

Security of Payment in Victoria – the fast and easy way to get paid

Building and Construction Industry Security of Payment Act 2002

Outline of presentation

- Overview of 'Security of Payment' legislation
- Making a payment claim
- Responding to a payment claim
- Adjudication
- Enforcement / getting paid

Overview of 'Security of Payment' legislation

- *Building and Construction Industry Security of Payment Act 2002*
 - Amendments in 2006 created new rules for contracts entered into on or after 30 March 2007 (This presentation is about the new rules)
- Helps contractors, subcontractors, consultants and suppliers to get paid for work done:
 - Statutory right to progress, milestone, final and one-off payments
 - Bans 'pay if paid' and 'pay when paid' clauses
 - Fast low-cost adjudication process
 - Payment enforced through the Courts

Overview of 'Security of Payment' legislation

Covered

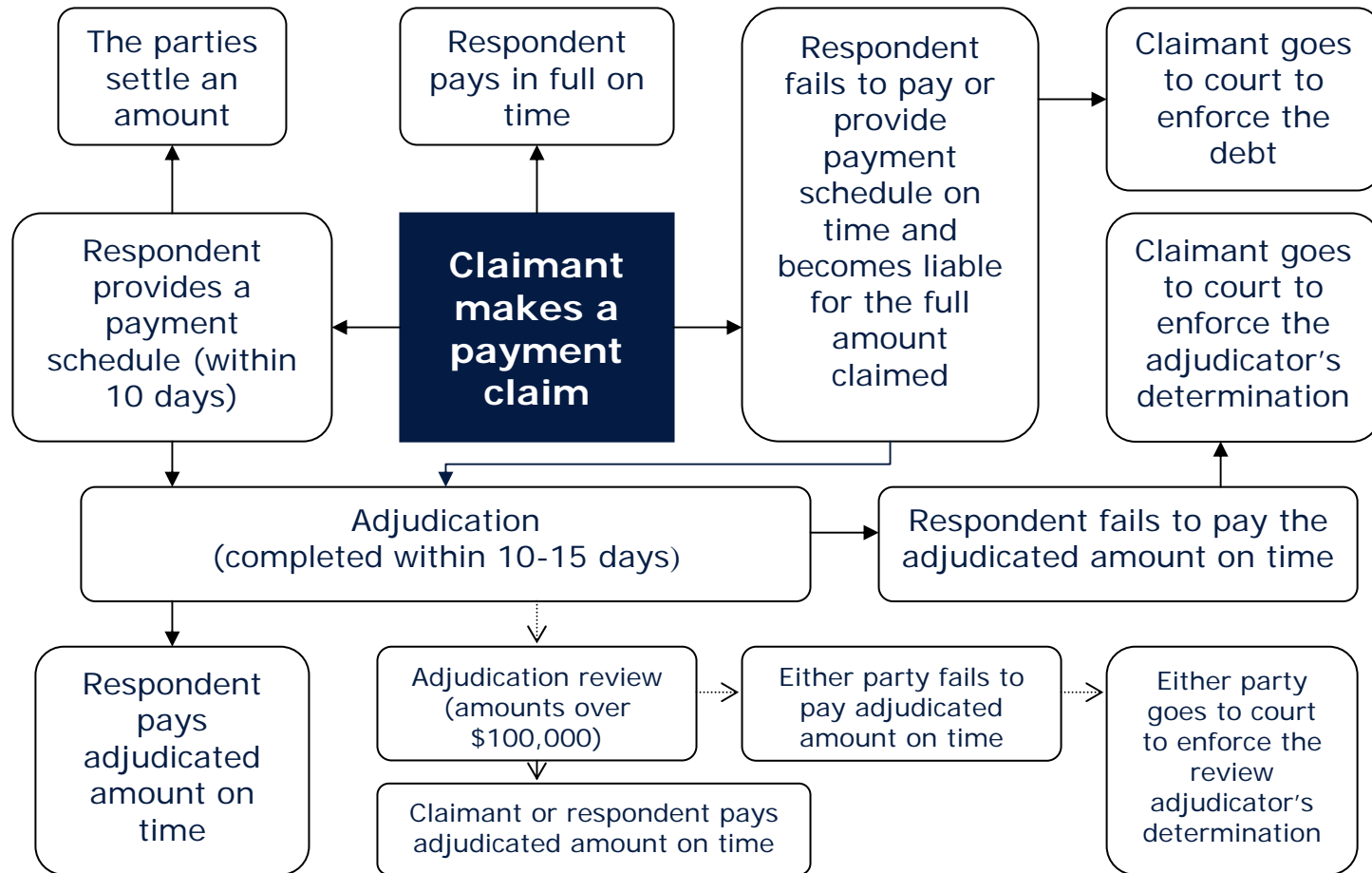
- ✓ Contracts to supply related goods or services
 - ✓ Residential and non-residential building
 - ✓ Civil engineering
 - ✓ Demolition
 - ✓ Electrical
 - ✓ Hire of plant and equipment
 - ✓ Landscaping
 - ✓ Maintenance
 - ✓ Mechanical/air conditioning
 - ✓ Plumbing
 - ✓ Professional services (eg design, architecture, surveying)
 - ✓ Supply of building materials

Not covered

- ✗ Domestic building contracts between a builder and the home owner. These come under the *Domestic Building Contracts Act 1995*. (But contracts with the home owner's building contractor and subcontractors are covered.)
- ✗ Contracts for mining, oil and gas exploration
- ✗ Employment contracts
- ✗ Contracts that are not based on the value of the work
- ✗ Contracts that are part of a loan agreement guarantee or a contract of insurance

How does it work?

Step 1: Claimant makes a payment claim



Making a payment claim – required information

YOU MUST

- Identify the work done or goods or services supplied
- Identify the amount claimed
- Clearly state that it is made under the *Act*. Write on it:

**This payment claim is made under the
Building and Construction Industry
Security of Payment Act 2002**

Making a payment claim – when you may claim

You must claim within three months of the reference date.

Type of payment	Reference date (if not specified in the contract)
Single or one-off	The day after you finish working or supplying goods or services under the contract
Final	The day after: <ul style="list-style-type: none">• the defects liability period ends or• the final certificate is issued or• you finish working or supplying goods or services under the contract
Other	20 days after you start working or supplying goods or services under the contract

Making a payment claim – what you may claim

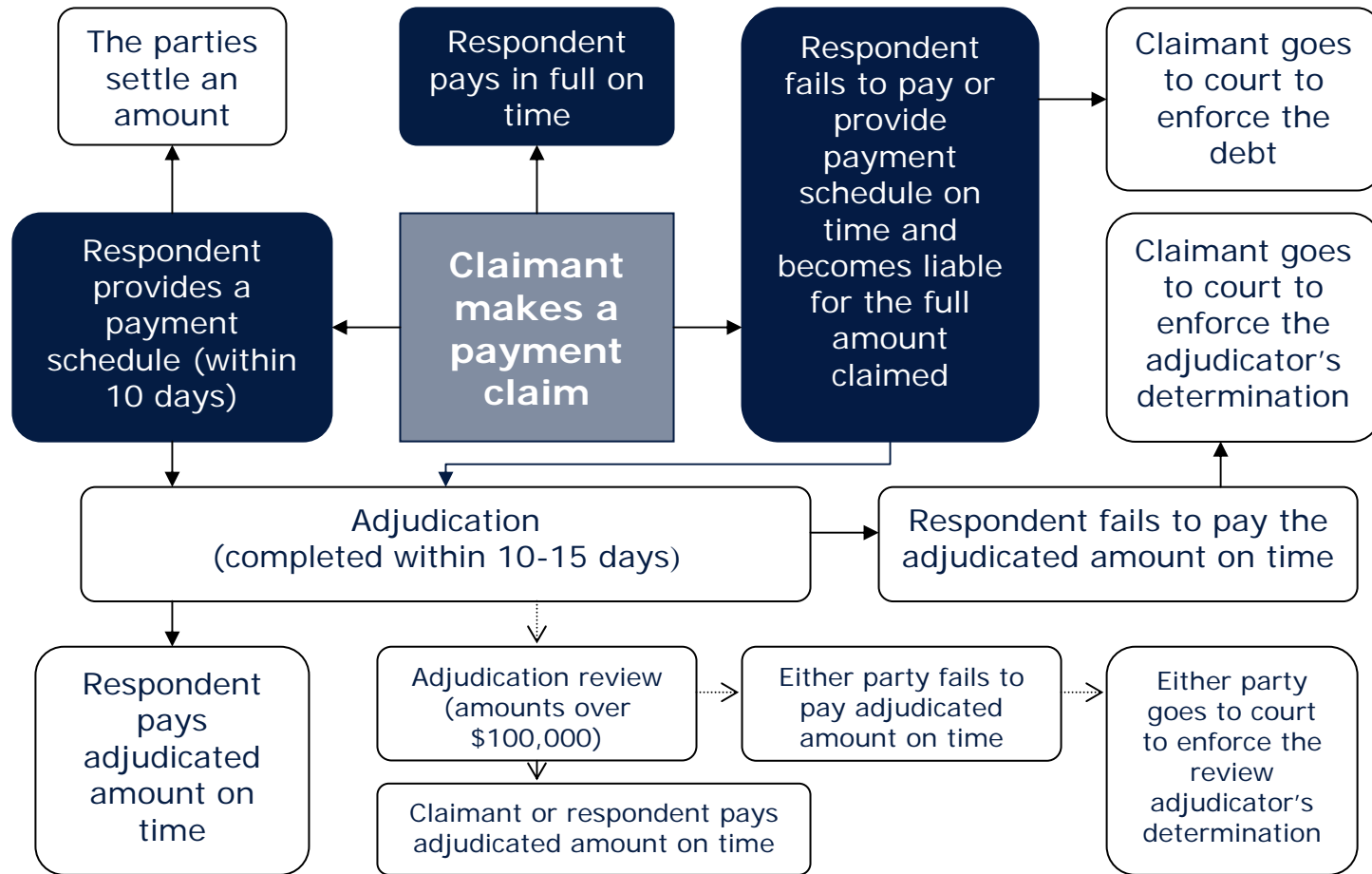
You MAY claim for:

- Work, goods or services as specified in the contract
- ‘Claimable variations’ to the contract:
 - All agreed variations and most disputed variations (limits apply)

You MAY NOT claim for ‘excluded amounts’ such as:

- Amounts due to events such as latent conditions, time-related costs and changes in law
- Damages for breach of the contract
- Any claim arising at law other than under the contract

Step 2: Responding to a payment claim

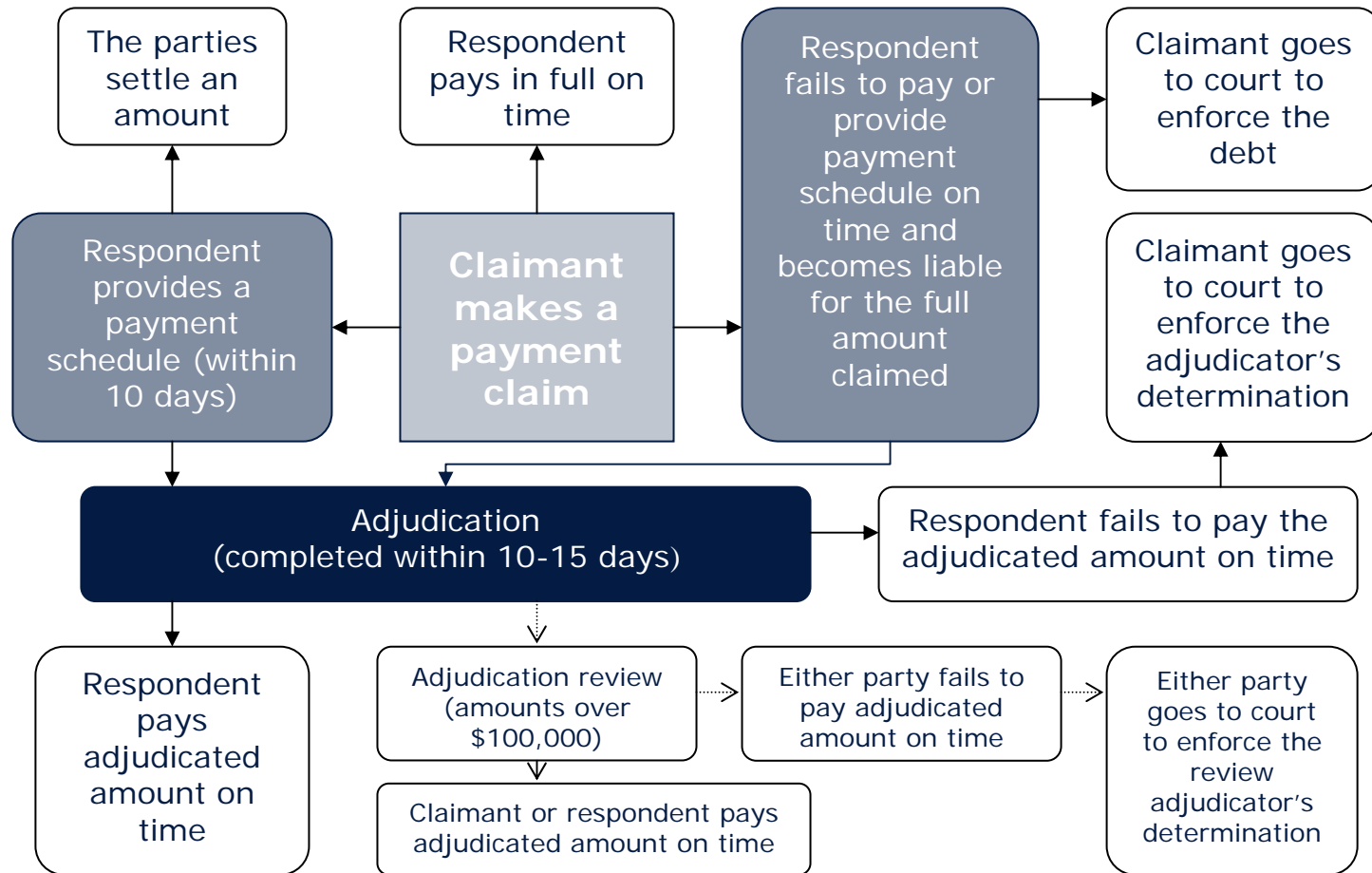


Preparing a payment schedule

A payment schedule **MUST:**

- Identify the payment claim to which it relates
- Indicate the amount that the respondent intends to pay and the reasons for any difference from the amount on the payment claim
- Identify any amounts that the respondent alleges are 'excluded amounts'

Adjudication



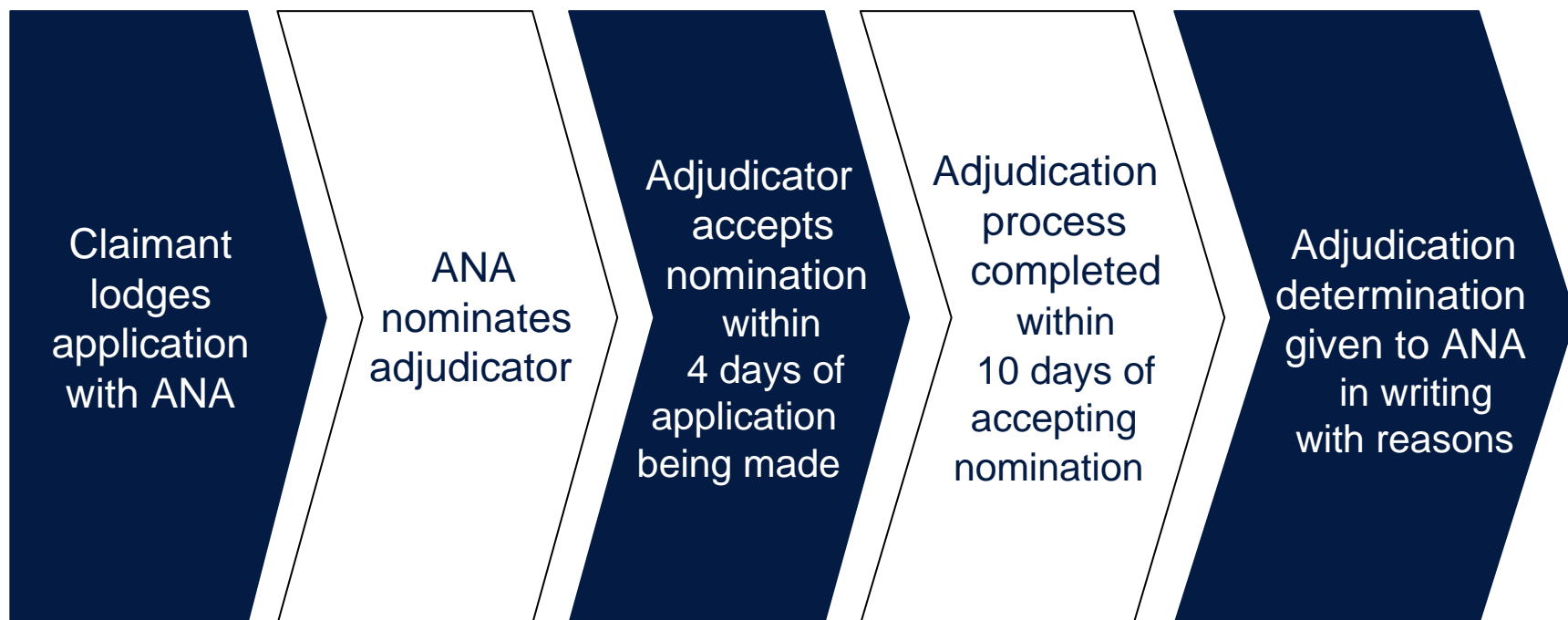
Adjudication - what is it?

A process created by the *Act* to resolve disputes about payments under construction contracts:

- Quick, fair and low cost
- Pay now, argue later
- Promotes cash flow during the construction process

Adjudicators determine the amount (if any) that the respondent must pay, when it is to be paid, and the rate of interest payable

Adjudication process



Adjudication – how to apply

- Apply in writing to an Authorised Nominating Authority (ANA) within the time limits set out in the *Act*.

If the respondent has provided a payment schedule: Apply within 10 business days of receiving the payment schedule (if disputing the amount that the respondent proposes to pay) or of payment being due

If the respondent hasn't provided a payment schedule: Within 10 business days of payment being due, notify the respondent of intention to apply, and then lodge the application within the next seven days

- The application must identify the payment claim and the payment schedule (if any) to which it relates
- A copy must be served on the respondent

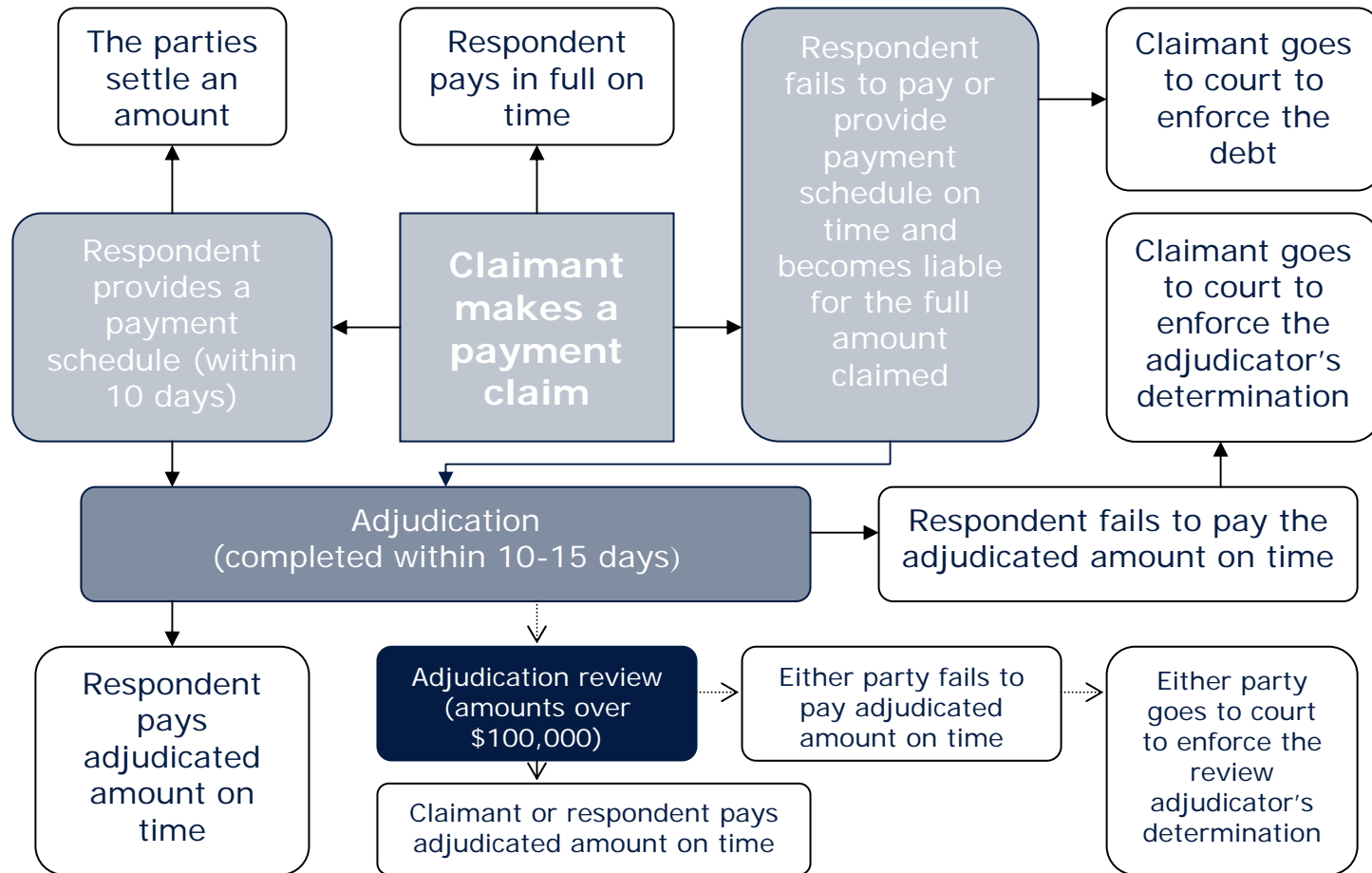
Adjudication – how to respond

- A respondent who has prepared a payment schedule can lodge an adjudication response with the adjudicator by the later of:
 - 5 business days after receiving the adjudication application, or
 - 2 business days after being notified that the adjudicator accepted the application
- The response must identify:
 - The adjudication application to which it relates
 - Any relevant principal and any other person with a financial or contractual interest
 - Any alleged excluded amounts
- A copy must be served on the claimant

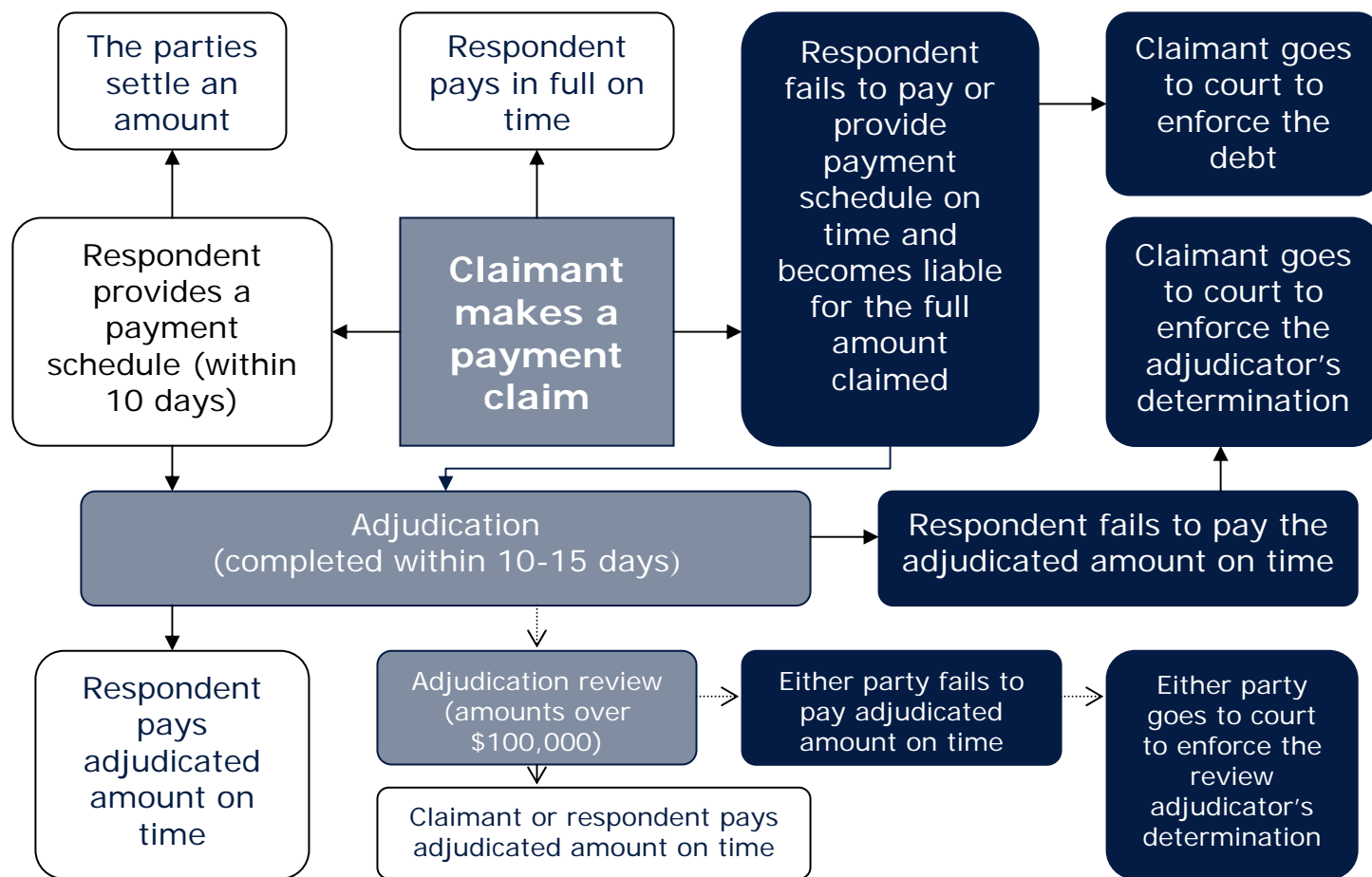
Adjudication – what it costs

- Two parts to the adjudication cost:
 - The ANA’s fees
 - The adjudicator’s fees and expenses
- The adjudicator may charge for expenses arising from the adjudication
- The adjudicator’s fees and expenses are shared equally between the claimant and the respondent

Adjudication review



Enforcement in the courts



Enforcement – other options for claimants

Suspend work

- Available where an amount is due and has not be paid by the due date. The right exists until the unpaid and due amount has been paid
- If work is suspended in accordance with the Act, the claimant bears no liability for any consequential loss or expense to the respondent

Exercise a lien

- A lien arises over unfixed plant or materials supplied by the claimant if payment is not made when due. It prevents the respondent from dealing with the unfixed plant or materials until the claimant is paid

Where to find information on the *SOP Act*

- The Building Commission website:
www.buildingcommission.com.au
 - Step-by-step guides to making and responding to claims and the adjudication process
 - Sample forms
 - Lists of ANAs and website links
 - Links to the *SOP Act* and the *Building Regulations*
- Phone the Building Commission: (03) 9285 6400

Building Commission



The Building Commission is a professional, supportive forward thinking body. It strives to create better buildings through its leadership, its partnership, its education of the Victorian building industry.