

Getting paid in building & construction:



Fast track
your cash flow

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Acknowledgments

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1. Section 1: Welcome and Introduction

1.1 Welcome

Welcome to Small Business Victoria's *Getting paid in building and construction: Fast track your cash flow* workshop. Over the next 2 hours we will explore the *Building and Construction Industry Security of Payment Act 2002 (Vic)* legislation and to give you practical skills in using the Act to help you get paid.

This workbook will be a valuable resource for you to retain, it will assist you in the effective use of the SOP Scheme, and to and implement better business practices.

PLEASE NOTE:

It is highly recommended that this workshop be followed up with **Business Victoria's Finance Fundamentals: Keep your cash flowing workshop** to fine-tune your basic cash flow knowledge and financial planning skills. Go to business.vic.gov.au to book.

1.2 Introduction and workshop objectives

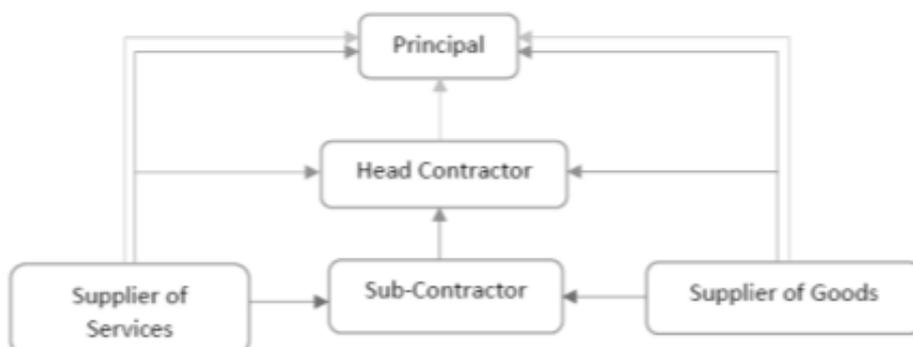
Getting paid in the building and construction industry can be challenging and time consuming. By implementing good business practices within your business, you will have proven processes that will increase the likelihood of being paid on time. This workshop has been developed to introduce you to the *Building and Construction Industry Security of Payment Act 2002 (Vic)* ("**SOP Act**") and the options available to you, should a payment dispute arise. It also provides you with additional information on business practices that you can implement to fast track getting paid.

The workshop will cover:

- An introduction to the SOP Act
- Understanding the SOP Act
- Making a payment claim under the SOP Act
- Responding to a payment claim under the SOP Act (a payment schedule)
- The adjudication process under the SOP Act
- This workbook also includes resources covering:
 - Business systems
 - Cash conversion cycle
 - Cash flow forecasting
 - Financial record keeping

Getting paid is all about thinking like a business. Many business owners don't like asking for money owed – however, running a business is not just about making the sales, but also about collecting the payment.

This workshop will give you a practical understanding of the SOP Act, and how to use it. The following diagram is a simple representation of the relationships between stakeholders in the building and construction industry.



1.3 Background to the SOP Act

1. Security of Payment legislation was first introduced in Australia in 1999 by New South Wales, Victoria followed in 2002. Each State and Territory of Australia now has its own Security of Payment legislation, which covers work performed or goods and services provided in that State/Territory.

This workshop only covers the Victorian SOP Act.

1.4 Purpose of the SOP Act

2. Every day, individuals and organisations enter into contracts for building and construction – and sometimes disputes arise over payment.
3. The *Building and Construction Industry Security of Payment Act 2002* (known as the SOP Act) helps ensure that any person who carries out construction work or supply related goods and services under a construction contract, gets paid.
4. The substantive features of the Act include:
 - To require delivery of a payment schedule with 10 business days of receiving a progress payment claim, failing which the full amount of the payment claim becomes due (albeit only a payment “on account”);
 - To introduce a quick system of independent adjudication where the parties dispute the amount of any progress claim;
 - It is designed to provide a fast and inexpensive process to recover payments due under a construction contract, often, without the need for lawyers to become involved.

1.5 What the SOP Act covers

5. The SOP Act applies to most contracts for building work or for the supply of related goods and services in Victoria. The contract may be oral, written or a combination of both.

The SOP Act applies to the following types of work:

- Residential and non-residential building
 - Civil engineering
 - Demolition
 - Electrical
 - Professional services (e.g. architecture, design, surveying)
 - Hire of plant and equipment
 - Landscaping
 - Maintenance
 - Mechanical air conditioning
 - Plumbing
 - Supply of building materials
6. Claims may be made under the SOP Act for 'progress payments' for work done or supplies made since a date determined by the contract or under the SOP Act. Progress payments include final, single and milestone payments.

1.6 What the SOP Act excludes

7. The SOP Act excludes some specific types of contracts and claims. Contract exclusions are detailed as follows:

The Act does not apply to domestic building contracts (within the meaning of the Domestic Building Act 1995 (Vic)). The Act does apply, however, where the building owner is in the "business of building residences".

"In the business of building residences" is generally taken to mean that the client has an ongoing business building homes.

If the client was building a group of townhouses to sell at a profit, unless the development business was ongoing, the SOP Act would not apply.

However, the SOP Act would apply to a subcontractor, or supplier of goods or services, who is working for the builder who is building the townhouses.

8. The Act does not apply to a construction contract that forms part of a loan agreement.
 - a. The Act does not apply to a construction contract where the amount payable is calculated by a method other than by the value of work done, or goods and services provided.
 - b. The Act also details classes of amounts said to be "excluded amounts" which must not be considered when calculating the amount of a progress payment.

The “excluded amounts” would include, for example, the following types of claims:

- › Any amount that relates to a variation of the construction contract that is not a claimable variation;
- › “Damages” claims
- › Delay costs/prolongation costs
- › Latent conditions claims
- › Non-contract claims (eg; claims in misleading and deceptive conduct, restitution/quantum meruit claims, ...)

1.7 Payment on account

9. Any amount determined by an adjudicator to be payable from a respondent to a claimant is “payment on account”. Both parties retain all their rights under the contract to commence an action under the contract for final determination of their entitlements.

1.8 Why use the SOP Scheme

10. The SOP Act has been specifically written for the building and construction industry to create a fast, inexpensive and not overly technical mechanism for resolving payment disputes.

1.9 Reference Date under the SOP Act

11. The SOP Act provides that a payment claim may be made on and from each “Reference Date” under a construction contract. The Reference Date is the date that the contract says a payment claim may be made.

For example, if the contract says “claims to be made on the 24th of each calendar month, then the Reference Date is the 24th of that month.

If the contract does not provide a Reference Date, the SOP Act provides some default provisions to calculate the Reference Date, as follows:

- For ongoing projects with monthly payment claims, the Reference Date is the date 20 business days after works commenced or goods and services were first provided, then every 20 business days thereafter or;
- For single or one-off payment claims, the Reference Date is the date immediately after the date that work was last performed or good and services provided.
- For final payment claims, the Reference Date is the date immediately after the expiry of any period for rectification of any defects or incomplete works.

12. The Reference Date, therefore, is the date on which a claim for a progress payment may be made, or date by reference to which the amount of a progress payment is to be calculated. This may be provided in the relevant construction contract (eg., where a payment claim is to be made on the 25th day of each month). Alternatively, where the relevant construction contract does not provide that date, then the Reference Date is the date 20 business days after work was first performed, then the date every 20 business days after that.

13. Note; a payment claim made before the relevant Reference Date would be invalid.

1.10 The Payment Claim/Payment Schedule process

14. The Act sets out a detailed process and timetable for payment claims and payment schedules.
15. The regime of payment claim and payment schedule in relation to progress payments under construction contracts is as follows:
 1. Where a party ("**the claimant**") is entitled to progress payments, it may deliver a "payment claim" to the party ("**the respondent**") liable to make the payment.
 2. In response to the payment claim, the respondent may deliver a "payment schedule", within 10 business days of receiving the payment claim, failing which the full amount of the payment claim becomes due.
 3. Where the payment schedule is for less than the payment claim, the Act provides a system of fast, independent, adjudication.
 4. The entitlement to payment is only "on account" (ie., either party still has their existing rights under the construction contract to commence proceedings to recover any such payment).
 5. The Act provides for immediate enforcement to recover the amount due, including a right to judgment.
16. Where a payment claim is made by the claimant, and the respondent disputes the amount claimed, the respondent must deliver a payment schedule within 10 business days. Where necessary, an unpaid claimant may proceed in court and make an Application for Summary Judgment.
17. Where the payment schedule is delivered, the claimant is entitled to payment of the amount in the payment schedule by the due date under the construction contract.
18. Where this payment is not made, the claimant is able to bring an Application for Summary Judgment for the amount.

2. Section 2: Payment Claim

2.1 Payment Claim under the SOP Act

1. The requirements as to a valid payment claim under the Act are set out in Section 14(2).
2. Section 14(2) of the Act provides as follows:
 - A payment claim—*
 - (a) must be in the relevant prescribed form (if any); and*
 - (b) must contain the prescribed information (if any); and*
 - (c) must identify the construction work or related goods and services to which the progress payment relates; and*
 - (d) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"); and*
 - (e) must state that it is made under this Act.*
3. In summary, the Payment Claim must:
 - a. comply with the requirement for form (there is no prescribed form);
 - b. contain the prescribed information (there is no prescribed information);
 - c. identify the construction work or related goods and services to which the progress payment relates;
 - d. indicate the amount of the progress payment that the claimant claims to be due;
 - e. state that it is made under the Act.
4. The minimum requirement is that the payment claim must state that it is made under the Act (this is the trigger, informing the respondent that the Act applies to this payment claim). There is no specific wording required, only that the payment claim must state that it is made under *Building and Construction Industry Security of Payment Act 2002 (Vic)*. For example: *"This payment claim is made under the Building and Construction Industry Security of Payment Act 2002 (Vic)"*.

2.2 One Payment Claim for each Reference Date/3-month time limit

5. A payment claim is invalid if multiple payment claims are served in relation to a single reference date, and/or if it made more than 3 months after the relevant reference date.

6. Sections 14(4)-(9) of the Act provide as follows:

(4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or

(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment— whichever is the later.

(5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract;
or

(b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

(6) Subject to subsection (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.

(7) Nothing in subsection (6) prevents a payment claim for a claimed amount in respect of a final, single or one-off payment being served under this Act in respect of a construction contract if—

(a) a claim for the payment of that amount has been made in respect of that payment under the contract; and

(b) that amount was not paid by the due date under the contract for the payment to which the claim relates.

(8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

7. Section 14(8) provides that only one payment claim may be served for any particular reference date.

8. However, Section 14(9), provides that nothing in section 14(8) prevents the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid. For example, the claimant could include in their current payment claim amounts previously claimed under that contract, but not paid. Provided the current payment claim was claiming for new works/goods.

2.3 Limits on Payments Claim in Victoria: Claimable Variations/Excluded Amounts

9. The Act includes limitations on what may be included in a valid payment claim.
10. Under the Act, a valid payment claim may not include Variations other than "Claimable Variations" under Section 10A, nor may it include certain types of claims described as "Excluded Amounts" under Section 10B.
11. Section 10 provides, so far as relevant, as follows:

10 Amount of progress payment

(1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of—

(i) construction work carried out or undertaken to be carried out by the person under the contract; or

....

as the case requires.

....

(3) Despite subsection (1) and anything to the contrary in the construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

2.4 Section 10A Claimable Variations:

12. The provisions of the Act as to what constitutes a "Claimable Variation" are complex. Under the Act, a variation to a construction contract is defined as "a change in the scope of the work to be carried out or the goods or services to be supplied, under the contract". The Act specifies which variations may be claimed in a payment claim, and which may not. Variations which may be claimed are called 'Claimable Variations'. If Variations claimed in a payment claim are not Claimable Variations within the meaning of Section 10A, then, pursuant to Section 10, an adjudicator is not to take them into account in determining the amount payable in respect of the progress claim
13. The substantive issues in relation to Section 10A of the Act:
 1. Are variations within the definition of "Class 1 Claimable Variations"?
 2. Are variations within the definition of "Class 2 Claimable Variations"?
 3. Does the contract contain a "dispute resolution clause" for the purpose Section 10A(3)(d)(ii)?

14. Under Section 10A, for a Variation to be a "Class 1 Claimable Variation" there must be "agreement" that:
 - a. The work had been performed; and
 - b. The scope of the work that had been carried out; and
 - c. The doing of that work constituted a variation; and
 - d. The value of that work; and
 - e. The time for payment of that work.
15. Under Section 10A, a Variation is a "Class 2 Claimable Variation" where there is "agreement" that:
 - a. The work has been performed; and
 - b. The person requiring the work has requested or directed that the work be performed;but there is not agreement:
 - c. As to the scope of the work that has been carried out; and/or
 - d. That the doing of that work constituted a variation; and/or
 - e. The value of that work; and/or
 - f. The time for payment of that work.
16. Section 10A of the Act provides as follows:

10A Claimable variations

*(1) This section sets out the classes of variation to a construction contract (the **claimable variations**) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.*

*(2) The **first class of variation** is a variation where the parties to the construction contract agree—*

(a) that work has been carried out or goods and services have been supplied; and

(b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and

(c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and

(d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and

(e) as to the value of that amount or the method of valuing that amount; and

(f) as to the time for payment of that amount.

- (3) **The second class of variation** is a variation where—
- (a) the work has been carried out or the goods and services have been supplied under the construction contract; and
 - (b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and
 - (c) the parties to the construction contract do not agree as to one or more of the following—
 - (i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;
 - (ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;
 - (iii) the value of the amount payable in respect of the work or the goods and services;
 - (iv) the method of valuing the amount payable in respect of the work or the goods and services;
 - (v) the time for payment of the amount payable in respect of the work or the goods and services; and
 - (d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into—
 - (i) is \$5 000 000 or less; or
 - (ii) exceeds \$5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).
- (4) 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, subsection (3)(d) applies in relation to that construction contract as if any reference to "\$5 000 000" were a reference to "\$150 000".

Or, put more simply:

Extract from VBA Security of Payment Fact Sheet 4 – April 2014

Variations on which the parties agree

All agreed variations may be claimed in a payment claim.

It is an agreed variation if both the claimant and the respondent agree on **all** of the following things:

- The claimant has carried out the work or supplied the goods or services
- The scope of the work that has been carried out or the goods and services that have been supplied
- The work or the supply of goods or services is a variation to the contract
- The claimant is entitled to be paid for the variation
- The value of the variation or the method of valuation
- The time for payment.

Disputed variations

Some disputed variations may be claimed in a payment claim if the parties do not agree about **one or more** of the following things:

- The work or the supply of goods or services is a variation to the contract
- The claimant is entitled to be paid for the variation
- The value of the variation or the method of valuation
- The time for payment.

Limits on disputed variations that may be claimed on a payment claim

Contract sum less than \$150,000

If the original contract value is less than \$150,000, the Act applies to all claims for disputed variations.

Contract sum more than \$5 million

If the original contract value is more than \$5 million, disputed variations must be resolved by the dispute resolution methods specified in the contract.

If the contract does not specify a method for resolving disputes, the Act applies.

Contract sum between \$150,000 and \$5 million

If the contract sum is between \$150,000 and \$5 million, the Act applies to claims for disputed variations up to 10% of the original contract sum.

If the total value of the disputed variations amounts to more than 10% of the original contract sum, the dispute must be resolved by the dispute resolution methods specified in the contract.

If the contract does not specify a method for resolving disputes, the Act applies.

2.5 Section 10B “Excluded Amounts”

17. Section 10B of the Act has the effect of excluding, from a payment claim, and the adjudicator is expressly excluded from taking into account, in determining the amount payable by the respondent to the claimant certain categories of claims, on the basis that those claims are an Excluded Amount under Section 10B of the Act.
18. Excluded Amounts would include, for example, the following types of claims:
 - “Damages” claims
 - Delay costs/prolongation costs
 - Latent conditions claims
 - Non-contract claims (eg., claims in misleading and deceptive conduct, restitution/quantum meruit claims, ...) ...

19. Section 10B of the Act provides as follows:

10B Excluded amounts

(1) This section sets out the classes of amounts (excluded amounts) that must not be considered in calculating the amount of a progress payment to which a person is entitled under a construction contract.

(2) The 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;

(c) any amount claimed for damages for breach of the construction 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.

2.6 Material that might be included in Payment Claims

20. If there is ultimately a dispute between the claimant and the respondent, both parties will wish that they had included all relevant and/or helpful material in the payment claim and/or payment schedule. In fact, in Victoria, it has become possible, in practice, for a claimant to include some new material in an Application for Adjudication, and for a respondent to include some new material in an Adjudication Response. It is nonetheless a risky process to rely upon this. Far better that the claimant includes all relevant material in each payment claim, and the respondent include all relevant material in each payment schedule.

21. The claimant, in making a payment claim, might include the following types of relevant documents in support of the payment claim (and, potentially, in support an Application for Adjudication if there is a dispute as to the payment claim):
 - Emails, letters, re work contained in the payment claim
 - Inspection records
 - Invoices from suppliers
 - Measurements
 - Test results
 - Quality assurance certificates
 - Meeting minutes
 - Site diaries
 - Photographs
 - SMS messages
 -

3. Section 3: Payment Schedule

3.1 Requirements of a Valid Payment Schedule

1. The requirements as to a valid payment claim under the Act are set out in Section 15(2).
2. Section 15.2 of the Act provides as follows:

A payment schedule—

 - (a) must identify the payment claim to which it relates; and*
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (**the scheduled amount**); and*
 - (c) must identify any amount of the claim that the respondent alleges is an excluded amount; and*
 - (d) must be in the relevant prescribed form (if any); and*
 - (e) must contain the prescribed information (if any).*
3. The requirements for a valid payment schedule, therefore, are that the payment schedule:
 1. Identifies the payment claim to which it relates; and
 2. Indicates the amount of the payment (if any) that the respondent proposes to make.

3.2 Material that might be included in Payment Schedules

4. The respondent, in providing a payment schedule, might include the following types of relevant documents in support of the payment schedule (and, potentially, in support of an Application for Adjudication if there is a dispute as to the payment claim):
 - Emails, letters, re work contained in the payment claim
 - Inspection records
 - Invoices from suppliers
 - Measurements
 - Test results
 - Quality assurance certificates
 - Photographs
 - SMS messages
 -

3.3 Failure to provide a Payment Schedule precludes an Adjudication Response

5. If a respondent fails to provide a payment schedule the Act precludes them from providing an Adjudication Response if the claimant chooses to pursue payment through the adjudication process.

6. Section 21(2A) provides as follows:

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).

4. Section 4: Application for Adjudication

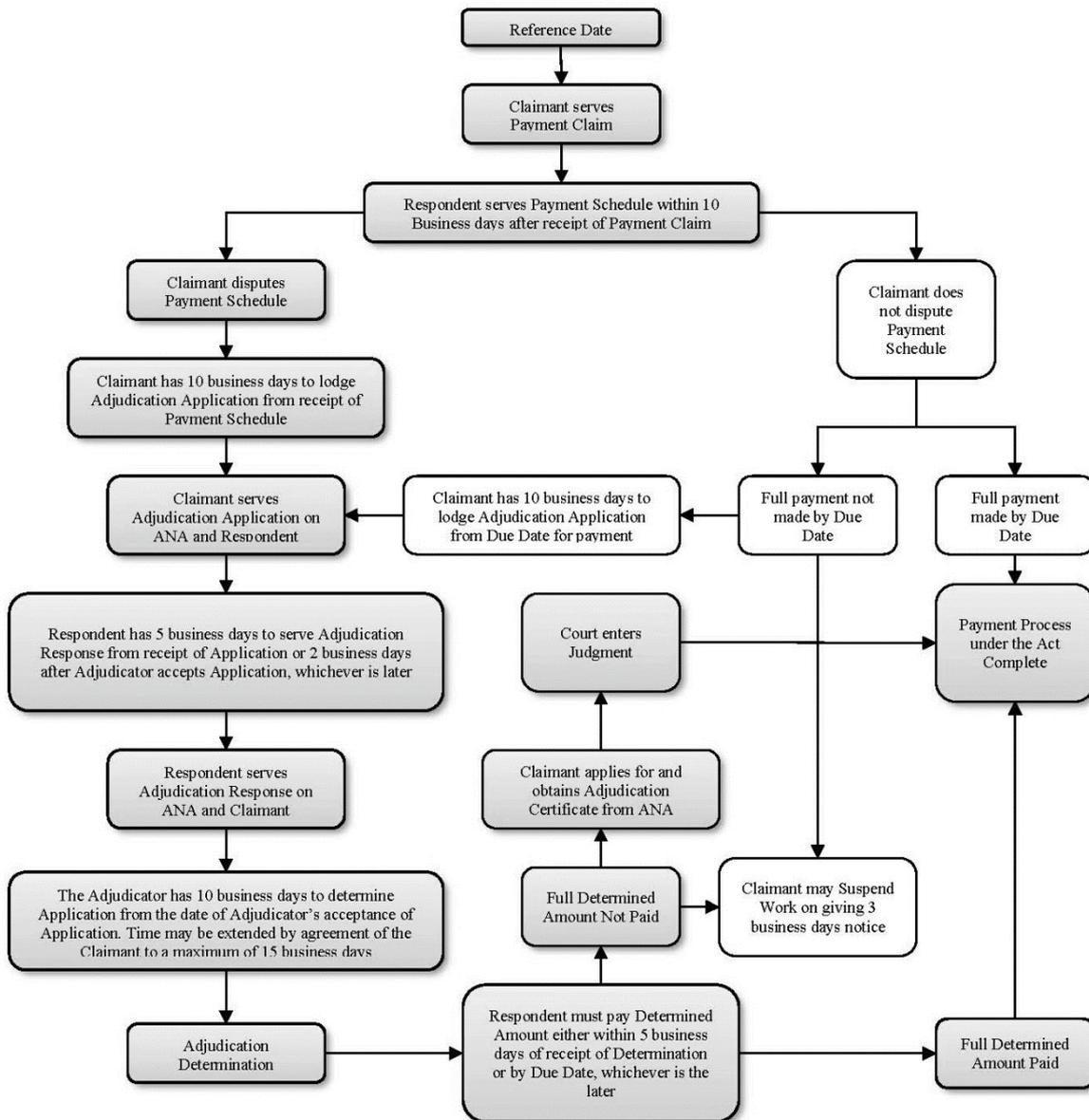
4.1 Application for Adjudication - Timing

1. There are strict requirements in relation to an Application for Adjudication, set out in Section 18.
2. Section 18(1) of the Act gives the claimant the right to make an Application for Adjudication in certain circumstances as follows:
 - (1) A claimant may apply for adjudication of a payment claim (an **adjudication application**) if—*
 - (a) the respondent provides a payment schedule under Division 1 but—*
 - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or*
 - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount;*
or
 - (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.*
3. A claimant may make an Application for Adjudication in the following circumstances:
 - a. Where the payment schedule amount is less than the payment claim amount;
 - b. Where the respondent does not pay the payment schedule amount when due;
 - c. Where the respondent does not provide a payment schedule and does not pay the claimed amount when due.

4.2 Payment Schedule received within 10 business days

- Where the claimant disputes the amounts contained in a payment schedule, it may lodge an Application for Adjudication with an Authorised Nominating Authority (ANA), appointed under the Act, within 10 business days of receiving the payment schedule, with a copy to the respondent.

Flow Chart – Payment Schedule Served



4.3 Payment Schedule not received/Section 18(2) Notice/Optional adjudication

5. Where the claimant serves a payment claim, and the respondent fails to deliver a payment schedule, the claimant becomes entitled (if not paid) to sue in court for judgment of the full amount claimed.
6. Alternatively, the claimant may, under the Act, prefer to apply for adjudication under Section 18(2). This type of adjudication is sometimes referred to as "optional adjudication".

Section 18(2) provides as follows:

An adjudication application to which subsection (1)(b) applies cannot be made unless—

(a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

7. Section 18(2) requires such a claimant, to first deliver a Section 18(2) Notice, notifying the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and giving the respondent an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's Section 18(2) Notice.
8. The time for giving a Section 18(2) Notice and the time for making an Application for Adjudication where no payment schedule was received, but the claimant prefers to go to adjudication rather than sue for judgment, is as follows. The Section 18(2) Notice must be given within 10 business days of the due date for payment of the payment claim. The Application for Adjudication must be made within 5 business days after the end of the 2-day period for the respondent to provide a payment schedule, referred to in subsection 18(2)(b).

11. Section 17. provides, so far as relevant, as follows:

17 Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent provides a payment schedule to the claimant—
(i) within the time required by the relevant construction contract; or
(ii) within 10 business days after the payment claim is served—
whichever time expires earlier; and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant; and

(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

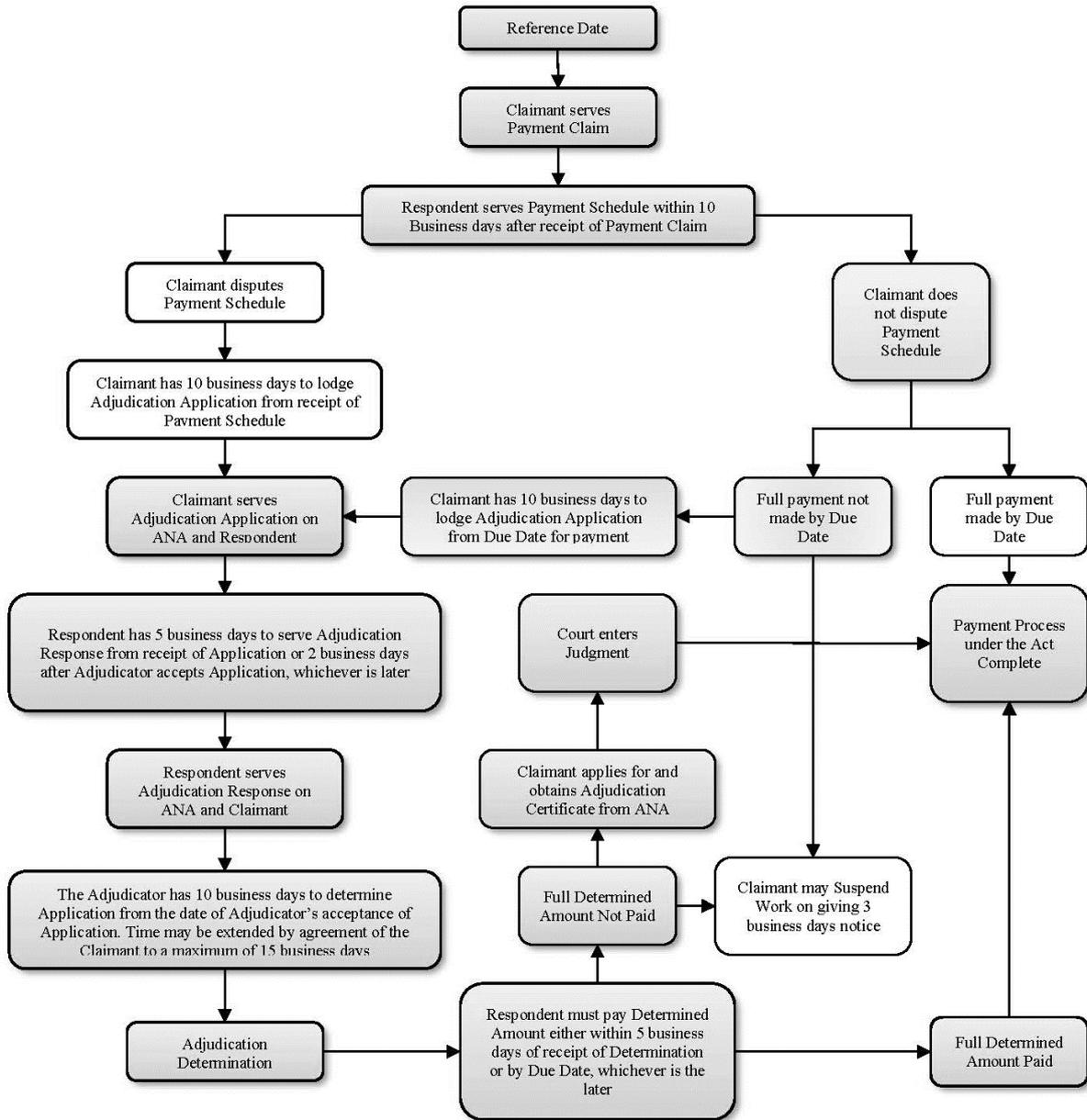
(2) In those circumstances, the claimant—

(a) may—

(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 18(1)(a)(ii) in relation to the payment claim; and...

Flow Chart – Payment Schedule Served – Scheduled Amount No Paid



4.5 Requirements for a Valid Application for Adjudication

12. There are strict requirements in relation to an Application for Adjudication, set out in Section 18.
13. Section 18(1) of the Act gives the claimant the right to make an Application for Adjudication in certain circumstances as follows:
 - (1) A claimant may apply for adjudication of a payment claim (an adjudication application) if—
 - (a) the respondent provides a payment schedule under Division 1 but—
 - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or
 - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount;
or
 - (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
14. A claimant may make an Application for Adjudication in the following circumstances:
 - a. Where the payment schedule amount is less than the payment claim amount;
 - b. Where the respondent does not pay the payment schedule amount when due;
 - c. Where the respondent does not provide a payment schedule and does not pay the claimed amount when due.
15. Section 18(3) of the Act provides as follows:
 - (3) An adjudication application—
 - (a) must be in writing; and
 - (b) subject to subsection (4), must be made to an authorised nominating authority chosen by the claimant; and
 - (c) in the case of an application under subsection (1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule; and
 - (d) in the case of an application under subsection (1)(a)(ii), must be made within 10 business days after the due date for payment; and
 - (e) in the case of an application under subsection (1)(b), must be made within 5 business days after the end of the 2-day period referred to in subsection (2)(b); and
 - (f) must identify the payment claim and the payment schedule (if any) to which it relates; and
 - (g) must be accompanied by the application fee (if any) determined by the authorised nominating authority; and
 - (h) may contain any submissions relevant to the application that the claimant chooses to include.
16. The Application for Adjudication is made to an Authorised Nominating Authority.

17. The date of delivery of the Application for Adjudication to an Authorised Nominating Authority is critical. The Adjudication Application must be delivered:
 - a. Within 10 business days after the claimant received the Payment Schedule; or
 - b. Within 10 business days after the due date for payment; or alternatively
 - c. In relation to an optional adjudication (an adjudication made where no payment schedule was received, but the claimant prefers to go to adjudication rather than sue for judgment (referred to as "optional adjudication", see below), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b).
18. The Adjudication Application must identify the Payment Claim and the Payment Schedule to which it relates.
19. Ultimately, the adjudicator will determine whether the adjudication application:
 - a. Was in writing;
 - b. Was made to an authorised nominating authority chosen by the claimant;
 - c. Was made within the relevant period;
 - d. Identified the Payment Claim and the Payment Schedule to which it related;In order to determine whether there was a valid Adjudication Application within the meaning of the Act.

4.6 Claimant's Choice of Authorised Nominating Authority (ANA)

20. The claimant may choose any of the Authorised Nominating Authorities appointed under the Act in Victoria.
21. Where, however, 3 or more ANA's are listed in a contract, the claimant must choose from 1 of those listed ANA's. Section 18(4) of the Act provides as follows:

If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.
22. The substantive effect of Section 18(4) is that, unless the construction contract expressly provides that the Authorised Nominating Authority shall be one of 3 or more Authorised Nominating Authorities listed on the construction contract, then the claimant is free to choose any Authorised Nominating Authority in Victoria.

5. Section 5 Adjudication Response

5.1 Adjudication Response, only if payment Schedule provided

1. Subject to having delivered a payment schedule in accordance with the Act, the respondent is entitled to lodge a response (“the Adjudication Response”) to the Application for Adjudication.
2. Section 21(2A) provides that the right to deliver the Adjudication Response is subject to having delivered a payment schedule in accordance with the Act.
3. Section 21(2A) provides as follows:

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).

5.2 Adjudication Response - timing

4. The time for delivery of the Adjudication Response are set out in Section 21(1) as follows:

*(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the **adjudication response**) at any time within—*
(a) 5 business days after receiving a copy of the application; or
(b) 2 business days after receiving notice of an adjudicator's acceptance of the application—whichever time expires later.

5.3 Adjudication Response – requirements

5. The (minimal) requirements of an Adjudication Response are set out in Section 21(2) as follows:

(2) The adjudication response—
(a) must be in writing; and
(b) must identify the adjudication application to which it relates; and
(c) must include the name and address of any relevant principal of the respondent and any other person who the respondent knows has a financial or contractual interest in the matters that are the subject of the adjudication application; and
(ca) must identify any amount of the payment claim that the respondent alleges is an excluded amount; and
(d) may contain any submissions relevant to the response that the respondent chooses to include.

6. Section 6: Section 21(2b) Notice

1. The Act envisages that new reasons, not previously included a payment schedule, might be included in an Adjudication Response. Section 21(2B), provides a mechanism for the adjudicator to identify those new reasons, and to give the claimant a chance to respond to those new reasons.
2. Section 21(2B) provides as follows:

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.
3. The effect of Section 21(2B) is to require the adjudicator to review the Adjudication Response when received, compare it with the payment schedule, and notify the claimant if in the adjudicator's opinion, the adjudication response included new reasons for withholding payment that were not included in the payment schedule. The adjudicator must write to the parties, identifying those reasons, and giving the claimant 2 business days from the date of service of the notice to lodge a response to those reasons with the adjudicator (Section 21(2B) Notice).
4. The underlying rationale of the Section 21(2B) Notice is to accord natural justice to the claimant, by giving the claimant the chance to answer new reasons contained in the Adjudication Response (not previously contained in the payment schedule).
5. It is common, in the above circumstance, that the adjudicator request, and the claimant agree to, an extension of the time for making the Determination. (In effect, the adjudicator will not have all of the respective submissions until day 7 or 8 of the 10 days available to review the material and make the Determination).

7. Section 7: Determination by the Adjudicator

7.1 Matters Regarded in Making the Determination

1. The adjudicator, in making the determination, is required by the Act to (only) consider the following:
 - a. Application for Adjudication
 - b. Adjudication Response (if any);
 - c. Response to Section 21(2B) Notice (if any);
 - d. Any other materials provided with those documents;
 - e. The results of any inspection
2. In making the determination the adjudicator will also have regard to the provisions of the *Building and Construction Industry Security of Payment Act (Vic) 2002*.
3. The Application for Adjudication will usually include the following:
 1. Application for Adjudication
 2. Submissions on behalf of the claimant
 3. The Payment Claim
 4. The Payment Schedule
 5. The construction contract

A well-prepared Application for Adjudication may also include any or all the following relevant to/in support of the amount claimed by the claimant should be paid in relation to the payment claim:

 6. Supporting correspondence (emails, letters, invoices, file notes,), relevant to the amount to be paid in relation to the payment claim
 7. Statutory declarations in support
 8.
4. The adjudicator must satisfy himself/herself of:
 1. Existence of a contract or other arrangement to which the Act applies;
 2. Service by the claimant on the respondent of a valid payment claim;
 3. A valid "adjudication application" within the meaning of the Act;
 4. Reference of the application to an eligible adjudicator, who accepts the application;
 5. Determination by the adjudicator of the application, by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable, and the issue of a determination in writing.

7.2 Existence of a Contract to which the Act applies

5. The Act requires that there be a "construction contract" within the meaning of the Act.
6. Section 4 of the Act provides, so far as relevant, as follows:

***"construction contract"** means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party*

7. The adjudicator must determine that there is a "construction contract", within the meaning of the Act. This includes contracts which are written, oral, or a combination of written and oral.

7.3 Service by the claimant on the respondent of a Valid Payment Claim

8. The Act requires that there be a valid "payment claim" within the meaning of the Act.
9. Section 4 of the Act provides, so far as relevant, as follows:

"payment claim" means a claim referred to in section 14

10. Section 14(2) of the Act provides as follows:

A payment claim—

(a) must be in the relevant prescribed form (if any); and

(b) must contain the prescribed information (if any); and

(c) must identify the construction work or related goods and services to which the progress payment relates; and

(d) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"); and

(e) must state that it is made under this Act.

11. There is no form prescribed for payment claims under the Act.
12. The Payment Claim must specify the amount claimed to be due.
13. The Payment Claim must describe the construction work to which the progress payment relates.
14. The Payment Claim must include words to the effect: "This is a payment claim under the Building and Construction Industry Security of Payment Act 2002".
15. In summary, the adjudicator needs to make the following findings:
 - a. The Payment Claim complies with the requirement for form (there is no prescribed form);
 - b. Contains the prescribed information (there is no prescribed information);
 - c. Identifies the construction work or related goods and services to which the progress payment relates;
 - d. Indicates the amount of the progress payment that the claimant claims to be due;
 - e. States that it is made under the Act.
16. On that basis, the adjudicator will determine whether that the Payment Claim complies with the requirements of Section 14(2).

7.4 Valid Adjudication Application

17. The Act requires that there be a valid “adjudication application” within the meaning of the Act, made by the claimant to an Authorised Nominating Authority.

18. Section 18(3) of the Act provides, so far as relevant, as follows:

An adjudication application—

(a) must be in writing; and

(b) must be made to an authorised nominating authority chosen by the claimant; and

(c) in the case of an application under sub-section (1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule;

(d) in the case of an application under subsection(1)(a)(ii), must be made within 10 business days after the due date for payment; and.....

(e) in the case of an application under subsection(1)(b), must be made within 5 business days after the end of the 2-day period referred to in subsection (2)(b); and

(f) must identify the payment claim and the payment schedule (if any) to which it relates; and

(g) must be accompanied by the application fee (if any) determined by the authorised nominating authority; and

(h)

19. The Adjudication Application must be in writing.

20. The Application for Adjudication must be made to an Authorised Nominating Authority. A list of current Authorised Nominating Authorities can be found on the Victorian Building Authority website.

21. The date of delivery of the Application for Adjudication to an Authorised Nominating Authority is critical. The Adjudication Application must be delivered:

a. Within 10 business days after the claimant received the Payment Schedule; or alternatively

b. Within 10 business days after the due date for payment; or alternatively

c. In relation to an optional adjudication (an adjudication made where on payment schedule was received, but the claimant prefers to go to adjudication rather than sue for judgment ((see below)), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b).

d. In relation to an application where a payment schedule was served, but any or all the scheduled amount was not paid on or before the due date, within 10 business days of the due date for payment.

22. The Adjudication Application must identify the Payment Claim and the Payment Schedule to which it relates.

23. The adjudicator will determine whether the adjudication application:
 - a. Was in writing;
 - b. Was made to an authorised nominating authority chosen by the claimant;
 - c. Was made within the relevant period;
 - d. Identified the Payment Claim and the Payment Schedule to which it related; to determine whether there was a valid Adjudication Application within the meaning of the Act.

7.5 Reference of the application to an eligible adjudicator, who accepts the application

24. The Act requires that an Authorised Nominating Authority refer the adjudication to an eligible adjudicator within the meaning of Section 19 of the Act.
25. Determination by the adjudicator of the application, by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable and the issue of a determination in writing:
26. The Act requires that the adjudicator issue a determination in writing, and determine the following:
 - a. the amount of the progress payment;
 - b. the date on which the progress payment becomes or became due; and
 - c. the rate of interest payable.

7.6 Assessment of the amount payable in respect of progress claim

27. Pursuant to Section 23(1)(a) of the Act, an adjudicator is required to assess: *the amount of the progress payment (if any) to be paid by the respondent to the claimant.*
28. The key principles to be followed by an adjudicator in assessing a payment claim under the Act are:
 1. The adjudicator is to determine and apply what the adjudicator considers to be the true construction of the Act in the light of the current case law;
 2. The adjudicator is to determine and apply what the adjudicator considers to be the true construction of the construction contract;
 3. The adjudicator is to determine whether the construction work the subject of the claim has been performed;
 4. The adjudicator is to determine the value of the work performed;
 5. If a construction contract contains a binding schedule of rates, the adjudicator is to have regard to the schedule in assessing value, and to state in the adjudication determination whether and how the schedule of rates was applied in the assessment of value, or why the schedule of rates was not applied;
 6. The adjudicator is to make the critical findings on the whole of the evidence presented at the adjudication;

7. The adjudicator is to make the critical findings by fairly assessing and weighing the whole of the evidence drawing any necessary inferences from the evidence (or absence of controverting evidence), arriving at a rational conclusion founded upon the evidence;
8. The adjudicator is not called upon to act as an expert;
9. The adjudicator is not entitled to impose an onus on either party to establish a sufficient basis for payment or a sufficient basis for withholding payment;

the adjudicator is to include in an adjudication determination both the reasons for the determination and the basis upon which any amount or date has been decided, and in providing these reasons the adjudicator must summarise the central reasons for the making of the critical findings in the adjudication determination with as much completeness as the time permitted under the Act will allow.

7.7 Date adjudicated amount payable under the construction contract

29. The adjudicator is required pursuant to Section 23(1)(b) of the Act to determine the date upon which the adjudicated amount became or becomes payable.
30. Section 23(1)(b) of the Act provides, so far as relevant, as follows:

An adjudicator is to determine the date on which that amount became or becomes payable ...

31. Section 12(1) of the Act provides, so far as relevant, as follows:

A progress payment under a construction contract becomes due and payable on the date on which the payment becomes due and payable in accordance with the terms of the contract; or if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment

7.8 Interest rate on Adjudicated Amount

32. The adjudicator is required pursuant to Section 23(1)(c) of the Act to determine the rate of interest payable on the adjudicated amount.
33. Section 23(1)(c) of the Act provides, so far as relevant, as follows:

An adjudicator is to determine the rate of interest payable on that amount in accordance with section 12(2)...

34. Section 12(2) of the Act provides, so far as relevant, as follows:

Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with sub-section (1) at the greater of the following rates the rate for the time being fixed under section 2 of the Penalty Interest Rates Act 1983; or the rate specified under the construction contract.

7.9 The party to pay the adjudicator's fees

35. The adjudicator may determine the appropriate allocation, between the claimant and the respondent, of the adjudicator's fees.
36. Section 45 of the Act provides, so far as is relevant, as follows:
- 45 Adjudicator's and review adjudicator's fees
- (2) An adjudicator is entitled to be paid for determining an adjudication application—*
- (a) the amount, by way of fees and expenses, that is agreed between the adjudicator and the parties to the adjudication; or*
- (b) if no amount is agreed, the amount, by way of fees and expenses, that is reasonable having regard to the work done and expenses incurred by the adjudicator.*
- (3) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.*
- (4) As between themselves, the claimant and respondent are each liable to contribute to the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.*
37. The adjudicator, in the Determination, may determine the appropriate allocation, between the claimant and the respondent, of costs of the adjudicator's fees.
38. The release of the determination will usually be made conditional upon payment of the adjudicator's fees.

7.10 Time for adjudicator to make determination

39. The adjudicator must complete their determination as quickly as possible, but not before the end of the period when a respondent may lodge an adjudication response
40. The adjudicator must complete their determination within 10 business days after the date of the Notice of Acceptance. The adjudicator may ask for a further 5 business days (taking the total maximum time to 15 business days).

7.11 Preparing an Application for Adjudication - Material that might be Included

41. The claimant, in making the adjudication application, might include any or all the following:
- Copy of relevant adjudication materials (contract, payment claim, payment schedule)
 - Submissions in support of claimant's claim
 - Other relevant documents (eg., invoices from suppliers, measurements, test results, quality assurance certificates, statutory declarations, proof of insurance, legal advices and expert reports, correspondence)

42. The Act provides that the adjudicator may only refer to the written submissions, inspect work, and/or call a conference (all within 10 business days). The task of the adjudicator will usually be detailed, complex, and fast. The adjudicator may request further information from the parties, and/or call a conference, inspect the site, and/or request the parties' agreement to extend the time for the determination.
43. Conferences and site inspections are uncommon, but in certain circumstances, may assist the adjudicator in making their Determination.
44. Generally, the claimant should, therefore, include, in the payment claim, (because it will be extremely likely that they will be unable to amend the payment claim for the purpose of the adjudication), all items claimed, including, for example, items comprising:
 - Direct costs (eg., sub-claimants, suppliers, equipment, labour, materials ...)
 - Job-related overheads (eg., site shed hire, supervisor salaries, site security, electricity and other services, crane usage, etc.)
 - Non-job-related overheads (share of organisation-wide overheads which should be allocated to each claim on a project)

7.12 Section 24 - Corrections to Determination

45. Under Section 24, the adjudicator has the power to correct mistakes in the Determination.
46. Section 24 of the Act provides, so far as relevant, as follows:

24 Correcting mistakes in determinations

(1) An adjudicator may correct a determination made by him or her if the determination contains—

(a) a clerical mistake; or

(b) an error arising from an accidental slip or omission; or

.....

47. The ability of an adjudicator to make a correction to a determination is limited to a clerical mistake. The adjudicator does not have the ability to reconsider or change the substance of their determination.

8. Section 8: Application for Review of Determination

8.1 Application for Review of Determination

1. The Act provides for a review of an Adjudication Determination, but only in relation to Excluded Amounts wrongly included or excluded by the adjudicator.
2. Sections 28B and 28C provide, so far as relevant, as follows:

28B Application for review by respondent

*(1) Subject to this section, a respondent may apply for a review of an adjudication determination (an **adjudication review**).*

(2) An application under this section may only be made if the respondent provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2).

(3) An application under this section may only be made on the ground that the adjudicated amount included an excluded amount.

(4) An application under this section may only be made if the respondent has identified that amount as an excluded amount in the payment schedule or the adjudication response.

(5) An application under this section may only be made if the respondent has paid to the claimant the adjudicated amount other than the amounts alleged to be excluded amounts.

(6) An application under this section may only be made if the respondent has paid the alleged excluded amounts into a designated trust account.

28C Application for review by claimant

*(1) Subject to this section, a claimant may apply for a review of an adjudication determination (an **adjudication review**).*

(2) An application under this section may only be made on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount.

3. There is a minimum threshold adjudicated amount of \$100,000 for a review adjudication, and the party making the application is required to pay to the respondent the undisputed amount and deposit the sum in dispute in trust.

4. The process:

Any Application for Review of Determination must be made within 5 business days after the Respondent or Claimant (as the case requires) receives a copy of the adjudication determination.

An Application for Review of Adjudication may only be made by the **Respondent** when:

1. The Adjudicated Amount exceeds \$100,000.00
2. The Respondent provided a Payment Schedule to the Claimant within the time specified in Section 15(4) or 18(2)
3. On the ground that the Adjudicated Amount included an Excluded Amount
4. If the Respondent identified that amount as an Excluded Amount in the Payment Schedule or the Adjudication Response
5. If the Respondent has paid to the Claimant the Adjudicated Amount, other than the amounts alleged to be Excluded Amounts
6. The Respondent has paid the amounts alleged to be Excluded Amounts into a designated Trust Account

An Application for Review of Adjudication may only be made by the **Claimant** when:

1. The adjudicator failed to take into account a relevant amount in making an Adjudication Determination because it was wrongly determined to be an Excluded Amount

An Application for Review of Adjudication may only be made to the ANA which the Application for Adjudication was made.

9. Section 9: Other Rights Under the SOP Act

9.1 Right to suspend works/supply of goods and services

1. The claimant may suspend works/supply of goods and services when:
 1. The respondent provides a payment schedule, but fails to pay all or any part of the scheduled amount on the due date, or;
 2. The respondent fails to provide a payment schedule and fails to pay the full amount on the due date, or;
 3. The respondent fails to pay all or any part of an adjudicated amount.
2. Section 29 of the Act provides, so far as is relevant:

29 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work or the supply of related goods and services under a construction contract if at least 3 business days have passed since the claimant has caused a notice of intention to do so to be given to the respondent under section 16, 17 or 28O.

(2) The right conferred by subsection (1) exists until—

(a) if the construction contract provides for a period of at least 1 business day for a return to work after the claimant receives payment from the respondent of an amount referred to in section 16(1), 17(1), 28M or 28N, the end of that period; or

(b) in any other case, the end of the period of 3 business days immediately following the date on which the claimant receives payment from the respondent of an amount referred to in section 16(1), 17(1), 28M or 28N.

9.2 Recovery from principal

3. Division 4 – Recovery from principal, details the circumstances where, if the Respondent fails to pay the whole or any part of the adjudicated amount, the Claimant may recover the unpaid amount from “the principal”.
4. In brief, Division 4 of the Act provides:
 1. If the Respondent fails to pay the whole or any part of the adjudicated amount, the Claimant may recover the unpaid amount from “the principal”, provided that:
 - a. The Claimant has obtained Judgment for the adjudicated amount or part of the adjudicated amount;
 - b. There is money that is payable, or will become payable from the principal to the Respondent;
 - c. Construction work carried out or the goods and services supplied by the claimant to or for the respondent under the construction contract are, or are part of or incidental to, the construction work or goods and services that the principal engaged the Respondent to carry out or supply.
 - d. The person who has engaged the Respondent to carry out construction work or to supply goods and services under a construction contract is not exempt from this Act under section 7(2)(b) or 7(2)(ba).

2. In brief, the procedure for recovering payment from the principal is as follows:
 - a. At the time the Claimant files the Adjudication Certificate and supporting documentation with the Court, they should also file a completed Form 3 – Debt Certificate.
 - b. The Court will return the certified Form 3 – Debt Certificate with the Judgment Order.
 - c. The Claimant must then serve a completed Form 2 – Notice of Claim, along with the certified Form 3 – Debt Certificate, on the principal.
3. When the amount has been paid by the principal, the Claimant must provide to the principal a completed Form 4 – Discharge Notice.

9.3 Notice of Lien

5. A lien is a form of security interest exercised over an item of property to secure the payment of a debt or performance of some other obligation.
6. Section 12A of the Act provides:

12A Lien in respect of unpaid progress payment

(1) If a progress payment under a construction contract becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent.

(2) The claimant must serve a notice in the prescribed form on the respondent before exercising a lien under subsection (1).

(3) A lien under subsection (1) is extinguished on the claimant receiving the progress payment.

(4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (1).

(5) Subsection (1) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials.

7. The Building and Construction Industry Security of Payment Regulations, Form 1 – Notice of Intention to Exercise Lien, is the Form which must be used to notify the Respondent of the intention to exercise a Lien.

10. Section 10: No Contracting Out/Pay When Paid

10.1 No contracting out

1. The Act has a specific provision preventing parties from contracting out of the Act. That is to say that even if the parties to a contract agreed that the SOP Act would not apply to that contract, that agreement or provision in the contract would have no effect.
2. Section 48 of the Act provides:

48 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement, whether in writing or not—

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or

(b) that may reasonably be construed as an attempt to deter a person from acting under this Act— is void.

10.2 Pay when paid

3. The Act has specific provisions making void any “pay when paid” clause in a contract.

Section 13 of the Act provides as follows:

13 Effect of pay when paid provisions

(1) A pay when paid provision of a construction contract has no effect in relation to any payment for—

(a) construction work carried out or undertaken to be carried out under the contract; or

(b) related goods and services supplied or undertaken to be supplied under the contract.

(2) In this section—

money owing, in relation to a construction contract, means money owing for—

(a) construction work carried out under the contract; or

(b) related goods and services supplied under the contract;

pay when paid provision of a construction contract means a provision of the contract—

(a) that makes the liability of one party (the first party) to pay money owing to another party (the second party) contingent on payment to the first party by a further party (the third party) of the whole or any part of that money; or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

11. Section 11: Enforcement

11.1 Enforcement

1. The provisions for enforcement of an adjudicated amount are set out in Division 2B of the Act.
2. The obligation on the respondent to pay the Adjudicated Amount is set out in Section 28M(1):

Subject to sections 28B and 28N, if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

(The relevant date is, unless the adjudicator determines differently, the date that is 5 business days after the date on which a copy of the adjudication determination is given to the respondent.)

3. The consequences of failing to pay the Adjudicated Amount is that the claimant may:
 - a. request an Adjudication Certificate; and/or
 - b. serve notice that the claimant intends to suspend work under the contract.
4. Under Section 28R, where the claimant has received an Adjudication Certificate from the Authorised Nominating Authority, the claimant may recover the amount in the certificate, in court, as a debt due. Section 28R(1) provides as follows:

(1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.

5. Section 28R(5) limits the defences that may be raised by the respondent where the claimant has commenced such proceedings, as follows:

(5) If a person commences proceedings to have the judgment set aside, that person—

(a) subject to subsection (6), is not, in those proceedings, entitled—

(i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or

(ii) to raise any defence in relation to matters arising under the construction contract; or

(iii) to challenge an adjudication determination or a review determination; and

(b) is required to pay into the court as security the unpaid portion of the amount payable

6. The Adjudication Certificate enables the claimant to obtain an Order for the amount in the Certificate by simple lodging with an affidavit in support.
7. For amounts under \$100,000, judgment is obtained from the Magistrates Court of Victoria. In brief, the process is as follows:
 1. The party seeking judgment lodge with the registrar, the adjudication certificate and affidavit in support.

2. The registrar may make an order when satisfied by affidavit that the adjudication certificate produced by the party was issued by an authorised nominating authority and that the amount or part of the amount payable under sections 28M or 28N of the Act remains unpaid.
 3. In determining the amount of the order, the registrar is to add all amounts set out in the certificate as a total sum and make the order for that sum less any amount that has been paid.
 4. An order made under the Act is enforceable in the same way as any other order of the Court and interest accrues on the amount of the order under the provisions of the Magistrates' Court Act 1989 (Vic).
8. Amounts over \$100,000 may be filed as follows:
- County Court of Victoria amounts over \$100,000.00 with no upper limit
 - Supreme Court of Victoria amounts over \$200,000.00 with no upper limit

12. Section 12: Contract Formation and Record Keeping

12.1 Contract formation

1. It is desirable, where possible, to record the details of a contract in writing.
2. Some contracts are lengthy and complicated, often running into hundreds of pages. Often, a contract is detailed in the terms of a quote and purchase order.
3. If a contract is verbal, it is good practice to send an email (or even an SMS) to the other party detailing what the agreement is.
4. In any event, if the contract is in writing, you should ensure that you have read the contract and fully understand the terms you have agreed to.
5. Conducting credit checks on new customers can help avoid non-payment.

12.2 Record keeping

It will be apparent from the preceding sections of this workbook that effective record keeping is critical. The ability to be able to provide supporting documentation in payment claims and payment schedules will often mean that disputes over payments do not arise.

It is highly recommended that this workshop be followed up with Business Victoria's Finance Fundamentals: Keep your cash flowing. Go to business.vic.gov.au to book.

6. If you are a claimant or respondent in an adjudication under the SOP Act, your ability to quickly and accurately provide submissions and supporting documentation, may impact on your success in an adjudication.
7. There are many accounting and business management packages which have functionality tailored to small, medium and large businesses. In addition to those packages, many businesses use:
 - a. Spreadsheets
 - b. Diaries
 - c. Timesheets
8. Probably one of the most powerful tools in a contractor's toolbox is a smartphone. The ability to record information in real time and take photos (which are generally time-stamped and geo-located), has been a game changing advancement in recent years.

13. Additional resources

1. There are several organisations who can assist with the SOP Scheme. For example:
 - a. The Victorian Building Authority
 - b. Authorised Nominating Authorities (ANS's)
 - c. Industry bodies (e.g. MBAV)
 - d. Lawyers
2. Business Victoria runs several excellent small business workshops to further your skills in areas such as:
 - Finance fundamentals: How to keep your cash flowing
 - Taking your business online: What you need to know
 - Marketing your business: How to get it right the first time
 - Business planning essentials: How to build a road map to success

Business Victoria

Business Victoria is a website that provides simple, easy to understand information for business owners, across all devices.

You can find out how to:

- **Find a Loan** to find and compare business loan options
- Find and manage all Government licences, permits and registrations for your business through **Australian Business Licence and Information Services**
- Book for locally delivered **Workshops and Events** that help you gain skills to improve your business
- Search a comprehensive directory of Government assistance for business through **Grants and Assistance**
- Download **business templates** (business and marketing plans, HR manual) to tailor for your business needs
- Find out details on **Victorian public holidays** and the dates for **daylight saving**
- **Manage risks** in your business to keep your business on track
- **Calculate Long Service Leave** entitlements by using the Long Service Leave Calculator.
- Refer to *Long Service Leave Act 2018* facts at business.vic.gov.au/hiring-and-managing-staff/long-service-leave-victoria/long-service-leave-an-overview

 business.vic.gov.au

 13 22 15

More useful contacts, links and resources

Australian Business Licence and Information Service (ABLIS)

Helps identify the state, local and federal license and state codes of practice needed to start and operate your business in Victoria. View details for your business to create a tailored report that includes application forms.

 business.vic.gov.au/licences

Australian Tax Office

The Australian Tax Office (ATO) provides a range of advice on 'Dealing with Disasters' available from their website.

 ato.gov.au/individuals/dealing-with-disasters

Tax Basics Seminar Program

The ATO hold free tax basics webinars. These webinars provide you with a basic understanding of small business tax issues and your obligations.

There are 12 topic modules for people who are either:

- Just starting a business or thinking about starting a business
- Wanting to update their knowledge
- Webinar topic information, session times and bookings can be made at:

 ato.gov.au/general/webinars/small-business-webinars/

 Business Infoline 13 28 66
ATO Direct 13 72 26
Superannuation Infoline 13 10 20

Austrade

Austrade Trade Commissioners are co-located at several Victorian Business Centres and can assist potential exporters and exporters with general export information and advice to access Commonwealth export assistance programs.

 austrade.gov.au

Entrepreneurs' Programme

The Entrepreneurs' Programme is the Australian government's flagship initiative for business competitiveness and productivity at the firm level. It forms part of the Australian government's new industry policy outlined in the Industry Innovation and competitiveness Agenda. This agenda is a business-focused element of the Australian Government's broader economic action strategy and brings together and builds upon other economic reforms to make the most of Australia's strengths and business opportunities.

With a national network of more than 100 experienced private sector advisers and facilitators, the Entrepreneurs' Programme offers support to businesses through three elements:

- Accelerating commercialisation, helping entrepreneurs, researchers and businesses address key challenges in the commercialisation pathway of bringing novel products, processes and service to the market.
- Business management, provides advice and facilitation services to improve business capabilities and networks;
- Research connections, helping small and medium businesses to access knowledge, engage with Researchers and foster innovation;

Practical support for businesses includes:

- advice from people with relevant private sector experience,
- co-funded grants to commercialise new products, processes and services,
- funding to take advantage of growth opportunities, and
- connection and collaboration opportunities.

 business.gov.au/assistance/entrepreneurs-programme-summary

Fair Work Ombudsman

Give advice and help you understand your workplace rights and responsibilities. If you have a question or problem relating to your workplace, visit their website.

The role of the Fair Work Ombudsman is to work with employees, employers, contractors and the community to promote harmonious, productive and cooperative workplaces. They investigate workplace complaints and enforce compliance with Australia's workplace laws.

 fairwork.gov.au

Future Industries Fund

The Future Industries Fund supports high growth, high value industries that are critical to securing Victoria's future as a competitive, innovative and outward looking economy.

The Victorian Government has identified six priority sectors that have potential for extraordinary economic growth and the capacity to create high-skill, high wage jobs.

These include:

- medical technologies and pharmaceuticals
- new energy technologies
- food and fibre
- transport, defence and construction technologies
- international education
- professional services.

 business.vic.gov.au/support-for-your-business/future-industries

Grants, Vouchers and Assistance Programs

Provide assistance, including **grant subsidies**, to financially viable Victorian businesses who can demonstrate a commitment to productivity gains, increased exports or import replacement, application of **new technologies** and **innovative practices**.

 business.vic.gov.au/support-for-your-business/grants-and-assistance

INNOVIC

Provides support for pre start-up innovators, inventors and entrepreneurs. Services provided include advice and screening, on-line business templates, regular innovations seminars, and referral services.

 innovic.com.au

Insurance Council of Australia

The Insurance Council of Australia has a range of factsheets and consumer tips available on their website.

 insurancecouncil.com.au/for-consumers/consumer-tips

IP Australia

IP Australia is a government body which administers the patent, designs, trademark and plant breeder's rights system and maintains these registers. It provides general information to individuals and organisations about how to take advantage of their IP. They have a very extensive web site providing information on all types of intellectual property.

 ipaustralia.gov.au

LaunchVic

LaunchVic is a Victorian Government body that aims to accelerate start-ups, drive new ideas and create jobs in Victoria. This initiative is designed to assist entrepreneurs to develop, incubate and grow early stage innovative businesses.

 launchvic.org

MyVictoria

MyVictoria is a recently launched website that assists in researching communities and gaining industry sector information. MyVictoria gathers and combines data to help you draw meaningful insights. Converting data into visual formats like maps, graphs and charts tells a story that:

- creates clear understanding
- brings important context
- conveys related information
- informs research and planning.

Use MyVictoria to build location intelligence to inform decision-making, inspire ideas and identify opportunities.

 myvictoria.vic.gov.au

Regional Development Victoria

The focus of Regional Development Victoria (RDV) is to support the government's vision of creating a stronger regional Victoria through job creation, better infrastructure and new investment. RDV currently administers several programs designed to:

- support business and industry development
- help new businesses to establish themselves
- assist existing industries to grow and diversify
- build prosperous, stronger regional communities.

RDV implements the Victorian Government's Regional Jobs and Infrastructure Fund, supporting major projects, creating jobs and building stronger regional communities.

The fund will have three parts, focusing on major projects, employment and communities.

- The Regional Infrastructure Fund invests in projects that create jobs, support population growth, grow our economy and meet the needs of both our regional cities and rural communities.
- The Regional Jobs Fund helps our regional industries and businesses to grow their workforces, expand their markets and create the jobs of the future.
- The Stronger Regional Communities Plan helps our regional towns attract families and young people to live and work.

 rdv.vic.gov.au

Regional Jobs Fund

The Regional Jobs Fund aims to improve regional capacity, innovation and capitalise on the potential of emerging industry sectors, particularly the Government's priority areas and new export markets.

 business.vic.gov.au/support-for-your-business/future-industries/new-energy-technologies

Small business workshops

The Business Victoria workshops program provides intending business owners, start-up businesses and small businesses with vital information through a wide range of practical workshops.

The program covers topics such as: business planning, marketing, finance, online business and employment.

 business.vic.gov.au/workshops

Small business bus

Operated by Business Victoria, the small business bus visits Melbourne and regional Victoria as a 'travelling office on wheels'. It offers friendly, professional assistance and expert advice from an experienced business mentor. To find out where the bus will be visiting, go to the website:

 business.vic.gov.au/

Victorian Government Offices

Victorian Government Trade and Investment offices are located throughout Victoria to assist small and medium businesses to flourish. They have an array of services available from books to computer listings of all the required licenses for a business. A list of the Victorian Government offices can be found at the end of this workbook.

 invest.vic.gov.au/all-offices

Victoria State Emergency Service

Victoria State Emergency Service is the control agency for flood, storm, tsunami and earthquake in Victoria, managing responses to those emergencies.

 ses.vic.gov.au

Victorian Small Business Commission

Since 2003, the Victorian Small Business Commission (VSBC) has been helping businesses resolve disputes and avoid litigation.

Their role is to advise small businesses on dispute resolution between other businesses, not-for-profit and local or state government entities, by offering preliminary assistance and providing mediation.

 vsbc.vic.gov.au

Workforce Victoria

Workforce Victoria provides information to small business operators and their employees about entitlements and obligations under State industrial legislation, including child employment and long service leave.

 business.vic.gov.au/operating-a-business/employing-and-managing-people

WorkSafe Victoria

WorkSafe Victoria provides the following assistance to small business:

- Provision of free independent health and safety consultancy to any small business in Victoria with 50 or less employees
- The WorkSafe Victoria Advisor Services which provides over-the-phone advice
- Free publications on a wide range of workplace health and safety and workers' compensation topics
- Free e-newsletters
- 24-hour 7 day a week emergency response.

Broadly, the responsibilities of WorkSafe are to:

- Help avoid workplace injuries occurring
- Enforce Victoria's occupational health and safety laws
- Provide reasonably priced workplace injury insurance for employers
- Help injured workers back into the workforce

Manage the workers' compensation scheme by ensuring the prompt delivery of appropriate services and adopting prudent financial practices

 [worksafe.vic.gov.au](https://www.worksafe.vic.gov.au)

Other Useful Links:

Australian Legal Information Institute

 austlii.edu.au

Australian Competition and Consumer Commission

 accc.gov.au

Australian Bureau of Statistics

 abs.gov.au

Business Entry Point

 business.gov.au

Consumer Affairs Victoria

 consumer.vic.gov.au

Department of Justice & Regulation, Victoria

 justice.vic.gov.au

Fair Work Commission

 fwc.gov.au

Law Institute of Victoria

 liv.asn.au

Victorian Public Holidays

 business.vic.gov.au/publicholidays

Australian Government Services for Aboriginal and Torres Strait Islander People

 indigenous.gov.au

NOTE: Information in this guide is correct as at July 2020

Victorian Government business offices

Ballarat

Regional Development Victoria
111 Armstrong Street North
Ballarat VIC 3350
T: (03) 5327 2800
E: information.ballarat@rdv.vic.gov.au

Bundoora

Victorian Government Office
Suite 16, Level 1, 20 Enterprise Drive
Bundoora VIC 3083
T: (03) 9935 0600
E: information.northmetro@ecodev.vic.gov.au

Geelong

Regional Development Victoria
Level 2, Harrison Place, 237 Ryrie Street
Geelong VIC 3220
T: (03) 5215 6000
E: information.geelong@rdv.vic.gov.au

Melbourne

CBD – Inner Melbourne Region
121 Exhibition Street
Melbourne VIC 3000
T: 13 22 15
E: information.innermelbourne@ecodev.vic.gov.au

Ringwood

Victorian Government Office
Level 1, Suite 11, 12 Maroondah Highway
Ringwood VIC 3134
T: (03) 9938 0150
E: information.eastmetro@ecodev.vic.gov.au

Sunshine

Victorian Government Office
Level 6, 301 Hampshire Road
Sunshine VIC 3020
T: (03) 8341 2400
E: information.westmetro@ecodev.vic.gov.au

Wangaratta

Regional Development Victoria
Level 1, 62 Ovens Street
Wangaratta VIC 3677
T: (03) 5722 7101
E: information.wangaratta@rdv.vic.gov.au

Bendigo

Regional Development Victoria
Level 1, 56-60 King Street
Bendigo VIC 3550
T: (03) 4433 8000
E: information.bendigo@rdv.vic.gov.au

Dandenong

Victorian Government Office
Level 6, 165-169 Thomas Street
Dandenong VIC 3175
T: (03) 9938 0100
E: information.southmetro@ecodev.vic.gov.au

Horsham

Regional Development Victoria
110 Natimuk Road
Horsham VIC 3400
T: (3) 5362 2111
E: information.horsham@rdv.vic.gov.au

Mildura

Regional Development Victoria
131 Langtree Avenue
Mildura VIC 3500
T: (03) 5051 2000
E: information.mildura@rdv.vic.gov.au

Shepparton

Regional Development Victoria
79a Wyndham Street
Shepparton VIC 3630
T: (03) 5895 4100
E: information.shepparton@rdv.vic.gov.au

Traralgon

Regional Development Victoria
33 Breed Street
Traralgon VIC 3844
T: (03) 5116 7300
E: information.traralgon@rdv.vic.gov.au

Wodonga

Regional Development Victoria
111-113 Hume Street
Wodonga VIC 3690
T: (03) 6059 0200
E: information.wodonga@rdv.vic.gov.au

14. Appendix

Resources

1. VBA Sample form – Payment Claim
2. VBA Sample form – Payment Schedule
3. VBA Sample form – Section 18(2) Notice
4. VBA Sample form – Adjudication response
5. SOP Regulations – Form 1 – Notice of Intention to Exercise Lien
6. SOP Regulations – Form 2 – Notice of Claim
7. SOP Regulations – Form 3 – Debt Certificate
8. SOP Regulations – Form 4 – Discharge Notice
9. SOP Regulations – Form 5 – Notice of names of persons from whom a claimant may recover
10. Timeline – Payment schedule served
11. Timeline – Payment schedule not served – Optional adjudication
12. Timeline – Payment schedule served – Scheduled amount not paid
13. Cash conversion cycle

1. VBA Sample form – Payment Claim



Payment Claim – Sample Form

This sample form can help you to prepare a payment claim under the *Building and Construction Industry Security of Payment Act 2002*.

WHY THIS IS A 'SAMPLE' FORM

The *Building and Construction Industry Security of Payment Act 2002* (the SOP Act) does not require you to use any particular form for a payment claim.

This form can help you to prepare a payment claim. You can use it, adapt it for your purposes, or decide not to use it at all.

BEFORE YOU START

Check your time limit to make a claim

The time limit within which you must serve the payment claim on the respondent depends on the type of payment you are claiming.

A progress payment for work done or goods or services calculated in accordance with a reference date must be claimed within the period provided by the contract or three months after the reference date – whichever is the later.

A final, single or one-off payment must be claimed within the period provided by the contract or, if no such period is specified, three months after the reference date.

Reference dates

The reference date is the date on which a claim for a progress payment may be made or by reference to which the amount of a progress payment may be calculated.

If the contract specifies the reference date, or how to determine it, you must comply with it.

If the contract does not specify the reference date or how to determine it, the following

reference dates apply.

- **Progress payments** – 20 business days after work was first carried out or goods or services were first supplied. Subsequent payment claims may then be made every 20 business days until the job is completed.
- **Single or one-off payments** – the day after the work was last carried out or the goods or services were last supplied under the contract.
- **Final payments** – the day after the end of any period under the contract for rectifying defects or omissions, or the day after the final certificate is issued. If neither of these applies, the reference date is the day after the work was last carried out or the goods or services were last supplied under the contract.

REQUIRED INFORMATION

A payment claim must:

- identify the construction work or related goods and services to which the payment relates
- indicate the amount of money that you claim is due (the 'claimed amount')
- include the 'Security of Payment Statement':
'This is a payment claim under the Building and Construction Industry Security of Payment Act 2002.'

SERVING THE PAYMENT CLAIM ON THE RESPONDENT

The payment claim must be served on the respondent within the time required by the contract or the SOP Act.

The payment claim can be served by delivering it in person to the respondent, lodging it during normal business hours at the respondent's ordinary place of business, posting or faxing it to



the respondent's ordinary place of business, or in any manner specified in the contract.

The payment claim is not served until it is received by the respondent or at the respondent's ordinary place of business. If it is posted, service is two business days after the day on which it was posted. If it is faxed, service is immediate unless the fax is sent after 4pm, in which case service is the next day.

NOTES FOR THE CLAIMANT

Completing this Form

Security of Payment Statement

Ensure the payment claim includes the Security of Payment Statement. The payment claim must include this statement.

1 Claimant's Details

Provide the name of the person or company that entered into the contract with the respondent and provide the contact details for your ordinary place of business.

2 Respondent's Details

Provide the name of the person or company that entered into the contract with you and the contact details for their ordinary place of business.

3 Project/Site/Job Description

Provide sufficient information to identify the project or site that you worked on, or provided goods or services to.

4 Payment Claim Number

For future reference, it is useful to assign the payment claim a number.

5 Payment Type

Specify the type of payment you are claiming.

You can claim for the following types of payments under the SOP Act.

- Payment based on a reference date. This refers to a payment based on a reference date determined by the contract or specified in the SOP Act. State the period of time the claim covers.
- Milestone payment. This refers to a payment based on an event or a date specified by the contract.
- Single or one-off payment.
- Final payment.

6 Due Date

The due date is the date specified by the contract or, if not specified by the contract, 10 business days after the payment claim is made.

7 Payment Claim Summary

Specify the amount you claim is due. The payment claim must include this information.

8 Construction work done or related goods and services for which this claim is made

You must identify the construction work or related goods and services to which the progress payment relates. The payment claim must include this information.

The tables distinguish between work done or goods or services supplied within the scope of the original contract and anything you have done for the respondent which is a variation to the contract.

9 List of Attachments

Attach any relevant information to support the claimed amount e.g. contract, completion certificates and delivery dockets. List the attached documents on the form.

10 Signature of Claimant

Check that the details you have provided are accurate and then sign the form.





ADDITIONAL INFORMATION

Claimable variations

The payment claim may include amounts for variations to the contract.

The SOP Act specifies which variations may be claimed in a payment claim, and which may not. Variations which may be claimed are called claimable variations.

Claimable variations include variations on which the parties agree and some disputed variations. All agreed variations may be included in a payment claim. Some disputed variations may be claimed in payment claim if the parties do not agree about certain matters which are specified in the SOP Act.

For more information, see the VBA's website and [Fact Sheet 4: Claimable Variations and Excluded Amounts](#).

Excluded amounts

The payment claim must not include any 'excluded amount'.

An excluded amount is:

- any amount that relates to a variation of the construction contract that is not a claimable variation
- 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 latent conditions, time related costs and changes in regulatory requirements
- any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract
- any amount in relation to a claim arising at law other than under the construction contract.

2. VBA Sample Form – Payment Schedule



Payment Schedule – Sample Form

This sample form can help you to prepare a payment schedule under the *Building and Construction Industry Security of Payment Act 2002*.

WHY THIS IS A 'SAMPLE' FORM

The *Building and Construction Industry Security of Payment Act 2002* (the SOP Act) does not require you to use any particular form for a payment schedule.

This form can help you to prepare a payment schedule in response to a payment claim. You can use it, adapt it for your purposes, or decide not to use it at all.

BEFORE YOU START

Check to ensure that you provide the payment schedule on time

The payment schedule must be served on the claimant within the time required by the contract or within 10 business days after you were served with a payment claim – whichever is earlier.

REQUIRED INFORMATION

A payment schedule must:

- identify the payment claim to which it relates
- indicate the amount of payment (if any) that you propose to make (the 'scheduled amount')
- if the scheduled amount is less than the claimed amount, indicate why there is a difference and if you are withholding payment provide reasons for withholding payment
- identify any amount of the claim you allege is an excluded amount.

SERVING THE PAYMENT SCHEDULE ON THE CLAIMANT

The payment schedule can be served by

delivering it in person to the claimant, lodging it during normal business hours at the claimant's ordinary place of business, posting or faxing it to the claimant's ordinary place of business, or in any other manner specified in the contract.

The payment schedule is not served until it is received by the claimant or at the claimant's ordinary place of business. If it is posted, service is two business days after the day on which it was posted. If it is faxed, service is immediate unless the fax is sent after 4pm, in which case service is the next business day.

Consequences of not providing a payment schedule

If you do not provide a payment schedule and do not pay the claimed amount on or before the due date you become liable to pay the full amount claimed on the due date for payment.

The claimant may recover this amount as a debt due in court or apply for adjudication. In either case, you may incur associated court or adjudication costs as well as having to pay the amount claimed. You may also be charged interest on the unpaid claimed amount from the due date for payment.

In the meantime, the claimant has the right to suspend work or cease supplying related goods and services under the contract until the dispute is resolved or payment is made.

If you fail to provide a payment schedule, the claimant must give you written notice of their intention to apply for adjudication. You then have two business days to provide a payment schedule.

If the claimant applies for adjudication, a respondent who has not provided a payment schedule may not submit an Adjudication Response or apply for a review of the adjudicator's determination.



NOTES FOR THE RESPONDENT

Completing this Form

1 Respondent's Details

Provide the contact details for your ordinary place of business.

2 Claimant's Details

These are likely to have been provided by the claimant on the payment claim, if not on the contract.

3 Project/Site/Job Description

Provide sufficient information to identify the project or site that the claimant worked on, or provided goods or services to.

4 Payment Claim Details

You must identify the payment claim. The payment schedule must include this information. Provide as much information as you can from the payment claim itself.

5 Scheduled Amount

Indicate the amount of the payment (if any) that you propose to make. This is the scheduled amount. The payment schedule must include this information.

6 Description of work, goods or services and amounts

The claimed amount is the amount that the claimant is seeking from you, as shown on the payment claim.

The scheduled amount is the amount you propose to pay.

The amount withheld is the amount that you do not agree to pay for any reason.

7 Reasons for withholding payment (including excluded amounts)

If you are withholding payment for any reason, you must show how much is being withheld and why. The payment schedule must include this information.

The payment schedule must also identify any amount of the claim that you allege to be an excluded amount.

8 List of Attachments

Attach copies of any documents that will help to explain a difference between the claimed amount and the scheduled amount. List the attached documents on the form.

9 Signature of Respondent

Check that the details you have provided are accurate and then sign the form.

ADDITIONAL INFORMATION

Claimable variations

The payment claim may include amounts for variations to the contract.

The SOP Act specifies which variations may be claimed in a payment claim, and which may not. Variations which may be claimed are called claimable variations.

Claimable variations include variations on which the parties agree and some disputed variations. All agreed variations may be included in a payment claim. Some disputed variations may be claimed in payment claim if the parties do not agree about certain matters which are specified in the SOP Act.

For more information, see the VBA's website and [Fact Sheet 4: Claimable Variations and Excluded Amounts](#).



Excluded amounts

The payment claim must not include any 'excluded amount'.

An excluded amount is:

- any amount that relates to a variation of the construction contract that is not a claimable variation
- 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 latent conditions, time related costs and changes in regulatory requirements
- any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract
- any amount in relation to a claim arising at law other than under the construction contract.

3. VBA Sample Form – Section 18(2) Notice



Section 18(2) Notice – Notice of intention to apply for adjudication and opportunity to provide payment schedule

This sample form can help you to prepare a section 18(2) notice under the *Building and Construction Industry Security of Payment Act 2002*.

WHY THIS IS A ‘SAMPLE’ FORM

The *Building and Construction Industry Security of Payment Act 2002* (the SOP Act) does not require you to use any particular form for a section 18(2) notice.

This form can help a claimant to prepare a section 18(2) notice that notifies the respondent of the claimant’s intention to apply for adjudication and the respondent’s opportunity to provide a payment schedule.

REQUIRED INFORMATION

A section 18(2) notice must notify the respondent of the claimant’s intention to apply for adjudication of the payment claim.

The section 18(2) notice gives the respondent an opportunity to provide a payment schedule to the claimant within two business days after receiving the claimant’s section 18(2) notice.

When is a section 18(2) notice required

A claimant is required to notify the respondent of the claimant’s intention to apply for adjudication of the payment claim when:

- the respondent fails to provide a payment schedule to the claimant, and
- the respondent fails to pay the whole or any part of the claimed amount by the due date for payment.

In those circumstances the claimant cannot make an adjudication application unless the claimant has given the respondent a notice under section 18(2) of the SOP Act.

Ensure the section 18(2) notice is provided within time

A section 18(2) notice must be served on the respondent within 10 business days immediately following the due date for payment.

The due date for payment is the date specified in the contract or, if not specified by the contract, 10 business days after the payment claim is made.

PROCEDURAL INFORMATION

The claimant’s entitlement to make an adjudication application

Where the respondent fails to provide a payment schedule to the claimant and fails to pay the whole or any part of the claimed amount by the due date for payment, a claimant may make an adjudication application only if:

- the claimant notifies the respondent of the claimant’s intention to apply for adjudication of the payment claim, and
- that notice is provided within 10 business days immediately following the due date for payment, and
- the respondent has been given an opportunity to provide a payment schedule to the claimant within two business days after receiving the claimant’s notice under section 18(2).

Adjudication application

A claimant that has served a section 18(2) notice may make an adjudication application – whether or not the respondent provides a payment schedule – within five business days after the end of the two day period referred to in the section 18(2) notice.

The claimant must make the adjudication

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application within five business days after, but not before, the end of the two day period referred to in the section 18(2) notice.

SERVING THE SECTION 18(2) NOTICE ON THE RESPONDENT

A section 18(2) notice can be served by delivering it in person to the respondent, lodging it during normal business hours at the respondent's ordinary place of business, posting or faxing it to the respondent's ordinary place of business, or in any manner specified in the contract.

The section 18(2) notice is not served until it is received by the respondent or at the respondent's ordinary place of business. If it is posted, service is two business days after the day on which it was posted. If it is faxed, service is immediate unless the fax is sent after 4pm, in which case service is the next day.

NOTES FOR THE CLAIMANT

Completing a section 18(2) notice

1 Claimant's Details

Provide the name of the person or company that entered into the contract with the respondent and provide the contact details for your ordinary place of business.

2 Respondent's Details

Provide the name of the person or company that entered into the contract with you and the contact details for their ordinary place of business.

3 Payment Claim Details

Identify the payment claim number, if used, and provide sufficient information to identify the project or site that you worked on, or provided goods or services to.

Identify the contract number, if applicable, and relevant contract details.

Specify the claimed amount – the amount you claimed in the payment claim.

The due date for payment is the date specified in the contract or, if not specified by the contract, 10 business days after the payment claim is made.

Specify the date the payment claim was served on the respondent.

4 Notice requirements

The notice must notify the respondent that the claimant intends to apply for adjudication of the payment claim.

The notice must include sufficient information and be served in a manner that meets the procedural information and requirements of a section 18(2) notice, including:

- notifying the respondent of the claimant's intention to apply for adjudication of the payment claim, and
- advising the respondent that they have an opportunity to provide a payment schedule to the claimant within two business days after receiving the claimant's notice under section 18(2), and
- advising that whether or not the respondent provides a payment schedule the claimant may make an adjudication application within five business days after the end of the two day period referred to in the notice.

5 Signature of Claimant

Check that the details you have provided are accurate and then sign the notice.



SAMPLE SECTION 18(2) NOTICE – NOTICE OF INTENTION TO APPLY FOR ADJUDICATION AND OPPORTUNITY TO PROVIDE PAYMENT SCHEDULE

1 Claimant's Details

Company	
Contact Person	
Address	
Phone	Fax

2 Respondent's Details

Company	
Contact Person	
Address	
Phone	Fax

3 Payment Claim Details

Payment Claim Number	
Project/Site/Job Description	
Contact Number (if applicable)	
Date of Contract	DD/MM/YYYY
Base contract	\$
Claimable variations	\$
Total (the 'claimed amount')	\$
Due Date for Payment	DD/MM/YYYY
Date Payment Claim served on Respondent	DD/MM/YYYY

4 Notice requirements

NOTICE UNDER SECTION 18(2) OF THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002

This is a notice under section 18(2) of the *Building and Construction Industry Security of Payment Act 2002*.
 The respondent is notified that the claimant intends to apply for adjudication of the payment claim referred to above.
 The respondent is advised that they have an opportunity to provide a payment schedule to the claimant within two business days after receiving this notice.
 The respondent is advised that whether or not the respondent provides a payment schedule the claimant may make an adjudication application within five business days after the end of the two day period referred to above.

5 Signature of Claimant

Signature of Claimant	
Date	DD/MM/YYYY



4. VBA Sample Form – Adjudication Response



SAMPLE FORM

Adjudication Response – Sample Form

This sample form can help you to prepare an adjudication response under the *Building and Construction Industry Security of Payment Act 2002*.

WHY THIS IS A 'SAMPLE' FORM

The *Building and Construction Industry Security of Payment Act 2002* (the SOP Act) does not require you to use any particular form for an adjudication response.

This form can help you to prepare an adjudication response. You can use it, adapt it for your purpose, or decide not to use it all.

BEFORE YOU START

When you can make an adjudication response

You may lodge a response to the claimant's adjudication application only if you provided a payment schedule to the claimant within the time specified by the SOP Act.

Your adjudication response must be lodged with the adjudicator within:

- five business days after receiving a copy of the application, or
- two business days after receiving notice of an adjudicator's acceptance of the application
- whichever is the later.

Relevant principal

A relevant principal is any person who has engaged the respondent under a contract to provide construction work, goods or services, if the work that the claimant has done or the goods or services that the claimant has supplied under the contract to the respondent is, or is part of or incidental to, the construction work, goods or services that the respondent was engaged to

carry out or supply.

The adjudicator must notify any relevant principal of the adjudication application.

Submissions relevant to the adjudication response

The adjudication response may contain any submissions relevant to the response that the respondent chooses to include. Copies of documents relevant to the submissions should be attached.

The respondent should make the adjudicator aware of any reasons for withholding payment which were provided in the payment schedule. The adjudicator is required to inform the claimant of these reasons, following which the claimant has two business days to lodge a response to those reasons with the adjudicator.

REQUIRED INFORMATION

An adjudication response must:

- identify the adjudication application to which it relates
- include the name and address of any relevant principal of the respondent
- include the name and address of any other person who the respondent knows has a financial or contractual interest in the matters that are the subject of the adjudication application
- identify any amount of the payment claim that the respondent alleges is an excluded amount.

SERVING THE ADJUDICATION RESPONSE ON THE CLAIMANT

A copy of the adjudication response (including attachments) must be served on the claimant, preferably at the same time as the original is



lodged with the adjudicator. The claimant's copy of the response can be served by delivering it in person, lodging it during normal business hours at the claimant's ordinary place of business, posting or faxing it to the claimant's ordinary place of business or in any manner specified in the contract.

The adjudication response is not served until it is received by the claimant or at the claimant's ordinary place of business. If it is posted, service is two business days after the day in which it was posted. If it is faxed, service is immediate unless the fax is sent after 4pm, in which case service is the next day. Provide the contact details for your ordinary place of business.

NOTES FOR THE RESPONDENT

Completing this Form

1 Adjudication Application Details

An adjudication response must identify the adjudication application to which it relates. The adjudication response must include this information.

2 Respondent's Details

Provide your name and contact details for your ordinary place of business.

3 Relevant Principal

Provide the name(s) of any relevant principal. The adjudication response must include this information.

4 Other Relevant Persons

The adjudication response must provide details of any company or individual (other than a relevant principal) who you know has a financial or contractual interest in the matters that are the subject of the adjudication application. The adjudication response must include this information.

5 Payment Schedule Details

If you have not given the claimant a payment schedule within the time required by the SOP Act you may not lodge an Adjudication Response.

6 Reasons for Withholding Payment

Clearly identify any new reasons for withholding payment. If you identify any new reasons, the adjudicator must inform the claimant. The claimant will then have two business days to lodge a response to those reasons with the adjudicator.

7 Excluded Amounts

Your adjudication response must identify any amount of the payment claim that you allege is an excluded amount.

8 Submissions Relevant to the Response

Provide any relevant information or argument in response to the claim that you want the adjudicator to take into consideration.

If necessary, set out your argument and further information in a separate document and attach it to the application.

9 List of Attachments

You should provide documents which support your submissions.

10 Signature of Respondent

Check that the details you have provided are accurate and then sign the form.

ADDITIONAL INFORMATION

Claimable variations

The payment claim may include amounts for variations to the contract.

The SOP Act specifies which variations may be claimed in a payment claim, and which may not.





Variations which may be claimed are called claimable variations.

Claimable variations include variations on which the parties agree and some disputed variations. All agreed variations may be included in a payment claim. Some disputed variations may be claimed in payment claim if the parties do not agree about certain matters which are specified in the SOP Act.

For more information, see the VBA's website and [Fact Sheet 4: Claimable Variations and Excluded Amounts](#).

Excluded amounts

The payment claim must not include any 'excluded amount'.

An excluded amount is:

- any amount that relates to a variation of the construction contract that is not a claimable variation
- 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 latent conditions, time related costs and changes in regulatory requirements
- any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract
- any amount in relation to a claim arising at law other than under the construction contract.



ADJUDICATION RESPONSE – SAMPLE FORM

1 Adjudication Application Details

Claimant
(ANA)
Adjudicator nominated by ANA
Application number assigned by ANA
Date you received a copy of the application DD/MM/YYYY
Date you received notice that the Adjudicator accepted the application DD/MM/YYYY

2 Respondent's Details

Company
Contact Person
Address
Phone Fax

3 Relevant Principal

Company
Contact Person
Address
Phone Fax

4 Other Relevant Persons

Company
Contact Person
Address
Phone Fax

5 Payment Schedule Details

Date of Payment Schedule DD/MM/YYYY
Date the Payment Schedule was provided to the Claimant DD/MM/YYYY
Amount claimed in Payment Claim (the 'claimed amount') \$
Amount you propose to pay (the 'scheduled amount') \$
Amount withheld \$

6 Reasons For Withholding Payment

Are there any reasons for withholding payment that you did not include in the Payment Schedule?

No

Yes Set out the amounts and reasons in your submissions relevant to the response.

7 Excluded Amounts

Do you allege that any amount of the payment claim is an 'excluded amount'?

No

Yes Total amount \$
Identify all alleged 'excluded amounts' in your submissions relevant to the response.



8 Submissions Relevant to the Response

9 List of Attachments

10 Signature of Respondent

Signature of Respondent
Date DD/MM/YYYY

5. SOP Regulations – Form 1 – Notice of Intention to Exercise Lien

FORM 1

Regulation 6

Building and Construction Industry Security of Payment Regulations 2013

NOTICE OF INTENTION TO EXERCISE LIEN

Section 12A(1) of the Building and Construction Industry Security of Payment Act 2002

To: *[name and address of ordinary place of business of respondent]*

Under section 12(1) of the Building and Construction Industry Security of Payment Act 2002 (*the Act*), a progress payment became due and payable to me by you under the construction contract between you and me dated *[insert date and other information identifying the construction contract]*.

The progress payment became due and payable on *[date]* *in accordance with the terms of the construction contract* because 10 business days have passed since *[insert date of service]* being the date on which I served a payment claim on you.

The progress payment is in respect of the following *construction work carried out/*related goods and services supplied by me under the construction contract:

[insert details of construction work, including the time and place the work was carried out, OR details of related goods and services supplied, including the time and place they were supplied, OR details of both]

I supplied the following *unfixed plant/*materials in connection with carrying out the construction work under the construction contract:

[clearly identify the unfixed plant or materials to which this notice refers]

At the date of this notice, I have not received the progress payment. Accordingly, I intend to exercise a lien in respect of the unpaid amount of the progress payment over the *unfixed plant/*materials listed above.

The lien will be extinguished when I receive the progress payment.

Signature of claimant:

Print name and address of ordinary place of business of claimant:

6. SOP Regulations – Form 2 – Notice of Claim

FORM 2

Regulation 7

Building and Construction Industry Security of Payment Regulations 2003

NOTICE OF CLAIM

(Section 32(2) of the Building and Construction Industry Security of Payment Act 2002)

To: *[name and address of ordinary place of business of principal]*

An *adjudicator/*review adjudicator has determined that an adjudicated amount is payable by *[insert name and address of ordinary place of business of respondent]* (the *respondent*) to me, in respect of a construction contract dated *[insert relevant date of contract]* between the respondent and me. The adjudicated amount is in respect of:

[insert details of construction work, including the time and place the work was carried out, OR details of related goods and services supplied, including the time and place they were supplied, OR details of both]

A debt certificate has been issued under section 33 of the Building and Construction Industry Security of Payment Act 2002 (*the Act*) by the *[insert name of Court]* dated *[insert date certificate was issued]*. A copy of the debt certificate is attached.

Unless, on your application, a court grants a stay of payments under section 37 of the Act, section 35 of the Act provides that, after this notice of claim is served on you, you are required to pay me the amount you owe to the respondent under a related contract with the respondent. The amount you are required to pay me is set out in the attached debt certificate.

You are required to pay this amount by making payments to me as they become payable under the related contract with the respondent (see section 35 of the Act).

If you fail to make any payment in accordance with section 35 of the Act, I am entitled under section 38 of the Act to sue you and recover the debt.

Dated:

Signature of claimant:

Print name and address of ordinary place of business of claimant:
*delete whichever is not applicable

(See attached debt certificate)

7. SOP Regulations – Form 3 – Debt Certificate

FORM 3

Regulation 8

Building and Construction Industry Security of Payment Regulations 2003

DEBT CERTIFICATE

(Section 33(2) of the Building and Construction Industry Security of Payment Act 2002)

IN THE *[name of court]* of VICTORIA
AT *[insert place]*

In proceedings between:
[name of claimant] ("Claimant")

of *[address of ordinary place of business]*

and

[name of respondent] ("Respondent")
of *[address of ordinary place of business]*

ORDER

On the application of the Claimant under section 33 of the **Building and Construction Industry Security of Payment Act 2002**, judgment having been *given/*entered in these proceedings on *[insert date of judgment]* for the recovery of *[insert adjudicated amount]*, being an adjudicated amount, IT IS CERTIFIED that the amount of *[insert judgment amount]* is a debt owed by the Respondent to the Claimant.

Date of issue: *[insert relevant date]*

[Signature of relevant court officer]

[Court seal]

*delete whichever is not applicable

8. SOP Regulations – Form 4 – Discharge Notice

FORM 4

Regulation 9

Building and Construction Industry Security of Payment Regulations 2003

DISCHARGE NOTICE

(Section 40(2) of the Building and Construction Industry Security of Payment Act 2002)

To: *[name and address of ordinary place of business of *principal/*respondent]*

For the purposes of section 40(2) of the **Building and Construction Industry Security of Payment Act 2002** (*the Act*), I acknowledge your payment of \$ to me as *partial/*full discharge of the amount owed to me specified in the debt certificate issued by the *[insert name of Court]* under section 33 of the Act on *[insert date debt certificate issued]*. A copy of the debt certificate is attached.

Dated:

Signature of claimant:

Print name and address of ordinary place of business of claimant:

*delete whichever is not applicable

(See attached debt certificate)

9. SOP Regulations – Form 5 – Notice of Names of Persons From Whom a Claimant May Recover

FORM 5

Regulation 10

Building and Construction Industry Security of Payment Regulations 2003

NOTICE OF NAMES OF PERSONS FROM WHOM A CLAIMANT MAY RECOVER

(Section 41(1) of the **Building and Construction Industry Security of Payment Act 2002**)

To: *[name and address of ordinary place of business of claimant]*

For the purposes of section 41(1) of the **Building and Construction Industry Security of Payment Act 2002** (*the Act*), in response to your demand of *[insert date of demand]* for this notice, I notify you that, under a contract with the following *person/*persons:

[insert name(s) of person(s)]

I have *carried out the following construction work/*supplied the following related goods and services:

[insert details of construction work, including the time and place the work was carried out, OR details of the goods and services, including the time and place they were supplied, OR details of both]

I provide this notice in the knowledge that, if I give it knowing that it is false or misleading in a material particular, I am guilty of an offence and liable to a penalty under section 41(2) of the Act.

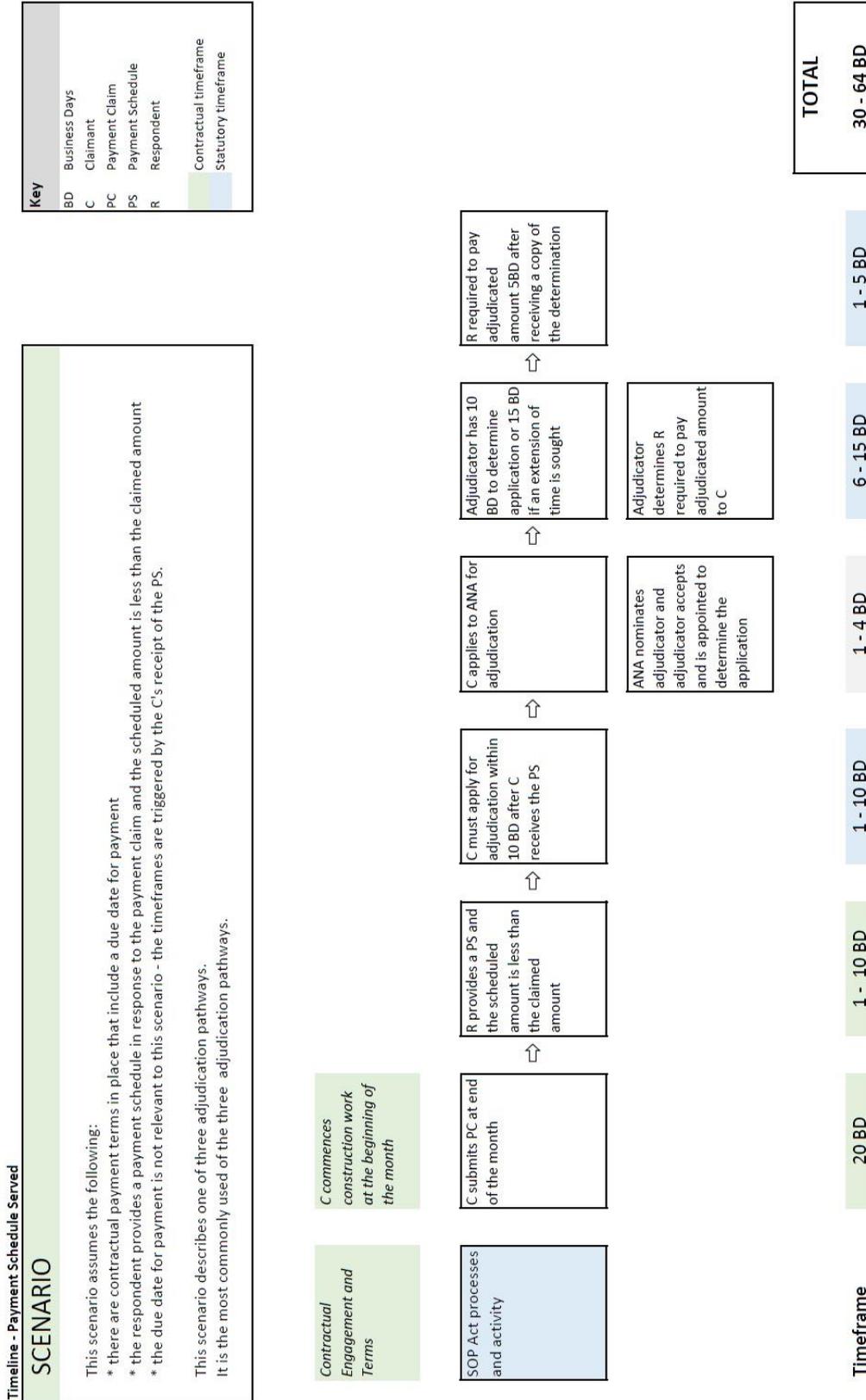
Dated:

Signature of respondent:

Print name and address of ordinary place of business of respondent:

*delete whichever is not applicable

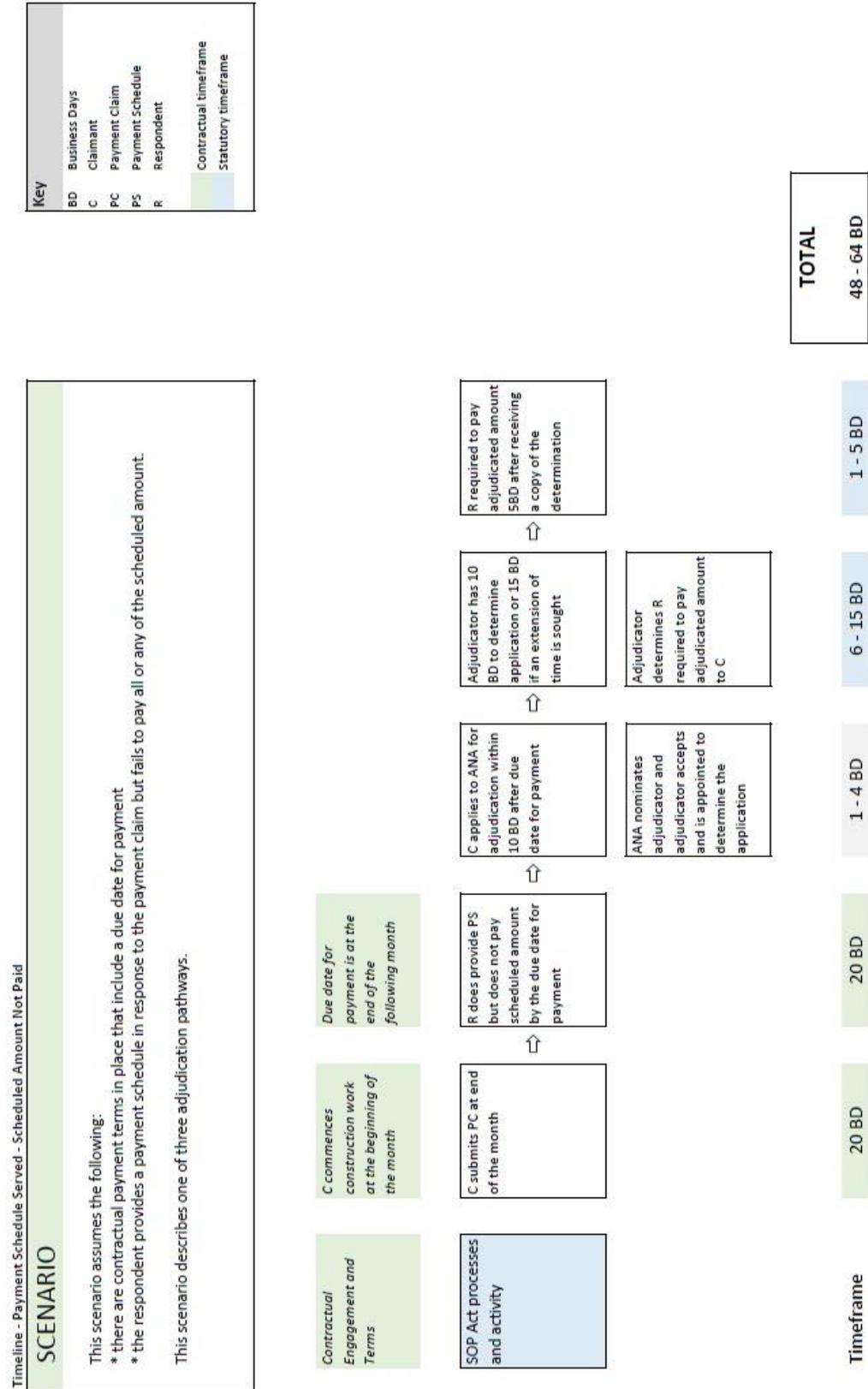
10. Timeline – Payment Schedule Served



Key

- BD Business Days
- C Claimant
- PC Payment Claim
- PS Payment Schedule
- R Respondent
- Contractual timeframe
- Statutory timeframe

12. Timeline – Payment Schedule Served – Scheduled Amount Not Paid



Key

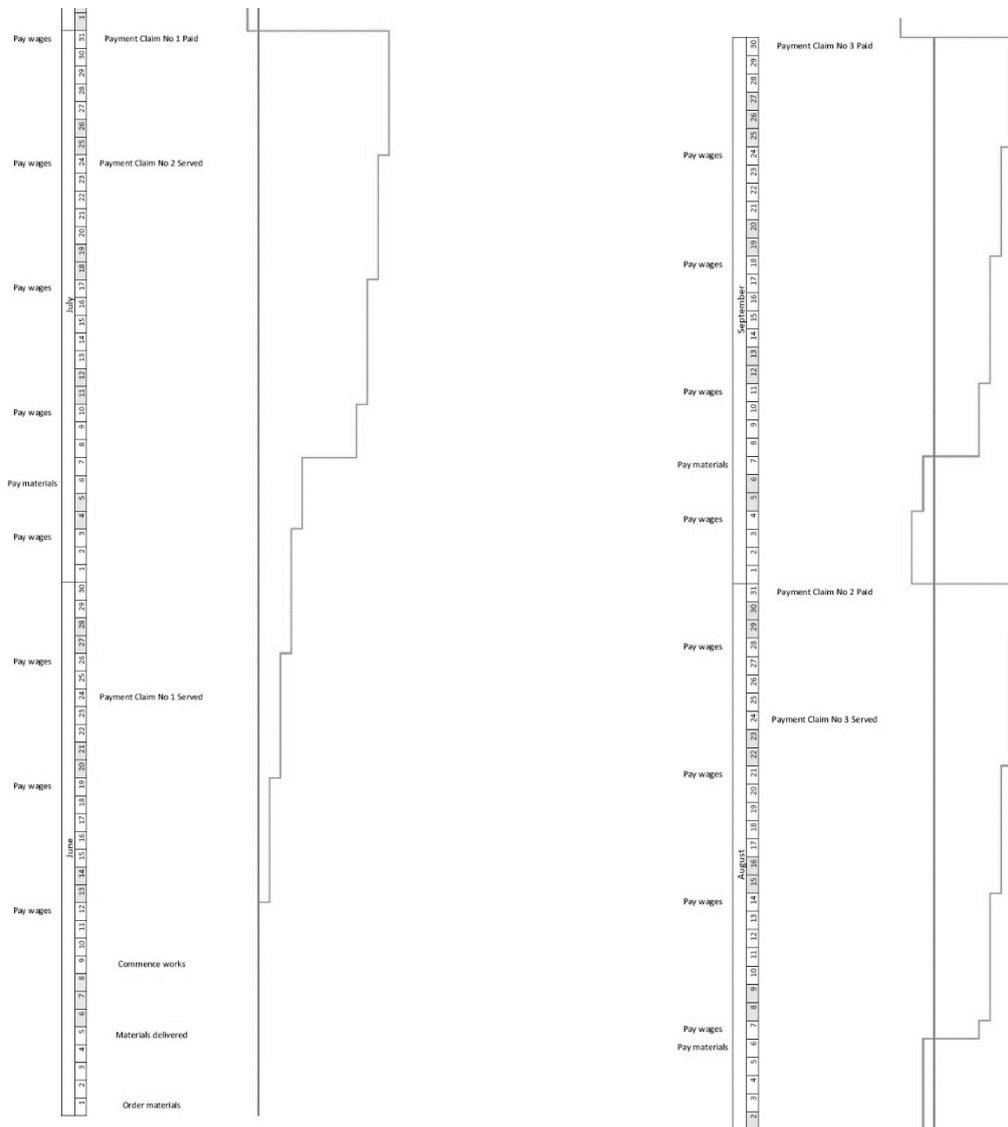
BD	Business Days
C	Claimant
PC	Payment Claim
PS	Payment Schedule
R	Respondent
	Contractual timeframe
	Statutory timeframe

13. Cash Conversion Cycle

Scenario:

- Contract is awarded on 1 June
- Materials ordered 1 June
- Employee wages paid each Friday
- Materials supplied on 30 day account
- Payment Claims submitted on the 24th of each month
- Payment of Payment Claim made on the last day of the month following the Payment Claim
- No cash retention

You will see from the simple diagrams below that the contractor must be able to accommodate significant expenditure in materials and wages before payment of the first Payment Claim is received.



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