T R A N S C R I P T

LEGISLATIVE ASSEMBLY ENVIRONMENT AND PLANNING COMMITTEE

Inquiry into Employers and Contractors Who Refuse to Pay Their Subcontractors for Completed Works

Melbourne – Thursday 8 June 2023

MEMBERS

Juliana Addison – Chair
Martin Cameron – Deputy Chair
Jordan Crugnale
Daniela De Martino
Sam Groth
Martha Haylett
David Hodgett

WITNESS *(via videoconference)*

Mr Robert Sundercombe, Adjudication Forum.

The CHAIR: Good afternoon, Robert. Welcome to the public hearing of the Environment and Planning Committee and our Inquiry into Employers and Contractors Who Refuse to Pay Their Subcontractors for Completed Works. The committee is hearing evidence today in relation to this inquiry, and this evidence is being recorded.

All evidence taken is protected by parliamentary privilege as provided by the *Constitution Act 1975* and further subject to the provisions of the Legislative Assembly standing orders. Therefore, the information you provide during the hearing is protected by law. You are protected against any action for what you say during this hearing, but if you go elsewhere and repeat the same things those comments may not be protected by this privilege. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament.

All evidence is being recorded. You will be provided with a proof version of the transcript following the hearing. Transcripts will ultimately be made public and posted on the committee's website.

For the Hansard record, can you please state your name and the organisation that you are appearing for.

Robert SUNDERCOMBE: Robert Sundercombe, and I am appearing for the Adjudication Forum.

The CHAIR: Terrific. Thank you very much, Robert, for being with us today. We are really looking forward to your contribution. Would you like to make some opening remarks?

Robert SUNDERCOMBE: Yes, I have a short PowerPoint – it is only seven slides – that I would like to share to use as the basis, and then I was going to go briefly through the points on that. Then I thought – I am sure you have had other submissions – that you may like to ask me some questions.

The CHAIR: That sounds perfect. Thank you so much, Robert. Robert, I will just introduce people. We have got the Deputy Chair Martin Cameron, Member for Morwell. We have got Daniela De Martino, Member for Monbulk; Jordan Crugnale, the Member for Bass; David Hodgett, the Member for Croydon; Sam Groth, the Member for Nepean; and Martha Haylett, the Member for Ripon. We are really looking forward to your presentation.

Visual presentation.

Robert SUNDERCOMBE: The Adjudication Forum is a body of mainly adjudicators. Now, adjudicators are people who would normally have other jobs. We are a group of people – we have about 20 members, with about 7 active members. So while I would not call it the 'adjudication union', the idea of it was set up to give adjudicators a voice or an opportunity of an area where they could communicate with people without necessarily going through the ANAs.

Now, the submission I am going to speak about mainly resolves around issues we have established – we being the forum – where the Victorian Act could be improved. But I understand you have had a presentation from John Murray, and I would strongly recommend – and I am sure you have already done it – that you consider his review of the security payment acts in Australia. While it is a little bit dated because there have been changes to the Act in Western Australia, it does provide you a very good outline.

Now, you would be familiar that in 2017 there were changes made to the Queensland security of payment Act, and one of the changes that was made was that they got away with ANAs and the QBCC started carrying out the role of appointing the adjudicators. Now, with all due respect to the public servants employed by the QBCC – and it is certainly not their fault – it has not really worked. You have a significant amount of decisions up there that do not provide any payment to the claimant because they end up with jurisdictional issues.

Now, ANAs, authorised nominating authorities, provide assistance to claimants and respondents, and they provide some generic advice that assists parties to overcome many of these jurisdictional issues. So I recommend that if you were to consider doing anything, it should not be getting rid of ANAs. They do it at the

moment. They are very well vetted by the Victorian Building Commission, and they do provide a valuable resource for construction industry participants.

Now, these are the 13 areas I was going to talk about, so I am going to briefly talk about the 10 that are not highlighted, then I am going to give a little bit more information about the other ones. The Victorian Act has a regime that relates to reference dates. This is extremely complicated, more complicated than the other Acts that still have reference dates, and really needs to be considered. Ideally reference dates should be abolished and a regime established so that claimants can make a payment claim once a month and be entitled to have that payment claim adjudicated if required.

Now, a payment claim under the Victorian Act – when payment claims can be served under the Victorian Act – is once again very, very complicated, and it has another issue in that you can only have up to three months after you have carried out work to make your claim unless there is another time provided under contract. This is too short for people, especially ma-and-pa businesses who have other things going on. Realistically if you have a construction business, it probably takes you six weeks to work out that you have not been paid, so a lot of that time in their three months is chewed up pretty early.

The Victorian Act does not allow residential contracts to be adjudicated. What this does is it excludes many of your building industry participants, but it also has a slight anomaly where a builder may not be able to make a claim on its client – the home owner – but its subcontractor could make a claim on the builder. Now, that is a bit of an anomaly, but it is just there, and where the Act has been applied to residential contracts in Victoria and New South Wales, the world did not finish. There were not predatory claimants running around making thousands of dollars off ma-and-pas. It seems to work, although – well, they have had it in Tasmania since about 2016 and it has been in New South Wales since 2020-odd.

The due date for payment – under the Victorian Act there is no minimum time for a due date for payment. This needs to be legislated so that claimants are entitled to be paid within a reasonable time. They have bills to pay, they have wages to pay and they should be entitled to be paid.

Times for adjudication – the times to apply for adjudication under the Victorian Act are very, very short. Now, I am not going to go into all the detail because I am trying to give you an overview, but if you have a look and compare it with the other Acts, they are ridiculously short.

Review adjudications under the Victorian Act require excluded amounts, and I will discuss them later. Review adjudications are not inherently a bad idea. The most recent security of payment Act in Western Australia has a review adjudication regime if there is a difference of $200,000 between the adjudicated amount and either the claimed amount or the scheduled amount or if the adjudicator decides that there has been no jurisdiction for a claim of greater than $50,000. The Victorian building commission has got the details of all of your matters, so you could establish quite reasonably where the sweet spot for these review adjudications was. Another advantage of them is they will stop people taking things to court. They also give parties the opportunity of being heard and feeling as if they are being heard if they are disgruntled after a decision against them.

Service of notices – basically this needs to be brought into the 21st century. Presently your service of notice regime allows for a facsimile, and if the facsimile is served after 4 o'clock it is deemed served the next day, so it just needs a bit of a tidy up.

Restrictions on the selection of ANAs – the Victorian Act has this restriction that creates confusion of the number of ANAs. I think there are only four. Now, if three are indicated in a contract, it must be one of those three, so there is no obvious reason why any ANA, who are regularly vetted by the QBCC, should not be able to receive somebody's adjudication application.

Recovering adjudication fees in an adjudication certificate – there is a drafting error in that in the Act where, if you have a look at the detail of the words included in the Act, adjudicators fees that have been paid by, say, a claimant, to have the matter released cannot be included in the certificate. This just needs a tidy up. Similarly, statutory indemnity for educators and ANAs also needs a tidy up because adjudicators do have a statutory indemnity, but that does not extend to ANAs.

I am just going to move onto these slightly more detailed slides. Now, the items that can be determined in an adjudication – under the Victorian Act a claimant is not entitled to have excluded amounts determined. These

amounts include disputed non-claimable variations, time-related costs, costs related to latent conditions and costs due to changes in regulatory requirements. Also, based on the court decision of what we call *Punton's Shoes*, claims for retention cannot be made under the Act. Now, the Victorian Act really needs to be amended so that if you have an entitlement under the contract or you are entitled to your retention, you should be able to claim it. Now, it is interesting that we are doing this today, because I am currently adjudicating a matter where a claimant was provided a superintendent certificate under a contract and not paid. They have had to make an adjudication application to get their money – or some of their money – because they are not entitled to press for amounts that have been certified for latent conditions.

Time to make a determination – adjudicators carry out a pretty lonely process without a lot of support, or without any support actually, and under the Victorian Act they are put under extreme pressure, because they only have a limited time to carry out their determinations. They have 10 business days, and the clock starts to tick the moment the parties have provided their notice of acceptance. Once the parties have provided the adjudicators a notice of acceptance, the respondent then has two business days to provide their adjudication response. After receiving the adjudication response, which may have new reasons for withholding pay, which I will speak about a bit later, the adjudicator then has to send a notice off to the claimant identifying these new reasons and giving the claimant a further two days to provide their response to these new reasons. Therefore here we are four to five business days into the adjudicator's 10 days, and at this point they only just have all the information. Now, the claimant can – it is the claimant's prerogative, and it would be wise to – extend this period by a further five days, but still the adjudicator could be left with a matter of many thousands of pages and still only have the last 10 days to provide their determination. It just puts people under what is not really a necessary pressure.

New reasons in an adjudication response – the Act allows respondents to include new reasons in an adjudication response if they have provided a payment schedule. That means the payment schedule could just fall over the line as a payment schedule – in other words, it identifies the payment claim to which it relates, it indicates a scheduled amount and it provides a reason for withholding payment – and that would qualify as a payment schedule. Respondents can then ambush the claimant in their adjudication response. It could go to hundreds of pages, and the claimant only has two business days to provide their response to that. That is after the adjudicator has had to go through and work out what these new reasons are. Respondents should not be entitled to ambush claimants. If we think that we want to give respondents a little bit more acceptance, you may want to increase their time to, say, 15 business days to provide their payment schedules.

That is the end of my presentation. I hope it made sense. If you have any questions, can you please let me know.

The CHAIR: Terrific. Thank you very much, Robert, for the amount of work that you have put into that and for raising these issues, which we have certainly been hearing from other witnesses as well. I will open it up to the members. Who would like to ask the first question? All right, I am happy to if no-one else is. I can see Hodgey has got his hand up, and then we will go to Sam.

David HODGETT: Thanks for the presentation, Robert. Look, we probably know the answer to this from some of our submissions last week and from your submission, but we are very much interested in where you think the best practices are around the states and why and which ones we perhaps should avoid. I think your submission advocates for or talks about how the scheme should be completely replaced, as WA did. Does that mean we should follow WA, or is New South Wales better in your view? What are your thoughts that might confirm or otherwise what we have heard from other witnesses?

Robert SUNDERCOMBE: Well, I do not think you should replace it. I think you have probably already got the framework there; I think you just should amend it. You have already got review adjudications; you just have to decide how they work. I do not think you should throw it all out. You have already got ANAs. You have already got a decent framework there. I would just be changing what you have. I mean, the New South Wales Act has evolved. You know, they have taken out things like the endorsement on a payment claim and they have put it back in, and they have had residential contracts and added them in. I think you should follow their way rather than trying to go back right to the beginning – that is my opinion.

David HODGETT: Okay. Thank you very much.

The CHAIR: Sam, thanks.

Sam GROTH: Thanks, Juliana. Thank you, Robert, for your time and your submission. I have just got a couple of questions. Firstly, around the excluded amounts – you said that, in my understanding, there probably should not be anything that is excluded if that is a part of the contract. Can you see any reason, or a situation where, we would need to include excluded amounts?

Robert SUNDERCOMBE: As far as I am concerned, if there is an entitlement under the contract, the claimant should be entitled to that amount under the Act.

Sam GROTH: So there is no reason to rule anything out whatsoever, really.

Robert SUNDERCOMBE: No. There is no entitlement to a damages claim, because that is not construction work, but if you are out of the entitlement and under the contract, you should be entitled to that under the Act. The adjudicator should be able to step in to the superintendent's shoes.

Sam GROTH: Okay. And you sort of briefly covered this, or you did cover it in terms of the 15 days, but the suitable timeframe for adjudication – is 15 days enough? Even if you did go to the 15 days, is there anyone who would still be at a detriment to that? Is 15 days enough for you to actually be able to do the job properly? I am guessing the time frame you are doing at the moment is because there is a detriment to somebody in that process – whether it is the adjudicator in doing their job or whether it is the claimant getting the right result coming through – but is 15 days enough?

Robert SUNDERCOMBE: I am going to rephrase your question a little bit.

Sam GROTH: Yes, if you can.

Robert SUNDERCOMBE: What should the duration be? The period should start when the adjudicator has the adjudication response. At that point they have all the information they need. At the moment your period starts but you may not get your information until four or five days, so you have lost four or five days. In most Acts – the New South Wales Act now and the Queensland Act and the ACT Act and the Western Australian and the South Australian Acts – the period to provide the determination, the statutory period, commences when you have the adjudication response. That is when it should commence. So at that point, then the parties should be able to agree on any additional time that the adjudicator may request.

Sam GROTH: Okay. Can I just follow up with one supplementary – is that okay?

Robert SUNDERCOMBE: Yes, that is fine.

Sam GROTH: So you would keep a time frame for the original submissions for you to go back, so obviously that does not then get drawn out. So you would keep that initial two-day, two-day but then start the adjudication time frame at the end of that.

Robert SUNDERCOMBE: That is correct.

Sam GROTH: Yes. Okay. Thank you.

Robert SUNDERCOMBE: So at that point you have got all your information.

The CHAIR: Terrific. Thanks, Sam. Any other questions from the committee?

Daniela DE MARTINO: Yes, please.

The CHAIR: Thanks, Daniela.

Daniela DE MARTINO: Thanks very much, Robert, for your presentation and for the time today. We note that from submissions and information provided to us that adjudicator fees can be as high as $500 an hour, so how often do you think subcontractors actually decide against using the adjudication process due to associated costs? And if I can ask a second follow-up, how often are lawyers actually involved in this process?

Robert SUNDERCOMBE: Okay. To answer your first question, most authorised nominating authorities have a fixed fee for matters under $40,000. So they will have a threshold. I cannot tell you what they are off the top of my head, but if you go on to, say, Adjudicate Today's website or ASC's website, they will have that there. So for these smaller matters the fees are fixed. I am guessing, I think for $40,000 it is about $4000 to $5000 for the fee – that is capped. So for the smaller matters, there is protection for the parties.

Now, as for adjudication fees being $500 an hour, I think they are $450 an hour, but once again that is published on the websites – that is there. I do not think it is published on Resolution Institute's, because they are not as fixed. With the ANA, ASC, Adjudicate Today and RICS, they actually have fees that are published on their websites. So your grade 1 adjudicators are paid whatever that says, whereas in Queensland the adjudicators set their own rates and at Resolution Institute the adjudicators set their own rate. So those could be anything; you could be paying $700. I am not saying you are, but if you have got a barrister, you could be paying that.

What was your second question? I am sorry.

Daniela DE MARTINO: The next one was: how often are lawyers involved in adjudication processes, probably specifically in Victoria?

Robert SUNDERCOMBE: Specifically in Victoria – lawyers representing parties – I would say 70 per cent of the time.

Daniela DE MARTINO: Right. Thank you for that.

Robert SUNDERCOMBE: It is a bit hard. I mainly do bigger matters because I have been adjudicating since 2003, but it is definitely more than 50.

Daniela DE MARTINO: Okay. That is good to know. Thank you.

Robert SUNDERCOMBE: Okay.

The CHAIR: Robert, can I ask: in your experience what is a bigger matter, in terms of a financial, dollar amount?

Robert SUNDERCOMBE: I would say a bigger matter would be a claimed amount above $50,000.

The CHAIR: $50,000. Very good.

Robert SUNDERCOMBE: I have done a matter that I think was $98 million.

The CHAIR: Oh, wow.

Robert SUNDERCOMBE: That was a large fund. So there is a big range.

The CHAIR: From the work that you have done as an adjudicator – you have obviously dealt with some pretty large subcontractors as well as mum-and-dad contractors – particularly at the smaller end where it could be just a very small business with only a couple of machines or a couple of employees, what is the impact of not being paid on the mental health and wellbeing of these smaller operators as well as potentially on their employees and even apprentices?

Robert SUNDERCOMBE: I do not know that. I mainly work for big firms, but I assume the impact of not being paid is, if you think about an excavation business with a couple of machines, that they have got wages to pay, they have got BAS and their taxes to pay and they have to pay the payments on those machines – now, wages come out weekly, BAS gets paid monthly and let us say hire-purchase or loan payments get paid monthly as well – so if they are not getting regular progress payments, if somebody is sitting on a $50,000 claim and there is no cash, that is going to have a devastating effect on their business, their employees and I assume their mental health and marriages.

I have worked as an advocate. I do not anymore, but I have worked as an advocate assisting parties. They were my clients, as I was assisting them to adjudicate. People are put under a significant amount of personal pressure

while this is going on. You know, what this Act does, as you are all aware, is it creates a statutory entitlement to that payment claim – and it is critical. It is not only critical for actually getting the money; it actually gives the claimants – let us call it – a stick to wave that will make people pay the money without it going to adjudication. Normally it is unusual for people at adjudication to get anything they have not done the work for, and it would be unusual for them to get anything that they are not entitled to.

The CHAIR: Thanks, Robert. Other questions?

Martin CAMERON: Robert – Martin Cameron here. Just a question for you: when you do the adjudication are you finding that both sides agree with the adjudication, or does it progressively end up going forward and end up in the courts? Are they happy enough with the adjudication when it gets done or is it going higher?

Robert SUNDERCOMBE: Okay. An adjudicator is allowed to make mistakes, so the only way an adjudication can be quashed is if an adjudicator makes a jurisdictional error. That means that the payment claim might have been invalid, the adjudication application might have been invalid or the adjudicator may have considered submissions that he or she should not have or may not have considered submissions that he or she should have. So that is the only reason that you would go to court. And, yes, people who lose are unhappy. But what the adjudication is trying to do is – adjudications are written for two people. They are written for a following court and the losing party. If the losing party understands that the adjudicator considered their submissions, they go, 'Okay, well they considered it, and they made their decision,' and they can deal with it. And that comes down to adjudicator training. Now, if the party is really aggrieved, that is why I am recommending you have some sort of adjudication review process where they can be done. You would need a threshold for that because it is a significant amount of work. You cannot have people whingeing about every $5000 they did not get, but you can decide where the threshold is. So as far as I am concerned the adjudicator has done their job if the losing party understands why they lost.

Martin CAMERON: Thanks, mate. Excellent.

The CHAIR: Robert, could I just ask a supplementary question to that? Is it sometimes a domino effect, that you have got someone in an adjudication in front of you and the reason they have not paid their subcontractor is that they have not been paid? Could it end up being that one adjudication leads to another adjudication leads to another like a domino effect?

Robert SUNDERCOMBE: You cannot use that as an excuse to not pay. That is called a pay-when-paid condition, and it is banned. It is barred from the Act, so that may happen –

The CHAIR: Right.

Robert SUNDERCOMBE: There is no doubt that may happen, but if the person further up the food chain can get their money, they can then pay the people going down the food chain. But you cannot say, 'We cannot pay you because we did not get paid.'

The CHAIR: Terrific. Other questions? You have been very thorough, Robert, so I think you have probably answered a lot of our questions. I will just have one final one. Why is liability protection for both adjudicators and ANAs required?

Robert SUNDERCOMBE: Well, we are trying to carry out a statutory obligation to the best of our ability, and people may make mistakes. You need to be able to do that where you not under the threat of being sued personally. You need to be able to carry out this role to the best of your ability where you can do it. Now, as an adjudicator, you get threatening stuff all the time. It is always coming at you. But you need to be able to boldly make what you think is the correct decision.

The CHAIR: Terrific. I am looking at lots of nodding and everything like that. Robert, thank you very much for your time today and for providing your perspective. We really welcome it. It is another important part of the sector that we are really keen to get an understanding of.

I will remind you that you will receive a copy of the transcript in the next couple of weeks for proofreading. We really look forward to producing the report from this inquiry, and we hope that it is worthwhile to you and your sector.

Robert SUNDERCOMBE: Alright. Thank you for the opportunity of presenting, and if you want any further information, Sam knows how to get in touch with me.

The CHAIR: Terrific. Thanks so much, Robert.

Witness withdrew.