OWNER-OCCUPIERS BEWARE: NSW SECURITY OF PAYMENT ACT NOW APPLIES

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The last remaining exemption for owner-occupier construction contracts from the operation of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOP Act) was repealed on 1 March 2021. Contractors under owner-occupier residential construction projects will be entitled to make claims for payment under the SOP Act, including making and enforcing adjudication applications.

This change to the SOP Act will significantly change how payment disputes are dealt with on owner-occupier construction projects, place significant burdens owner-occupiers to become familiar with the security of payment regime, and potentially lead to more payment disputes on owner-occupier construction projects by giving contractors a further (and often quicker) avenue for pressing their claims.

BACKGROUND – HOW WAS RESIDENTIAL AND OWNER-OCCUPIED CONSTRUCTION CONTRACTS PREVIOUSLY DEALT WITH UNDER THE SOP ACT?

Prior to the changes, the SOP Act did not apply to any contracts (including subcontracts) for the carrying out residential building work. The effect of this exemption was that residential developers, including owner-occupiers, were not subject to the stringent payment claim and adjudication processes under the SOP Act. In particular, head contractors under residential building contracts were unable to issue and adjudicate payment claims against "owner-occupiers" (individuals who reside in or intend to reside in the premises the subject of the construction contract).

The *Better Regulation Legislation Amendment Act 2019* (NSW) and *Building and Construction Industry Security of Payment Regulations 2020* (NSW) (SOP Regulation) removed the exemption for residential building work under the SOP Act.

As a result of these amendments, from 1 March 2021 onwards a head contractor under any contract for construction work, including owner-occupier construction contracts, is entitled to make and adjudicate payment claims under the SOP Act.

Contracts for residential building work (as defined under the *Home Building Act 1989* (NSW)) will now also be required under clause 8 of the *Home Building Regulation 2014* (NSW) to include information on the operation of the SOP Act and the SOP Regulation in the approved form.

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WHAT IS THE DUE DATE FOR PAYMENT UNDER RESIDENTIAL CONSTRUCTION CONTRACTS?

Perhaps acknowledging the special circumstances of an owner-occupier construction contract, under section 11(1C) of the SOP Act a progress payment under an 'exempt residential construction contract' (which currently only includes owner-occupier construction contracts) becomes due and payable on:

- the date on which the payment becomes due and payable in accordance with the terms of the contract; or
- if the contract makes no express provision, on the date occurring 10 business days after the payment claim was made in relation to the payment.

Importantly, unlike non-exempt construction contracts which expressly provide a due date for payment, the section 11(1C) does not impose a cap or maximum period for payment in respect of a payment claim under a construction contract .

DOES THE SOP ACT APPLY TO OWNER-OCCUPIED CONSTRUCTION CONTRACTS ENTERED INTO BEFORE 1 MARCH 2021?

It is unlikely that the amendments to the SOP Act and the changes in the SOP Regulations will apply to contracts entered into before 1 March 2021. Generally for a law to have a retrospective effect, it needs to be unambiguously clear in that intention. However, there is currently no judicial or legislative guidance on how earlier contracts will be treated. In the meantime, it is recommended that owner-occupiers under construction contracts be aware of the operation of the SOP Act and be prepared to respond to any payment claims if they are made. If a payment claim or adjudication application is received, you **must** respond to it within the required timeframe.

WHAT THIS MEANS FOR YOU

- Contractors under owner-occupier construction contracts can now use the SOP Act to enforce disputed claims for payments. This provides contractors with an extremely quick mechanism to recover disputed payments, with adjudication decisions usually made within 15 business days of the adjudication application.
- Owner-occupiers and contractors alike need to be familiar with the strict requirements of the SOP Act, including the timing and contents requirements for a valid payment claim and payment schedule, as well as the times for which disputed claims may be referred to adjudication.
- To ensure the parties to owner-occupier construction contracts comply with their obligations under the SOP Act, the payment provisions under all owner-occupier construction contracts should be aligned with the processes under the SOP Act.

If you would like assistance on how to address these legal risks in your business, please contact the authors of this alert.

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