Explaining Security of Payments Legislation (Victoria) in Plain English

Joel A Silver[*]
Barrister

Level 19
Owen Dixon Chambers West
525 Lonsdale Street
Melbourne Vic 3000

(03) 9225 6604
jsilver@vicbar.com.au

Author's Note (17 April 2025): This paper was originally published on 2 June 2020, and aspects of the paper may not reflect the law of today.

Table of Contents #

[*] LLB (Hons) (Melb), GDLP (Leo Cussen Institute), LLM (Melb). With thanks to both my clerk Susan Wilkes and my research assistants Daniel Ho and Adam Kahlberg for their proof-reading assistance. Credit also due to Dr Matthew Bell of Melbourne Law School for his encouragement to write this practice paper. Any remaining errors remain my own.

Overview

1. This paper is a guide to legal practitioners needing to understand, in a short period of time, the essentials of the *Building and Construction Industry Security of Payment Act* 2002 (Vic) – which I will call '**the SOPA**' – where that particular law is not ordinarily in your area of practice.

2. SOPA is a statutory framework that allows contractors to obtain "interim" progress payments for work performed, subject to their final entitlements under the construction contract. It has a "pay now, argue later" philosophy, and cannot be contracted out of. Other states and territories have similar legislation in place.

3. The mechanism it establishes is best understood by quoting subsection (3) of section 3 ('**Object of the Act**'):

> The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—
> (a) the making of a payment claim by the person claiming payment; and
> (b) the provision of a payment schedule by the person by whom the payment is payable; and
> (c) the referral of any disputed claim to an adjudicator for determination; and
> (d) the payment of the amount of the progress payment determined by the adjudicator; and
> (e) the recovery of the progress payment in the event of a failure to pay.

4. SOPA cannot be read and understood on the first go. It contains more than a few technical nuances, more so than in the other "East Coast model" states which have similar legislation, which can cause difficulties.

5. Nevertheless, SOPA must be understood by any lawyers with clients connected to the construction industry (including homeowners).

6. The legislation has many, tight timeframes, the failure to provide timely advice can have serious financial consequences.

7. It is also important that clients understand their rights if using SOPA (such as contractors' right to suspend works).

8. Clients may need advice–
   (a) before a payment claim is made (for advice on eligibility under SOPA, and the form of payment claims);
   (b) when a claim is received (for advice on how to respond in a payment schedule)
   (c) when a claim has gone unanswered (for advice on recovering money, and if a contractor can walk off the job);
   (d) when a payment schedule comes back (for advice on next steps, including if the schedule indicates nothing will be paid)
   (e) when an adjudication application is received (for advice on participating in that process);
   (f) following adjudication (for advice on pursuing judicial review)

9. The further along advice is first sought, the more difficult it is to assist.

10. This is foundation paper intended for legal practitioners. It provides practical knowledge, ensuring the reader has "minimum competence" to serve clients, including with reference to decided cases (both in Victoria and interstate). It is not a substitute for the proper, considered advice in each case that many SOPA claims will require.

I. Foundation concepts

A. Progress payments

11. SOPA gives contractors a right to claim progress payments, through a regime to one side of their contractual rights.[1]

12. Such payments are "interim" and on account of work done, ensuring cash flow despite any argument as to defects or quality. In other words, it is payment first, subject to further argument. That is to occur once work concludes (or the contract terminated), through ordinary civil proceedings.[2]

13. Progress payments, whether the entitlement is founded in contract or statute, are an exception to the rule that, in an 'entire contract' (also called an '*entire obligation*'), there is no payment obligation before the contract (or obligation) is completely performed (at least, substantially complete).[3]

14. When used by SOPA, "progress payment" can include a final payment, single or one-off payment, and a payment based on an event or date (called 'milestone payments').[4]

15. To understand who can claim such payments, and for what, the starting position is section 1 ('**Purpose**')–

> The main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.

16. From this, it can be observed that a contractor must meet two criteria:
    - **first**, they have must have:
        - carried out construction work; or
        - supplied related goods and services; and

[1] *Building and Construction Industry Security of Payment Act* 2002 (Vic) sub-s 3(4) ('**SOPA (Vic)**')
[2] SOPA (Vic) sub-s 47(3)(b)
[3] Consider discussions in *Hoenig v Issacs* [1952] 2 All ER 176; *Help Tan Hung Nguyen v Luxury Design Homes* [2004] NSWCA 178, *Mann v Paterson Constructions* [2019] HCA 32, [215] (Nettle, Gordon and Edelman JJ)
[4] SOPA (Vic) s 4

- **second**, they must have done so under a "construction contract."

B. Construction work and "related" goods and services

17. These terms are respectively defined in sections 5 and 6 of the SOPA.

18. Section 5 defines "construction work," and is relatively broad, but with certain exclusions (such as for minerals extraction).

19. It includes, in sub-s 5(1)(e), '*any operation which forms an integral part of,* ***or is preparatory to or is for rendering complete***' other construction work, as defined. This means physical work and labour, not the intellectual or professional labour of providing architectural or other services.[5]

20. Section 6 defines related goods and services, and includes many professional services, as can be seen in subsection 6(1)–

> In this Act, ***related goods and services***, in relation to construction work, means any of the following goods and services—
>
> (a) goods of the following kind—
>
> (i) materials and components to form part of any building, structure or work arising from construction work;
>
> (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;
>
> (b) services of the following kind—
>
> (i) the provision of labour to carry out construction work;
>
> (ii) architectural, design, surveying or quantity surveying services in relation to construction work;
>
> (iii) building, engineering, interior or exterior decoration or landscape advisory or technical services in relation to construction work;
>
> (c) any other work of a kind prescribed for the purposes of this subsection.
>
> (my underlining)

[5] *Peter's of Kensington v Seersucker Pty Limited* [2008] NSWSC 897, [40] (McDougall J)

21. It is noted that 'architectural, design, surveying or quantity surveying services' must be 'in relation to' construction work. It does not matter if that construction work is not guaranteed to occur.

22. In *Peter's of Kensington v Seersucker Pty Limited* [2008] NSWSC 897, the owners instructed the defendant to prepare and lodge a town planning application, to allow a reduction of the number of carparking spaces in an approved retail development. Whether the project would go forward was uncertain.

23. McDougall J (at paragraph 31) held (under the New South Wales SOPA) that this was irrelevant, as it is unnecessary that the services '*be the subject of a fixed and certain intention as to its ultimate performance*.'[6]

C. Construction contracts

24. SOPA, which applies to '*any construction contract, whether written or oral, or partly written and partly oral*,' defines construction contract as follows–[7]

> **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.

25. It can immediately be observed that the term "construction contract" can mean either a "contract," or an "other arrangement."

26. As Nicholas J explained in *Okaroo v Vos*:[8]

> *the legislature intends that **"contract" is to be given its common law meaning** and that **"arrangement" means a transaction or relationship which is not enforceable at law** as a contract would be.*

[6] *Peter's of Kensington v Seersucker Pty Limited* [2008] NSWSC 897, [31] (McDougall J)
[7] SOPA (Vic) s 7
[8] *Okaroo v Vos* [2005] NSWSC 45, [41] (Nicholas J)

27. *Okaroo* concerned a developer (Okaroo) who wanted a particular joinery subcontractor (Vos) on their project. Vos, based on past dealings with Okaroo's chosen builder, refused to enter into a subcontract with them.

28. Subsequently, Okaroo paid a direct deposit to Vos, and Vos' subcontract with the builder stated Okaroo (not the builder) would pay Vos monthly. This was held to be an "other arrangement," after the builder went into liquidation and Vos claimed money from Okaroo directly.

D. Jurisdictional exclusions

29. Section 7 of the SOPA states that the Act does not apply to several categories of construction contracts (**this paper only deals with two**).

30. This includes construction contracts that concern–[9]

> (a) construction work carried out outside Victoria; and
> (b) related goods and services supplied <u>in respect of construction work carried out outside Victoria</u>.
>
> (<u>my underlining</u>)

31. Equivalent prohibitions exist in other states.

32. This is important, in preparing the payment claim, because the claim must refer to the right law and the correct jurisdiction: in larger projects that cross state boundaries, that can be vexed.

33. The issue arose in *Shell Refining (Australia) v AJ Mayr Engineering* [2006] NSWSC 94. Modules were fabricated and pre-assembled in New South Wales (the construction work), and then were transported to Geelong for installation in Shell's oil refineries.[10]

[9] SOPA (Vic) sub-s 7(4)
[10] In this context, the delivery of the modules is a 'supply' of plant and materials (which comes under goods). The transport is an element of supply.

34. Shell contended the transport costs fell outside the New South Wales SOPA, but was unsuccessful. Bergin J explained the restriction was inapplicable, as while the modules were supplied (as goods) into Victoria, their supply was '*in respect of construction work*' within New South Wales (that is, the assembly and fabrication of the modules).[11]

E. Excluded domestic building contracts

35. SOPA excludes two "domestic building" construction contracts, with reference to the *Domestic Building Contracts Act* 1995 ('**DBCA**'):
    (a) contracts **between a building owner and a builder**;[12] and
    (b) contracts for the work identified in section 6 of the DBCA relating to a residence (including work carried out by an architect, or building practitioner registered as an engineer or draftsperson, and work used to obtain foundations data).[13]

36. However, there are exceptions to these exceptions.

37. The farthest reaching exception is where the '*building owner*,' or '*the person for whom the work is, or is to be, carried out*,' is in '*the business of building residences*' and the construction contract is '*entered into in the course of, or in connection with, that business*.'

38. Vickery J has observed that the term 'business of building'–[14]

> *connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.*

39. This is a starting point (particularly the word "repetitive"), not a rule: **in practice, the courts look at the facts**.

40. This is simple enough for commercial scale developments (creating multiple dwellings across many floors, and built for an 8-figure sum)[15] – noting even a single project can

---

[11] *Shell Refining (Australia) v AJ Mayr Engineering* [2006] NSWSC 94, [73] (Bergin J)
[12] SOPA (Vic) sub-s 7(2)(b)
[13] SOPA (Vic) sub-s 7(2)(ba)
[14] *Director of Housing v Structx* [2011] VSC 410, [28] (Vickery J), referring to *Hope v Bathurst City Council* (1980) 144 CLR 1, 8-9 (Mason J)
[15] *Maxcon Constructions v Ily Australia* [2017] VCC 1382, [20]-[22] (Burchell JR)

occur "in the business of building"[16] – or when a respondent has a history of building, even if the projects proved unsuccessful.[17]

41. It is more complex when a two-to-three lot subdivision is concerned, leading to debate on if the owners intend to house their family.[18]

42. If the respondent is "in the business," a proceeding under SOPA is not a "domestic building dispute" under the DBCA, and VCAT is not a "court of competent jurisdiction" under the SOPA. VCAT cannot hear such a proceeding, and it cannot be stayed under the DBCA.[19]

43. The importance of this "exception to the exception" is that it determines if SOPA applies or not. An adjudicator determining otherwise has adjudicated in the absence of a necessary jurisdictional fact, which their determination cannot bring into existence. This is discussed later.

[16] *Ian Street Developer v Arrow International* (2018) 54 VR 721, 749 (Riordan J), referring to *United Dominions Corporation v Brian Pty Ltd* (1985) 157 CLR 1, 15 (Dawson J)
[17] *Promax Building Developments v P Carol* [2017] VCC 495, [25]-[28] (Anderson J)
[18] *Golets v Southbourne Homes* [2017] VSC 705, [54] (Vickery J)
[19] *Domaine Homes (Vic) (ACN 090 713 732) v Ria Building* [2005] VCC 111; *Glenrich Builders v 1-5 Grantham Street & 415 Brunswick Road* [2008] VCC 1170

II. Claiming payment

A. Reference dates

44. Contractors who undertake construction work (or supplies related goods and services) '*under a construction contract*' are entitled to a progress payment, '[o]*n and from each reference date*.'[20]

45. Reference dates accrue either:[21]
    - if the contract has a progress payment mechanism, when determined by the contract; or
    - if the contract is silent, 20 business days after the first date of work or supply, and reoccurring every 20 business days.

    Different rules exist for the reference dates arising for single and one-off payments (as distinct from milestone payments) and final claims.[22]

46. Unless a reference date exists, a contractor cannot claim payment.

47. It should be noted that, in John Murray AM's *Review of Security of Payment Laws* (December 2017), the "reference dates" concept has been slated for abolition, and New South Wales has replaced it with a blanket, end of month entitlement to claim payment.[23]

48. Once a reference date accrues, a contractor can make a progress claim for up to 3 months following the reference date (other states are more generous, New South Wales allowing a claim for up to 12 months).[24] Under current legislation, reference dates cease to accrue following termination,[25] although this has been modified in New South Wales.[26]

B. Format of payment claims

---

[20] SOPA (Vic) sub-s 9(1)
[21] SOPA (Vic) sub-s 9(2)(a)-(b)
[22] SOPA (Vic) sub-s 9(2)(c)-(d)
[23] *Building and Construction Industry Security of Payment Act 1999* (NSW), sub-s 13(1A)
[24] SOPA (Vic) sub-s 14(4)
[25] As discussed in *Southern Han Breakfast Point (in liq) v Lewence Construction* (2016) 260 CLR 340. The case stands for the proposition, amongst other things, that the existence of a reference date is a jurisdictional fact.
[26] *Building and Construction Industry Security of Payment Act 1999* (NSW), sub-s 13(1C).

49. Unsurprisingly, claiming payment under the SOPA requires contractors to pay close attention to the legislation itself.

50. Section 14 ('**Payment claims**') provides–

> (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
>
> (2) 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) The claimed amount—
>
> (a) may include any amount that the respondent is liable to pay the claimant under section 29(4);
>
> (b) must not include any excluded amount
>
> …
>
> (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.
>
> (my underlining)

51. Subsection 14(2) is the critical section, though as Victoria has no prescribed forms or information,[27] sub-s 14(2)(a) and (b) are superfluous.

[27] Despite the urging of Vickery J. See *Hickory Developments v Schiavello (Vic)* (2009) 26 VR 112, 123 [52]; *Gantley v Phoenix International Group* [2010] VSC 106 [139] *Facade Treatment Engineering v Brookfield Multiplex Constructions* [2015] VSC 41 [26]-[27]

52. It is relatively straightforward to comply with sub-s 14(2)(d) and (e) (that is, to state the claim amount in dollars, and state that the claim is made under the *Building and Construction Industry Security of Payment Act* 2002). Courts do not treat abbreviating or misspelling the legislation as a cardinal sin.[28]

53. It is sub-s 14(2)(c), requiring a claim '*identify the construction work or related goods and services to which the progress payment relates*,' that is more vexed, and often depends on the particular facts of the case. I deal with that under the next subheading.

54. A payment claim does not, however, have to identify the reference date it is made against. This leaves leeway to argue multiple claims were lodged against the same reference date (which sub-s 14(8) prohibits).

C. Identification of construction work in payment claims

55. The precision required in identifying construction work (or related goods and services) depends on the given case.

56. The information must be in a form meaningful to the parties.[29] The meaning must be understood in the context of the project and the contract: there is no need to go into the nuts and bolts.[30]

57. As Palmer J explained, in *Multiplex Constructions v Luikens* [2003] NSWSC 1140, payment claims (and schedules) are made in a particular context:[31]

> *A payment claim and a payment schedule are, in many cases, given and* ***received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim****. A payment claim and a payment schedule must be produced quickly;* ***much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves****. A payment claim and a payment schedule*

[28] *Hawkins Construction v Macs Industrial Pipework* (2001) 163 FLR 18, 24 (Windeyer J)
[29] *Isis Projects v Clarence Street* [2004] NSWSC 714, [52] (McDougall J)
[30] Ibid. [54] (McDougall J)
[31] *Multiplex Constructions v Luikens* [2003] NSWSC 1140, [76] (Palmer J)

should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.

58. McDougall J's guidance is that the following satisfies the legislation:[32]

> *(1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;*
> *(2) That reference is supplemented by a single line item description of the work;*
> *(3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;*
> *(4) There is a summary that pulls all the details together and states the amount claimed.*

In other words, an itemised invoice.

59. While it may take some time to set all this information out, contractors can usually supply it. Sources include their original quotations (preferably itemised), work diaries, equipment hire dockets, labour dockets, and claims made on the contractor by their subcontractors.

60. It is not unhelpful to include the supporting information as an annexure to the claim document itself (given it can substantiate the claim).

61. While all information should be contained in the one document, the case law permits some reference to other documents. For example, in *John Beever v Paper Australia* [2019] VSC 126, Lyons J held two tax invoices, whose sole detail was reference to earlier *contractual* claims (that is, not made under SOPA), met the identification requirement.

62. His Honour summarised the authorities as follows:[33]

> *(1) the test of whether a claim is a payment claim for the purpose of the Act is objective;*
> *(2) however, the manner in which compliance is tested is not overly demanding and should not be approached in an unduly technical manner or from an unduly critical point of view;*

---

[32] *Isis Projects v Clarence Street* [2004] NSWSC 714, [37] (McDougall J); His Honour's observations were approved on appeal.
[33] *John Beever v Paper Australia* [2019] VSC 126, [83] (Lyons J)

(3) for the purposes of the identification requirement, it is necessary that the payment claim reasonably identifies the construction work to which it relates such that the basis of the claim is reasonably comprehensible to the recipient party when considered objectively i.e. from the perspective of a reasonable party who is in the position of the recipient;

(4) in evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties from their past dealings and prior exchanges of information including correspondence passing between them before and at the time of the payment claim. To that extent, the Court may go beyond the face of the document itself.

63. His Honour also noted Mason P's observation that:[34]

> *payment claims are to be read in context, including the context of industry conventions and the usage adopted by the parties in their earlier contractual dealings. Construction work for which a claim is made may be identified by reference to earlier documents such as variation claims and other documents capable of being identified by reference to the contract or the earlier dealings of the parties. This list is not intended to be exhaustive.*

D. Excluded amounts

64. Subsection 14(3)(b) states that a payment claim must not include an excluded amount, as set out in section 10B. This is a distinctly Victorian provision.

65. The following, in sub-s 10B(2), are defined as excluded amounts–

(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;

[34] *Clarence Street v Isis Projects* (2005) 64 NSWLR 448, 457 (Mason P)

66. Claimable variations are defined in section 10A, and an entire practice paper can be written on the issue. Time-related costs includes liquidated damages.[35]

67. But-for the excluded amounts, a forensic examination of the construction work and its progress would be needed, an exercise considered unsuitable, and undesirable, to the fast-tracked recovery of recovering an interim payment.[36]

[35] *Seabay Properties v Galvin Construction* [2011] VSC 183, [88] (Vickery J)
[36] *Shape Australia v Nuance Group [*2018] VSC 808, [91] (Digby J)

E. Service

68. Subsection 14(1) states a contractor may serve a claim on '*the person **who**, under the construction contract concerned, **is or may be liable** to make the payment*.' In other words, the principal themselves.

69. This has practical significance, given (unlike other aspects of SOPA) it does not adopt the construction contract. Under many contracts, claims are to be served on a third party, such as a contract administrator or superintendent, not the principal itself. This is often done so the third party, as agent, can value the work done, and prepare a response, which is then delivered to the principal so that payment can be arranged.

70. It is important, then, that a principal does not ignore a claim, because they consider it should not be made to them. And if they forward it onto their agent, the agent ought to understand that the time for them to respond is calculated from when the principal (not the agent) was served.

71. Such an issue arose in *Lucas Stuart v City of Sydney* [2005] NSWSC 840, where the contractor served a payment claim on the appropriate officer of the principal, not a project manager as done previously. The principal did not respond, and sought to contend misleading and deceptive conduct (which was not permitted) as a defence to the payment claim. The validity of service under SOPA, despite past practice, was not in issue.

III. Payment schedules

A. Concepts

72. Ignoring a payment claim, even one that is questionable, is unwise: failing to respond can result in application for judgment on the "due date" for payment (as defined in section 12), and a court could find the claim acceptable.

73. More importantly, there is no practical reason for not responding to a payment claim, so long as the criteria set out in the SOPA are kept in mind, specifically in section 15 ('**Payment schedules**'):

> (1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.
>
> (2) 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) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
>
> (4) If—
>
> (a) a claimant serves a payment claim on a respondent; and
>
> (b) the respondent does not provide 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—
>
> the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

74. The response time is the foremost consideration, noting that a contract can abridge (but not extend) the time for issuing a payment schedule.

75. A payment schedule must satisfy up to four criteria:
    - it must identify the related payment claim;
    - it must indicate the amount proposed to be paid;
    - (if applicable) if must "indicate why" the amount to be paid is less than the claim amount; and
    - (if applicable) it must identify any excluded amounts.

    As for payment claims, no information or forms have been prescribed.[37]

76. Failing to state reasons will be the schedule's downfall. This is unfortunate, as stating reasons is usually not difficult (although justifying it in adjudication is another matter). This is a matter within the knowledge of the respondent: the contractor has claimed an entitlement, and the respondent is responsible for setting out the dispute.[38]

77. The use of the word "indicate," as opposed to–[39]

> *"state", "specify" or "set out", conveys an impression* ***that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently*** *to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.*

78. Victoria, it should be noted, does (unlike other states) permit the introduction of reasons not included in payment schedules before an adjudicator.[40] The same cannot be done if judgment is sought on a debt due.

B. Payment schedules in practice

79. What, in practice, however, does a payment schedule look like?

---

[37] As pointedly observed in *Façade Treatment Engineering v Brookfield Multiplex* [2015] VSC 41, [26] (Vickery J)
[38] *Clarence Street v Isis Projects* (2005) 64 NSWLR 448, 455 (Mason P); see also *Perform v Mev-Aus Pty Novatec Construction* [2008] NSWSC 858
[39] *Multiplex Constructions v Luikens* [2003] NSWSC 1140, [78] (Palmer J)
[40] SOPA (Vic) s 21

80. While the case law allows for some 'want of precision,' reliance on the same is best avoided. Much can depend on the payment claim (that is, what you are responding to), and who prepares the schedule.

81. For example, some payment claims are in the form of a "trade breakdown," in where value is attributed to an item (such as "electrical" or "Level 1 Joinery"), and as works progress, a growing percentage is attributed. A schedule may respond with an alternative view of the percentage.

82. In other projects, principals appoint contract administrators, or other professionals (such as a quantity surveyor) to make an assessment.

83. Reasons can be in writing, and relatively informal, as seen in the following email in *Gisley Investments v Williams* [2010] QSC 178:[41]

> *We do agree that we owe you a final draw for this job however, the job has yet to be finished. Due to the upsetting and threatening conversation I received from you on Tuesday, November 17, my understanding from the outcome of that was that you were blackmailing me. You demanded I pay you, a much larger amount, other than our agreement, in order for you to go ahead with finishing the job.*
> *That was why I sent you the email stating your services were no longer required.*
> *This job should have been completed three months ago. You serving me paperwork, stating I owe you this outrageous amount of money is shocking to say the least.*
> *As we agreed, we were to pay you 5% of the total cost of the job. If you could save money on any part of the project then you would be paid 30% of that savings. For payment of the 30% savings (of which there were none) I gave you a Toyota Hiace 2002 valued at the time at $12,000. I have asked you repeatedly over the course of the year to get the road worthy certificate so the vehicle could be transferred into your name. You have yet to do that. Although, I still paid for it's yearly registration and insurance. There have been traffic infringements incurred by you, of which I have paid as well.*
> *We don't understand why, when we became so close to finishing, you became so desperate.*
> *If you would like to finish the job, I am happy to pay you the remaining outstanding amount owing as per our agreement. But, whilst the job continues to remain unfinished, final payment is not yet owed* (my underline).

[41] *Gisley Investments v Williams* [2010] QSC 178, [4] (Douglas J)

84. This still satisfied the SOPA ("*paperwork*" identified the claim, it was said no amount would be paid, and the reason why no amount was to be paid was because that "*the job has yet to be finished*" and "*final payment is not yet owed*"). The superfluous content was irrelevant.

85. The recent decision of the New South Wales Court of Appeal in *Style Timber Floor v Krivosudsky* [2019] NSWCA 171 has challenged previous views that payment schedules must be completely self-contained to the exclusion of context. In other words, **a payment schedule** (like a payment claim) **can incorporate documents by reference**.

86. In *Style Timber Floor*, the contractor emailed 7 invoices concerning 5 different projects in Sydney as a payment claim, to which the principal replied:

> *If you want, make a* (sic) *appointment with me, come to my office. I will show you the working agreement between* [the parties], *many emails, photos, videos, back charges from builders and other trades, complains* (sic) *from my clients. You will understand why I can't pay you. The damages you* (sic) *done is more than what you claimed* (my underline).

87. This was not a payment schedule, in particular, because it was not clear what site the email were referring to, or which of the 7 invoices specifically the email was addressing.

88. However, the Court cited around 21 individual emails between the parties (put in evidence, curiously, by the claimant and not the respondent), and noted this might not be all of them. As the words "many emails" were used, the judgment indicated it could not be said which was incorporated.

89. Despite *Style Timber Floor*, the safest position is to contain reasons within the payment schedule itself, not refer to other documents, because a reference may be unsatisfactory or ambiguous.

90. This includes not referring back to previous schedules as a source of its reasons for reduced payment, or making a statement to the effect that a claim is "again refuted."[42]

[42] *Pacific General Securities v Soliman & Sons* (2006) 196 FLR 388, 404 (Brereton J)

IV. Recovering payment

A. The due date

91. The SOPA contains a distinction, on the one hand, between the conclusion of the payment claim/schedule process (which ends when the time to respond expires, or a payment schedule is scheduled), and when payment of the claim becomes "due and payable."

92. If the contract is silent, payment is due on the date 10 business days after a payment claim is made (in other words, the date the schedule is due), but if the contract contains relevant terms, those terms prevail.[43]

93. This is significant in standard forms. For example, under the *Australian Building Industry Contracts* 2008 "simple works" suite of contracts, after a "payment certificate"[44] is issued by the Superintendent, the assessed claim does not become payable until the claimant has provided the certificate, together with a tax invoice, to the principal themselves.

B. Methods of recovery (and suspending work)

94. If no payment schedule is issued (section 16), or the scheduled amount is not paid by the due date (section 17), a claimant has two options:[45]
    (a) apply to recover of the unpaid portion of the claim '*as a debt due*' in '*any court of competent jurisdiction*'; or
    (b) make an adjudication application under section 18.

95. If the adjudication route is taken, a successful claimant can (if not paid) obtain an adjudication certificate from an authorised nominating authority,[46] which can then be filed in court, and a judgment obtained upon it.[47] This debt can also, interestingly, be recovered from those further up the line from the contractor's principal.[48]

---

[43] SOPA (Vic) s 12
[44] A document legally synonymous with a schedule
[45] SOPA (Vic) sub-ss 16(2)(a) and 17(2)(a)
[46] SOPA (Vic) sub-ss 28O, 28P and 28Q
[47] SOPA (Vic) s 28R
[48] SOPA (Vic) ss 30-31

96. The other option, when payment is due but not received, is to serve a notice of intention (stated to be made under the SOPA) to suspend work or the supply of related goods and services.[49] A suspension can be effected once three business days have passed since service of the notice.[50] If done correctly, a SOPA suspension will not be considered in breach of contract.[51] Advice should be sought before doing so, given that if there is a non-compliance, a suspension will be regarded as a breach of contract, enabling termination.

C. Obtaining judgment

97. The SOPA process for obtaining judgment for a "debt due" is often called a summary procedure, as there is no ability for the respondent to raise a defence on the merits, only to challenge compliance with the legislation itself. The question is whether or not SOPA has been followed.

98. This not the same test as for summary judgment (real prospect of success).[52] However, there is some case law considering the appropriate test when, in a proceeding commenced by writ with a statement of claim, a plaintiff makes an application for summary judgment and files affidavit material.

99. The answer to this dilemma, on recent County Court authority, is that SOPA proceedings are appropriate to be commenced by originating motion (under rule 4.06 of the applicable Rules) using affidavit evidence of pleadings, and not by writ, thus avoiding an unnecessary layer of process.[53]

100. Guidance is found in Practice Note PNCO 2– 2019 (Operation and Management of the Building Cases List).

101. Whichever form of originating process is used, an affidavit will be needed, which should address compliance with SOPA and attest to:

- The construction contract (or arrangement);
- The reference date;

[49] SOPA (Vic) ss 16(2)(b), 17(2)(b), 28O(1)(b)
[50] SOPA (Vic) sub-s 29(1)
[51] SOPA (Vic) sub-s 29(3)
[52] *Civil Procedure Act* 2010 (Vic) ss 61-63
[53] See *3D Flow Solutions v Armstrong Creek* [2018] VCC 674 and *SJ Higgins v The Bays Healthcare Group* [2018] VCC 805

- The payment claim (exhibited) and proof of service;
- The payment schedule (or lack thereof); and
- The fact of no payment (or only part payment).

102. While usually appropriate for claims below $100,000.00, the civil procedure rules of the Magistrates' Court of Victoria do not permit originating motions, meaning the expedited process envisioned by SOPA is not available (noting the County Court does seem to accept cases of this value).

103. Once judgment is obtained, if (despite any suspension) payment is still not forthcoming, there are no special processes for payment: a claimant must look to the usual procedures set out in Order 66 of the Supreme Court Rules, such as a warrant of seizure and sale (Order 69).

104. For reasons explained in detail elsewhere, the statutory demand procedure under the *Corporations Act* 2001 does not work with SOPA debts. In short, as a SOPA judgment debt is interim, it can still be construed as the subject of a 'genuine dispute,' and challenged through an off-setting claim.

105. Civil contempt is not an option, unless (at least possibly) the defaulting party has made it impossible to enforce the judgment through the normal processes of the court.[54]

V. Challenging the adjudication

A. Scope for review

106. Although it can resemble contractual dispute resolution, adjudication is a statutory process, "authorised nominating authorities" authorised by the Victorian Building Authority to appoint adjudicators.[55]

107. A step-by-step description of the process is beyond the scope of this paper.

108. Readers should consider sections 18 to 28R of the SOPA, with particular attention to subsection 23(2) – which sets out the matters '*and those matters only*' that an adjudicator must

[54] *Bellerive Homes v FW Projects* [2019] NSWSC 193, [199]-[200] (N Adams J)
[55] SOPA (Vic) s 42

consider – and subsection 23A(3), which requires that an adjudication determination be in writing. The process is not a simple task of the adjudicator choosing one party's stance over another.[56]

109. With some limited exceptions when an excluded amount is involved,[57] adjudication determinations are not susceptible to merits review.

110. If the adjudication process is defective, the aggrieved party can seek judicial review. The usual course, as for other administrative decisions, is to apply for the prerogative writ certiorari in the Supreme Court of Victoria.[58] This is based on standard administrative law principles.

111. Such objections cannot be raised by way of defence, when an application for judgment is made on an adjudication certificate.[59]

112. In contrast, prerogative writs cannot be awarded in the County Court of Victoria (unless Parliament provides otherwise, which has not occurred for SOPA).[60] It can make declarations.[61] As adjudication made contrary to law is void, not merely voidable, a declaration by a court of competent jurisdiction may be enough, without the need to quash the determination.[62]

113. The grounds for judicial review of adjudication determinations include:

- On procedural fairness/natural justice grounds, including:[63]
  - The hearing rule;
  - The bias rule;
  - Failing to make a *bona fide* attempt to conduct the adjudication.[64]
- Jurisdictional error.[65]

---

[56] *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* (2006) 196 FLR 388, 412 (Brereton J)
[57] SOPA (Vic) ss 28A, 28B and 28C
[58] *Constitution Act* 1975 (Vic) s 85
[59] SOPA (Vic) sub-s 28R(5)
[60] *County Court Act* 1958 (Vic) sub-s 38(2)(c)
[61] *County Court Act* 1958 (Vic) sub-s 37(1)(a)
[62] *Brodyn v Davenport* (2004) 61 NSWLR 421, 441 (Hodgson JA)
[63] Robert McDougall, '*Natural Justice and the Building and Construction Industry Security for Payments Act 1999 (NSW)*' (Paper delivered at the Royal Institute of Chartered Surveyors Seminar, 13 May 2014, Millers Point, Sydney NSW)
[64] *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, 442 (Hodgson JA)
[65] *Probuild Constructions (Aust) v Shade Systems* (2018) 264 CLR 1

B. Jurisdictional error

114. Jurisdictional error is a complex concept.

115. Before *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, some jurisdictions interpreted SOPA as ousting judicial review, others disagreeing.[66]

116. *Kirk* held that ouster/privative clauses (state or federal) are contrary to Chapter III of the Commonwealth Constitution, meaning that all jurisdictional errors of law are reviewable, whatever the relevant legislation states.

117. This does not extend to non-jurisdictional errors of law on the face of the record, which SOPA laws do oust from review.[67]

118. While no single test exists for distinguishing between jurisdictional and non-jurisdictional error,[68] the question is whether the adjudicator has jurisdiction to determine an application, without complying with the suggested jurisdictional limitation (that is, what it is said the adjudicator did wrong).[69]

119. This calls for consideration of the following:

(1) the mode of expression in the text of the element directly in issue;[70]
(2) the structure of the legislative scheme (which is the context in which the words expressed must be taken into account);[71] and
(3) the adverse effects of finding an element is jurisdictional.[72]

120. If the relevant failing of the adjudicator is jurisdictional, the error will fall into one of three, broad categories:

---

[66] *Musico v Davenport* [2003] NSWSC 977 (McDougall J holding certiorari available for all jurisdiction errors); *Brodyn v Davenport* (2004) 61 NSWLR 421 (the Court of Appeal limiting reviewable jurisdictional errors); *Hickory Developments v Schiavello (Vic)* (2009) 26 VR 112, 130 (Vickery J disagreeing)
[67] *Probuild Constructions (Aust) v Shade Systems* (2018) 264 CLR 1
[68] *Chase Oyster Bar v Hamo Industries* (2010) 78 NSWLR 393, 403 (Spigelman CJ)
[69] *Clyde Bergemann Senior Thermal v Varley Power Services* [2011] NSWSC 1039, [24] (McDougall J)
[70] *Chase Oyster Bar v Hamo Industries* (2010) 78 NSWLR 393, 404 (Spigelman CJ)
[71] Ibid. 404-5 (Spigelman CJ)
[72] Ibid. 407 (Spigelman CJ)

(1) *the **mistaken denial or assertion of jurisdiction**, or (in a case where jurisdiction does exist), misapprehension or disregard of the nature of or limits on functions and powers;*

(2) ***entertaining a matter or making a decision of a kind that lies**, wholly or partly, **outside the limits on functions and powers**, as identified from the relevant statutory context;*

(3) ***proceeding in the absence of a jurisdictional fact**;[73] disregarding something that the relevant statute requires to be considered as a condition of jurisdiction, or considering something required to be ignored; and misconstruction of the statute leading to misconception of functions.*

121. Long recognised jurisdictional facts include:[74]

- The existence of a construction contract between the claimant and the respondent, to which the SOPA applies;
- The service by the claimant on the respondent of a payment claim;
- The making of an adjudication application by the claimant to an authorised nominating authority;
- The reference of the application to an eligible adjudicator, who accepts the application; and
- The 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.

122. Other examples include the availability of a reference date,[75] and the application of the domestic building contract exemptions (which, if applicable, mean there is no construction contract under SOPA).

123. Adjudicators also cannot proceed if there has been a genuine resolution of a dispute between the parties,[76] which if the resolution remains effective, can mean the SOPA is not operational.

---

[73] A jurisdictional fact is a criterion that empowers the decision-maker (namely, it gives them jurisdiction): see *Gedeon v Commissioner of NSW Crime Commission* (2008) 236 CLR 120, 139 (Gummow, Kirby, Hayne, Crennan and Kiefel JJ), referred to in *Chase Oyster Bar v Hamo Industries* (2010) 78 NSWLR 393, 43 (Spigelman CJ)

[74] These were called the "basic and essential requirements" of an adjudicator's jurisdiction in *Brodyn v Davenport* (2004) 61 NSWLR 421, 441 (Hodgson JA). Before *Kirk*, other errors of law could not be reviewed in New South Wales. Each requirement is still an example of a jurisdictional fact, as noted in *Chase Oyster Bar v Hamo Industries* (2010) 78 NSWLR 393, 425 (McDougall J)

[75] *Southern Han Breakfast Point (in liq) v Lewence Construction* (2016) 260 CLR 340

[76] See generally *Fitzroy Shopfitting and Building v Solene Investments* [2016] VCC 1352, [28] (Anderson J); *Valeo Construction v Tiling Expert* [2019] VSC 291

VI. Practical tips

124. Legal practitioners acting for those involved in construction (including apparent mum and dad homeowners) must be clear that any document referencing the SOPA (even if mis-spelt, for example, if it is made '*pursuant to the Building and Construction Act*') demands their immediate attention.

125. A legal practitioner receiving a SOPA-related enquiry must – whatever the instructions are – deal with it as soon as possible (at least to work out what timeframes are in play), and if capacity is short, refer it to another lawyer. SOPA does not offer extensions of time for clients with a busy lawyer.

126. If the document is a payment claim, the practitioner should advise the client to prepare a payment schedule *post haste*, and ascertain if the time for doing so has been abridged by contract from the usual ten business days.

127. If acting for a respondent, the time to dispute the validity of a claimant's actions (including the payment claim) is after a payment schedule is filed, not before. The basis of the objection may be wrong, or your instructions inadequate.

128. If a client wants to serve a payment claim, the claim should be prepared keeping the requirement of both SOPA and the construction contract in mind. The starting point is McDougall J's advice. Including detail is a good idea, *depending on how it is set out* (though the parties' are the ones who need to understand it, there is no harm in making it accessible to a stranger to the transaction, as the adjudicator will be).

129. For both payment claims and payment schedules, cross-referencing other documents – although permissible – is best avoided given it can lead to ambiguity or ineffectiveness; if it is done, all relevant documents must be provided concurrently, in a hard copy or electronic bundle.

130. Before a claim is made, available reference dates must be identified (based on when the subject work was done, and previous claims).

131. Take care before advising a client to issue a suspension notice. If works are suspended when there is no entitlement to do so, a breach could be alleged and used as grounds for termination of the client's contract.

132. Do not rule out compromise, although ensure it is documented in proper terms of settlement, having regard to the parties' relationship going forward. A payment by consent is far simpler than enforcing judgment. It may also present the parties with an opportunity to renegotiate their relationship.

133. Where the claimant appears to be at risk of insolvency, seek advice. That is a complex issue.[77]

[77] *Hakea Holdings Pty Ltd v Denham Constructions* [2016] NSWSC 1120