

# **Inquiry into employers and contractors who refuse to pay their subcontractors for completed works**

## **Joint industry submission to the Victorian Parliament**

**19 May 2023**



## About Us

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This joint submission is made by Level Playing Field, the Crane Industry Council of Australia, the Structural Steel Fabricators Association Victoria, the Australian Timber Flooring Association and individual subcontractors who have suffered harsh financial consequences as a consequence of principals and head contractors who have either been impacted by insolvency or refused to pay them for construction works they have performed.

The submission has been prepared by Level Playing Field, a law firm specialising in construction law and representing subcontractors, assisted by Christie Jones of Counsel, who specialises in building and construction disputes. Level Playing Field regularly advises clients who are experiencing issues with non-payment for construction work and acts for claimants and respondents in adjudications and proceedings under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Victorian Act**). Level Playing Field has a unique insight into the problems faced by subcontractors in the construction industry, its principal lawyer Ping Gangur having worked as a Registered Domestic Builder (DB-U) and Commercial Builder (CB-L) for over 12 years. In construction, her experience ranges from site management to contract administration and finance in addition to involvement in a family run structural steel fabrication business completing large commercial projects such as Cabrini Hospital, Knox Hospital and Carey Grammar.

### The Crane Industry Council of Australia

The Crane Industry Council of Australia (**CICA**) is the national peak industry body for the crane industry and its workers. Founded in 1980, CICA represents approximately 700 member organisations.

CICA liaises with crane owners, hirers, operators, construction companies, government and regulatory bodies as well as other establishments affiliated with cranes and their use to improve crane usage, efficiency and safety outcomes. CICA provides resources, develops initiatives and advocates on matters of concern to its members as well as empowers its members with solutions and information they need to effectively run their businesses and operations.

### Structural Steel Fabricators Association Victoria

The Structural Steel Fabricators Association of Victoria (**SSFV**) is an association of Victorian steel fabricators who conduct business Australia-wide. SSFV was founded by six of the biggest Victorian steel fabricators in the 1960s.

SSFV has a membership base of approximately 73% of steel fabricators across Victoria, covering the smallest to the largest steel fabricators. All of SSFV's members

are Victorian based companies conducting business primarily for the Victorian building and construction industry.

### **Australasian Timber Flooring Association**

The Australasian Timber Flooring Association (**ATFA**) is the peak industry body for the timber flooring industry throughout Australia and New Zealand. ATFA is a strong and dynamic, not-for-profit, member-based association singularly focused on the timber flooring industry. ATFA delivers high-quality, industry specific services and technical information to its members and the community.

ATFA is led by its 1000+ members, driven by an industry Board and Industry Committees throughout the states and NZ, ATFA exists only to build the professionalism and market share for its members who comprise of timber flooring contractors, timber flooring manufacturers, coating manufacturers, adhesive manufacturers, suppliers and retailers.

### **Individual Subcontractors**

The submission is also made for and on behalf of individual subcontractors including:

1. Always Airconditioning and Plumbing (mechanical contractor);
2. APR Structural Steel Pty Ltd (structural steel fabricator);
3. Barra Steel (structural steel fabricator);
4. Caelli Construction (concrete contractor);
5. Caster Construction (concrete contractor);
6. Collective Crane Hire (crane contractor);
7. Continental Steel (structural steel fabricator);
8. Donald Crowl Plastering (plastering contractor);
9. Elite Plumbing (plumbing contractor);
10. Façade Designs International (façade contractor);
11. Holloway Air Pty Ltd (mechanical contractor);
12. Kumnicks Plumbing (plumbing contractor);
13. LB Concrete Solutions Pty Ltd (concrete contractor);
14. McGrath Plumbing Pty Ltd (plumbing contractor);
15. Multicrete (concrete contractor);
16. Plinius Engineering (structural steel fabricator);
17. Premier Cranes & Rigging Pty Ltd (crane contractor);
18. Req Construction Pty Ltd (plastering contractor);
19. Ridge Plumbing (plumbing contractor);
20. Skylift Cranes (crane contractor);
21. Structural Challenge (structural steel fabricator);
22. Tullamarine Plumbing & Drainage (plumbing contractor); and
23. Timbertech Floors (timber flooring contractor)

## **The Building and Construction Industry and Security of Payment**

1. The building and construction industry is one of the most important sectors in Victoria. Not only is our industry responsible for delivering to Victorians their homes, roads, transport, parks, hospitals, schools and aged care facilities – it is the third largest employer in the State and accounts for over 50% of the State's tax revenue.
2. The building and construction industry is in crisis. In addition to navigating ongoing uncertainties arising from the Covid-19 pandemic, we are facing increasingly tough economic conditions which have led to the collapse of far too many participants in the industry, both large and small.
3. With increasing risks for construction projects given the current economic climate comes an increasing risk of disputes at all contracting levels and a heightened need for legislative reform to ensure cashflow to all participants in the industry.
4. At the heart of the crisis is the ongoing issue of construction cashflow and ensuring a sufficient level of protection to ensure that all participants in the construction chain, including subcontractors, are paid for work they have completed or goods and services they have supplied. Payment risk is felt most sharply at the subcontractor level – with security of payment remaining a key issue which affects the ability of all subcontractors to make a living and be rewarded for work they perform.
5. The contracting methodology in the Australian building and construction industry is hierarchical, with the developers and principals at the top of the construction chain determining the contracting mode. Typically, developers and head contractors push the majority of construction risks downstream. As a consequence, subcontractors, who are responsible for performing approximately 80% of all construction work and for contributing the bulk of materials and labour for construction projects, are typically most at risk for not getting paid.
6. Over the past two decades, the State governments have enacted security of payment legislation designed to strengthen cashflow in the industry, ensure that those who carry out construction work receive prompt payment for work they perform and shift the risk of insolvency to principals and head contractors.<sup>1</sup>
7. While security of payment legislation in Victoria, Queensland, South Australia, the ACT and Tasmania is based on the NSW security of payment legislation first introduced in 1999, there are key differences in the legislation amongst States.

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<sup>1</sup> Bruce Collins QC, *Independent Inquiry Into Construction Industry Insolvency in NSW* (Collins Inquiry Report), November 2012, pp 20-21.

8. While security of payment legislation has made some inroads in improving cashflow down the construction chain there is a long way to go and the downward shift of construction risk to the most vulnerable participants in the industry, together with ongoing issues in respect of non-payment of these participants, remains a huge problem which is crippling the building and construction industry.
9. In December 2016, the Commonwealth Government appointed Mr John Murray AM to conduct a review to examine ways to improve consistency in security of payment legislation and increase protections for subcontractors to ensure they are paid on time for work they have performed. As the Terms of Reference for the review noted, *'while well-intentioned, the often vastly different security of payment laws operating in each jurisdiction are not working as well as intended and there are barriers to access'* and *'it is a fundamental right of anyone that performs work in accordance with a contract to be paid without delay for the work they have done.'*
10. The focus of Murray's review was to consider protections for individuals and small business subcontractors, whom the Commonwealth Government recognised can be crippled by delays and disputed payments.<sup>2</sup> The Issues Paper released by the Commonwealth Government highlighted that statutory intervention is critical to govern contractor's rights to receive prompt payment for work carried out, identifying two key fundamental principles:
  - (a) Cashflow is the lifeblood of the industry – and the most effective way in which a contractor's cashflow can be preserved and maintained is through progress payments; and
  - (b) The only reason a head contractor receives progress payments from the principal is due to the work carried out by subcontractors – the head contractor would not have a basis to receive the progress payment claimed.
11. In his final report titled Review of Security of Payment Laws 'Building Trust and Harmony' dated December 2017, Murray made 86 recommendations to improve consistency in security of payment legislation and increase subcontractor payment protections.
12. Many other States have since introduced amendments to their security of payment legislation adopting some of Murray's recommendations and strengthening their security of payment regimes such that the protections afforded to construction industry participants in those jurisdictions surpasses those afforded to industry participants in Victoria.
13. Victoria cannot continue to lag behind in providing appropriate protections to subcontractors who are the lifeblood of the building and construction industry.

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<sup>2</sup> Media Release, 21 May 2018, available at: [John Murray AM appointed to review security of payments laws | Ministers' Media Centre \(dese.gov.au\)](https://www.ministers.gov.au/ministers/media-centre/2018/05/21/john-murray-am-appointed-to-review-security-of-payments-laws).

## Summary of proposed reforms

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The parties to this submission jointly agree that urgent legislative amendment to the Victorian Act is required to improve consistency in security of payment legislation and increase protections for subcontractors in Victoria to ensure they are paid on time for construction work they have performed consistent with the objects of the Victorian Act.

The reforms proposed by the parties to this submission find support both in security of payment legislation in other States and the recommendations contained in the Murray Report. The reforms are necessary to ensure that subcontractors, who are the backbone of the construction industry, can survive in the tough economic climate they face and ensure our economy which heavily relies on the success of the building and construction industry not only recovers but prospers.

### **Reform 1 – Implementation of statutory trusts to protect against insolvency**

14. The implementation of cascading statutory trusts for construction projects with a value of at least \$1,000,000.
15. Cascading statutory trusts will apply to all subcontractors linked to a head contractor – which will provide important protection to small to medium subcontractors who are often at the end of contracting chain.
16. Single consolidated trust accounts should be established, separate from a contractor's general banking accounts.
17. Responsibility for managing a statutory trust will belong to the participants in the construction project, specifically, it should be the responsibility of the party that is the trustee in the relationship.
18. The implementation of statutory trusts will ensure that when a payment is made to a party for work carried out by someone else, and where payment is withheld by way of cash retention, the party receiving the payment or holding the retention will be taken to hold those funds on trust for the person who carried out the work.
19. Statutory trusts will provide protection of payments to subcontractors and cash retention in the event of their contractor's insolvency, prevent the misuse of funds, and better facilitate payments to those who have performed construction work and are entitled to payment.
20. As recognised by Murray, while security of payment legislation focuses on enshrining a right to progress payments and providing a mechanism for the rapid resolution of payment disputes, there has been little focus on ensuring payments

made to those high in the contracting chain for work carried out by subcontractors are protected from insolvency and misuse.<sup>3</sup>

21. The need for statutory trusts to protect payments and retention is heightened by the tough economic conditions currently facing the building and construction industry and the recent collapse of both large and small industry participants.
22. The absence of protection of payment for work performed by subcontractors is killing the industry. Head contractors are struggling to find enough subcontractors to engage on construction projects. Subcontractors themselves are struggling to survive – being forced to carry the lion's share of risk on construction projects whilst frequently suffering from non-payment or delayed payment for the work they perform.
23. Level Playing Field acts for numerous subcontractors who, through the insolvency of contractors higher up the construction chain, have been prevented from recovering significant sums of money they are owed in respect of work they have performed. By way of example:
  - (a) A small crane company who is owed the sum of \$253,097.68 by a structural steel fabricator who has recently entered external administrators. The crane company is now in a position where they need to consider how to continue trading and whether to downsize.
  - (b) A mid-sized concreting company which currently has over \$1 million in outstanding cash retention that was due in 2022. Of that sum, the concreting company is unable to recoup \$204,164.59 as a consequence of insolvency of contractors. Whether the balance is recoverable is highly questionable, given the issues associated with recovering retention under the Victorian Act addressed at reform 4 below.

## **Reform 2 – Retention monies**

24. The Victorian Act should expressly provide that it applies to cash retention held under construction contracts. This can be facilitated by way of an amendment to the definition of 'construction work' to ensure that a claim for retention can form part of a claimant's progress claim.
25. At present, where a principal decides not to release retention at the end of a contractually stipulated period, such as upon practical completion or the end of the defects liability period, the Victorian Act is of no assistance. This follows a number of Victorian cases where it has been held by the Courts that retention is

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<sup>3</sup> Review of Security of Payment Laws 'Building Trust and Harmony', J Murray AM (December 2017) (**Murray Report**), p.291.

not payment for ‘construction work’ and is therefore not claimable under the Victorian Act.<sup>4</sup>

26. The position under the Victorian Act in respect of retention is in contrast to security of payment legislation in other jurisdictions, with claims for cash retention being allowed in NSW,<sup>5</sup> Queensland,<sup>6</sup> the ACT,<sup>7</sup> Tasmania<sup>8</sup> and South Australia.<sup>9</sup>
27. Holding onto retention, when construction works are completed and without a demonstrated right to do so, is a frequent occurrence in the Victorian building and construction industry. This is particularly problematic given most payment disputes manifest at the end of a construction project and where retention often represents a subcontractor’s entire profit on a construction project.
28. Urgent legislative reform is required to ensure that subcontractors have a right to recover retention under the Victorian Act and are not forced to resort to expensive and time-consuming legal proceedings, against head contractors who are generally more sophisticated and better resourced.
29. Level Playing Field has acted for numerous subcontractors who have been prevented from recovering unpaid cash retention from contractors on the basis that there is no ability to make a stand alone claim under the Victorian Act and where legal proceedings would be too expensive and time consuming to justify commercially.<sup>10</sup>

### **Reform 3 – Reference dates**

30. The requirement for a ‘reference date’ should be abolished in favour of:
  - (a) a simple entitlement for contractors to issue one payment claim for every named month (or more frequently if so provided under the contract); and
  - (b) an express right exists to make a payment claim following termination of a construction contract.
31. By reason of the requirement for a ‘reference date’ as currently defined under the Victorian Act, and confusion as to when a ‘reference date’ arises, claimants are being unfairly prevented from making payment claims under the Victorian Act due to the absence of a ‘reference date’ and the objective of ensuring prompt payment is being undermined.

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<sup>4</sup> See for example, *Puntons Shoes v Citi-Con* [2020] VSC 514 and *Foursquare Construction Management v Chevron Corporation Pty Ltd* [2020] VCC 1797. See also the attached case summary in respect of *Holloway Air Pty Ltd v Promax Regional Developments Pty Ltd*.

<sup>5</sup> *Building and Construction Industry Security of Payment Act 1999* (NSW), s 13(3)(b).

<sup>6</sup> *Building Industry Fairness (Security of Payment) Act 2017* (QLD), s 68(2)(b).

<sup>7</sup> *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 15(3)(b).

<sup>8</sup> *Building and Construction Industry Security of Payment Act 2009* (TAS), s 17(3)(b).

<sup>9</sup> *Building and Construction Industry Security of Payment Act 2009* (SA), s 13(3)(b).

<sup>10</sup> See for example the case summary in respect of *McGrath Plumbing Pty Ltd*.



32. Disputes about reference dates are one of the most frequently litigated aspects of the Victorian legislation, with the cases highlighting the confusion that exists in the industry in respect of reference dates, the prohibitive effect reference dates are having on the ability of claimants to get paid for construction work they have performed and the need for legislative reform to ensure a fairer system for all.
33. Level Playing Field has acted have numerous subcontractors who have been unable to rely on the Victorian Act to recover significant sums of money owing to them for works performed, and therefore have effectively lost that money, due to reference date issues. In an adjudication undertaken by Holloway Air Pty Ltd, the adjudicator determined no money was owed to Holloway Air Pty Ltd because the payment claim was a claim solely for retention monies. It was held that there can be no relevant reference date for retention monies under section 9 of the Victorian Act because reference dates under the Act are determined based on progress payment entitlement for construction work undertaken or the supply of related goods and services under the contract.
34. In an adjudication undertaken by Tullamarine Plumbing & Drainage Pty Ltd, Tullamarine Plumbing & Drainage were unable to rely on the Victorian Act to recover funds owing to them again because of a reference date issue – with the adjudicator determining that the final payment claim the subject of the adjudication was not made pursuant to a reference date.
35. Reference dates issues have since been heightened following the High Court's decision in *Southern Han Breakfast Point Pty Ltd (in liquidation) v Lewence* [2016] HCA 52 (***Southern Han***). In *Southern Han*, the High Court held that the claimant's rights to a payment claim were suspended following termination of the contract, unless there was a contractual term which specifically enlivened additional reference dates post-termination. Absent such a clause, a right to issue a payment claim did not survive termination of the contract. As a consequence, parties down the contractual chain do not have any redress under the Victorian Act to recover payment for work completed when a contractor terminates a contract prior to a reference date arising.
36. Security of payment legislation in both Queensland and NSW has been amended following *Southern Han* to enshrine an express right to make a progress claim following termination.<sup>11</sup> NSW has gone even further, with an amendment to the legislation having abolished reference dates, consistent with recommendations to this effect in the Murray Report.<sup>12</sup>
37. The proposed form will ensure consistency with other the other States and provide greater payment protection for subcontractors.

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<sup>11</sup> *Building Industry Fairness (Security of Payment) Act 2017* (Qld), s 70; *Building and Construction Industry Security of Payment Act 1999* (NSW), s 8.

<sup>12</sup> Murray report, p131.

## Reform 4 – Excluded Amounts

38. Remove the extensive carve outs in section 10B(2) of the Act which prevent a claimant from including in a payment claim claimed 'excluded amounts' relating to latent conditions, time related costs, changes in regulatory requirements and amounts claimed for damages for breach of contract.
39. At present, the Victorian Act enables a claimant to claim payment for 'construction work' or the supply of related goods or services but excludes 'excluded amounts' and 'disputed variations' (the latter discussed at proposed reform 5 below).
40. As a consequence, even though a claimant may be entitled under a construction contract to include in a progress claim amounts for latent conditions, time related costs, changes in regulatory requirements and the like, they are prohibited from including claims for those amounts in a payment claim under the Victorian Act.
41. This problem has become particularly pronounced following the Victorian Court of Appeal's decision in *Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd* [2021] VSCA 41 (***Yuanda v Façade***). Prior to this decision, if a claimant brought proceedings to recover a debt owing under a payment claim under section 16(2) of the Victorian Act, and the payment claim was found to include an 'excluded amount', that amount could be 'severed' from the payment claim and the Court could enter judgment in favour of the claimant on the balance of the payment claim. Following *Yuanda v Façade*, if a payment claim includes a claimed amount which is found to be an 'excluded amount', judgment cannot be given for any amount the subject of the payment claim.
42. The payment claim in *Yuanda v Façade* was for the amount of \$3,469,365.58. The judge found that every other requirement of section 16(2) of the Victorian Act had been satisfied, except for the inclusion of an 'excluded amount'. The excluded amount was in relation to interest of \$64,154.37. The inclusion of \$64,154.37 prevented judgment being entered in favour of Façade.
43. A case study from the director of *Façade Designs International Pty Ltd* detailing his experience with the Victorian Act is included as part of **Annexure A – Submission from Façade Designs International Pty Ltd**.
44. Victoria stands alone in this regard. No other State has the same prohibitive restrictions in their security of payment legislation. As a consequence, Victorian subcontractors face increased financial stress than their interstate counterparts – their only recourse to recover these 'excluded amounts' being through expensive and time-consuming arbitration, expert determination or litigation against sophisticated and well-resourced principals and head contractors.

45. The proposed reform would ensure consistency with security of payment legislation in NSW,<sup>13</sup> Queensland,<sup>14</sup> South Australia,<sup>15</sup> the ACT<sup>16</sup> and Tasmania<sup>17</sup> where the amount of a progress payment to which a person is entitled in respect of a construction contract is the amount claimed for construction work undertaken or the supply of related goods or services under a construction contract (without restrictive carve outs for excluded amounts).
46. This proposed reform is consistent with Murray's recommendation that the legislation should not include carve-outs of amounts that a claimant is entitled to under a construction contract.<sup>18</sup> As Murray recognised, it is illogical and unfair to restrict a contractor to making claims under the security for payment legislation to only certain types of amounts that a contractor is entitled to under a construction contract.<sup>19</sup> Further, these illogical and unfair restrictions have the potential to impose severe financial hardship on contractors.<sup>20</sup>

### **Reform 5 – Disputed variations**

47. Remove the carve out in section 10A(2) of the Act which prevents a claimant from including in a payment claim claimed 'non-claimable variations' (commonly referred to as 'disputed variations').
48. At present, the Victorian Act prohibits a claimant from including in a payment claim a claimed amount for a variation where, despite a claimant having performed the variation work, the variation has not been expressly agreed by the parties unless the claim qualifies under the highly convoluted definition set out in section 10A of the Victorian Act. The language in section 10A of the Victorian Act has been described as 'tortuous'.<sup>21</sup>
49. Again, Victoria stands alone in this regard. No other State has adopted restrictions on 'disputed variations' in their security of payment legislation. As a consequence, it is only Victorian subcontractors who face increased financial stress with their only recourse to recover 'disputed variations' being through expensive and time consuming arbitration, expert determination or litigation against often sophisticated and well resourced principals and head contractors.
50. The proposed reform would ensure consistency with other State security of payment legislation including that in NSW, Queensland, South Australia, the ACT and Tasmania.

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<sup>13</sup> *Building and Construction Industry Security of Payment Act 1999* (NSW), s 13(3).

<sup>14</sup> *Building Industry Fairness (Security of Payment) Act 2017* (Qld), s 71.

<sup>15</sup> *Building and Construction Industry Security of Payment Act 2009* (SA), s 9.

<sup>16</sup> *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 11.

<sup>17</sup> *Building and Construction Industry (Security of Payment) Act 2009* (Tas), s 12(3).

<sup>18</sup> Murray Report, p.124.

<sup>19</sup> Murray Report, p.123.

<sup>20</sup> Murray Report, p.123.

<sup>21</sup> *SSC Plenty Road v Construction Engineering (Aust) & Anor* [2015] VSC 631, [12].

51. The proposed reform is consistent with Murray's recommendation that the legislation should not include restrictive carve-outs of amounts that a claimant is entitled to under a construction contract.<sup>22</sup>

### **Reform 6 - Voiding unfair contract terms**

52. The Victorian Act should be amended to expressly void unfair contract terms, such as notice-based time bars, which operate to prohibit a claimant from receiving an entitlement to claim a payment or an extension of time that they would otherwise have had where compliance with a notice requirement is not reasonably possible, unreasonably onerous or serves no commercial purpose.
53. At present, sophisticated principals and head contractors often include contract terms which shut subcontractors out from the right to receive an entitlement to payments and the right to claim extensions of time for the predominant purpose of making it difficult or impossible for claimants to pursue what would otherwise be valid entitlements.
54. While notice-based time bars can act to provide principals and head contractors with certainty surrounding a contractor's entitlements throughout a project and allow them to manage associated risks, their original intent has shifted and their mechanisms are becoming increasingly complicated.
55. Unfair contract terms have no commercial purpose and are having harsh and onerous consequences for subcontractors – many of whom have limited resources to devote to detailed contract administration and should not be punished and shut out from an entitlement to payment because they have failed to comply with an unreasonable notice requirement, particularly where delays to a construction project are caused by circumstances beyond their control.
56. The Building and Construction Industry Security of Payment (Review Recommendations) Amendment Bill 2021 was introduced into the South Australian Parliament on 26 May 2021.
57. In the Second Reading speech, it states that the bill is designed to introduce: Reforms to strengthen the protections around threatening or intimidating behaviour and unreasonable contractual terms include:
- (a) making it an offence to directly or indirectly insult, threaten or intimidate, or attempt to assault, threaten or intimidate, a person in relation to an entitlement or claim for a progress payment; and

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<sup>22</sup> Murray Report, p.124.

- (b) making void certain provisions in contracts if the requirement to give notice would not be reasonably possible or be unreasonably onerous or serve no commercial purpose.<sup>23</sup>

58. The proposed reform is consistent with Murray's recommendation that security of payment legislation should void a contractual term that purports to make a right to claim or receive payment, or a right to claim an extension of time, conditional upon notice where compliance with the notice requirements is not reasonably possible, is unreasonably onerous or serves no commercial purpose.<sup>24</sup>

### **Reform 7 – Reasons for withholding payment on payment schedules**

- 59. The Victorian Act should expressly prohibit respondents to an adjudication from providing new reasons for withholding payment that are not the subject of payment schedules.
- 60. Presently, the Victorian Act provides an incentive to principals and head contractors to withhold some reasons for non-payment from a payment schedule, and then ambush subcontractors at adjudication by including new reasons in an adjudication response.
- 61. The consequence of this is that a claimant who commences an adjudication in an attempt to recover amounts owing to it under a payment claim is faced with increased costs and delays. Where a respondent to an adjudication provides new reasons for withholding payment that are not the subject of its payment schedule, a claimant has only two business days to address the new reason for withholding payments and the costs of adjudication are increased by the need for the adjudicator to review the payment claim and payment schedule to identify new reasons for non-payment, request further submissions and then re-consider the matter.
- 62. Again, the Victorian position contrasts with the position in other States. In NSW,<sup>25</sup> Queensland,<sup>26</sup> South Australia,<sup>27</sup> the ACT,<sup>28</sup> and Tasmania,<sup>29</sup> respondents are prohibited from providing new reasons for withholding payment that are not included on their payment schedules.

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<sup>23</sup> Second Reading Speech of the Building and Construction Industry Security of Payment (Review Recommendations) Amendment Bill 2021.

<sup>24</sup> Murray Report, p.289.

<sup>25</sup> *Building and Construction Industry Security of Payment Act 1999* (NSW), s 20(2B).

<sup>26</sup> *Building Industry Fairness (Security of Payment) Act 2017* (Qld), s 82(5).

<sup>27</sup> *Building and Construction Industry Security of Payment Act 2009* (SA), s 20(4).

<sup>28</sup> *Building and Construction Industry Security of Payment Act 2009* (ACT), s 22(4).

<sup>29</sup> *Building and Construction Industry Security of Payment Act 2009* (Tas), s 23(4).

63. The proposed reform is consistent with Murray's recommendation that security of payment legislation should not provide an opportunity for a respondent to include new reasons for withholding payment when lodging an adjudication response.<sup>30</sup>

### **Reform 8 – Important definitions**

64. The following important definitions under the Victorian Act should be amended:
- (a) Construction Work – in addition to expressly including retention, the definition should be drafted in the broadest possible terms, based on the definition from the NSW security of payment legislation, to ensure more mining and oil and gas projects fall within the ambit of the legislation.
  - (b) Construction Contract – the definition should be drafted in the broadest possible terms, again based on the definition from the NSW security of payment legislation, to ensure that all persons carrying out construction work under a construction contract can avail themselves of the statutory rights under the legislation.
  - (c) Business Day – the definition under the South Australian legislation should be adopted which excludes the traditional industry shutdown period between 22 December and 10 January, to ensure that respondents to adjudication applications are not shut out from defending those applications as a consequence of being away from work during the holiday season.
65. The proposed reforms to these definitions are consistent with recommendations made by Murray.<sup>31</sup>

### **Reform 9 - Inclusion of the residential building sector**

66. Extension of the Victorian Act so that it applies broadly to the residential building sector, including owner occupied construction contracts.
67. As part of this proposed reform:
- (a) payment claims in respect of residential building projects should have a longer period for the provision of payment schedules; and
  - (b) a mandatory information sheet would be served with payment claims to ensure the owner-occupier is aware of the Victorian Act and the consequences of failing to respond to a payment claim within a stipulated timeframe.

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<sup>30</sup> Murray Report, p.97.

<sup>31</sup> Murray Report, pp. 106, 111 and 114.

68. Presently, the Victorian Act applies to residential construction only where an owner is 'in the business of building residences'.
69. The Victorian position is in contrast to the position in other States including NSW<sup>32</sup> and Tasmania<sup>33</sup> where security of payment legislation applies broadly in the residential building sector including to owner occupied construction contracts.
70. The proposed reform is consistent with recommendations by Murray – and recognises that participants in the residential building sector face the same cash flow issues as subcontractors when they do not receive prompt payment.<sup>34</sup>

## Case studies – difficulties in recovering payments under the Victorian Act

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- Attached to this Submission are case studies from clients of Level Playing Field (with their written consent) and members of the Master Plumbers, the Crane Industry Council of Australia, the Structural Steel Fabricators Association of Victoria and the Civil Contractor's Federation of Victoria outlining their experiences attempting to recover payment for work they have performed under the Victorian Act (**Annexure B – Case Studies**).
- Each of the case studies highlight the shortcomings of the Victorian Act and the difficulties faced by subcontractors in recovering payment for work performed by them as a consequence of these shortcomings. As things presently operate, subcontractors are walking away from vast sums of money because they do not have sufficient payment protection under the Victorian Act and they do not have the time or resources to pursue recovery through expensive litigation.
- Adopting the legislative reforms proposed in this Submission will ensure that in future, subcontractors are better protected and are able to receive payment on time for work they have performed.

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<sup>32</sup> *Building and Construction Industry Security of Payment Act 1999* (NSW), s 4(2).

<sup>33</sup> *Building and Construction Industry Security of Payment Act 1999* (Tas), s 3.

<sup>34</sup> Murray Report, p.126.

**To the Level Playing Field Lawyer,**

First off, I'd like to say thank you for taking the time and urgency to listen to subcontractors, taxpayers and employers like me who have significantly suffered from the non-payment in the construction industry.

My name is Tony Callipari, I have been in the construction industry since 1989 and founded Façade Designs International (hereinafter "FDI") in 2002, and this is my story.

For as long as I have been operating Façade Designs International, as a subcontractor for the installation of Façade on high-rise buildings the monthly progress claim system has been a custom more so than a written rule. In fact, in my years of practice, as a professional builder too, never have I been facing the issue of arguing about the construction work I have completed, variation to the said construction work or an excluding amount, up until the most recent incidents.

**Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd [2021] VSCA 41**

In 2019, Façade Designs International, which I am the head of, pressed charges against Yuanda for the non-payment of construction work and variation to the construction works.

Until this day, May 9<sup>th</sup>, 2023, I am still in the process to fight for my right to be paid, which includes completed construction works, retention on monthly progress claims as well as a variation to construction works signed off by our contractors on site.

For the complete details, I invite you to read the judgment from the Supreme Court and the Court of Appeal.

However, I'd like to add a few non-published things:

In 2019, I pressed charges against Yuanda despite having contracted with them for over 10 years. Throughout my years of working alongside this company, the system was:

- Establishment Claim: Allowing me to get money to commence the job.
- Monthly progress claim including work completed (installation of façade panels) and variation works based on site records signed monthly by the company site manager.

And never have I ever had an issue. Until September 30<sup>th</sup>, 2019, claim. After more than 10 years of a mutually trusting relationship and system that was agreed upon by both parties the unexpected happened... I was left to dry.



My frustration is the following. I understand the law. I have followed and continue to follow the law. But when is it fair for me to say that Justice has not been met as yet.

- My total contested claim is \$3,469,365.58.
- The law decided that the interest amount included in my progress claim of \$64,154.37 is excluded.
- As a business owner, this led me to conclude that Justice has decided that 1.8% of my total claim value is enough to not pay me despite recognizing the construction work I have completed, the agreed variation, and my retention. I am not a lawyer, but as an Australian citizen, I'd love to apply my right to **recommend that rejecting a claim on the basis that such excluded amount is enough to reject my claim needs to be reconsidered.**
- To date I have paid a considerable amount in lawyer's fees. **My question is: Has justice been denied due to its constant delay?**

No one should be ignorant of the law. And I agree! However, I'd love to ask the question: **Should the law be interpreted from the eyes of the contractors?** Such as, should the meaning and interpretation of variation construction be legitimately interpreted by its usage between two parties that have never disputed their ways before? I understand that I am a builder and I installed Façade, but I still have signed a contract. And my understanding of contract law is *"A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms"*. In this regard, should the law interpret my claim as an honest contractor requiring payment for work that has been approved by both parties and completed rather than arguing on words, I had to google the meaning of.

The reality is I haven't been paid, and obviously, I had to keep seeking work to (1) pay my lawyers for justice (2) bring bread and butter on the table and pay my other life obligation.

Unfortunately, using my right to act on the SOPA has ruined my reputation and not many builders were willing to offer me work believing that I went bankrupt or simply because for some reason they were afraid I would exercise my right on them... were they already forecasting avoiding payment? Because null should be afraid of the SOPA unless payment is not duly processed...

## **Chapter 2: Fairlite Pty Ltd**

Yes, my story doesn't end with Yuanda. In June 2021, I signed a contract for the supply of labour hire for the installation of the façade on the 627 Chapel Street project. At the time, I was, too, contracted by Fairlite for the West Side Place project, the two being completely distinct contracts.

To my knowledge, it is the nature of the industry to have separate accounts for each project, and therefore, cashflow is a distinct portfolio, as, by law, it is not legal to run insolvent.

Through the projects, it was common for Fairlite to delay payment, FDI having to constantly chase up the payment of the invoices, which ended up being paid until December 2021 claim. Despite the non-payment, we continued to pursue the work as we had a great relationship (or thought we had) and it was an unfortunately common practice for Fairlite to delay payment.

19/05/2023

I will skip the finer details, but as you may be aware Pro Built Builder went under administration on or about February 2022. Pro Built was the builder that contracted Fairlite for the supply and installation of West Side Place project, the initial and distinct project FDI was employed for.

As a business owner, I have always: paid my employees (as per EBA!), paid their super, their annual leave, sick leave, public holiday, insurance, my taxes, suppliers, rented my crane, paid for my tools, everyone's work clothes, paid for their medical bills and even parking tickets, without counting the number of coffees I have paid to sit down with my lovely contractors to agree on variation work and to be paid on time! As a business owner, I have paid my due, in duly manner, because I was expecting, my invoice and therefore my wage to be paid in a duly manner as well. What comes around goes around...

The above monologue is an analogy to the fact that OK! Even if Fairlite was not administrating their business the way I was doing it, and like my mom taught me years ago to have a distinct account for my expenses vs what is going to be spent on entertainment, therefore, if Fairlite was to go bankrupt themselves following the incident of Pro Build in February 2022, there was still no reason why my invoices for December and January couldn't be paid ...

#### **In Conclusion:**

Yes, I cannot urge enough the fact that there are issues in the Construction Industry that have to be resolved as soon as possible.

I believe the following: **(MY RECOMMENDATION)**

- The SOPA to be interpreted in the eyes of a small/medium construction owner (no financial capacity for a lawyer to interpret and follow "wording");
- The excluded amount clause is to be considered as a "blue pen cross capacity" meaning that if there is an excluded amount this one only should be excluded from the claim without the capacity to undermine an entire claim;
- Establishment fees are ESSENTIAL for a small business to operate on a project, as we do not have the cash flow builders have;
- We are one of the only industries to be paid following a service. At the very minimum, a monthly instalment should be deposited in a trust, that is legally not available for any unrelated expenses, ensuring the agreed contractual amount is being paid;
- Retention amount to be deposited in a trust unavailable to be used by the builder/contractor for any other expenses.

I highly appreciate you caring about our industry and taking action on this matter as it is an unfortunate situation more so considering that we are the one industry-leading in local Australian employment and to continue to do so, we too deserve a wage!

Respectfully,

Tony Callipari

## Annexure A - Case studies

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### **Holloway Air Pty Ltd v Promax Regional Developments Pty Ltd**

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**Total owed:** \$51,149.99

1. Holloway Air Pty Ltd (**Holloway**) was engaged by the head contractor (**Promax**) to conduct a complete mechanical services package at a Swan Hill project.
2. On 7 October 2021, Holloway issued a payment claim to Promax in the amount of \$51,149.99 (incl. GST).
3. On 29 November 2021, Holloway lodged an adjudication application with Rialto Adjudications Pty Ltd. It was held that no money was owed to Holloway because the payment claim was a claim solely for retention monies.
4. John McMullan held that there can be no relevant reference date for retention monies under section 9 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**the Act**) because reference dates under the Act are determined based on progress payment entitlement for construction work undertaken or the supply of related goods and services under the contract.
2. Holloway's right to return of a portion of retention monies was distinct from either a claim under the contract for the value of work carried out or an entitlement under the Act for the value of construction work carried out and related goods and services.
3. McMullan found that the Payment Claim was in substance a claim for retention despite claiming for the balance of works, rather than specifically claiming for 'retention'.
4. Therefore, the payment claim failed to relate to construction work under section 5 of the Act, meaning the \$51,149.99 contained in the payment claim was not recoverable under the Act. Holloway was awarded NIL in the adjudication determination.

### **Tullamarine Plumbing & Drainage Pty Ltd v Vaughan Constructions Pty Ltd**

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**Total owed:** \$222,935.86 (excl. GST).

1. Tullamarine Plumbing & Drainage Pty Ltd (**Tullamarine**) was engaged by the contractor (**Vaughan Constructions**) to conduct a plumbing (hydraulic services) package for a Coburg project.
2. On 5 June 2020, Tullamarine issued a payment claim to Vaughan Construction in the amount of \$222,935.86 (excl. GST).
3. On 10 June 2020, the head contractor issued Tullamarine a payment schedule for \$24,469.97 (excl. GST).
4. On 23 June 2020, Tullamarine lodged an adjudication application with the RICS Dispute Resolution Centre. Jonathan Smith was appointed as adjudicator.
5. In Smith's determination dated 15 July 2020, it was held that there was no jurisdiction for the matter to be determined by adjudication because the payment claim was issued outside of time.

6. Pursuant to the contract, that reference dates continued to arise until the later of the end of the defects liability period and completion of the subcontractors obligations.
7. Smith held the later date was the date of practical completion under the head contract (being 4 October 2019) and therefore 31 October 2019 marked the latest reference date.
8. Given that a final payment claim can be issued up to three months after the latest reference date, Tullamarine's payment claim was required to be served on the contractor by 31 January 2020. However, Tullamarine's final payment claim was issued on 5 June 2020.
9. Therefore, Smith held there was no jurisdiction for the claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**the Act**) because Tullamarine's final payment claim was not pursuant to a reference date under the Act. Tullamarine was unable to recover its debt under the Act.
10. There was no way for Tullamarine to know when its reference date for a final claim arose under the Contract because it depended on the defects liability period under the head contract.

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#### **Allways Airconditioning and Plumbing Pty Ltd v Lanskey Constructions Pty Ltd**

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**Total owed: \$333,778.50**

1. Allways Airconditioning and Plumbing Pty Ltd (**Allways**) was engaged by the builder (**Lanskey Constructions Pty Ltd**) to carry out air-conditioning and electrical works on a Vermont South project.
2. Between May 2022 and August 2022, Allways issued four payment claims to the builder for constructions works completed pursuant to the contract.
3. These invoices remained unpaid in the amount of \$333,778.50.
4. On 10 November 2022, Allways issued a statutory demand to the builder seeking payment of the \$333,778.50 owed to it.
5. Allways was made aware that a third-party creditor of the builder whose debt had also remain unpaid had issued the builder with a Notification of Winding Up on 18 November 2022.
6. The statutory demand remained unpaid by the builder after the 21-day period stated on the statutory demand had lapsed on 1 December 2022. This entitled Allways to commence winding up proceedings against the builder.
7. However, Allways elected not to proceed with a winding up application against an insolvent debtor due to commercial reasons as the prospects of recovering the debt appeared faint.
8. Therefore, the amount for unpaid works totalling \$333,778.50 was never recovered by Allways.

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#### **McGrath Plumbing Pty Ltd**

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**Total owed: \$100,000.00**

1. McGrath Plumbing Pty Ltd (**McGrath**) were engaged by a series of contractors to carry out plumbing works on various projects around Melbourne.
2. Following completion of construction works on the respective projects, McGrath issued final payment claims seeking a reduction in security for retention monies pursuant to the security clauses under the contracts. The combined amount of retention monies owed to McGrath exceeded \$100,000.

3. In each case, the contractor did not return retention monies to McGrath.
4. McGrath contacted Level Playing Field Lawyers for legal advice in relation to return of return monies.
5. McGrath was advised that each claim lacked a valid reference date as they related solely to retention monies as opposed to construction works. As such, the final payment claims could not be pursued under the contract
6. Therefore, McGrath did not pursue an adjudication application for any of the above projects.
7. Given the low quantum, it was not commercial for McGrath to pursue multiple litigation proceedings to recover retention from the debtors.
8. McGrath was unable to recover retention monies in excess of \$100,000.00.

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#### **Premier Cranes & Rigging Pty Ltd**

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**Total owed:** \$29,223.37

1. Premier Cranes & Rigging Pty Ltd (**Premier**) was engaged by LMSD (VIC) Pty Ltd T/A Cockram Construction to provide crane and rigging services at Barwon Prison.
2. Following completion of construction works Premier was owed \$29,223.37 in retention money.
3. On or around 7 December 2021, Cockram went into liquidation and Premier did not recover \$29,223.37.

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#### **Plinius Engineering**

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**Total owed:** \$140,000.00

1. Plinius is owed for a retention job completed in 2022.
2. There is currently no outcome for their dispute.

This has impacted their cashflow and they have stopped pricing for this builder who works on government projects.

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#### **APR Structural Steel v Devco**

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1. APR Steel entered into a contract with Devo for the supply and install of structural steel at 15 Cool Store Road, Hastings.
2. Under the Contract, the reference date to issue a payment claim was by the 25th day of each calendar month.
3. Between 18 December 2018 and 28 September 2020, APR sent ten payment claims under the SOPAct. Devco failed to issue any payment schedules within 10 business days of service.
4. Burchell J found that APR needed to issue the payment claims by 25th of the month and therefore Payment claims 4, 5, 6, 11, 12, and the shop drawing claim were issued after that reference date and therefore invalid.

## **Structural Challenge**

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**Total owed: \$14,000.00**

1. Structural Challenge Pty Ltd is a structural steel fabricator located in Dandenong South.
2. They are owed \$14,000.00 from Probuild Constructions for their work on a structural steel roof at 1000 Latrobe St Melbourne due to final retention amounts. Given that Probuild has been liquidated, Structural Challenge has no recourse to the retention money.

## **Premier Plumbing v Lanskey**

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**Total owed: \$400,000.00**

1. Throughout 2022, Premier Plumbing Service Trust (**Premier Plumbing**) carried out hydraulic works for a supermarket project on behalf of Lanskey Constructions Pty Ltd (**the Builder**).
2. The Builder accrued debt owed to Premier Plumbing in the amount of \$400,000.00.
3. The debt related to unpaid monthly progress payment claims issued by Premier Plumbing to the Builder between July and December 2022.
4. The Builder entered voluntary administration in December 2022 with a liquidator appointed on 23 January 2023.
5. Following the Builder entering administration, Premier Plumbing stopped further works on site with the support of the union.
6. Since learning of the Builder's insolvency, Premier Plumbing has undertaken various negotiations with the project's developer and administrators in an attempt to recover the debt owed to it and to negotiate a return to complete the remaining stages of the project.
7. To date, Premier Plumbing has not been paid any of the \$400,000.00 owed to it by the Builder.

## **DSR Engineering v Lloyd Group**

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**Total owed: \$450,000.00**

1. Between mid-2021 and March 2023, DSR Engineering Pty Ltd (**DSR**) carried out structural steel packages for six projects on behalf of Lloyd Group (**the Builder**).
2. The Builder entered voluntary administration on 31 March 2023.
3. DSR was on site for one its projects on the day the Builder announced it had entered voluntary administration. DSR was instructed by the Builder to leave and DSR has not returned to site since.
4. The Builder owes DSR retention monies for the projects in the amount of \$450,000.00.
5. However, prior to announcing its administration, the Builder had paid each of the prior progress statement claims issued by DSR.
6. DSR is currently undertaking negotiations with the project's developer and administrators in an attempt to recover the debt owed to it.
7. To date, DSR has not been paid any of the \$450,000.00 owed to it by the Builder.

## Ridge Plumbing Pty Ltd

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**Total owed:** \$1,466,000.00

1. Ridge Plumbing is a small business that has lost \$1,466,000.00 in its trading.
2. As a result of the losses, the owner has had to sell its cars and properties to cover the debt.

Contractor	Amount of unpaid debt
Lloyd Group – work on Broadmeadows fire station	\$215,000.00 progress payments \$60,000.00 retentions
Donnan Consulting	\$91,000.00
Work on college in Doreen	\$1,100,000.00

## Commercial Concreter

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**Total owed:** \$1,004,240.05.

1. This Commercial Concreter currently has outstanding retention of \$1,004,240.05. Out of this retention owing, the following builders have become insolvent, meaning Commercial Concreter cannot recover the money:

Head Contractors in liquidation/insolvent in 2023	
Commercial builder	\$81,172.69
Lloyd Group Pty Ltd	\$47,200.37
Commercial builder	\$75,791.53
<b>Unrecoverable retention money</b>	<b>\$204,164.59</b>

## Donald Crawl Plastering

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**Total owed:** \$150,050.00

1. Donald Crawl Plastering has experienced non-payment for the following work:

Head Contractor	Project	Unpaid debt	Description of unpaid debt
Lanskey	Bannockburn Plaza	\$130,000.00	Progress claims
HMC Harris	Lyndon Aged Care	\$5,250.00	Retention money
Dome Building	Apartment project	\$14,800.00	Retention money
		<b>\$150,050.00</b>	

## Barra Steel

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**Total owed:** \$758,900.65

1. Barra Steel is another company with large sums unpaid from builders.

Head Contractor	Project	Unpaid debt	Description of unpaid debt
Commercial Builder	School Project in Parkville	\$126,750.00	Retention money and insolvent builder
Commercial Builder	Warehouse development project	\$83,097.76	Retention amounts
Property developer	Property development in Doncaster	\$15,203.16	Retention amounts
Residential builder	Residential project	\$67,817.01	Agreed settlement amount paid
Commercial builder	Secondary college	\$459,950.10	Contract works + retentions

## Commercial Crane Hire

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**Total owed:** \$768,841.30

1. Collective Crane Hire is owed for the following works:

Head Contractor	Project	Unpaid debt	Description of unpaid debt
Weldtek	Install of steel at government project	\$468,708.19	Difficulties in adjudication due to difficulty proving the value of works taken out and unclaimable variations.
T&P Steel	Install of steel for community hub	\$253,097.68	T&P Steel are currently in voluntary administration.
Steel Fabricator	Install of steel on school project	\$47,036.11	Steel fabricator advised they would pay debt owed however it has been 7 months without payment.

## Caster Construction

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**Total owed:** \$214,501.75

1. Caster Construction is concreting business owed various amounts from different companies.
2. The director of Caster has provided the following comments:
  - (a) Industry allows for a maximum 10% net profit for subcontractors. That 10% is held on every claim until 5% of contract sum is reached resulting in subcontractor operating on 0% net profit until 5% of contract sum is reached and 5% is held as retention.



- (b) For structure contractors, practical completion can be as long as 18 months after our completion.
- (c) Builders do not generally have funds when retention is due, leaving subcontractors without payment.

3. Below is a summary table of non-payment experienced by Caster:

<b>Contractor</b>	<b>Description of works</b>	<b>Amount of debt</b>	<b>Summary of debt</b>
<b>Lloyd Group</b>	Construction of 2 level pavilion (Greensborough)	\$39,955.00	Retention money
<b>Commercial Builder</b>	External Paving (Clayton)	\$2,123.00	Retention money
<b>Commercial Builder</b>	Construction buildings in Clyde Nth, Watsonia, Brighton	\$79075.81 across 3 projects	Retention money and non-payment of a preapproved variation
<b>Commercial builder</b>	Construction of Lite n Easy	\$64,277.04	Retention money
<b>Commercial Builder</b>	Construction of 17 level apartment building	\$4,481.00	Retention money
<b>Commercial Builder</b>	Construction of house in Toorak	\$1,719.58	Retention money
<b>Commercial Builder</b>	Construction of basement in Ashburton	\$2,462	Non-payment of a preapproved variation
<b>Commercial Builder</b>	Construction of Pavilion in Malvern	\$2,415.29	Retention money
<b>Commercial Builder</b>	Construction of apartment in St Kilda	\$17,993.03	Retention money