimable are not claimable. They cease to be the second class of variation defined in s 10A(3). They are then excluded amounts. The claimant is then precluded from making any claims in adjudication for additional recompense for disputed variations.

Take another example, Assume that a contract (which includes a dispute resolution clause) to paint a building is a lump sum contract for $1m. and the paint specified (and to be supplied by the contractor at a cost of $500,000 which is included in the contract price) is Brand X, Assume that before the contractor orders the paint, the Superintendent directs the contractor to use Brand Y instead of Brand X. Assume that Brand Y is cheaper and results in a saving of $250,000. Under the contract, the respondent (the principal) would be entitled to have the variation valued and the contract price reduced to reflect the saving. However, if the direction is a variation as defined in the Act, the variation would

not be a "claimable variation" under clause 10A. Section 10B(2) provides that "excluded amounts" include any amount that relates to a variation of the construction contract that is not a claimable variation. Section 10B provides that excluded amounts must not be taken into account in calculating the amount of a progress payment. The adjudicator would not be able to take into account the deduction which the respondent is entitled to under the contract.

Another way of looking at this is to say that because Brand Y paint is a 'variation', the claimant is not entitled to any payment for paint because a claim for payment for Brand Y paint is not a claimable variation. It could be said that the supply of paint, as distinct to its application, is a supply of related goods and that there has been a variation in the related goods and the claimant is not entitled to claim for the variation.

Is there any significance in the fact that s 10B(2) refers to "a variation of the construction contract"? A variation of the contract is quite different to a change in the scope of the construction work to be carried out under the contract. What significance is there in the fact that "variation" is qualified by "of the construction contract"? Or is this simply a case of careless drafting?

If the respondent asks the claimant to carry out additional work and the claimant agrees to do so, is that a variation or a new contract?

For what it is worth, it is presently the writer's opinion that where a contract provides [as does clause 40.1 of AS2124-1986] that the contractor will carry out specified work and comply with directions of the Superintendent, compliance with a direction to do additional work or omit work or similar directions would not involve a change in the scope of the construction work to be carried out. The scope of the construction work includes such changes. However in any adjudication, the adjudicator must consider the terms of the particular contract and the submissions of the parties.

13. Claimable variations

Section 10A sets out two classes of "claimable variations". The first class [see s 10A(2)] is variations over which there is no dispute. It is not uncommon for the parties to a construction contract to agree that the contract price is to be adjusted by a particular amount in respect of particular variations. This class of variation should cause no problems.

The second class of variation [see s 10A(3)] will cause untold problems.

Contracts are one of three types, lump sum, schedule of rates or a combination of lump sum and schedule of rates. To decide whether a disputed variation is a claimable variation, it is necessary to ascertain the "consideration under the construction contract at the time the contract is entered". How do you do that when the contract includes rates and the quantities are not known until the work is complete? How are provisional sums to be treated. They are not part of the consideration payable but they often go to make up the contract price.

The "consideration under the construction contract at the time the contract is entered" is not the same as the Contract Sum as the term is frequently used in contracts. For example, under clause 2 of General Conditions AS2124-1986 the Contract Sum means, "where the Principal accepted rates, the sum ascertained by calculating the products of the rates and the corresponding quantities in the Bill of Quantities or Schedule of Rates". The Contract Sum is an amount used for various purposes under the contract, for example, insurance, but it is not the contract price. The contract price is the accepted rates multiplied by the actual quantities, not the estimated quantities, together with additions and deductions provided for in the contract. The "consideration under the construction contract at the time the contract is entered" is the rates. They cannot be converted into a lump sum (for the purposes of s 10A) by adopting estimated quantities.

Take a contract to excavate for a swimming pool. Assume that the consideration under the contract is:

> $100 per tonne of rock
> $200 per tonne of contaminated material;
> $50 per tonne of material other than rock or contaminated material.

What is the "consideration under the construction contract at the time the contract is entered". How can the adjudicator determine for the purposes of s 10A(3)(c) whether the consideration is $5,000,000 or less or for the purposes of s 10(3)(d) whether the "total amount of claims" under the

contract for the second class of variations exceeds 10% of the "consideration under the construction contract at the time the contract is entered".

In some cases, it may be possible to show the maximum or minimum consideration. For example, when the contract price is the rates set out above, if the total of all material to be excavated is 100 tonnes, it could argued that even if all the material was contaminated material, the consideration would be less that $200,000 [100 tonnes by $220/tonne] and therefore the "consideration under the construction contract at the time the contract is entered" must be less than $5m.

On the other hand, if the total quantity to be excavated is 2 million tonnes then even if there proves to be no rock or contaminated material, the "consideration under the construction contract at the time the contract is entered" must exceed $5m [2m x $50].

But it is not good enough for an adjudicator to decide that the consideration must be less than a certain amount or more than another amount. Effect cannot be given to s 10A(3)(d) and (4) unless the party relying upon the section can prove to the satisfaction of the adjudicator the amount of the consideration under the construction contract at the time the contract is entered. This is where the onus of proof will be important. If the claimant asserts that a variation is a claimable variation the claimant will have the onus. If the respondent asserts that a variation is not a claimable variation, the respondent will have the onus. A claimant may be able to throw the onus on the respondent by claiming payment for work directed by the respondent and not describing the work as a variation.

Section 10A(3)(b) is presumably drafted on the premise that the 'consideration under a construction contract' will always be a specific amount in money. Section 7(2)(c) exempts from the Act a construction contract under which the 'consideration payable for construction work carried out under the contract' is calculated otherwise than by reference to the value of work carried out. However, the 'consideration under a construction contract' [s 10a(3)(d)] and the 'consideration payable for construction work carried out under the contract' [s 7(2)(c)] are not necessarily the same. If they were the same, the Act would not use two different terms. *Brambles Australia v Philip Davenport* [2004] NSWSC 120 is an example of a demolition contract where the scrap metal recovered by the contractor had a value and was part of the consideration under the contract. The contract was not exempt from the NSW Act. Section 7(2)(c) is the same in the NSW and Victorian Acts.

In *Brambles*, the respondent unsuccessfully contended that the contract was exempt under s 7(2)(c). It is worth citing paragraph 72 of the judgment of Einstein J on the onus of proof:

> The determination of the Defendant's [the respondent's] submission involves deciding where the onus of proof lies as to whether a contract is a category under s 7(2) having regard to the proper construction of s 7 as a whole in its general statutory context. The relevant principle was stated in *Vines v Djordjevith* (1995) 91 CLR at 519:
>
> > "But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evidence that such an enactment supplies considerations of substance for placing the burden of proof on the parties seeking to rely upon the additional or special matter".

It seems that if the respondent contends in an adjudication that a variation is not a claimable variation because the 'consideration under the construction contract at the time the contract was entered into' is an amount that, under s 10A(3)(d) or (4), would take the variation out of the second class of claimable variation, the onus would be on the respondent to satisfy the adjudicator as to the amount of the consideration. It seems that in many contracts, particularly schedule of rates contracts, the respondent will not be able to discharge this onus.

Contracts often include a bill of quantities or a schedule of rates with estimated quantities. There is usually a provision that if the actual quantities differ from the estimated quantities, there will be an adjustment of the price. It does not seem that such an adjustment is a "variation" as defined in the Act.

The following is an attempt to provide a brief outline of the position with respect to claimable variations:

Is there any dispute about the variation or its value?	No	Claimable variation
Yes		
Does the contract have a dispute resolution clause	No	Claimable variation
Yes		
Does the contract price exceed $5m.?	Yes	Not a claimable variation
No		
Does the sum of the disputed variation claims exceed 10% of the contract price?	No	Claimable variation
Yes		
Does the contract price exceed $150,000?	Yes	Not a claimable variation
No		Claimable variation

14. Total amount of claims at any time

Section 10A(4) provides:

> If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, sub-section 3(d) applies in relation to that construction contract as if the reference to "$5 000 000" were a reference to "$150,000".

There are more ambiguities here. The terms "at any time" and "total amount of claims … for the second class of variations" are ambiguous. The example in the Act, at the end of s 10A, does nothing to resolve the ambiguities.

In the example, the contractor makes a "new claim" that work is a variation. The claim is presumably in a progress claim that is going to adjudication. The claim is disputed. The example states, "The new claim brings the total amount of claims for disputed variations under the contract to $350,000".

There are two ways of regarding the words "at any time". They could mean:

(1) at the time that the progress claim is made;
(2) at the time that the progress claim is made or any time before that; or
(3) at the time that a progress claim is made or any time before or after that.

The example appears to assume that the words have the second meaning. However, that does not make sense. All claims for variations will be the second class of variation until they are agreed. A variation can start off as a second class variation and subsequently become a first class of variation. Claims may be settled or abandoned.

The only way to make sense of s 10A(4) is to assume that "at any time" has the first meaning. The adjudicator looks at the claim before the adjudicator and determines the total of claims then existing for variations other than agreed variations. It does not make sense to have regard to claims that have been settled or abandoned. Those are no longer claims for the second class of variation. They are either claims for the first class of variation or they are not claims at all.

In deciding the "total amount of claims … for the second class of variations", it seems that, in addition to the amount of the variation claims in the particular progress claim before the adjudicator, the adjudicator could have regard to the amount of variation claims other those made in the payment claim before the adjudicator. The statement in the example, "The new claim brings the total of claims for disputed variations under the contract to $350,000" must be taken to mean disputed variation claims

existing at the time of the payment claim. The fact that an amount has been included in a previous adjudicated progress payment does not stop it from being a disputed variation. However, if a previous variation claim is no longer a disputed claim at the time of the adjudication, it seems that the adjudicator cannot have regard to it in computing the "total amount of claims … for the second class of variations".

In NSW, since *Brodyn v Davenport* [2004] NSWCA 394, where an adjudicator misconstrues a provision of the contract or the Act, the Supreme Court will not on that account interfere with the adjudicator's determination. Mere errors of law by an adjudicator are not a ground in NSW for setting aside an adjudicator's determination. Adjudicators are allowed to make errors of law. It will be interesting to see whether the Victorian courts will follow NSW and accept the adjudicator's decision on what is the amount of the 'consideration under the construction contract at the time the contract is entered into' and what is the 'total amount of claims … for the second class of variations'. Or will the Victorian courts decide these issues for themselves? In that event, will the courts decide only on the information and submissions before the adjudicator or will they allow additional evidence and submissions by the parties?

15. Dispute resolution clause

Section 10A(3)(d)(ii) refers to a contract in which the consideration exceeds $5m "but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c))".

This is ambiguous. Must the contract provide a method of resolving all disputes or is it sufficient if the contract has a provision for resolving some disputes, including disputes over variations?

What is a "method of resolving disputes"? An arbitration clause appears to be one. An expert determination clause, properly drafted, is another. But what about a clause that says that the Superintendent will decide all disputes? That is an expert determination clause. What about a clause that says that disputes are to be resolved by litigation? What about a contract that provides such a lengthy process that it would take many months to decide disputes [see *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823]. Could a "method of resolving disputes" be void under s 48 [no contracting out] in that it "may reasonably be construed as an attempt to deter a person from taking action under this Act" [s 48(2)(b)]?

New South Wales v Banabelle [2002] NSWSC 178 illustrates the problems that can arise if there is a shortcoming in an expert determination clause. In that case the clause provided a space for inserting the name of the authority to nominate the expert if the parties did not agree upon an expert. The space was left blank. The Court held that the expert determination clause was not capable of being enforced.

Adjudicators are likely to be frequently asked to decide whether a dispute resolution clause is a valid 'method of deciding disputes under the contract' within the meaning of s 10A(3)(d). Will the Victorian courts leave that question to adjudicators to decide or will the courts decide the question for themselves?

16. Variations – the 10% rule

Section 10A(4) provides:

> If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, sub-section 3(d) applies in relation to that construction contract as if the reference to "$5 000 000" were a reference to "$150,000".

Take first contracts for $5m or less. Disputed variations could be for as much as $500,000 if the contract price was $5m. But if "at any time the total amount of claims" for disputed variations under that contract exceeded $500,000, the adjudicator would have to look to see if the contract includes a "method of resolving disputes". If it does then the adjudicator cannot consider the claim for disputed variations.

It is only in respect of:

(a) contract for $150,000 or less;

(b) a contract that does not provide a "method of resolving disputes",

that an adjudicator can decide disputed variation claims exceeding 10% of the contract price.

Section 10A was obviously designed to protect the larger contractors. A contractor with a contract for $150,000 or less could have disputed variations claims decided in adjudication for any amount, even amounts greater than the contract price. If the contract price exceeds $150,000, by the simple expedient of including in the contract a "method of resolving disputes", a contractor can avoid having variation claims for more than 10% of the contract price decided in adjudication.

As discussed above, schedule of rates contracts present special problems in determining the contract price, ie the "consideration under the construction contract at the time the contract is entered into".

17. Payment claims

Section 14 of the original Act has been repealed and a new s 14 has been substituted. The new s 14 only applies to payment claims made under construction contracts let on or after 30 March 2007 [s 53]. At the time of writing there is no prescribed form or prescribed information for a payment claim [s 14(2)(a) and (b)]. As was the case under the original Act, a payment claim must identify the construction work or related goods or services, indicate the amount claimed and state that it is made under the Act. The form at pp 299-300 of P Davenport, *Adjudication in the Building Industry*, 2nd ed, Federation Press, 2004 can be used for payment claims under construction contracts whether let before or after 30 March 2007.

Section 14(3)(b) provides that the claimed amount must not include any excluded amount. The fact that it does does not go to the validity of the payment claim.

It is in the time for making payment claims that adjudicators will find the major differences between, on the one hand, the original Act, the NSW Act and the Queensland Act and, on the other hand, the 2006 Act.

Section 9(2) defines the 'reference date' and s 14(4) to (9) prescribe the time for making payment claims after, the relevant reference date. The Act has different provisions for:

(1) a "single or one-off payment" [for example a contract that provides for a single invoice or payment on completion or a contract that provides for payment upon delivery of goods];
(2) a "final payment"; and
(3) any other payment claim.

In all cases, if the construction contract provides for (1) the date when progress claims are to be made or (2) the date to which the amount of progress payments are to be calculated, that is the reference date. The Act does not resolve the ambiguity which exists in some contracts which provide for both (1) and (2) but at different times. While the Act imposes no express constraints on the ability of the respondent to prescribe the times for making progress claims, it seems that the courts may impose limits. For example, discussing the NSW Act, Hodgson JA in *Minister for Commerce v Contrax Plumbing* [2005] NSWCA 142 at [54] expressed the opinion that if a contract provided for yearly reference dates such a provision would be rendered void by the 'no contracting out provision', the equivalent of s 48. I will now deal with the situation where the contract does not provide for a reference date or the provision is void.

In the case of a "single or one-off payment", the reference date is the date immediately following the last day that construction work was last carried out or the related goods or services were last provided [s 9(2)(c)].

In the case of a final payment, if the contract provides for a final certificate, the reference date is the date immediately following the issue of the final certificate [s 9(2)(d)(ii)]. If the contract does not provide for a final certificate but does have a defects liability period, the reference date is the day after the expiration of the defects liability period [s 9(2)(d)i)]. If there is no final certificate and no defects liability period then the reference date is the date that construction work was last carried out or the related goods and services were last provided [s 9(2)(d)i)].

In the case of all other progress claims, the reference date (when not prescribed by the contract) is "the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after" the construction work was first carried

out or the related goods or services were first supplied. It will often be difficult to discover what the reference date is but Victoria chose not to follow NSW and Queensland and make the reference date the last day of each named month [January, February, etc.].

In NSW, when the respondent wishes to contend that the respondent is not liable under the Act to pay a payment claim because the claim is out of time the respondent must make the allegation in the payment schedule (see *Brookhollow R&R Consultants* [2006] NSWSC at [48]). In Victoria, s 21(2B) allows the respondent to include in the adjudication response reasons additional to those included in the payment schedule.

To prove the defence, the respondent must first identify the reference date for the payment claim. It is not necessary for the claimant to state a reference date in the payment claim. This involves determining whether the payment claim is:

(1) a "single or one-off payment";
(2) a "final payment"; or
(3) a payment claim that is neither (1) nor (2).

Having identified the category of payment claim and the reference date under s 9 for the category, the respondent must turn to s 14.

If the payment claim is in the third category, ie it is not for a single or one off payment or a final payment, the claimant has a minimum of 3 months after the reference date, to serve the payment claim. The contract can provide for a longer period [s 14(4)].

If the payment claim is for a "single or one off payment", the contract can prescribe the period within which the claimant can serve a payment claim [s 14(5)(a)]. There is no express limit in the contract on the period. Could it be as short as one day or would that be an attempt to contract out of the Act and be void under s 48?

It is strange that in respect of payment claims other than those for a single or one off payment or a final payment the claimant has a minimum of 3 months in which to make a payment claim but in the case of a single or one-off payment claim or a final payment claim there is no minimum period. There is no apparent reason why s 14(4) includes "whichever is the later" but s 14(5) does not include that protection for the claimant. The situation could be that the claimant is too late to make a final payment claim but not too late to make a payment claim that is not the final claim. For example, by making a claim for $1 less than the final payment claim, the claimant could, after the time has expired for making a final payment claim, make a payment claim that is not the final claim.

Another constraint that exists in Victoria but not in NSW or Queensland is that there is only one reference date for a "single or one off payment" [s 9(2)(c)]. Section 14(8) provides that "A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract". However, it seems from s 14(6), (7) and (9) that if a payment claim is not paid, the claimant can serve another payment claim in respect of the same reference date, provided that the claimant does so within the 3 month period or whatever shorter period is stated in the contract.

If an unpaid claim is being made again, the claimant should be careful to increase the amount claimed so that the respondent cannot raise the argument which succeeded in *Doolan v Rubikcon (Qld) Pty Ltd* [2007] QSC 168. The Queensland Supreme Court accepted that the claimant was entitled to include the unpaid amount of the first payment claim in the second payment claim and that it was not necessary for the claimant to have done any more work since the time of the previous claim. It was just necessary for the claimant to claim extra. The Court found that the second claim was invalid because it was identical to the first claim apart from the date. For this conclusion, the Court relied upon s 17(5) of the Queensland Act. It provides, "A claimant cannot serve more than one payment claim in relation to each reference date under the construction contract". Section 17(6) provides, "However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim". The equivalent provisions in the Victorian Act are s 14(6) to (9). My view is that *Doolan* was wrongly decided.

18. Payment schedules

Section 15 deals with the requirements for a payment schedule. They are the same as under the original act except that s 15(2)(c) now provides that a payment schedule must:

- identify any amount that the respondent alleges is an excluded amount;

- be in the prescribed form, if any; and
- contain the prescribed information, if any.

At the time of writing there are no prescribed forms or prescribed information for a payment schedule. Consequently the form at pp 300-301 of P Davenport, *Adjudication in the Building Industry*, 2nd ed, Federation Press, 2004 can be used for payment schedules under construction contracts whether let before or after 30 March 2007.

As with "must" in s 14(3)(b) [a payment claim must not include any excluded amount], so too in s 15(2)(c) [a payment schedule must identify any excluded amount], "must" does not mean "must". The failure of the respondent to identify an excluded amount in the payment schedule does not prevent the respondent from claiming in the adjudication response that an amount is an excluded amount [s 21(2B)].

Unlike the NSW and Queensland Acts, the Act does not provide, "The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant [s 20(2B) of the NSW Act, s 24(4) of the Qld Act]. Section 21(2B) provides:

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

Perhaps this provision, more than any of the many other provisions in the 2006 Act that favour the respondent over the claimant, demonstrates how those representing the interests of respondents were most influential in the drafting of the 2006 Act.

A claimant has to make the decision on whether the expense of taking a payment claim to adjudication justifies doing so. The claimant has to make that decision on the reasons given by the respondent in the payment schedule for withholding payment. If those reasons appear to the claimant to be unjustified, the claimant will initiate an adjudication and thereby incur liability for the costs of preparation, the fees of the ANA and the fees and expenses of the adjudicator, which could be very considerable. After the claimant has incurred liability for those costs, fees and expenses, the respondent can change the reasons for refusing payment or raise new reasons. This is most unfair on the claimant.

While the claimant has at least 10 business days in which to prepare and serve submissions in response to the respondent's reasons in the payment schedule [s 18], the claimant has only 2 business days in which to prepare and serve submissions in response to the new reasons raised by the respondent in the adjudication response. There is no more cogent example of how unfair the Victorian Act is to claimants compared to the NSW Act.

Victorians have not had much experience with adjudication. Presumably those responsible for drafting the Act are not familiar with the tactics used by respondents in NSW and Queensland to defeat payment claims. Sometimes a payment schedule will contain hundreds of reasons for withholding payment. Some of the reasons will address particular items. Some will go to the whole payment claim. Sometimes payment schedules and adjudication responses comprise boxes of files. Sometimes they are drafted by lawyers and contain many submissions on the law.

To allow a respondent an unlimited right to raise additional reasons (for withholding payment) and the claimant only 2 business days to address them is manifestly unfair. In the adjudication application, the claimant cannot include any new grounds for claims [*John Holland v Cardno* [2004] NSWSC 258]. The 2006 Act invites the respondent to ambush the claimant by raising additional reasons when the claimant has only 2 business days to prepare and serve a response. The adjudicator has no power to extend the 2 business days.

If a respondent does raise new reasons in the adjudication response and succeeds on those reasons, the adjudicator can nevertheless exercise the discretion in s 45(4) and determine that because the respondent failed to raise those reasons in the payment schedule, the respondent should pay 100% of the adjudication fees.

19. Adjudication review determinations

In the Victorian Adjudicator Accreditation Courses conducted by Adjudicate Today, the task which adjudicators found most difficult was determining the moot adjudication review applications. The obligations imposed upon the review adjudicator are difficult, and in one instance, impossible to satisfy.

Section 28I says that the review adjudicator can substitute a new adjudication determination for the one being reviewed or confirm the original determination. Even if the review adjudicator confirms the original determination, the review adjudicator must still do all the things required by s 28I(6) and (7) and consider whether review adjudication fees are to be apportioned.

The Act leaves unanswered many important questions. For example, how does an adjudicator deal with applications by both the claimant and the respondent for a review? How, if at all, can the adjudication review determination affect the apportionment of adjudication fees of the original adjudicator? For example, assume that the claimant has paid $10,000 to the original adjudicator and the original adjudicator apportioned his or her fees making the respondent liable for 100% of the adjudicator's fees. Assume that on review the review adjudicator substitutes a new adjudication determination for the original a determination. The original determination is then of no effect. Presumably the apportionment of adjudication fees in the original adjudication is of no effect. Is there then any basis upon which the claimant can recoup the original adjudicator's fees from the respondent?

In the adjudication review determination can the review adjudicator:

- consider issues other than whether the original determination included an excluded amount or failed to take into account a relevant amount because the adjudicator wrongly determined it to be an excluded amount;
- decide that an amount, other than an amount identified by the respondent in the review application, is an excluded amount;
- correct other errors that the review adjudicator believes that the original adjudicator made, whether they are slips or substantive matters such as the value of work, the rate of interest or the due date for payment?

To enable the review adjudicator to specify [as required by s 28I(6)(b)] the amounts actually paid to the claimant, the review adjudicator will require that information from the parties. Because the review adjudicator must calculate the amount of interest payable [s 28I(e)], the review adjudicator will also have to know the date upon which amounts were paid. Interest will presumably have to be calculated from [but excluding] the due date for payment decided by the original adjudicator to [and including] the date upon which the review adjudicator makes the review determination but giving credit for payments made to the claimant on account of the original determination. Credit would not be given for amounts paid to the designated trust account. Some adjudicators on the accreditation course made the mistake of thinking that they could order the respondent to pay to the claimant the amount in the designated trust account.

Section 28I(6)(e) requiring the review adjudicator to determine an amount of interest is misconceived. It serves no purpose but to introduce further ambiguity. The original adjudicator determines a rate of interest. This rate should be repeated in the adjudication review determination. If interest due is not paid, the amount is calculated and included in an adjudication certificate. There is no point in the review adjudicator calculating the amount of portion of the interest.

The review adjudicator must specify the date on which the further amount (and interest) to be paid by the respondent or the amount to be repaid by the claimant becomes payable. This is an impossible task. Section 28I(10) says that that date is 5 business days after the respondent or the claimant (as the case requires) is given a copy of the review adjudication. The copy is served by the authorised nominating authority [s 28J] and will not be served until the review adjudicator's fees are paid. At the time the review adjudicator makes his or her review determination, the review adjudicator will not know the date. The best that the review adjudicator can do is to state how the date for payment can be calculated, ie by reference to s 28I(9).

Section 28I(6)(f) and (9) are misconceived. Assume that the original adjudicator determines that the respondent must pay the claimant $150,000 and that the due date for payment is 1 June 2007. Assume that the respondent makes an application for a review on 1 August 2007 and claims that $50,000 of the $150,000 is an excluded amount. The respondent must on or before 1 August 2007 pay

the claimant $100,000 and must pay $50,000 into a designated trust account. Assume that on 10 August 2007 the review adjudicator decides that the $50,000 is not an excluded amount. The due date for payment of that $50,000 should be 1 June 2007 as determined by the original adjudicator. It does not make sense for s 28I(9) to provide that the review adjudicator must decide that the date for payment of the $50,000 is 5 business days after the authorised nominating authority serves a copy of the review determination on the respondent. That date might be 1 October 2007.

Under s 28I(6)(e) the review adjudicator must decide the amount of interest payable on the $50,000 from 1 June 2007 to 10 August 2007. But what about the interest on the $50,000 from 10 August 2007 to 1 October 2007 and what about interest on the $100,000 from 1 June 2007 to 1 August 2007?

Under s 28J the authorised nominating authority must effect service as soon as practicable. It seems that until the review adjudicator is paid, the review adjudicator will not release the review determination to the authorised nominating authority or will only release it in escrow.

20. Conclusion

This paper does not deal with every difference between adjudication in NSW, Queensland and Victoria. It has highlighted the most important differences. Adjudicators will have to examine the amendments in detail to ensure that they comply with all the requirements imposed on adjudicators. For example, buried in the mass of detail is a requirement in s 22(2) that an adjudicator must serve a notice upon any relevant principal and "any other person who the adjudicator reasonably believes, on the basis of any submission received from the claimant or the respondent, is a person who has a financial interest or contractual interest in the matters that are the subject of the adjudication application". The Act does not say what the notice must say or what purpose it might serve or what the effect might be of failing to serve the notice. The Act does not even say when the adjudicator must serve the notice.

There are likely to be many applications to the Victorian courts challenging the validity of adjudicators' determinations. The threshold issue for the Victorian courts will be whether to follow NSW and refuse to set aside a determination even if the adjudicator has made an error of law in construing the contract or the Act, or conduct a judicial review of the adjudicator's decision.

If the object of the Act as stated in s 3 and the purpose of the 2006 amendments as stated by the Minister for Planning in his second reading speech are to be achieved, the Act requires drastic redrafting.