Article Information

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NSW Security of Payment Act Amendments – Loophole closed for unlicensed residential builders

Piper Alderman's Sydney Projects and Construction team consider the latest amendments to the NSW Security of Payment Act, which close loopholes that previously enabled unlicensed contractors engaged in residential building work to claim for payment under the Act.

On 20 August 2024, section 8 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SoP Act**) was amended to close a loophole left open when owner occupied work became covered by the SoP Act on 1 March 2021.

Section 8 of the SoP Act now reads as follows (new text underlined):

> "**8 – Right to progress payments**
>
> (1) A person who, under a construction contract, has undertaken to carry out construction work or to supply related goods and services is entitled to receive a progress payment.
>
> (2) A person is not entitled to a progress payment under subsection (1) if the construction contract—
>
> (a) does not comply with the *Home Building Act 1989*, section 4, or
>
> (b) involves construction work that is residential building work done in contravention of the *Home Building Act 1989*, section 92."

Implications

Prior to this amendment, the entitlement to a progress payment under the SoP Act arose regardless of whether a claimant had complied with trade licencing or insurance requirements under section 92 of the *Home Building Act 1989* (NSW) (**HBA**), being the species of insurance formerly known as "Home Warranty Insurance", but now known as Insurance Under the Home Building Compensation Fund (**HBCF Insurance**).

This has now changed. From 20 August 2024, if the work or related goods and services the subject of the claim is "residential building work", as defined under the HBA, the claimant will not be entitled to make a payment claim under the SoP Act, where:

1. that person has contracted to carry out "residential building work" or "specialist work" (as defined in the HBA at Schedule 1, clause 2 and Schedule 1, clause 1, respectively) and that person does not hold a valid contractor licence; or
2. a contract of insurance that complies with the HBA is required but was not taken out and provided to the other party to the construction contract.

Conclusion

Previously, the absence of HBCF Insurance, had it been raised by a respondent, should have put an end to a claim under

the SoP Act. If an adjudicator had determined to the contrary, the determination was exposed to judicial review.

That was not, however, the case in respect of unlicenced contracting. Almost without exception, adjudicators would not find the absence of mandatory trade licences under the HBA to be a barrier to claiming payment under the SoP Act or to being awarded an adjudicated amount.

The recent amendment gives the absence of either trade licences or HBCF Insurance, in the context of residential building work under the HBA, the status of jurisdictional errors (if an adjudicator were to award an adjudicated amount to such a contractor). Adjudicators will need to be alert to and consider these issues in order to manage exposure of their determinations to judicial review.

By reason of this amendment, the NSW SoP Act is now brought more in line with many of its interstate counterparts, filling a substantial loophole, and encouraging those undertaking residential building work to be appropriately qualified and authorised and to ensure that HBCF Insurance is in place.