

SECURITY OF PAYMENTS AND DEVELOPERS

The *Building and Construction Industry Security of Payment Act 1999* (NSW) (as amended) ("SOPA") has proven to be a very effective method for contractors to obtain payment from builders and developers in the course of a construction project.

Although payment claims are often made by subcontractors against builders under SOPA, builders can use SOPA to make payment claims on principals.

Section 7 of SOPA however contains some exceptions as to when the Act does not apply.

One of those exceptions is contained in Section 7(2)(b) of SOPA which excludes the application of the Act to construction contracts for *"the carrying out of residential building work (within the meaning of the Home Building Act 1989) on such part of any premises for whom the work is carried out resides in or proposes to reside in."*

Clearly the exception operates to protect home owners who reside or intend to reside in premises the subject of the relevant construction work from payment claims made under SOPA by builders and/or contractors who are directly engaged by the home owner.

The rationale for this exception being that the jurisdiction for disputes in relation to the payment of monies to builders are the subject of the Home Building Act 1989 and the jurisdiction of the Consumer Trader and Tenancy Tribunal.

The Developers argument

It has been the writer's experience however, that developers have relied on section 7(2)(b) to support arguments that a builders payment claim under SOPA, is not valid because the developer

intended to reside in the premises the subject of the construction contract.

The position under SOPA in response to this assertion by developers is unclear.

It is the writers view however, that it is strongly arguable that SOPA is intended to apply to developers whether they reside in or propose to reside in the premises or not, although this is not always the view expressed by Adjudicators.

The writer's view is based on the way in which section 7(2)(b) of SOPA imports the definition of term "residential building work" from the Home Building Act 1989.

Residential Building Work

Section 3 of the Home Building Act 1989 defines "residential building work" as:

".... any work involved in, or involved in coordinating or supervising any work involved in:

- (a) the construction of a dwelling, or*
- (b) the making of alterations or additions to a dwelling, or*
- (c) the repairing, renovation, decoration or protective treatment of a dwelling."*

What is significant; is that although the definition of "residential home building work" in the Home Building Act 1989 is used in section 7(2)(b) of SOPA, the Home Building Act 1989 does make a distinction between the rights of developer and the rights of an owner occupier and the existence of this distinction must in the writers view, avoid the application of section 7(2)(b) of the SOPA Act to developers.



Reasons why Act applies to Developers

In the writers opinion section 7(2)(b) of SOPA cannot be interpreted to exclude a Builder's entitlement to make a claim under SOPA in circumstances where the owners are also developers for at least the following reasons:

- Section 3A of the *Home Building Act 1989* defines a developer with reference to four or more existing or proposed dwellings
- developers are treated very differently to successors in title or home owners under the Home Building Act 1989.

This is clear from section 18C of the Home Building Act which provides that a successor in title is entitled to the benefit of a statutory warranty against a developer as if the:

"developer were required to hold a contractor license and had done the work under a contract with that successor in title to do the work."

The point being that the developer and the home owner are treated differently under the *Home Building Act 1989* in that a developer gives a statutory warranty to a "successor in title" [ie home owner] whereas a home owner is the beneficiary of such a warranty.

That being the case, developers must be in a very different category of persons to the category contemplated by section 7(2)(b) of SOPA.

- an absurdity would arise where an individual developer could avoid the operation of SOPA simply because they chose to reside in a high rise apartment complex.
- any interpretation of section 7(2)(b) of SOPA, in favour of developers would create the very mischief that SOPA seeks to avoid which according to the Second Reading Speech of Mr Iemma was to "*stamp out the practice of developers and contactors delaying payment to subcontractors and suppliers by ignoring progress claims, raising spurious reasons for not paying or simply delaying payment...*"
- an interpretation of section 7(2)(b) of SOPA against developers would be consistent with the Second Reading Speech of Mr Iemma in respect of the Building and Construction Industry Security of Payment Amendment Act 2002 (NSW) where he states:

"Since its initial introduction, a minor anomaly has been drawn to my attention regarding the effect of the original bill on home buyers and home Developers. The Government deliberately decided to exempt these people from the effects of the proposed legislation as they were not seen as being part of the construction industry. Also, contractors working for home Developers and home buyers have access to other security of payment mechanisms established under the Home Building Act. A slight drafting anomaly in clause 7 (2) (b) designed to create this exemption can result in a scenario where, say, a developer, building a 50-storey



apartment block, by proposing to reside in one of the apartments can be exempted from the effects of the bill. This was never intended as an outcome and the amendment is designed to close this off.” [emphasis added]

Despite the intention of the Government to address the unintended effects of the original Act in so far as developers were concerned, the amendments of 2003 did not provide any greater degree of clarity to the question of whether SOPA applies to developers.

Based upon the above however, any builder entering into a construction contract with a developer should be aware that there are compelling reasons to argue in any Adjudication Application as to why SOPA still applies even if the developer resides or intended to reside in the premises.

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