13 March 2024

Anticipating changes to Victorian building law: be alert, not alarmed?

Joel A Silver[*]
Barrister

Owen Dixon Chambers West
Level 19, 525 Lonsdale Street
Melbourne Vic 3000
DX 94 Melbourne Vic

P: 03 9225 6604
F: 03 9225 7907
jsilver@vicbar.com.au

In the coming years, the Parliament of Victoria will consider updating the three primary laws governing building and construction work. Some changes could be retrospective. Legal practitioners may need to give clients anticipatory advice, in particular to builders and developers, who may face a very changed landscape (including the loss of the corporate veil on certain projects). This paper addresses the possible impact of the foreshadowed changes, based on my own experience, and some observations of interstate experiences that should be considered.

A. Overview

1. Since the 1990s, the statutory landscape in Victoria for building and construction work has been rather stable, the changes made in that time being small and incremental, without altering the overarching regulatory approach.

2. That landscape comprises the following Acts (and their associated regulations):
   (a) the *Building Act* 1993 and the *Building Regulations* 2018;
   (b) the *Domestic Building Contracts Act* 1995 ('**DBC Act**') and the *Domestic Building Contracts Regulations* 2017; and
   (c) the *Building and Construction Industry Security of Payment Act* 2002 ('**SOP Act**') and the *Building and Construction Industry Security of Payment Regulations* 2013.

[*] Barrister and Accredited Mediator. LLB (Hons) (Melb), GDLP (Leo Cussen Institute), LLM (Melb). My thanks to Fabian Brimfield for kindly proof reading this paper. Any errors are my own.

3. Three review processes likely to change those laws are underway:

- In late 2019, the Victorian Government appointed an 'Expert Panel on Building Reform' ('**Expert Panel**'), which in late 2023, released its Stage 2 Report. The report proposes changes to building law generally, and to residential building in particular. This includes a statutory duty of care to avoid pure economic loss for any person undertaking 'building work'. Stage 3 of the Expert Panel's work will propose a new Building Act;

- in November 2023, the Department of Government Services released an Issues Paper titled 'Review of the *Domestic Building Contracts Act* 1995,' following the Victorian Government's announcement that will provide 'stronger protections' for Victorians building or renovating their homes, after the collapse of volume builder Porter Davies;

- also in November 2023, the Legislative Assembly Environment and Planning Committee released the report of their Inquiry titled '*Employers and contractors who refuse to pay their subcontractors for completed works*' ('**Inquiry**'). The focus of the Inquiry was the efficacy of the SOP Act, which stands almost unchanged since 2006.

4. The purpose of this paper is to identify some (but not all) changes proposed by the Expert Panel and the Inquiry (the Issues Paper has not yet prompted any report), and to explain how they may work in practice.

5. This includes a degree of respectful editorialising.

B. Proposals by the Expert Panel

I. A statutory duty of care for building practitioners

6. Recommendation 3 of the Expert Panel proposes the introduction of a statutory duty of care to '*strengthen building owners' abilities to seek recourse through negligence claims*', which the Panel proposes as follows (footnotes omitted):

- *The duty would be owed to each owner of the land in relation to which construction work is carried out and to each subsequent owner of the land.*

- *The duty would be non-delegable and parties would not be able to contract out of it.*

- *The duty would relate to a broad range of work, including building work; preparation of designs; manufacture and supply of building products; and supervising, coordinating and project managing design and construction.*

- *The duty of care could apply to building work, or other kinds of work, for a 10-year period (consistent with statutory warranties in the DBCA).*

7. As phrased, it is not clear if the Expert Panel suggests that the duty would apply only to residential building work (as currently captured by the DBC Act), or to building work more generally (including commercial building work).

8. At present, an individual building practitioner (that is, the actual person who is registered, and performs work) is not liable to a building owner, unless named as the contracting builder, or if they provide a personal guarantee. This means that builders practitioners can deploy the corporate veil, such that an individual named as the "builder on permit" has no liability.

9. This is so even in contracts to construct a single-home, as described in *Bryan v Maloney* (1995) 182 CLR 609; while some case law suggests directors of small building companies can be concurrently liable in tort with a company for a breach of a duty of care (see in particular, *Olindaridge v Tracey* [2016] QCATA 34) – usually when the director is the sole employee, and personally performs the building work – those cases are based on a particular understanding of the concept of "assumption of responsibility", which is not necessarily good law in Australia (as opposed to the UK), and is difficult to establish in any event.

10. That position may change.

11. The proposed duty draws inspiration from section 37 of the *Design and Building Practitioners Act* 2020 (NSW), which applies retrospectively for a 10-year period preceding the legislation.

12. As highlighted in *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5 and *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624, the drafting of the New South Wales duty leaves much to be desired: without going into detailed analysis, after a fairly sophisticated analysis of the legislation, including amendments adopted to the first draft of the Bill, the Court of Appeal's ruling indicates that the duty applies perhaps more broadly than a cursory reading of the relevant sections might indicate.

13. *Roberts*, which dealt with damage caused to a premises by the builder, also confirms that in practice, damages for breach of the statutory duty will often be similar (if not the same) as breach of contract, meaning that unless it is shown that rectification is unreasonable, diminution-in-value is not the appropriate measure of damages.

14. The duty in section 37 provides that a '*person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects*' in relation to defined construction work.

15. It is unclear to what extent this species of duty covers the same loss and damage as strict contractual promises might (for example, the implied warranties in section 8 of the DBC Act, such as the obligation to ensure that all work is undertaken in a proper and workmanlike manner, or that all work must comply with the provisions of the *Building Act* 1993).

16. The other aspect of the New South Wales duty is that in *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWCA 301, the Court of Appeal held that the drafting of the legislation (in particular, the statement that the duty is non-delegable) was sufficient to exclude the duty from the apportionment provisions of the *Civil Liability Act* 2002 (NSW). This means that the duty applies to building practitioners required to hold professional indemnity insurance, such as

designers and plumbers (who could thus be pursued for 100% of a claim, based on joint and several liability principles), and could thus affect the availability of cover.

17. If Victoria enacted this statutory duty, the following may be expected:

    (a) individual building practitioners would be denied a corporate veil, because despite the building contract, they would be personally liable (ie. liability would be based on the persons named on the building permit);

    (b) sub-contractors (being the individuals carrying out work) would owe a tortious duty directly to the building owner, rather than to the contracting builder;

    (c) building practitioners could claim contribution, on the basis of the statutory duty owed by the sub-contractor to the owner, against those individuals (not just against the sub-contracted company), although this may not involve a claim for the exact same loss and damage; and

    (d) sub-contractors would *also* be held to an objective standard of care, which may conflict with their contractual obligations to a builder (cutting across the High Court's concerns in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515). This means that a sub-contractor could not rely on contractual directions from a builder, if as a matter of the statutory duty, they were required to "disobey".

18. It is not clear to me to what extent the builder's contractual scope defines the scope of the statutory duty: a builder may be named on permit, but in practice, they do not perform most of the building work (as opposed to supervising sub-contractors). Would this require a factual enquiry to ascertain the specific responsibilities of each practitioner involved in a project? Or would it simply be creating a duty of care that practically replicates the construction contract?

19. The potential conflict between the "objective" duty of a subcontractor, and their contractual obligations to a builder, is also particularly troubling, although that could be resolved

through a defence that provides a sub-contractor is not liable to an owner if their breach of duty was due to a builder's direction. If that does not occur, the law will be ignoring contractual realities in favour of simpler principles of law disengaged from any factual analysis.

20. In practice, the 10-year limitation of actions periods for building actions means that by the time many disputes crystallise – and it the commencement of an action, just shy of the 10-year mark, is not so uncommon – many subcontractors no longer hold the relevant records, or recall the project with much detail. In my respectful view, this proposal may be well-meaning, but could be substantially unfair. In contrast, the long-stop limitation in New South Wales is only 6 years.

21. These matters will hopefully become apparent before any proposed law reforms reach Parliament, in particular, the consequences of the duty being enacted retrospectively, and what building work the duty would apply to (which in New South Wales, could be almost anything).

22. What should practitioners be alerting their clients to?

23. The first is that builders, subcontractors, and owners should be encouraged to use updated standard forms of contract when they become available, given that the commonly used Housing Industry Association and Master Builders Association forms will no longer reflect the law.

24. The second is that, given the risk of veil-piercing, building practitioners on permit will need to give serious consideration to how they generally structure their financial affairs;

25. The third is that building practitioners must seriously consider the risks of being named on permit, without having great involvement in the works, given the duty would extend to supervision. This will be important for large builders who nominate one practitioner as the builder on multiple permits, even where that person will not have day-to-day involvement.

26. The fourth is that those employed in the supervision, coordination, or project management functions (for example, a site foreman, or a project superintendent) may have exposure they did not before, and will – which can be said perhaps for sub-contractors too – need to consider appropriate insurances, or indemnities from their employer.

II. First resort insurance for apartment buildings

27. Recommendation 6 of the Expert Panel is to introduce a "mandatory decennial liability insurance system" for residential apartments four storeys and above (which currently do not require any warranty insurance), being a system of "first resort".

28. As the Panel explains:

> **A first resort system is one where consumers can progress to an insurance claim earlier than under a last resort scheme**. In a first resort scheme, the insurer may be the first port of call for the claimant, and they may have greater responsibility (earlier in the process) to resolve the dispute. Insurers can pursue costs from practitioners in a first resort scheme. In a first resort system, consumers tend to be compensated in a timelier manner. Normally, the original builder will be given an opportunity to rectify work before insurance is triggered, which provides funding for rectification by an alternative builder.

Proposed elements of the scheme include a "developer rating system", and a requirement for developer bonds. In other words, the insurance will be obtained by the developer (not the builder) for the benefit of the future owners.

29. The Panel also concedes that the concept needs to be developed further, including to establish if it is economically viable.

30. This proposal differs from the Domestic Building Insurance required by Ministerial Order for residential construction of 3 stories or less, which is a system of "last resort" (in which

all other avenues of recovery have failed), and is only available if the builder is dead, has disappeared, or is insolvent.

31. Under a first-resort model, the owner approaches the insurer first, who would either accept or decline the claim, rather than the owner having to wait for the outcome of litigation.

32. Although this may seem to give the insurer more control over the mode and timing of rectification (as opposed to the owners), and restrict an owner from "taking the money and leaving" (itself not a bad idea, if the goal is to ensure liveable dwellings), that in practice is not too different to present circumstances, when multiple owners in a defective building litigate as a group. In practice, owners in the group sign up to a common rectification proposal, rather than each using a different expert who proposes a different form of rectification.

33. If this system were adopted, I would expect it to include a broad right of subrogation, permitting the first resort insurer to pursue others, including, for example, any person who owed a duty of care to the owners (such as under the statutory duty above). An educated guess would suggest that this will see an increase in inter-insurer disputes, although whether those would be litigated openly is anyone's guess.

34. Another expected aspect of such a system, as in DBI, would be a specialist tribunal with review jurisdiction over contested insurer decisions. That would continue to generate a significant amount of litigation, and require continued resourcing of Victorian courts and tribunals with specialist building lawyers and experts.

III. New developer responsibilities and liabilities

35. As a matter of plain English, I define a developer as a person who finances (personally or using loan funds) the construction of a building by a builder with the intention of selling (or letting) it – or at the least an appreciable proportion of the building – to a third party immediately on completion.

36. A developer is sometimes involved in a project earlier than construction, for example, obtaining the original planning permit, or procuring the design documentation and a building permit.

37. In this way, developers can be thought of as "active" investors, who identify and progress new residential and commercial constructions in order to profit.

38. The term "developer" is not presently legislated. In Recommendation 1, the Expert Panel proposes an inclusive definition, which should line up with the definition of other states, and '*should include*':

- *an individual or partnership on whose behalf the work was done; and*

- *the owner of the land (if this is different to the individual or partnership on whose behalf the work was done).*

39. Under section 3A of the *Home Building Act* 1989 (NSW), 'developer' is defined in the following manner:

> *(1) For the purposes of this Act, an individual, a partnership or a corporation on whose behalf residential building work is done in the circumstances set out in subsection (2) is a developer in relation to that residential building work.*
>
> *(1A) Residential building work done on land in the circumstances set out in subsection (2) is, for the purpose of determining who is a developer in relation to the work, deemed to have been done on behalf of the owner of the land (in addition to any person on whose behalf the work was actually done).*
>
> ***Note—***
>
> *This makes the owner of the land a developer even if the work is actually done on behalf of another person (for example, on behalf of a party to a joint venture agreement with the owner for the development of the land). The other person on whose behalf the work is actually done is also a developer in relation to the work.*
>
> *(2) The circumstances are—*

(a) the residential building work is done in connection with an existing or proposed dwelling in a building or residential development where 4 or more of the existing or proposed dwellings are or will be owned by the individual, partnership or corporation, or

(b) the residential building work is done in connection with an existing or proposed retirement village or accommodation specially designed for the disabled where all of the residential units are or will be owned by the individual, partnership or corporation.

(3) A company that owns a building under a company title scheme is not a developer for the purposes of this Act.

40. The closest concept to a "developer" in Victorian legislation is in sub-s 7(2)(ba) of the SOP Act, which provides that if a homeowner is '*in the business of building residences*', their domestic building contract is subject to the SOP Act.

41. Given the application of that concept is unclear, its replacement with a proper definition of developer would be welcome.

42. But adopting the New South Wales definition is not necessarily a good solution, as it is not apparent when '*4 or more of the existing or proposed dwellings are or will be owned by the individual, partnership or corporation*': while a 'proposed dwelling' would be identifiable on the plans, the conflicting temporal concepts ('are' and 'will be') make it unclear at what point in time ownership is to be assessed, and on what basis. It also seems an arbitrary dividing line, that might lead to different outcomes on similar facts, for example:

- if 3 of 5 units are sold "off-the-plan" before construction, why would the developer not owe warranties for the remaining 2 of 5 units, when if only 2 units were sold, the warranties would be owed?

- what intentions change, subsequent to the building permit, for example, the whole development is sold to a "build to rent entity" and any building contract novated? Does the original developer still owe a duty to that entity?

It seems Victoria could do better with this notion.

43. Another definition of "developer" is found in Victoria's Domestic Building Insurance Ministerial Order (made 23 May 2003):

> *any building owner or other person for whom 3 or more homes are being or proposed to be built—*
> *(a) on any one building site; or*
> *(b) on more than one building site under one domestic building contract;*

This definition is available so that an insurer can restrict developers from making claims for incomplete works under a warranty insurance policy. It also has its limitations.

44. In my view, a simpler solution would be an "exemption-based" as part of the building permit process, in which all building owners are developers (and bound by the obligations of a developer) unless they obtain a certificate from the VBA stating that:
    (a) the development is a single-dwelling that will serve as a family home of the building owner, or a close relative, and the land is owned personally by the building owner and/or the close relative; or
    (b) the development is no more than 4 dwellings, and the development will be occupied by the building owner and/or their close relatives,

    and where transfer of title to the proposed dwellings will be restricted to either the building owner or the identified relatives.

45. The Expert Panel also makes three other, significant recommendations:

- first, as mentioned above, Recommendation 2 is for a 'Developer Bond Scheme', in which developers must lodge pay a bond, in developments over 3 stories or other prescribed 'high risk' developments (for example, the development of a former tip or

quarry), set as a percentage of the contract price and only returned '*should no defects be found before the fixed period expires*', which the Expert Panel suggests 'as an example' should be held for 10 years;

- second, Recommendation 2 also suggests that developers be required:

  to engage an agent such as a superintendent, site architect, or clerk of works to be regularly onsite for prescribed buildings or projects. *Under this reform, the developer would engage an agent such as a superintendent, site architect or clerk of works to regularly monitor compliance and quality on site for the developer. The agent would conduct inspections and report to the developer so the developer is aware of, and maintains, shared responsibility for the whole construction process. The agent would not have statutory powers or certification functions.*

- third, Recommendation 3 proposes extending the statutory warranties in section 8 of the DBC Act to be provided by the developer.

46. If a Developer Bond Scheme were introduced, Parliament would need to give serious consideration to the questions of:
    (a) who holds the bond (is it the developer's bank, or a public authority: if held for the developer, the bond could be used to offset interest on any remaining loan funds if not enough apartments were sold, without which the developer may not be viable);
    (b) who decides when the bond will be released and what is considered a "defect" (again, likely to lead to much work for the lawyers); and
    (c) who receives the interest (for example, does it "top up" the funds for use towards rectification, is it simply released to the developer, or as in the legal profession, does the interest go towards a public purpose fund, or towards funding a regulator).

47. Putting to one side that financiers often require a Superintendent to be appointed as a matter of course, the legislated requirement to engage of a Superintendent seems to be over-reach: in larger scale developments, that would interfere with the Principal's freedom to contract for works supervision in an appropriate manner, while in smaller scale developments, the recommendation ignores the fact that local developers often have

sufficient experience to conduct oversight personally, requiring them to retain an unnecessary professional for no practical benefit, and simply increasing the cost of development. Moreover, given the recommendation would not require the Superintendent or "clerk" to owe any duty, there would be no practical benefit for relevant authorities (such as Consumer Affairs or the VBA) monitoring compliance with that condition.

48. The extension of the section 8 warranties reflects the position in the New South Wales *Home Building Act* 1989, in which developers have the same liabilities to owners and subsequent owners as the contracted builder.

49. This change would be the most far-reaching, if made, in that developers (as a past owner themselves) would be held liable for their contracted builder having breached their building contract: in the case of an insolvent builder, this would see the developer not only having paid the builder in the first place, but also penalised for the builder's wrongs, and perhaps having to pay twice.

50. It could be that this encourages developers to require greater security from builders before contracting them, or to insist on personal guarantees (which may not count for much on some occasions). Or it could lead to more developers choosing to operate as a single-purpose vehicle, noting that the wide-definition of "developer" in New South Wales reduces the utility of these arrangements.

51. It would make more sense for a developer to owe a duty in respect of defects that were known or reasonably observable during construction, rather than latent matters than they could not reasonably have done anything about in the course of the works. However, that nuance has not been acknowledged, so far.

C. Proposals by the Inquiry

I. Extension of the SOP Act to domestic building contracts

52. As readers are probably aware, the SOP Act is not unique to Victoria, and the Inquiry's work follows work elsewhere, including:
    - a national review of security of payment laws conducted by John Murray AM in 2017;
    - subsequent reforms to the New South Wales SOP Act in 2022 (the original New South Wales laws were the model for the Victorian Act); and
    - the adoption of the "East Coast" SOP Act model by Western Australia in 2023 (which previously had a very different law).

53. Many of the Inquiry's proposals deal with uniquely Victorian aspects of the scheme.

54. Unless a building owner is in the '*business of building residences*', domestic building contracts between a home owner and a builder are excluded from the SOP Act.

55. Major domestic building contracts often use a progress payment structure reflecting the milestones in section 40 of the *Domestic Building Contracts Act* 1995, in which the builder is entitled to claim payment on reaching defined milestones, instead of claiming fortnightly or monthly based on quantities of work or material substantiated.

56. If milestones are used, what is considered "completion" of a stage can be the subject of case law (for example, *Cardona v Brown* (2012) 35 VR 538 deals at some length when a garage door is necessary to the completion of "lock-up" stage), whereas if the parties choose another definition, there can be disagreement over what the parties meant.

57. Section 4.9.1 considers a range of submissions in favour of extending the scheme, with reference to the West Australian model providing that contracts valued at more than $500,000.00 are captured, which is prefaced on the homeowner receiving a notice. The Inquiry, however, has recommended further engagement before proceeding further.

58. In my practice, many domestic building disputes are caused by disagreement between the owners and the builder concerning if a stage has been completed, including if the presence of defects prevents that stage being completed.

59. Although there would be some virtue in providing for the parties to appoint an arbiter (of sorts) to decide if a milestone is reached (if the parties disagree) – the alternative can see one party decide to terminate, leading to a wider dispute – my view is that the SOP Act model would introduce unnecessarily legalism into domestic building contracts, and unnecessarily cut across owners' contractual rights that are far easier to follow.

II. Removal of "excluded amounts"

60. The Victorian SOP Act contains two concepts, in sections 10A and 10B, of 'Claimable variations' and 'Excluded amounts', the later of which includes a variation '*that is not a claimable variation*', latent conditions, time-related costs, and claims for damages for breach of contract (amongst others).

61. An excluded amount '*must not be taken into account in calculating* [my underline] *the amount of a progress payment to which a person is entitled under a construction contract*', meaning it cannot be claimed, or scheduled.

62. The rationale for excluded amounts has always been weak in sophisticated contracts where a Superintendent or Architect is the Principal's agent, and must undertake a formal process of assessing claims, and in which parties have the benefit of dispute provisions if they disagree, for example, with the certification of practical completion or an extension of time request.

63. The effect of this is that the parties in sophisticated contracts are prevented from having the benefit of what they agreed to, and must litigate. Except in termination or take-out scenarios, in which there is an attempt to "back-charge" for a third party's work, there is no good reason for this.

64. In contrast, in simple, less formal contracts between a Head Contractor and a Subcontractor, excluded amounts still have some merit.

III. Cascading statutory trust scheme

65. Following an adjudication, and a claimant obtaining judgment for an adjudicated amount, Part 3, Division 4 of the Victorian SOP Act provides for the claimant to recover a payment directly from the respondent's principal, out of money that '*is payable or becomes payable to the respondent*' by the principal (in respect of work under what could be called the 'head contract').

66. Section 6.4.1 of the Inquiry considers a quite sophisticated proposal in the Murray Review to prevent misuse of subcontractor payments (including retention) from head contractor insolvency or misuse (at least in contracts over $1 million), in which all funds paid under a construction contract must be held in trust by the 'intermediary' until they can be passed onto the subcontractors '*who actually supplied the goods or services*'.

67. The proposal would involve a 'deemed' trust, rather than requiring the head contractor to establish a trust account at bank, and would require the head contractor to certify to their bank the purpose of each use of funds, together with preventing the head contractor withdrawing their own share of funds until all subcontractors have been paid for completed works.

68. The proposal would also see subcontractors entitled to request records to show the funds are in-place, and allow subcontractor funds to be protected from secured creditors in the event of insolvency.

69. An obvious observation is that a cascading trust system, if adopted, would be a significant deterrent to under-tendering, as if a head contractor attempted to underbid on a project (or inadvertently did so on misconceived estimation), they could not obtain payment before subcontractors, meaning that if the head contractor failed to quote a realistic price, the head contractor would face the consequences immediately. This would, it seems, see the consequences of that underestimating fall at the feet of the principal, which would encourage them (in the first instance) to verify tender bids before proceeding.

IV. Removing Christmas/New Year from the definition of 'business days'

70. This is a simple change, where the period from 22 December to 10 January would no longer be considered '*business days*' for the purposes of calculating time under the SOP Act.

71. This would end claims made at or about the time of the industry shutdown, which cannot be responded to that easily.

72. This change would be more effective if accompanied by the removal of provisions in the SOP Act that allow the parties to agree to a different period for the service of payment claims and schedules, which do not necessarily need to be calculated in accordance with 'business days' (for example, sub-s 14(4)(a) permits the parties to extend the period for making a claim beyond 3 months from the reference date, while sub-s 15(4)(b)(i) permits the parties to agree to reduce the period in which a payment schedule must be served).

V. Removal of scope to include fresh reasons for withholding payment in an adjudication response

73. The provision for fresh reasons for withholding or reducing payment in an adjudication response (which a respondent submits, following the adjudication claim) is a uniquely Victorian provision: other states have never permitted fresh reasons to be added, and they must be disregarded by the Adjudicator.

74. The removal of this provision would put more pressure on a respondent to ensure their scheduled reasons for withholding payment are clear and comprehensive, as that would be the only opportunity to do so.

VI. Modernisation of notice requirements

75. Although case law has accepted that documents can be served by email, that does not reflect the present section 50.

76. The Inquiry has recommended updating the section, together with including reference to regulations that allow for other methods of service (such as permitting service to an electronic "lock box", including in Adjudication).

VII. Extending timelines

77. The Inquiry includes several recommendations for extending time in various processes under the Act, including permitting payment claims to be made within 6 months (not 3 months) of the "reference date", and permitting parties to agree to give an adjudicator up to 20 additional business days for an adjudicator to complete an adjudication determination (rather than 5 business days, if agreed by the claimant, on top of the prescribed 10).

VIII. Monthly claims to replace reference dates (sort of) and retention claims

78. A "reference date" is the date when a claimant is entitled to claim payment, and they may only make one claim per reference date.

79. At present, sub-s 9(2) of the SOP Act does not provide for consistent reference dates, which instead depend on if:
    (a) the construction contract itself determines the date (including where the claim relates to a milestone, rather than a payment date at particular intervals); or
    (b) the construction contract does not determine the date (in which case, reference dates occur at 20 business day intervals); or
    (c) the payment is a "single or one-off payment" for which the contract makes no provision as to the due date; or
    (d) if the payment claimed is a "final payment" as defined in a contract (usually the last payment claimed after the expiry of a defects liability period, where the claim relates to outstanding retention).

80. The Inquiry has recommended that the concept of "reference dates" be abolished, and a new model based on sub-ss 13(1A)-(1C) of the New South Wales Act be adopted, the effect of which is that:

- a payment claim may be served on and from the last day of the '*named month*' when construction work was first carried out, and on the last day of '*each subsequent named month*', unless the construction contract identifies an earlier date in 'any particular named month'; and
- if a construction contract is terminated, a last claim may be served '*on and from the date of termination*.'

81. The Inquiry also recommends making clear that retention can be claimed in a payment claim (a point that has been debated under the current law), and empowering an adjudicator to determine if retention money is due to be returned).

82. These proposed would apply a "one size, fits all" approach to all construction contracts, without recognising the particular characteristics of certain payment claims under certain contracts (in particular, final payments and milestone payments, the later of which would be critical if the scheme were extended to domestic building contracts). The merits of this can be debated.

IX. Adjudication certificates not required to be accompanied by affidavit

83. After an authorised nominating authority issues an adjudication certificate, sub-s 28R(2)(b) of the SOP Act requires the applicant to complete an affidavit confirming the amount adjudicated has not been paid, and how much.

84. The Inquiry recommends adopting the New South Wales approach, in which merely filing the certification will lead to judgment.

X. Due dates no longer tied to the construction contract

85. A confusing element of security of payment laws is the existence of a separate concept of the "due date", as distinct from the time in which a payment schedule must be lodged by. Some contracts, for example, provide that payment is not due until a tax invoice (as distinct

from a payment claim) has been served, such that parties can be tripped up by minor contractual technicalities, despite this contradicting the policy of the SOP Act.

86. Recommendation 8 of the Inquiry is that while the contract can set a date, the payment term must not exceed 25 business days after the payment claim has been made, alternatively 10 business days from the claim if the contract is silent.

D. Changes not mentioned, but probably needed

I. Extension of third party limitation claims

87. Where an owner commences a proceeding, builders often commence an action for contribution under section 23B of the *Wrongs Act* 1958.

88. Under section 134 of the *Building Act* 1993, where an occupancy certificate or certificate of final inspection has been issued, a 'building action' can only be commenced within 10 years of the date of that certification.

89. In *Smith v Henley Arch Pty Ltd (Building and Property)* [2019] VCAT 2024 – at a point in time where, the Supreme Court has since held, VCAT did not actually have jurisdiction to consider claims for contribution – Aird DP determined that an action for contribution is not a '*building action*'.

90. In theory, this means that even after the period in section 134 of the *Building Act* 1993 (ie. of 10 years), a builder can commence an action for contribution within the additional period of one year provided for in sub-s 24(4)(a)(ii) of the *Wrongs Act* 1958, which is '*within the period of twelve months after the writ in the action against the [builder] was served on*' the builder (the definition of "writ" was amended in 2023 to include an application to VCAT).

91. Contribution, however, is limited to situations where the third party joined would also be liable to the plaintiff or applicant, rather than the defendant or respondent (for example, a sub-contractor to a builder); in other words, while a one-year extension is given for

contribution claims, it does not extend to third party claims generally, meaning builders sued on the cusp of a limitation period are arguably statute-barred from pursuing persons directly liable to them.

92. It would be sensible for any revised Building Act to change the present section 134, to include a one-year extension period for third party claims generally (not just those for contribution).

II. Stays under the SOP Act

93. Despite the "pay now, argue later" policy of SOP legislation, there is some scope for those rights to be suspended, where a counterclaim is arguable, or an appeal from a judgment is on-foot, in circumstances where the interim payment would become final before that further process were determined.

94. Except in an appeal, the test is that there must be '*more than a "real risk"*' that the amounts could not be recovered, as first set out in *Grosvenor v Musico* [2004] NSWSC 344, whereas in an appeal, an applicant for a stay must show '*special or exceptional circumstances*', such as '*where there is a 'real risk' the appeal would be rendered nugatory*', as identified in *Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd* [2020] VSCA 269, although some doubt has been expressed as to the later conclusion.

95. It would be preferable if the SOP Act itself defined the basis for seeking a stay, so as to make it clear what criteria must be considered when making such an application.

III. Contractual provisions continuing despite the SOP Act

96. Although section 48 of the SOP Act states that the SOP Act has effect despite contrary provisions in a contract, and that any agreement to restrict the operation of the SOP Act is void, that is not the same as overriding a contract to provide that includes terms determined by statute (consider, for example, section 46 of the *Retail Leases Act* 2003).

97. Part of the SOP Act's unnecessarily complex nature is that it exists over the top of the contracts it regulates, meaning that the underlying civil dispute is preserved, warts and all, including contractual non-compliances.

98. This means, for example, that while a payment claim may be a progress claim for the purposes of the SOP Act, it is contractually invalid, and as such, the parties can still trip over technicalities in a subsequent civil proceeding.

99. The interim nature of the SOP Act and the adjudication system would not be undermined by going one step further, and simply stating that contracts are taken to provide that a valid progress claim or schedule under the SOP Act is always a valid contractual claim or certificate.