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Bulletin – Recent Developments in the Law – Security of Payment Legislation Now Applies to Progress Claims made for Residential Building Work Against Mums n Dads Owner-Occupiers

From its commencement in 2000, the Building and Construction Industry Security of Payment Act 1999 (**BCISOPA**) did not apply to builders' claims against owner-occupiers. The original Act provided:

Section 7 (2):

*This Act does not apply to: (b) a construction contract for the carrying out of residential building work (within the meaning of the Home Building Act 1989) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in (**Owner-Occupier Exemption**).*

Legislature Has Removed Owner-Occupier Exemption

By strange contortion, the legislature removed the Act's Owner Occupier Exemption, as follows:

First Legislative Step:- The 2018 amendments to the BCISOPA and the Building and Construction Industry Security of Payment Regulation 2020 (**Regulations**) amendments, applying to contracts entered into on or after 21 October 2019, removed the Owner-Occupier Exemption from the legislation and inserted its equivalent into clause 4 of the Regulations; and then.

Second Legislative Step:- By mechanism in schedule 2 of those very Regulations, deleting clause 4 from the Regulations themselves, thereby removing the Owner-Occupier Exemption from the scheme of the BCISOPA from 1 March 2021.

The justification for removing the Owner-Occupier Exemption to the BCISOPA is that subcontractors in the past could always utilise the BCISOPA to enforce Payment Claims, whereas the Builder was exempt and had to rely up NCAT or other tribunal for enforcement of claims, and could not utilise the BCISOPA to ensure healthy cash-flow from the Owner Occupiers, leaving a heavy cash-flow burden with the builder.

That has all changed, meaning that all a builder may have to do to enliven the BCISOPA to its claim, which could be as simple as an invoice describing the works as being an *x percent progress claim under the Contract*, is to include on said claim the section 13 (2) (c) endorsement wording:

"This is a Payment Claim made under the Building and Construction Industry Security of Payment Act 1999"

BCISOPA Ignored at Your Peril – Owner-Occupier Must Provide Payment Schedule within Ten Business Days

The BCISOPA is very powerful legislation, ignored at a Respondent's (Principal, Owner-Occupier or any one up the contracting chain's) peril.

A Payment Claim must be responded to by way of a Payment Schedule clearly disputing the claim, within ten (10) business days of receipt of the Payment Claim. Failure to reply with a timely Payment Schedule results in the Payment Claim converting to a statutory debt pursuant to section 14 (4).

Further, the statutory debt can be enforced in court by way of application for 'rapid' summary judgment pursuant to section 15. Such summary judgment application may be heard and awarded within a few weeks expiration of the ten (10) business day Payment Schedule period. Indeed RGCL has obtained judgment for claimants with ignored Payment Claims in such rapid timeframes on many occasions.

Payment Schedule Must be Comprehensive

Further, a Payment Schedule must also be comprehensive – and contain sufficient reasons to justify the dispute. A poorly drafted Payment Schedule will constrain an Owner-Occupier's ability to provide a through Adjudication Response in reply to an Adjudication Application made by the builder. Section 20

(2B) relevantly provides:

(2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

Should an Owner-Occupier ignore the Payment Claim and also fail to provide a Payment Schedule within 5 business days of the builder's second chance section 17 (2) notice, (assuming the builder elects adjudication over court based 'rapid' summary judgment), then no Adjudication Response is permitted under the adjudication scheme of the BCISOPA. Section 20 (2A) relevantly states:

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14(4) or 17(2)(b).

Owner Occupiers and Architects, Must Seek Advice Immediately upon Receipt of Payment Claim

Owner Occupiers should provide RGCL with any invoice that makes reference to the BCISOPA, immediately upon its receipt.

We need the Payment Claim immediately because documents must be reviewed and a comprehensive Payment Schedule must be produced (in consultation with the Owner-Occupier, Architect and other service providers) within ten (10) business days of receipt of the Payment Claim. The ten (10) business day time constraint is absolute and enforced by the courts as such.

The Payment Schedule must set out a scheduled amount, if any, together with clear reasons as to why an amount less than the claimed amount is being scheduled.

Builders

Builders can now utilise the BCISOPA against Owner-Occupiers in relation to residential building works – whether a whole new build or extension or renovation work. The removal of the Owner Occupier Exemption is for contracts entered into from 1 March 2021.

RGCL can assist the builder in relation to claim strategies to maximise the benefits of the BCISOPA including:

- Preparation of claim and timing to ensure compliance with section 13 of the Act;
- Optimisation of benefit of the BCISOPA by way of timing of claims over the project life cycle to maximise cash-flow, return and negotiation of resolution of issues; and
- Utilisation of enforcement mechanisms provided by the Act including:
 - Adjudication;
 - 'Rapid' summary judgment of unanswered Payment Claims in court;
 - Court based enforcement of judgments, including garnishee orders, examination of judgment debtor Owner-Occupier; and
 - Suspension of works for unpaid undefended Payment Claim, unpaid adjudicated amount, or underpayment of scheduled amount; under the relevant provisions of the BCISOPA, which provisions contain both an effective shield (against liability for defects resulting from proper suspension) and a sword (allowing claims for lost profit for owner termination in response to proper suspension).

This bulletin is not intended as legal advice. We must review the particular facts of any matter you may have and then provide you with specific advice.

Yours faithfully,
Richard Green B Eng LLB (Hons) solicitor
Richard Green Construction Lawyers