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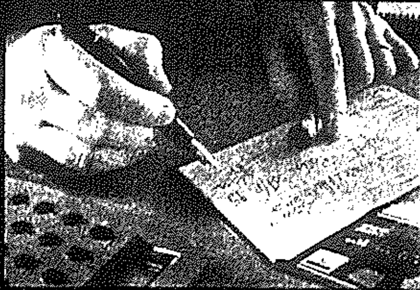

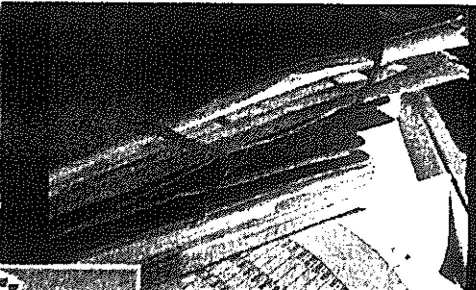

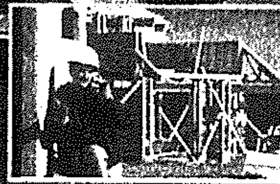

payment

and other legislative changes

for

J.A.Citizen Pty Ltd

Domestic Building Contracts (Conciliation and Dispute Resolution) Act 2002 Seminar Notes

Kim Lovegrove, Miro Djuric and Steven Adorjan of the MBAV prepared this material

The commencement date is 1 July 2002

The impact of these amendments is such that they will radically redefine building dispute resolution in Victoria.

Some of the key reforms are as follows.

- The Office of Consumer and Business Affairs will establish a centralised complaint bureau.
- Domestic building dispute conciliators will be appointed by the Bureau of Consumer and Business Affairs and a large number of inspectors, reputedly 50, will be appointed by the Building Commission.
- The consumer body will be invested with the powers to issue proceedings in the VCAT on behalf of consumers and - interestingly - will have the ability to defend proceedings issued by builders in the VCAT. The State will, in a sense, underwrite litigation for owners in certain circumstances. No such accommodation has been afforded to builders – no matter what the circumstances.

The bureau will have the power to refer all consumer complaints to conciliation; it can also request the Building Commission to appoint inspectors to resolve any disputes concerning defects that remain unresolved after conciliation. If the inspector finds that there is defective building work, he/she must give directions as to how it must be remedied by the builder. If the builder fails or refuses to comply, the matter of refusal or failure will be referred to the Building Practitioners Board for investigation. Once the BPB assumes jurisdiction, it can then invoke the full array of all of its powers. These range from fining to suspending or canceling a builder's registration.

There is some irony in these reforms, because traditionally disputes over defects were civil matters presided over by the Courts and latterly also by the VCAT. In civil matters monetary damages are the usual remedy against a builder who is found liable.

As the BPB now has jurisdiction to decide what is a defect, and how it must be fixed, followed by jurisdiction over a builder's alleged failure to rectify alleged defects in the allegedly appropriate way, what we have is the quasi-criminalisation of a traditional civil wrong. This is a paradigm shift, because now the builder can and will be punished, by having his or her registration suspended or canceled, and his or her livelihood taken away for that matter.

A builder to whom a decision of the BPB applies may appeal against the decision to the Building Appeals Board ("BAB") only. This could bottleneck the BAB and is likely to

impact upon BAB caseloads and length of time that it takes to resolve an appeal. The reason being is that disputes over defects take a long time to resolve as each defect has to be considered and expert evidence is required for such pontification.

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It is the writer's prediction that there will be great many appeals over inspectors' findings; the reason being is that it is very unusual for one technical consultant's findings to be consistent with another consultant's findings and there is little to suggest that the potential for an *inspector's* opinion to be susceptible to challenge will be any less than a that of a *building consultant.*

If the BAB upholds the decision of the BPB then the builder would have exhausted all appeal avenues - save for such access as it may have to the Supreme Court.

There is a plethora of issues that will flow from these amendments; not the least of which will be jurisdictional conflicts between the VCAT and the BPB. Additional issues are as follows.

Firstly, if a builder refuses to abide by an inspector's recommendations, the BPB could cancel or suspend the registration failing to carry out a recommendation contained in the inspector's report. In such circumstances the builder could not work; yet if proceedings to do with the same dispute had been issued in the VCAT, the VCAT may find that inspector's report or recommendation was wrong.

Secondly, the traditional pattern of many a building dispute was that the builder sued in the VCAT for moneys owed and the owner generated a list of defects. The owner then lodged a counterclaim in the VCAT. All matters concerning the dispute were heard by the one adjudicator. This will change: the owner is likely to lodge a complaint with the Bureau whereupon an inspector will be appointed. Rationale being why pay for a consultant to formulate a list of defects when the State will pay. A further consequence will be that the traditional pattern of consolidated legal proceedings will be repudiated. Both the VCAT, the civil body and the Commission and the BPB, a quasi-criminal adjucatory body, will preside over the same dispute and facts.

The most vexing area could relate to contracts that have been terminated on account of owner default. The owner may contend that the work is defective by virtue of the work being incomplete. We can only conclude that there will be over-competing and non-complementary jurisdictional involvement.

There are a number of major changes under the new Order, including:

- The insurance policies may exclude liability for any defects as long as the builder is alive and in business. This means that, as long as the builder has not died, disappeared or become insolvent, owners will **always** have to address their claims for rectification of defective work to the builder – not to the insurer.

- **Note:** this will trigger the other new legislation – the Conciliation and Dispute Resolution Act.

- Homeowners warranty insurance is no longer required for multistory residential buildings. These are defined as buildings of "3 or more stories rise" (within the meaning of the *Building Regulations* 1994) that contain 2 or more separate dwellings.

- The Order also removes the requirement for homeowners warranty insurance in relation to domestic building contracts whose price is less than $12,000.

  - **Note, however,** that all domestic building work above $5,000 must still comply with all other provisions of the *Domestic Building Contracts Act* 1995 with respect to *major domestic building contracts* (including the form and content of the contract, etc.)

- Defects are now divided into two categories, namely "structural defects" and "non-structural defects".

- The cover provides indemnification for non-structural defects for a period of 2 years after the *completion date* of the contract (or the date of termination of the contract); and for a period of 6 years after *completion date* for structural defects.

  - **Note, however,** that the Builder's liability for all defects remains unchanged – that is: 10 years from the above *completion date.*

- An insurance policy may exclude or limit claims for money paid to builders that exceed what should have been paid in accordance with the *Domestic Building Contracts Act ("*DBCA*").*

- The limit of indemnity increases from $100,000 (plus any legal costs) to $200,000 (inclusive of legal costs). This is a significant increase even having regard to the fact that the new limit includes legal fees.

- The policies are also allowed to exclude claims arising from breaches of trade practice legislation (cl 38).

- Persons registered in the category of demolisher are exempt from the operation of the Ministerial Order.

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002

On 14 May 2002 the above Act was assented to and will commence by no later than 31 January 2003.

It applies to – nominally – all parties in the chain of all construction contracts (which, in turn, are defined to include supply, hire, and other contracts associated with a construction project). The most notable exception is the home-owner principal (but only in so far as the principal actually lives – or will be living – in the home in question.)

The Act voids any contractual provisions that exclude, modify or restrict its operation (or which have that effect).

It imposes a compulsory regime of progress payments as between principals and contractors, as well as between contractors and sub-contractors (or suppliers etc) and provides for a regime of progress claims, progress certificates (which the Act calls "payment schedules") and payments, together with a new fast-track dispute resolution system (in respect of discrepancies between claims and certificates) and sanctions for breaches of obligations.

The following is a summary of the key provisions of the Act, pulled together in what I hope is a more easily digestible sequence than the text of the Act. It is intended to enable those involved in construction contracts to gain a quick appreciation of their main new rights and obligations.

1. The Act does not apply to:

- Contracts between builders and those owners who actually live (or intend to live) in the home in question;
- Contracts where there is no arms-length money price for the work
- Contracts relating to construction work outside Victoria;
- Contracts entered before14 May 2002
- Contracts forming a part of any
  - loan agreement
  - contract of guarantee
  - contract of insurance

  with a "recognised financial institution"
- To the extent that a contract provides for an employee to carry out construction work for his/her employer as part of his/her employment

2. The Act applies to

All other construction contracts – including all sub-contracts – whether written or oral and **including** contracts "for related goods and services" being for the supplies of

- materials,
- components
- plant
- labour
- equipment
- design services
- architectural services
- engineering services
- surveying services
- quantity surveying services
- interior or exterior decorator services;
- landscape advisory services
- technical services

relating to, in connection with or arising from construction work. Including sale, hire and any other type of contracts.

3. Right to progress payments

Each contractor (and sub-contractor etc) is entitled to progress payments for work done (supplies made)

either	as specified in the contract (by reference to dates or to intervals, as the case may be)
or	(if the contract makes no express provision) at 20 day intervals; commencing 20 days after the day on which the work/supply first starts

4. Certain provisions (" pay when paid") are invalid

Under the Act, any provisions (written or otherwise) that seek to make payment to a contractor conditional on any corresponding payment to the other party being approved by, or received from a third party under another contract, - that is "*pay if paid*" and "*pay when paid*" provisions - are invalid and have no effect.

5. Procedure for recovering progress payments

5.1 If a contract stipulates provisions for claims, schedules and payments (together with the times for supplying each) then those provisions will apply.

5.2 If a contract does not contain such provisions, then payments must be claimed and made under the Act, as follows:

5.2.1 The Claimant prepares a claim, which must include:

a. Details of the work or services to which the claim relates
b. The claimed amount
c. A statement that it is made under the Act

5.2.2 In response, the Respondent may provide, within 10 business days after the payment claim is served a "***payment schedule***" (similar to a progress payment certificate) which must include:

- details of the claim to which it relates
- the amount (if any) proposed to be paid by the Respondent
- reasons why the amount to be paid is less than the amount claimed (if it is less) and
- reasons for withholding any part of the claim (if any part is being withheld)

5.2.3 A progress payment is then due and payable at 20 day intervals; commencing 20 days after the day on which the work/supply first starts

6. Amount due and payable

The amount of the progress payment due is
either

(a) the amount claimed in the ***payment claim***

- if the respondent, for whatever reason, does not supply a "payment schedule" within
    - the time permitted (if any) in the contract

    or,
    - within 10 days (if no period is stated in the contract for this item)

- **or**

(b) the amount shown in the ***payment schedule***

- if such a schedule was supplied within the time permitted in 6(a) above

7. Consequences of failing to pay as and when required

7.1 If the respondent fails to pay the full amount claimed in the ***payment claim*** on or before the due date – in a situation where no payment schedule was supplied by the respondent within the time stipulated – then the claimant may

- recover any unpaid amount from the respondent as a debt due; and
- may serve ***notice of intention to suspend the work*** (and/or supply) under the contract.

7.2 If the respondent fails to pay the full amount shown on the ***payment schedule*** on or before the due date – in a situation where the respondent had supplied such a payment schedule within the time stipulated – then the claimant may

- recover any unpaid amount from the respondent as a debt due; and
- may serve ***notice of intention to suspend the work*** (and/or supply) under the contract.

8. Resolution of disputes: Differences / discrepancies between claims and schedules

8.1 If a claimant is dissatisfied with the (lesser than claimed) amount shown on a ***payment schedule***, s/he may apply for adjudication of the progress payment.

8.2 The application must

- be in writing
- be made within 5 business days after receipt by the claimant of the relevant payment schedule
- state that it is under this Act
- identify the relevant payment claim and payment schedule
- be made to an eligible ***adjudicator*** whose identity is agreed upon by the parties ***after*** receipt by the claimant of the relevant payment schedule
- If agreement cannot be reached, the application must be made to an ***authorised nominating authority***
  - chosen by agreement between the parties

  or, in the absence of agreement
  - chosen by the claimant.
- be served on the respondent (copy of)

8.3 The application may contain such relevant submissions as the claimant chooses.

8.4 A nominated adjudicator may accept the application by a serving notice of acceptance on each party. On service of the latter of the notices, the acceptance takes effect. The adjudicator must also notify the Building Commission within 10 days of accepting an application. (The Building Commission is also informed of the adjudicator's determination; all of which are only to be used for monitoring the functioning of the Act)

8.5 The respondent may lodge an ***adjudication response*** within

- 5 business days of receipt of copy of the application;

or

- 2 business days after receipt of the adjudicator's acceptance

whichever is the latter.

8.6 The ***adjudication response*** must

- be in writing
- identify the relevant adjudication application
- identify the name and address of any ***relevant principal*** of the respondent (i.e. the person – if any - with whom the respondent has a relevant "head contract" or similar agreement)
- be served on the applicant (copy of)

8.7 The response may contain such relevant submissions as the respondent chooses.

8.8 Unless the parties agree to additional time, the adjudicator must determine an application within **10 business days** after the adjudicator's acceptance takes effect.

8.9 If:

i. the claimant fails to receive the adjudicator's notice of acceptance within 4 business days after the application is made;

or

ii. the adjudicator fails to determine the application within the time referred to in 8 above

then the claimant may make a new application.

8.10 The adjudicator may determine the following:

a. The amount of progress payment to be paid
b. The date on which that amount becomes payable

8.11 The respondent must pay the amount determined by the adjudicator (or - if there is already litigation between the parties under the relevant contract – it must give a security for that amount pending resolution of the litigation). The time for compliance is

either the date determined by the adjudicator
or (in the absence of such date) t4 business days after the date of the adjudicator's determination

8.12 Any failure by the respondent to comply, within time, with the adjudicator's decision entitles the claimant to

- recover the amount as a debt due in any court of competent jurisdiction; and
- recover interest in the same court; and
- serve ***notice of intention to suspend work***

9. Recovery of debts due

Debts due may be recovered in any court of competent jurisdiction, but only if/when the court is satisfied that the relevant chain of events set out in the Act leading to the right to recover has occurred.

After obtaining judgment for a debt from the Court, as above, the claimant has the option – subject to procedures set out in the Act – to recover the judgment amount from the Principal (if any). In these circumstances the Principal must pay as much of the debt as it can offset against any moneys that are – or will become – payable by the Principal to the respondent under the relevant contract.

10. Notices of intention to suspend work

(a) Each "***notice of intention to suspend***" must state that it is given under this Act.
(b) Unless the respondent complies with its relevant obligations within 2 business days of receiving a ***notice of intention to suspend***, the claimant may – on the third day – suspend work (or supply etc) on the contract
(c) The suspension may continue until the respondent corrects its relevant breach/es.
(d) Such suspension does not constitute a breach of contract by the claimant.

11. Other provisions

The Act deals with the mechanics of:

- adjudicators
  - eligibility
  - authorisation of nominating authorities
  - fees
  - immunity from liability
- adjudications
  - procedures
  - criteria to be considered by adjudicators
  - correction of mistakes in determinations
- securities and trust accounts
- procedures for obtaining payment directly from Principals
- service of notices
- regulations

Stephen Adorjan
MBAV Legal Manager

SELECTED ASPECTS OF THE *BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT* 2002

1. WHAT DOES THE STATUTE DO ?

This legislation is unusual in that it seeks to establish protections for the inward cash flow of the various participants along the building and construction industry "food-chain" but is equivocal (or flexible) about when and how these protections apply or are invoked.

It has been described as a system that "hovers over" the existing legislative and contractual landscape somewhat like a cloud, and applies only when certain conditions are fulfilled to trigger its application.

For example, if a *construction contract*[1] makes its own provisions in respect of the valuation of work and the timings for certain events (namely the intervals between the progress payment claims to which the claimant is entitled [2], the period in which a "counter-offer"[3] may be made, and the periods for payment falling due in either of the above cases) then the Act has no application regarding any of those timings. However, if the contract fails to specify any of these parameters, the statutory default timings kick in for those items. In a contract where – say – only two of these items are specified, the *mandated timings* will be a mixture of those specified in the contract and the statutory defaults for the remaining items.

Moreover, whatever the source may be for the *mandated timings*, the protections embodied in the Act still **do not apply until and unless**

- a "claimant" makes a positive decision to avail him/herself of the protections of the Act; **and then**
- takes all the steps set out in the Act to activate the protections – and takes these steps correctly.

In this respect one should note that

(a) Although the operation of the default provisions in respect of valuation and timings[4] referred to earlier is made reasonably clear, the "opt-in" application of the rest of Act is not manifest from the text

[1] As defined – broadly – in Sections 4, 5 and 6 of the Act
[2] Called "reference dates" in the Act and defined in Section 9.
[3] Called "Payment Schedule" in the Act and defined in Section 15.
[4] Sections 9, 10, 11, 12, 14 and 15

or the Parliamentary papers. It can only be deduced by analysis and interpretation of the statute (including that done by the Courts in NSW).

(b) On the contrary, section 48 declares void any

> "provision in any agreement (whether in writing or not) under which the operation of [the] Act is excluded, modified or restricted, or which has the effect of excluding or modifying or restricting the operation of [the] Act".

(c) On a casual reading of the above one would gain the impression that the protection of the Act is thus guaranteed for all claims under all contracts to which the Act applies. [5] Decisions in NSW indicate, however, that it is only the *availability* of the protection that is guaranteed. Although no *agreement* may impair the protection, it may be voluntarily waived or inadvertently forfeited by any claimant.

(d) It appears that, even within any one contract, there is nothing to prevent a claimant from making any mixture of *unprotected* claims – that is, claims not "made under the Act" - and of *protected* claims "under the Act", as long as these claims are otherwise contractually valid.

(e) Moreover, If a claimant, having decided to take advantage of the protection offered by the Act, makes a mistake in certain formalities set out in the Act, s/he will be disqualified from obtaining the protection.

(f) Equally, there may be pre-conditions which, if not fulfilled, have the effect of disqualifying a claimant from "opting in".

2. WHAT DOES THE LEGISLATION PURPORT TO DO?

In seeking to interpret the legislative intention, let us consider the Parliamentary records.

(a) **The Second Reading Speech** [6] makes the following relevant points :

- The object of the Act is that: - any person who carries out construction work (as very broadly defined by the Act) **is entitled to receive and is able to recover, specified progress payments** in relation to the carrying out of that work.

[5] Set out in Section 7 of the Act
[6] All emphases added

- if the contract does not provide for progress payments, a progress **payment process is implied into the contract.**
- The Act provides for quick adjudication of disputes with an **obligation to pay or to provide security for payment.**
- Part 2 "provides **a statutory entitlement** to receive progress payments" – **but** these provisions do not override "relevant provisions in the contract"
- Part 3 deals with the procedures for recovering progress payments
- Part 4 sets out miscellaneous provisions.

(b) **The Explanatory Memorandum** states that:

Clause 9 (1):

Establishes a right to progress payments for construction work carried out – or the provision of related goods and services provided - under a *construction contract* (as defined).

Clauses 9(2)(a), 10(a), 11(1)(a), 11(2)(a) & 12(a) :

Provide that certain details (the timing of claims and any counter-offers; as well as the amounts and timing of the payments) of a progress payment are to be in accordance with the respective provisions – if any – in the contract.

Clauses 9(2)(b), 10(b), 11(1)(b), 11(2)(b) & 12(b) :

Provide for determining the above parameters for progress payments if there is no corresponding provision in the contract itself.

While it is not made manifestly clear, it is submitted that Clause 9(1) is intended to establish a right to progress payments in all *construction contracts* covered by the Act, not only those contracts that do not contain corresponding provisions (and where therefore these provisions are implied by the Act). This observation is made necessary by reason of the apparently inconsistent use in the Act of the terms "under the contract" and "under the Act". It appears that at times these terms are interchangeable, but at other times they are mutually exclusive.

3. JUDICIAL INTERPRETATIONS OF THE (NSW) ACT

Some judicial interpretations would constrain the apparent broad rights to progress payments in all construction contracts to which the Act applies. As the NSW Act[7] and the Victorian Act are, in most respects, identical – or nearly identical – these decisions have relevance to us.

(a) Limitations on the rights or protections conferred (?)

First, it is maintained that the Act can only establish a right to make a progress payment claim, it cannot establish (create) a right to actual payment where that right does not exist under the contract – or, presumably, otherwise.

Secondly, wherever a contract does provide for a regime of progress payments, the "*reference date*" (that is, the date on which a claim may be made) must be determined "by or in accordance with the terms of the contract." [8] This "determination" appears to go beyond a simple statement that the first reference date is – say – 30 days after the start of work on site.

It appears that if a contract stipulates that the contractor is barred from making ***any*** claim until certain conditions are met, the first "reference date" cannot arise until (and unless) those conditions have been fulfilled.

This was the decision of Balla DCJ in the District Court of NSW [9] in a case where a certain Clause 14.2 of the head contract (which was implied into the sub-contract in question) had stipulated that the (sub) contractor was not entitled to any payment whilst it had not fulfilled its -nominal - obligations under certain other clauses of the (sub)contract (which had also been imported, wholesale, from the head contract). Those obligations included the provision of suppliers' warranties, keeping the site clean and tidy, provision of a construction method statement, daily lists of personnel on site and similar items. In the event the fact that these obligations had not been fulfilled was held to be arguably fatal to the sub-contractor's ability to make any progress claim and hence to take any advantage of the Security of Payment legislation.

With respect, if this interpretation should prevail, even the *availability* of the protection of the Act may be circumvented by contractual obstacles (intended to achieve this result, or otherwise), despite Section 48. [10]

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[7] The Building and Construction Industry Security of Payment Act 1999 No 46 ("the NSW Act")
[8] Section 9(2)(a)
[9] Aerify Group Pty Ltd -v- Acorp Pacific Pty Ltd [DCNSW at Sydney – No.995/2002 (2 July 2002)]
[10] The corresponding provision in the NSW Act is Section 34

Meanwhile, all contractors need to check what conditions are specified in the contract before any payment may become claimable. In addition, subcontractors need to be vigilant as to what provisions of a head contract are imported into their own contracts with the head contractor. All provisions that are not relevant or necessary for the efficacy of the contract or subcontract contract should be excluded.

(b) Act does not apply to claims not "made under the Act" (?)

Furthermore, the protective mechanism created by the legislation[11] for defining when a payment is due and for enforcing such payments accordingly, appears to be inapplicable to those claims that somehow fall outside the ambit of the claims *created by the Act* . That is to say, if a claim is made –say- pursuant to a contract which itself contains all the necessary provisions (and therefore any claim made would not necessarily be a "*claim made under the Act*") then the automatic falling due provisions might not come into being <u>even though</u> all the other conditions for their imposition under the Act have been satisfied.

This is implied by the decision of Bergin J in the NSW Supreme Court [12] where the defendant successfully argued that summary judgment could not be given in favour of the plaintiff, since the defendant had an *arguable case* in alleging that the plaintiff's progress payment claim was "not a claim within the meaning of ss13 or 14 [13] of the Act"

In order to fall within the ambit of the Act a contractor should therefore ensure that both the contract they use and the claims they make under the contract bring these unarguably "under the Act".

(c) Final claim is not (necessarily) a "progress claim" (?)

Austin J of the NSW Supreme Court had to decide two issues involving the interpretation of the Act In <u>*Jemzone -v- Trytan*</u> [14] .

A "Final Notice" had been submitted. Under the circumstances of the case, this Final Notice entitled the contractor "to receive all money due and payable under the contract" within 10 days of the contractor's written request. [15] No payment was received within the 10-day period, nor did the owner issue a "*payment schedule*" (in essence a counter-offer) within time.

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[11] Part 3

[12] Baulderstone Hornibrook Pty Ltd –v- HBO+DC Pty Ltd [2001] NSWSC 821 (14 September 2001)

[13] These correspond to Sections 14 and 15 of the Victorian Act, respectively, and set out specific details that a payment claim and a payment schedule (respectively) must contain

[14] [2002] NSWSC 395 (7 May 2002)

[15] *Id*, at paragraph 32

One issue decided by the judge was that under sections 14 and 15 [16] of the Act, once the response period for a payment schedule has passed without a payment schedule being lodged, *"there is immediately a debt for the unpaid amount regardless of [any] ... genuine dispute ... or offsetting claim"* [17]. Therefore, if the Final Account were to qualify as a progress payment claim under the Act, it would be enforceable notwithstanding counter-claims put by the Owner, as these were out of time.

It was held, however, that - at least this – Final Payment is not a "progress payment under the Act". The reasoning appears to be based on the fact that the drafter of the building contract [18] used by the parties had seen fit to use the terms "progress payments" and "the final payment" in various parts of the text. This was held to evince an intention that a "request for payment of all moneys due and payable under [this] contract ...is not a request for a progress payment" [19]

It will therefore be prudent to ensure that contracts contain express provisions to the effect that Semi-final and/or Final payment claims are progress payment claims for the purposes of the Act.

(d) Compliance with formal requirements

Austin J went on to confirm – obiter - that failure to satisfy formal requirements of the Act in respect of claims made can itself be fatal to those claims qualifying for the benefits of the Act. He pointed out for example that the statement.

> " This invoice is subject to the Building and Construction Industry Security of Payment Act 1999, No. 46"

was "not a statement that the document [was] a payment claim made under the Act"[20] as required under section 13(2)[21] of the Act. Therefore the claim would have failed to qualify for this failure, even if the Final Claim had been accepted as a progress payment claim. This is consistent with the decision in Baulderstone referred to above.

To give the matter some balance, it was held in another case, that trivial discrepancies in the formal requirements would not remove the claim from the ambit of the Act. In *Hawkins Construction -v- Mac's Industrial Pipework* [2001] NSWSC 815 (18 September 2001) Windeyer J rejected the proposition that the

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[16] Corresponding to sections 15 and 16 of the Victorian Act
[17] *Ibid*, at paragraph 27
[18] BC3 (Commercial) by the MBA NSW (December 1983 edition, 1990 print)
[19] *Ibid*, at paragraph 34
[20] *Id.* at paragraph 46
[21] Corresponding to Section 14(3) of the Victorian Act

requirements of s13(2) of the NSW Act had not been satisfied just because the following defects had occurred:

- The claim quoted an incorrect contract reference number (but otherwise it adequately and correctly identified the contract to which the claim referred); and

- The name of the Act had been abbreviated to :

  "Building Construction Ind Security of Payments Act 1999"

  instead of :

  "Building and Construction Industry Security of Payments Act 1999"

His Honour held that these defects were so trivial as to render any action based upon them unarguable.

There are two further points arising in connection with this decision. First, although Austin J was familiar with this decision, he distinguished the facts in Jemzone before arriving at the opposite conclusion in that case.

Secondly, after Jemzone, the Hawkins decision was unanimously affirmed by the full Court of Appeal. This is the highest level decision on a case arising from the Act so far.

In practice it will be, it is submitted, difficult for contractors preparing claims to distinguish between those discrepancies that the Court considers trivial and those it does not. The prudent procedure is to ensure that the formal requirements of sections 14 and 15 (of the Victorian Act) are meticulously observed.

4. CONCLUSION

There are very few reported judgments so far on the NSW Act. There have been a number of cases decided in the District Court of New South Wales but these are not generally available. It will be interesting to observe how the Victorian Courts will interpret these aspects of the new legislation, and indeed, how any appeal courts may interpret the NSW legislation in future.

Meanwhile, we need to assume that these interpretations will apply and manage their practical impact along the lines recommended above.

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Stephen Adorjan
November 2002

SECURITY OF PAYMENT
SOME RECOMMENDED STRATEGIES

(With thanks to Deacons Solicitors)

An Informed/Clever Claimant will

- Ensure that the contract gives him/her the right to extensions to the completion date for all time lost in consequence of suspensions of the Works authorised by the Act in respect of late payments.
- Make claims strictly in accordance with the Act, and supported by backup.
- Move quickly to suspend work and obtain summary judgment if a payment schedule is not received in time;
- Apply for adjudication **quickly – and with supporting material** – if he or she intends to dispute any payment schedule.
- If a sub-contractor, he or she should serve on the Principal, as soon as possible, notice of each claim submitted to the Head Contractor.

An Informed/Clever Respondent will

- Prepare contracts as stated above, particularly in relation to payment schedule procedure.
- Have a system in place for speedy and proper preparation and issuing of a payment schedule whenever a claim is considered unjustified.
- Prepare for a possible adjudication process when issuing a payment schedule.
- If a head contractor, set up a process, which allows for co-ordination of all anticipated sub-contract and supplier claims and his/her own anticipated claims on the Principal.
- Link the processes with cash flow criteria including any finance arrangements.
- Ensure that his/her resources are adequate to manage the progress claim/payment processes within the required timetables.

LOVEGROVE SOLICITORS

Lovegrove Solicitors are commercial and construction lawyers who are experts in building law. We have five lawyers who practice in this area. We provide advice on both Victorian and NSW planning and industry law.

We provide advice on the:
- Building Act
- Planning and Environment Act, Victoria
- Domestic Building Contracts Act
- Environment Planning and Assessment Act NSW

We provide legal representation before the Victorian and NSW Courts and Tribunals, including the:
- Building Appeals Board, Victoria
- Administrative Disputes Tribunal, NSW
- Victorian Civil and Administrative Tribunal
- Building Practitioners Board
- NSW Land and Environment Court

Profile of Lawyers

Kim Lovegrove, Principal BA LLB DipT

Author of a number of books on building law, including *Lovegrove on Building Control.* He has fifteen years' experience in building law. He was the past Deputy Executive Director of the ABCB and past Assistant Director of Building Control Victoria. He has appeared before the BAB, BPB and IN ALL Court Jurisdictions. He was the consultant who developed the Building Act and Part 4 of the Environmental Planning and Assessment Act NSW, and is regarded as an expert on building law.

Justin Cotton BA LLB

Justin is the second most senior practitioner in the practice. He is our in-house general counsel and does appearance work in all jurisdictions. He also provides advice on the EPAA. Justin is also a family lawyer.

Minh Tran LLB BSc

Practices in all forms of building law and is an in-house draftsperson. She has assisted the principal on drafting contracts of up to $33 million. The majority of Minh's practice is in the VCAT.

Miro Djuric GL (Sar) LLB

Practices in all areas of building law. Miro has conducted matters before the Building Practitioners Board, Victoria, and the Land and Environment Act NSW, and he provides advice on the Building Act.

Ian Plum LLB

Advises on building legislation, and practices in litigation, building law, planning and commercial law. Ian has studied for an Associate Diploma in Electrical Engineering and has a number of years' experience in the building industry in various roles. He has clients in both NSW and Victoria.

For Victorian matters, please phone (03) 9329.8855, for NSW matters, phone (02) 9247.9499, or email at lovegrovesolicitors@bigpond.com. Visit our website at www.lovegrovesolicitors.com

Seminar Evaluation

Security of Payment Seminar

Presenters: Stephen Adorjan & Kim Lovegrove **Date: 20 Nov. 2002**

Please complete this seminar evaluation sheet, taking time to carefully consider your responses.

Content

✓ Tick to rate	Low	Med	High
Interest value	☐	☐	☐
Relevance to your business	☐	☐	☐
Currency (up to date)	☐	☐	☐

Presenter

✓ Tick to rate	Low	Med	High
Apparent knowledge of subject area	☐	☐	☐
Clarity of presentation (how well did they communicate?)	☐	☐	☐
Encouragement of feedback/ questions (were you given enough opportunity to ask questions?)	☐	☐	☐
Delivery style (was the presenter engaging?)	☐	☐	☐

Seminar Materials

✓ Tick to rate	Low	Med	High
Attendees notes (were they easy to follow etc)	☐	☐	☐
Amount of detail (was enough information given etc?)	☐	☐	☐

Duration

	yes	no
Was the amount of time adequate?	☐	☐

Other Comments/ Suggestions

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Thank you for taking the time to complete this evaluation.