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## REVIEW OF ADJUDICATION OUTCOMES IN VICTORIA AND POTENTIAL IMPACT OF LEGISLATIVE CHANGE?



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### INTRODUCTION

This is a follow-up article on the topic of adjudication in Australia (the first DGA e-brief article here: [Review of adjudication outcomes across Australian States \(NSW, VIC, and QLD\): are the regimes effective?](#))

In this article, we delve into the history of adjudication outcomes in Victoria and explore the potential impact of recently proposed legislative changes.

The underpinnings of Victoria's legislation, which provides for adjudication of construction industry disputes, the *Building and Construction Industry Security of Payment Act (Vic) 2002* ("**SOPA**"), unchanged since 2006, look set to be overhauled in the near future. A parliamentary inquiry delivered its report in November 2023, which made significant recommendations regarding how payment practices could be improved in Victoria.

### HISTORIC ADJUDICATION DATA TRENDS

As a recap, authorities in the NSW, VIC, and QLD above publish adjudication activity statistics<sup>i</sup> that provide insights into the functioning of adjudication regimes in each state.

While there are many insights into the workings of adjudication regimes across the States, the variability and the trends over time, the overall picture is clear from the ratio of the amount determined through adjudication compared to the claimed amount in adjudication applications (what could be termed the "**Success Ratio**").

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i In Victoria the *Building and Construction Industry Security of Payment Act (Vic) 2002* ("**SOPA**") applies to any construction contracts entered after 30 March 2007. SOPA aims to ensure that any person who carries out construction work or supplies related goods and services under a construction contract will be paid; and further, that if disputes arise over payment, a claimant may rely on a relatively quick and inexpensive adjudication process to recover payments due.

ii Data from Building and Construction Industry (Security of Payment) Act Adjudication Activity Annual Report for VIC, NSW, and QLD. See e.g. Adjudication activity statistics published by Victorian Building Authority (<https://www.vba.vic.gov.au/building/security-of-payment/adjudication-activity-statistics>)

Analysis over the period 2018 to 2023 showed that in NSW and QLD, the Success Ratios<sup>iii</sup> are 12% and 18%, respectively. By contrast, the Success Ratio for VIC is notably higher at 35%. In practical terms, this means that a claimant in an adjudication process in VIC could expect to recover approximately 35 cents in the dollar on average.

The adjudication statistics published by the Victorian Building Authority provides insights into adjudication activity over time. Charts A and B below summarise how the application and determination numbers and amounts claimed changed over the period 2005 to 2023:

- The number of adjudication applications has seen a general increase over the years with periodic fluctuations. Determinations lag the applications as one would expect, given that not all applications proceed to a determination based on a negotiated settlement or otherwise.
- There is a notable change around the commencement of the COVID-19 pandemic in 2020 – a steep decrease and subsequent recovery.
- Success Ratio of Determinations to Applications: There has been a decrease in the Ratio over the years, suggesting that although more claims are being lodged, a smaller proportion is recovered in adjudication determinations on average.

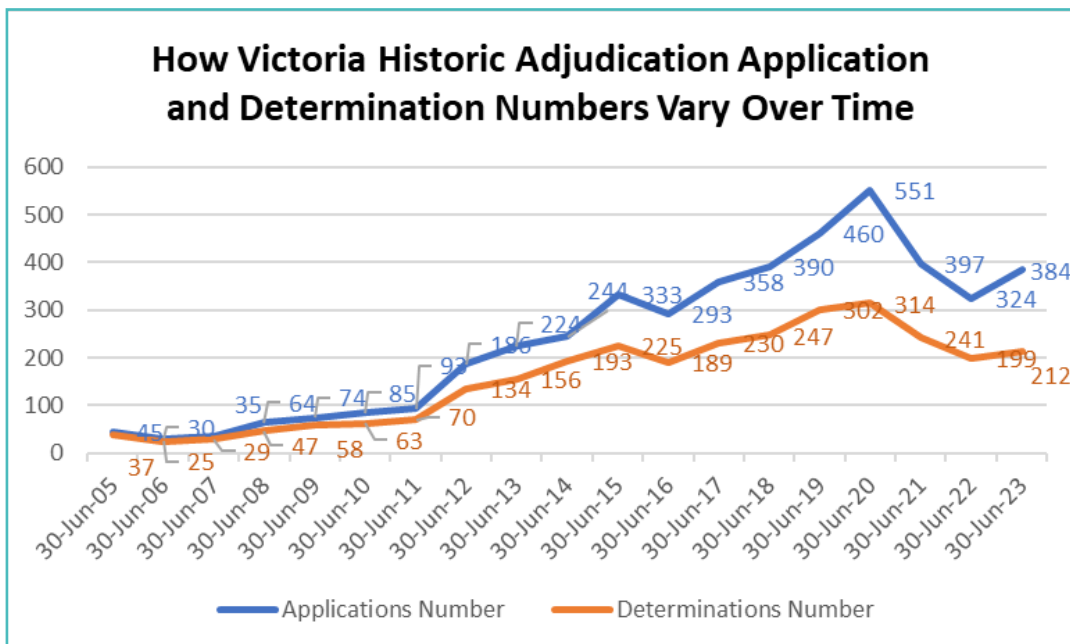


Chart A: Victoria Adjudication Applications and Determinations Comparison from 2005 to 2023

<sup>iii</sup> Details explained in the first article. Calculated from the available statistics, the ratio of the amount determined through adjudication compared to the claimed amount (termed the "Success Ratio").

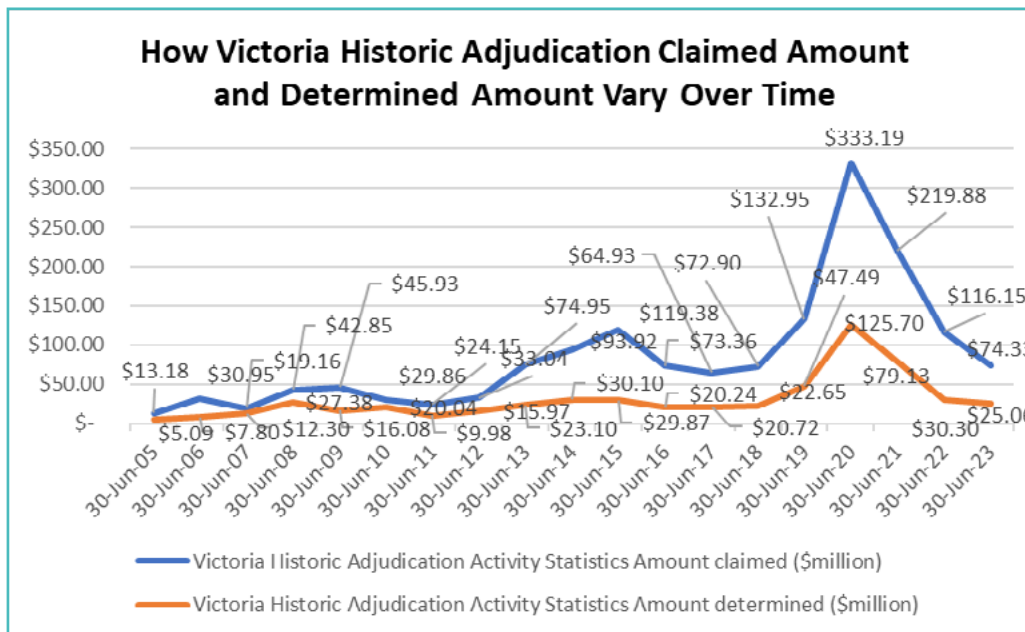


Chart B: Victoria Adjudication Applications and Determination Amounts Comparison from 2005 to 2023

Analysis of the adjudication statistics for NSW indicates that more applications and larger claim amounts by claimants did not lead to a meaningful improvement in the award by adjudicators. It is interesting to see the same trend in VIC.

Within the data published each year in VIC it is possible to calculate the Success Ratios across bands of claim amounts (adjudication applications claiming less than \$5,000, \$1,000,000 to \$4,999,999, etc.).

Range of amounts (\$)	Financial Year 2018 to 2023		Financial Year 2018 to 2023		Total Success Ratio
	Total Claimed Amount	Total Adjudicated Amount	Average Claimed Amount	Average Adjudicated Amount	
<5,000	\$ 670,154.00	\$ 306,472.00	\$ 111,692.33	\$ 51,078.67	46%
5,000-9,999	\$ 1,584,340.00	\$ 780,424.00	\$ 264,056.67	\$ 130,070.67	49%
10,000-24,999	\$ 7,937,954.00	\$ 3,673,074.00	\$ 1,322,992.33	\$ 612,179.00	46%
25,000-39,999	\$ 8,587,428.00	\$ 3,865,395.00	\$ 1,431,238.00	\$ 644,232.50	45%
40,000-99,999	\$ 29,605,080.00	\$ 15,029,740.00	\$ 4,934,180.00	\$ 2,504,956.67	51%
100,000-249,999	\$ 62,317,504.00	\$ 27,928,976.00	\$ 10,386,250.67	\$ 4,654,829.33	45%
250,000-499,999	\$ 72,027,936.00	\$ 31,211,092.00	\$ 12,004,656.00	\$ 5,201,848.67	43%
500,000-749,999	\$ 43,060,056.00	\$ 12,606,235.00	\$ 7,176,676.00	\$ 2,101,039.17	29%
750,000-999,999	\$ 37,457,999.00	\$ 12,845,591.00	\$ 6,242,999.83	\$ 2,140,931.83	34%
1,000,000-4,999,999	\$ 229,256,743.00	\$ 48,763,369.00	\$ 38,209,457.17	\$ 8,127,228.17	21%
5,000,000-9,999,999	\$ 66,297,442.00	\$ 21,447,162.00	\$ 11,049,573.67	\$ 3,574,527.00	32%
>10,000,000	\$ 390,604,803.00	\$ 151,965,536.00	\$ 65,100,800.50	\$ 25,327,589.33	39%
Total	\$ 949,407,439.00	\$ 330,423,066.00			

Table 1: Total sum of claimed amounts versus total sum of adjudicated amounts by claim range for 2018-23 financial year<sup>iv</sup>

iv The total claimed and adjudicated amount were computed using the data available on the Victorian Building Authority website, comprising the "Claimed amount" and the "adjudicated amount" recorded for each financial year spanning from 2018 to 2023. The total success ratio was determined through the total adjudicated amount compared to the total claimed amount in the table.

Success Ratios generally decrease as claim values increase. This may suggest that even where a claimant may have access to better advice, and financial capabilities, the recoveries in adjudication determinations do not improve markedly. There is no clear linear trend comparing amounts claimed and adjudication determination amounts as shown in Chart C.

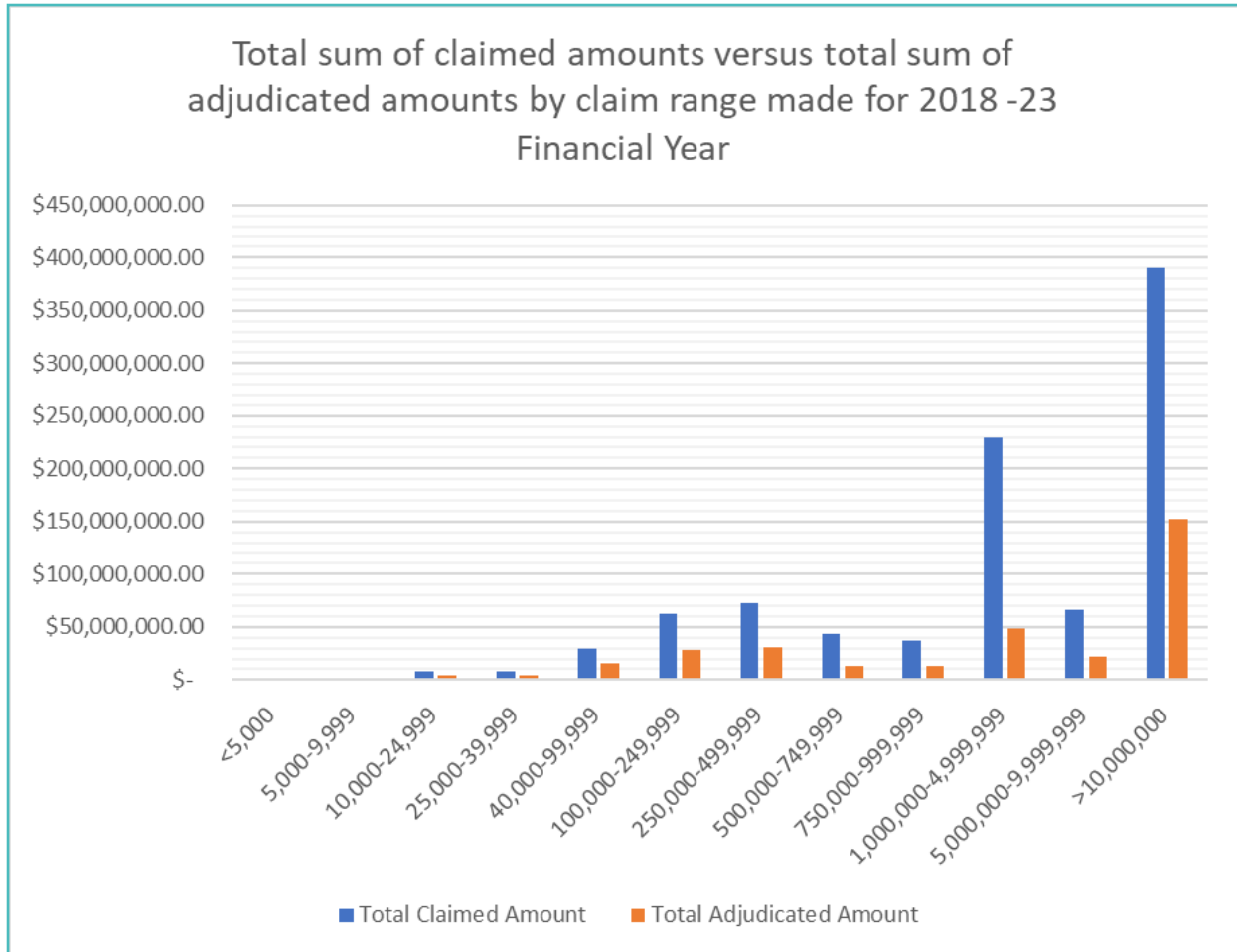


Chart C: Total sum of claimed amounts versus total sum of adjudicated amounts by claim range made for 2018 -23 Financial Year

## IMPACT OF PROPOSED LEGISLATIVE CHANGES

In November 2023, the Victorian Government’s Environment and Planning Standing Committee has made significant recommendations to amend SOPA and adjudication procedures following its inquiry into payment issues for subcontractors.<sup>v</sup>

<sup>v</sup> Parliament of Victoria, Legislative Assembly Environment and Planning Committee, Employers and contractors who refuse to pay their subcontractors for completed works, Inquiry Report November 2023. Link: <https://new.parliament.vic.gov.au/4addf8/contentassets/9ab3bdb01ce64ba3a0a5d6532f9e0bfa/laepc-60-01-nonpayment-of-subcontractors.pdf>

Among the Inquiry's 28 recommendations are the following important proposals:

1. Abolition of the "excluded amounts" regime which is unique to Victoria (Recommendations 2 and 19)

As a recap to the first DGA e-brief article: Review of adjudication outcomes across Australian States (NSW, VIC, and QLD): are the regimes effective?, part of the explanation for the higher Success Ratio in VIC would be the nuances of the SOPA regime. It is distinct from the other States, as SOPA does not permit claims for "excluded amounts". This is an exclusion of numerous potential claims which are commonplace in construction: claims for disputed variations, damages for breach of contract, delay and disruption costs, latent conditions, or a principal's claims for liquidated damages.

The abolishment of the 'excluded amounts' and 'non-claimable contract variations' provisions may invite an increase in applications in both number and quantum claimed, as one barrier to adjudication as a forum to resolve these disputed claims is removed.

DGA anticipates that the potential increase in claimed amounts would necessitate a wider role for expert advisors in technical, delay and quantum disciplines to evidence claims for delay, disruption and other claims currently prohibited under the "excluded amounts" regime.

The financial impact on claimants and subcontractors should be an improvement in cash flow (and certainty of recovery of costs) as progress payments could reflect all works rather than be subject to certain exclusions under the current SOPA regime.

2. Stop clock for festive period from 22 December to 10 January (Recommendation 4)

Everyone associated with adjudication processes in VIC would breathe a sigh of relief. This commonsense proposal would bring VIC more in line with equivalent legislation in other States.

This recommendation offers a practical solution to accommodate the industry's holiday slowdown. It provides a temporary halt to adjudication timelines, allowing parties involved to navigate the festive period without the stress of immovable deadlines imposed by legislation.

3. Adjudicators can declare void notice-based time bars and other unfair terms (Recommendations 5 and 6)

This signifies a significant step towards promoting fairness in construction industry payment entitlements and adjudication.

Modelled on provisions in Western Australia, this recommendation would empower adjudicators to rectify instances of unfairness arising from strict or onerous time-bar clauses governing payment entitlements.

DGA envisions that the implementation of Recommendations 5 and 6 could lead to increased focus on adjudicators and their exercise of broad powers to amend contractual terms, particularly among claimants and subcontractors. By granting adjudicators the authority to nullify unfair terms, the construction industry may witness a more equitable resolution of disputes.

#### 4. SOP Act extended to residential building contracts, subject to consultation (Recommendation 10)

This recommendation aims to broaden the scope of SOPA to encompass residential construction contracts.

DGA would expect to see an increase in lower-value adjudication as a result and a focus on the cost-effectiveness of adjudication for claimants. Recommendation 10 could positively impact payment practices within the residential construction sector, offering a more structured and regulated framework for resolving payment disputes.

### ANTICIPATED TRENDS POST-LEGISLATIVE CHANGES

Based on recent events and the state of the construction industry in VIC, DGA would expect to see many Recommendations from the Inquiry enacted into adjudication legislation. Historically, adjudication processes are supportive of claimants in VIC, with a higher Success Ratio compared to other States. It will be interesting to watch trends in the Success Ratios going forward, particularly for outcomes on higher value claims of more than A\$1m.

The proposed legislative reforms in VIC may increase the need for expert advisors to substantiate claims for delay, disruption, and other aspects currently restricted under the existing “excluded amounts” regime. The gap between the amounts claimed and determined might narrow.

Overall, the proposed legislative reforms and potential outcomes signify a shift towards a more efficient, consistent, and claimant-friendly adjudication landscape.

## DGA CONTACT INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at [DGAGroup@dga-group.com](mailto:DGAGroup@dga-group.com)

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