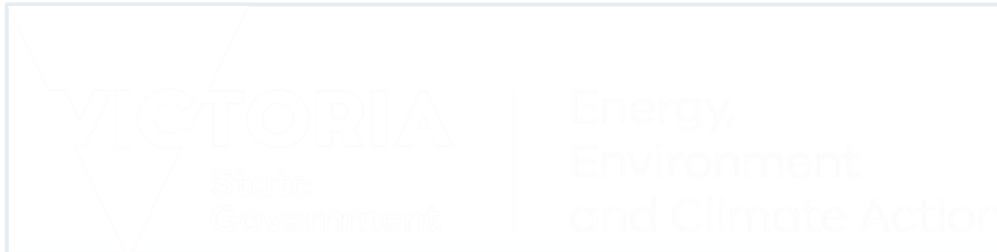


## Inquiry into payment practices in the Victorian construction industry - MBAV



### Strengthening the statutory right to claim payment

**Recommendation 2:** That the Victorian Government repeal ss 10, 10A & 10B of the Building and Construction Industry Security of Payment Act 2002 (Vic) and insert a new provision modelled on both s 9 of the Building and Construction Industry Security of Payment Act 1999 (NSW) and s 18 of the Building and Construction Industry (Security of Payment) Act 2021 (WA). The new provision should enable contractors to claim a progress payment calculated in accordance with a contract or, if the contract does not provide for the matter, calculated on the basis of the value of construction work carried out. \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 2.

MBV support the proposal to repeal ss 10, 10A, and 10B of the Building and Construction Industry Security of Payment Act 2002 (Vic) and replace them with a provision modelled on s 9 of the Building and Construction Industry Security of Payment Act 1999 (NSW) and s 18 of the Building and Construction Industry (Security of Payment) Act 2021 (WA). However, we would need to review the specific clauses before extending our full support. The provision should empower contractors to claim progress payments either in accordance with the contract terms or, in the absence of such terms, based on the value of construction work completed

**Recommendation 3:** That the Victorian Government remove the concept of 'reference dates' from the Building and Construction Industry Security of Payment Act 2002 (Vic) and insert a statutory entitlement to claim payment modelled on ss 13(1A), (1B) and (1C) of the Building and Construction Industry Security of Payment Act 1999 (NSW). The new provisions should:

- enable at least one payment claim to be made per calendar month;
- expressly provide for a payment claim to be made on or following the termination of a contract, for goods and services provided up to the date of termination; and
- override any contracted dates for payment claims if they are longer than those provided for by the SOP Act.

\*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 3

MBV support the proposal to remove the concept of 'reference dates' from the Building and Construction Industry Security of Payment Act 2002 (Vic) and replace it with a statutory entitlement to claim payment, akin to ss 13(1A), (1B), and (1C) of the Building and Construction Industry Security of Payment Act 1999 (NSW). The new provisions should allow at least one payment claim per calendar month, permit claims following contract termination, and supersede any contracted payment claim dates exceeding those provided by the SOP Act. This change promotes clarity and fairness in payment procedures within the construction industry. However, we would need to review the specific clauses before extending our full support.

**Recommendation 4:** That the Victorian Government amend the definition of business days contained in s 4 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to exclude:

- Saturdays and Sundays
- Victorian public holidays, and
- the period between 22 December and 10 January inclusive.

Division 2, s 4 of the Building and Construction Industry (Security of Payment) Act 2021 (WA) provides a suitable model for this reform. \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 4.

MBV support the proposed amendment to redefine "business days" in s 4 of the Building and Construction Industry Security of Payment Act 2002 (Vic). Excluding Saturdays, Sundays, Victorian public holidays, and the period between 22 December and 10 January enhances clarity for industry members. The model provided by Division 2, s 4 of the Building and Construction Industry (Security of Payment) Act 2021 (WA) serves as an excellent guideline for this necessary reform. Clear advice and guidance on business days are crucial to ensuring smooth and efficient operations in the construction sector.

**Recommendation 5:** That the Victorian Government amend the Building and Construction Industry Security of Payment Act 2002 (Vic) to insert a provision modelled on s 16 of the Building and Construction Industry (Security of Payment) Act 2021 (WA).

The new section should provide that notice-based time bar clauses can be declared 'unfair' by an adjudicator, a court, an arbitrator (or other expert appointed by the contracting parties to determine a matter under the contract) if compliance with the clause:

- is not reasonably possible
- would be unreasonably onerous.

A notice-based time bar provision of a construction contract that is declared to be unfair has no effect in relation to the payment claim that is the subject of the proceedings. However, it continues to have effect in other circumstances arising under the same or a related contract. \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 5.

MBV support the intention behind the proposed amendment to insert a provision modelled on s 16 of the Building and Construction Industry (Security of Payment) Act 2021 (WA), we note the importance of ensuring effectiveness and fairness in its application. As this new clause has not yet been tested in Western Australia, it raises questions about its practical implications. We advise thorough scrutiny and consultation, including with MBA WA, to ascertain the potential benefits and risks before providing full support.

**Recommendation 6:** That the Victorian Government amend the Building and Construction Industry Security of Payment Act 2002 (Vic) to insert a provision modelled on s 15 of the Building and Construction Industry (Security of Payment) Act 2021 (WA). The new provision should provide that the Building and Construction Industry Security of Payment Regulations 2023 (Vic) may prohibit unfair construction contractual clauses and, in doing so, nullify their effect. \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 6.

MBV support the proposed amendment to the Building and Construction Industry Security of Payment Act 2002 (Vic) to insert a provision, modelled on s 15 of the Building and Construction Industry (Security of Payment) Act 2021 (WA). This provision should empower the Building and Construction Industry Security of Payment Regulations 2023 (Vic) to prohibit unfair construction contractual clauses and render them ineffective. MBV's advocacy for the removal of unfair clauses, particularly those imposed by government entities, aligns with principles of fairness and equity in the construction industry. However, we would need to review the specific clauses before extending our full support.

**Recommendation 7:** That the Victorian Government amend the Building and Construction Industry Security of Payment Act 2002 (Vic) to extend the time limit on claiming payment to six months. Amendments should be modelled on s 23 of the Building and Construction Industry (Security of Payment) Act 2021 (WA) which enables:

- a progress payment to be claimed up to six months after the relevant construction work was completed, or later if provided for in the contract;
- a final payment to be claimed before whichever of the following is the latest:
  - six months after the completion of works or supply of goods under the construction contract
  - 28 days after the end of the last defects liability period for the construction contract
  - the date provided for in the construction contract. \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 7.

MBV endorse amending the Building and Construction Industry Security of Payment Act 2002 (Vic) to extend payment claim time limits to six months, following the model of the Building and Construction Industry (Security of Payment) Act 2021 (WA). This change enhances fairness and flexibility in payment procedures. However, we would need to review the specific clauses before extending our full support.

**Recommendation 8:** That the Victorian Government amend s 12 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to provide that a payment under a construction contract becomes due and payable:

- on the date set by the terms of the contract, subject to the payment term not exceeding 25 business days after the payment claim has been made, 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. \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 8.

MBV supports the proposed amendment to s 12 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to provide clarity on when payments under construction contracts become due and payable. However, we seek additional clarity on how this change interacts with contractual terms. Specifically, if a contract stipulates a longer payment term, such as 30 days, does this proposed amendment supersede that provision?

**Recommendation 9:** That the Victorian Government amend s 14 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to expressly:


- provide an entitlement to claim retention money under the Act, either as part of a broader payment claim or as a standalone claim;
- empower an adjudicator to decide whether retention money is to be returned, the proportion which is owed, and the date on which it is to be returned. \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 9.

MBV support the proposed amendment to s 14 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to explicitly establish an entitlement to claim retention money under the Act. Empowering adjudicators to decide on the return of retention money, including proportion and timeline, ensures fair treatment and resolution of disputes within the construction industry. However, we would need to review the specific clauses before extending our full support.

**Recommendation 10:** That the Victorian Government engage with the residential building sector to consider amending the Building and Construction Industry Security of Payment Act 2002 (Vic) to encompass construction contracts with homeowners. Any amendments made should provide that a payment claim made to a homeowner is not validly served unless it is accompanied by standard information (produced by the Victorian Building Authority) explaining security of payment law, the statutory timeframes, how to respond to a payment claim, and where to seek assistance and further information. \* 

Does your organisation support this recommendation?


No, do not support Recommendation

\* 

Please provide further information about your 'No' response to Recommendation 10.


MBV acknowledges the importance of educating homeowners on security of payment law, however we have reservations about amending the Act to include construction contracts with homeowners. Our primary concern lies in the potential complications and overlaps with existing legislative frameworks and builders' obligations. The introduction of homeowners into the adjudication process raises questions about practicality and feasibility within the residential space. Careful consideration is necessary to avoid unintended consequences and ensure clarity if implemented. Further discussion and thorough examination of these complexities are crucial before proceeding with any amendments.

**Recommendation 14:** That the Victorian Government insert a provision in the Building and Construction Industry Security of Payment Act 2002 (Vic) requiring the Act and any corresponding regulations to be reviewed three years after the recommendations of the report are implemented, should they be taken up. The review should report within 12 months and incorporate consultation with the construction sector to:

- identify persistent and emerging poor payment and contracting practices in the construction sector and avenues for addressing these behaviours;
- assess whether Victorian security of payment law is achieving its legislated objectives and recommend opportunities to improve its operation;
- consider developments in the security of payment law of other Australian jurisdictions and determine whether similar reform would be beneficial in Victoria. \* 

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 14. 

MBV agree with the proposal to insert a provision in the Building and Construction Industry Security of Payment Act 2002 (Vic) mandating a review three years after implementing the recommendations of the report. Consultation with the industry is crucial to address poor practices and enhance the effectiveness of the legislation. However, we would need to review the specific clauses before extending our full support.

## Improving the adjudication of payment disputes



**Recommendation 15:** That the Victorian Government amend s 21 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to:

- prohibit respondents from including reasons in their response to an adjudicator that was not previously included in the payment schedule;
- remove the requirement for adjudicators to identify these reasons and provide claimants with two days to respond to them. \*

Does your organisation support this recommendation?

Yes, support Recommendation



You are welcome to provide further information about your 'Yes' response to Recommendation 15.

MBV support the proposed amendment to s 21 of the Building and Construction Industry Security of Payment Act 2002 (Vic). However, we emphasise the need for enhanced education on adjudication procedures to ensure clarity and compliance with the new requirements. However, we would need to review the specific clauses before extending our full support.

**Recommendation 16:** That the Victorian Government amend s 18 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to provide respondents with five business days to provide a payment schedule in response to an adjudication notice. \*

Does your organisation support this recommendation?

Yes, support Recommendation



You are welcome to provide further information about your 'Yes' response to Recommendation 16.

MBV support the proposed amendment to s 18 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to extend the timeframe for respondents to provide a payment schedule in response to an adjudication notice to five business days. This adjustment provides respondents with adequate time to prepare a comprehensive response, contributing to fair and efficient dispute resolution processes in the construction industry. However, we would need to review the specific clauses before extending our full support.

**Recommendation 17:** That the Victorian Government amend s 22 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to provide that an adjudication determination must be made within 10 business days of:

- a respondent providing a valid adjudication response
- the date an adjudication response became due, or
- if the respondent is not entitled to provide an adjudication response, the date the adjudicator accepted the adjudication application.

However, the claimant and the respondent may agree to extend the time by which an adjudicator must make a determination by up to an additional 20 business days.

Reforms should be modelled on s 37 of the Building and Construction Industry (Security of Payment) Act 2021 (WA). \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 17.

MBV support the proposed amendment to s 22 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to ensure timely adjudication determinations. Adherence to a 10-day timeframe, with the option for extension by mutual agreement, aligns with best practices outlined in s 37 of the Building and Construction Industry (Security of Payment) Act 2021 (WA). However, we would need to review the specific clauses before extending our full support.

**Recommendation 19:** That the Victorian Government repeal div 2A of the Building and Construction Industry Security of Payment Act 2002 (Vic) to remove the adjudication review mechanism, which only allows for the review of determinations involving excluded amounts. \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 19.

MBV support the proposal to repeal Division 2A of the Building and Construction Industry Security of Payment Act 2002 (Vic), specifically to remove the adjudication review mechanism concerning excluded amounts. Simplifying the adjudication process will streamline dispute resolution and enhance efficiency in the construction industry. However, we would need to review the specific clauses before extending our full support.

**Recommendation 20:** That the Victorian Government amend s 50 of the Building and Construction Industry Security of Payment Act 2002 (Vic) and the Building and Construction Industry Security of Payment Regulations 2023 (Vic) to modernise how notices may be served. Reform should be modelled on s 113 of the Building and Construction Industry (Security of Payment) Act 2021 (WA) and reg 22 of the Building and Construction Industry (Security of Payment) Regulations 2022 (WA). \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 20.

MBV support the proposed amendment to s 50 of the Building and Construction Industry Security of Payment Act 2002 (Vic) and the Building and Construction Industry Security of Payment Regulations 2023 (Vic) to modernise notice service methods. We appreciate the addition of email, aligning with the efficient practices outlined in s 113 of the Building and Construction Industry (Security of Payment) Act 2021 (WA) and reg 22 of the Building and Construction Industry (Security of Payment) Regulations 2022 (WA). However, we would need to review the specific clauses before extending our full support.

**Recommendation 23:** That the Victorian Government amend s 46 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to extend the protection from civil liability already afforded to adjudicators to authorised nominating authorities for the duties and functions they perform under the Act in good faith. Section 30 of the Building and Construction Industry Security of Payment Act 1999 (NSW) provides a suitable model. \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 23.

MBV supports the proposed amendment to s 46 of the Building and Construction Industry Security of Payment Act 2002 (Vic) to extend protection from civil liability to authorised nominating authorities. Emulating the model provided by Section 30 of the Building and Construction Industry Security of Payment Act 1999 (NSW) ensures fair treatment and encourages the effective functioning of the adjudication process. However, we would need to review the specific clauses before extending our full support.

**Recommendation 26:** That the Victorian Government amend div 2B of the Building and Construction Industry Security of Payment Act 2002 (Vic) to provide that an adjudication certificate may be filed as a judgement for a debt in any court of competent jurisdiction and is enforceable accordingly. Section 25 of the Building and Construction Industry Security of Payment Act 1999 (NSW) provides a suitable model. \*

Does your organisation support this recommendation?

Yes, support Recommendation

You are welcome to provide further information about your 'Yes' response to Recommendation 26.



MBV support the proposed amendment to Division 2B of the Building and Construction Industry Security of Payment Act 2002 (Vic) to allow adjudication certificates to be filed as judgments for debt in any court of competent jurisdiction and enforced accordingly. Modeling this provision after Section 25 of the Building and Construction Industry Security of Payment Act 1999 (NSW) ensures effective enforcement mechanisms, promoting fairness and accountability in the construction industry. However, we would need to review the specific clauses before extending our full support.

## Insolvency in the construction sector



**Recommendation 27:** That the Victorian Government work with the construction sector to review the application of a cascading deemed statutory trust scheme, as outlined by the Review of Security of Payment Laws: Building Trust and Harmony (2017). The review should consider the design and implementation of a cascading deemed statutory trust model which is:

- best suited to the Victorian construction sector, and
- integrated with the statutory rights and adjudication process established by the Building and Construction Industry Security of Payment Act 2002 (Vic).

The review should also identify appropriate industry education and support measures to ease the transition to a cascading deemed statutory trust model, should the review identify a model appropriate to adopt. \*



Does your organisation support this recommendation?

No, do not support Recommendation

\*

Please provide further information about your 'No' response to Recommendation 27.

MBV would support further investigation into a statutory trust scheme, however we cannot support the scheme until we see further detail.

Project trust accounts (project bank accounts) assume payments are the same up and downstream – it effectively ties downstream payments to upstream payments. Currently, subcontractors have different terms and mechanisms to support the delivery of projects. Project trust accounts can take away that flexibility and create more complexities. Using project trust accounts in conjunction with lump sum tendering contracts can exacerbate this.

The challenges around payments within the industry often revolve around the entitlement and valuations of work. Project trust accounts alone will not address poor payment practices such as lengthy payment timeframes by the client, or a failure to assess variations and other claims in a timely manner by the client or head contractor.

Cascading project trust accounts as prescribed in the Review of Security of Payment Laws 2018 would be a preferable model compared to what has been exemplified in Queensland, provided legislative obligations were kept to a minimum. There should be considerations for limitations to forms of contracts where the “actual cost of construction” is reimbursable. This will mean that other fees, overheads, and profits are not subject to a trust. Project trust accounts are already used in the industry in Defence contracts.

**Recommendation 28:** That the Victorian Government consider introducing a retention trust scheme to the Victorian construction sector modelled on the retention trust scheme established by the Building and Construction Industry (Security of Payment) Act 2021 (WA). In the event of the adoption of the cascading deemed statutory trust model outlined in recommendation 27, the scheme outlined in this recommendation would be superseded. \*



Does your organisation support this recommendation?

Yes, support Recommendation  ▼

You are welcome to provide further information about your 'Yes' response to Recommendation 28.

MBV support the introduction of a retention trust scheme in the Victorian construction sector, following the model established by the Building and Construction Industry (Security of Payment) Act 2021 (WA). A retention trust scheme provides essential protection for contractors and subcontractors, ensuring the secure handling of retention funds. We acknowledge that in the event of adopting the cascading deemed statutory trust model, this scheme would be superseded, emphasising the importance of flexibility and effectiveness in safeguarding payments within the industry.



This content is created by the owner of the form. The data you submit will be sent to the form owner. Microsoft is not responsible for the privacy or security practices of its customers, including those of this form owner. Never give out your password.

Microsoft Forms | AI-Powered surveys, quizzes and polls [Create my own form](#)

[Privacy and cookies](#) | [Terms of use](#)