SQUIRE PATTON BOGGS

Pay now, argue later: The consumer law challenge to security of payment debts

A constitutional argument that resisted summary judgment in Western Australia has now been rejected by the Victorian Court of Appeal

Australia – June 2026

Respondents resisting payment under security of payment legislation have, in recent years, reached for a constitutional argument. The contention is that the legislation is invalid, under Section 109 of the Commonwealth Constitution, to the extent it prevents a respondent raising a defence based on the Australian Consumer Law (ACL).

Where a state law is inconsistent with a commonwealth law, the commonwealth law prevails and the state law is invalid to the extent of the inconsistency. The argument gained enough traction in Western Australia to defeat an application for summary judgment. It has now been rejected on the merits in Victoria, and that rejection has been confirmed by the Victorian Court of Appeal. For claimants, that is welcome confirmation that the "pay now, argue later" regime works as intended; for respondents, it is a clear signal that an ACL allegation is not a ready shield against an interim payment obligation.

The question raised in Western Australia

In *OSB Group Pty Ltd v Complete Hire & Sales Pty Ltd* [2024] WASC 310, our client OSB sought to recover a payment claim as a statutory debt under the *Building and Construction Industry (Security of Payment) Act* 2021 (WA) (SOP Act). Rather than proceed to adjudication, OSB applied for summary judgment in the Supreme Court of Western Australia.

The respondent, Complete, resisted the application. It contended that OSB had engaged in misleading or deceptive conduct that induced it to enter the construction contract, and that Section 27(3)(b) of the SOP Act – which precludes a respondent from raising any cross-claim or defence in recovery proceedings – was invalid under Section 109 of the Constitution to the extent it was inconsistent with Complete's rights under the ACL.

Musikanth J approached the application on ordinary principles. Summary judgment is granted only where there is no real question to be tried, and the SOP Act does not displace that threshold. His Honour was satisfied there was a construction contract and that the SOP Act applied. However, because Complete was, on the face of Section 27(3)(b), prevented from raising an ACL defence, His Honour found there was a serious question to be tried as to whether that preclusion gave rise to a constitutional inconsistency. Summary judgment was refused.

The decision identified the constitutional question but did not resolve it. The substantive issue – whether the SOP Act truly is inconsistent with the ACL – was left open. The matter itself was subsequently resolved in OSB's favour, without any definitive ruling on the Section 109 point.

The answer given in Victoria

That open question has now been answered, and answered on appeal. In *1559 High Street Pty Ltd v Camillo Builders Pty Ltd*, the Supreme Court of Victoria rejected the argument at first instance ([2025] VSC 244, Stynes J), and on 9 June 2026, the Court of Appeal dismissed the developer's appeal ([2026] VSCA 129).

The dispute arose under the *Building and Construction Industry Security of Payment Act* 2002 (Vic). The developer, 1559HS, had an adjudicated amount of roughly AU$1.85 million determined against it, on which the builder obtained judgment in the County Court. 1559HS applied to set that judgment aside, contending that it had been prevented from running a misleading or deceptive conduct defence under Section 18 of the ACL, and that the provisions governing the entry and setting aside of judgment – sections 28M, 28O and 28R – were invalid under Section 109 to the extent of any inconsistency with the ACL.

The Court of Appeal (McLeish, Kennedy and Kaye JJA) rejected the challenge. The SOP Act, it held, creates a novel statutory right to a provisional payment of an adjudicated amount that is separate and distinct from the parties' rights under the contract or the ACL, and the two regimes operate concurrently. Enforcing an interim payment ahead of the final determination of the parties' rights does not alter, impair or detract from ACL rights: a party kept out of its money can still pursue its ACL claim in separate proceedings, where the court can bring the provisional payment to account and order restitution, interest and other relief.

The court preferred the majority reasoning of the Full Federal Court in *Birdon* to the contrary view of Basten JA in *Bitannia*, and distinguished *Façade Treatment* as turning on the automatic setoff that liquidation attracts under the Corporations Act.

The court also dismissed a complaint that entering judgment without a hearing denied the developer procedural fairness, holding that the ability to bring an ACL claim could not affect the right to enter judgment under the SOP Act. One note for readers working with the current Victorian act: the decision considered the provisions as they stood before the significant amendments that commenced on 15 April 2026, some of which touch the sections in issue.

What this means for claimants and respondents

The Victorian decisions are not binding in Western Australia, but they are recent, directly on point and now carry the authority of an intermediate appellate court. Together they confront the very argument that secured the respondent a serious question to be tried in *OSB v Complete* and find it without substance. The clear signal is that the constitutional argument, while sufficient to resist summary judgment at the interlocutory stage in WA, is unlikely to succeed on the merits.

For claimants, that brings welcome confidence to the recovery of statutory debts and adjudicated amounts. The "speak up or pay up" architecture of the legislation is doing precisely what it was designed to do, and an ACL allegation is not a ready means of defeating it.

For respondents, the practical message is that misleading and deceptive conduct, where it is genuinely in issue, should be pursued as a substantive claim in separate proceedings, not deployed as a shield against an interim payment obligation. A respondent who disputes a claim or the existence of a contract should still respond to a payment claim within time; silence carries real consequences under this regime.

A note of caution remains on procedure. As *OSB v Complete* shows, summary judgment is not a soft option. Where there is any genuine factual contest over the existence of a construction contract, the identity of the contracting parties or the conduct alleged, a claimant may be better served by adjudication. The choice of recovery pathway warrants careful thought at the outset.

How we can help

We acted for OSB in the Western Australian proceedings. Our construction, engineering and projects team advises claimants and respondents across the full spectrum of security of payment matters, from payment claim strategy and adjudication to summary recovery, enforcement and the conduct of related court proceedings. If you would like to discuss how these decisions affect a current or anticipated dispute, please contact a member of our team.

Author

Robert O'Brien
Special Counsel, Perth
T +61 8 9429 7580
robert.obrien@squirepb.com

71730/07/26