

Construction Law Update

October 2007

Welcome to Noble Lawyers Construction Law Update
- a regular news bulletin highlighting issues and legal decisions that affect the building and construction industry.

Security of payment gets some teeth

On 30 March 2007, the long awaited amendments to the *Building and Construction Industry Security of Payment Act* finally came into force. The Act as amended should make it much easier for builders, sub-contractors and suppliers to obtain payment of their progress claims. The key features of the amended Act are:

- The removal of the provisions allowing the respondent to provide security in lieu of payment;
- The expansion of the Act to include claims for final payments, one off payments and milestone payments;
- To allow subcontractors to use the adjudication process to access monies held on trust by head contractors or principals;
- The granting of certificates by Authorised Nominating Authorities where the respondent has failed to pay an adjudicated amount by the due date for payment, which the claimant can lodge with the appropriate court as an application for judgement, avoiding the time and expense of litigation where unmeritorious defences might be raised;
- The right of an aggrieved party to seek a review adjudication in limited circumstances;
- The introduction of "excluded amounts" that cannot be taken into consideration by an adjudicator including claims for damages, delay costs and latent conditions.

As the Attorney General said in the Second Reading Speech for the amending bill (adopting the words used many years before by Lord Denning), cash flow is the lifeblood of the construction industry.

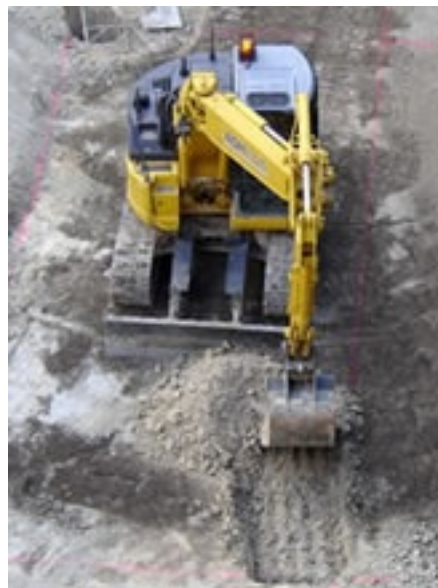
These amendments should improve the utility of the Act in obtaining regular progress payments for all industry participants to ensure that lifeblood flows, however, they only apply to contracts entered into from 30 March 2007. The original version of the Act continues to apply in respect of contracts entered into prior to that date.

Of course, strict time limitations apply, so claimants and respondents alike need to ensure that they are fully

informed of the Act and the potential benefits and consequences that can flow from it.

The VMIA and directions to builders under the House Contracts Guarantee Act

The Victorian Managed Insurance Authority ("the VMIA") has the responsibility of administering the HIH (Domestic Building) Fund ("the Fund"). The Fund is used to compensate owners who would otherwise have been entitled to claim on domestic builders' warranty policies written by HIH and FAI prior to their collapse.



Notwithstanding that HIH was placed into provisional liquidation 6 ½ years ago, there is a surprising number of claims still being made. Under section 44 of the *House Contracts Guarantee Act* ("the Act"), once a claim is made to the VMIA it may give reasonable directions to the builder responsible for the works the subject of the claim to complete or rectify work or pay to the Fund any amount in respect of the completion or rectification of the building work or to pay into the Fund any amount that the VMIA has paid out of the fund on a claim.

At first glance, it seems that these are broad powers indeed that have been conferred on the VMIA and which may have very serious repercussions for builders. However, section 44(3) places a significant limitation on those powers

by restricting the VMIA's power to do so only to the extent that HIH (including FAI) could require that work or require a payment to it by a builder under the relevant HIH policy.

In our opinion, this may in certain cases mean that the VMIA has no power to give directions to a builder. Firstly, the relevant policy must give that power to HIH over the subject builder. This means that there must exist a contract between HIH and the builder, for unless there is a contractual relationship between them, HIH has no power to require a builder to carry out work or make payment to it.

First and foremost, generally, builder's warranty policies were purchased by builders for the benefit of home owners. Generally, these policies amount to contracts of insurance between the insurers and home owners and home owners can make claims to the insurers in accordance with the policy terms, conditions, limitations and exclusions.

However, it is another thing entirely to suggest that the policy constitutes a contract between the insurers and the purchasing builders. It may be that in some cases the policies do constitute such a contract, however, if push came to shove, as concerns the VMIA, it would have to prove the existence of such a contract.

Potentially that might be a difficult burden to overcome in circumstances where the VMIA may have to rely upon the co-operation of the liquidator of HIH to produce the policy said to confer the power over the builder and then find someone to give evidence about the making of such a contract.

In the event that the VMIA gives to a builder one or more of the directions it is empowered to do under the Act (whether in the proper exercise of that power or otherwise) there are essentially 3 options open to the builder.

They are:

1. Comply with the direction, either by carrying out the rectification or completion work or paying over the required sum; or
2. Seek review by VCAT of the decision by the VMIA to issue the direction; or
3. Do nothing.

In our opinion, generally, we consider option 3 may be the best. Why do we say that? We say that because unless the builder considers that it is legally or morally bound to carry out the work or pay over the money, why would it do so without investigating and, if appropriate, enforcing its legal rights.

In that case, the builder can wait until proceedings are commenced (if ever) and deal with it in the usual way raising all of the defences available to it. In our opinion, this is preferable to seeking a review by VCAT, which requires the builder to commence a proceeding in which it will have the burden of proof to challenge a direction that has absolutely no force unless and until the VMIA obtains an order from a court or the Tribunal following a builder's refusal to comply with a direction. To obtain such an order, the VMIA would have to commence a proceeding in which would have the burden of proof.

Whilst each case is different, and should be judged on its own merits, as concerns the VMIA, we cannot envisage many situations where a builder would obtain a benefit by seeking to have a decision reviewed by VCAT.

Proportionate liability update

In *Dartberg Pty Ltd v. Wealthcare Financial Planning Pty Ltd* [2007] FCA 1216, Middleton J. considered the operation of the proportionate liability provisions in Part IVAA of the *Wrongs Act* in the context of a proceeding in the Federal Court commenced by a plaintiff in which it sought relief under Commonwealth legislation.

Whilst the Court ruled that the Commonwealth legislation relied upon by the plaintiff imposed a "specific and comprehensive regime imposing liability according to its terms" (see par 33) such that the provisions of the *Wrongs Act* did not apply in that case, the Court made some interesting observations on the proportionate liability scheme contained in Part IVAA.

Under section 24AF(1)(a), Part IVAA applies to: "*a claim for economic loss or damage to property in an action for damages...arising from a failure to take reasonable care*".

Section 24AE of the *Wrongs Act* defines damages as including "any form of monetary compensation". The Court noted the definition and expressed the view that "Part IVAA would also apply to a claim for a sum certain..." (see par 17). Accordingly, on the Court's view, defendants facing a claim for a debt under a contract could also take advantage of the proportionate liability scheme under the Part provided the plaintiff's claim is one "arising from a failure to take reasonable care".

On that issue, the Court said that even though the claims made by the plaintiff do not rely upon a plea of negligence or a failure to take reasonable care, such a failure may form part of the allegations or evidence to be tendered and at the end of the trial after the evidence has been heard it might be found that Part IVAA applies.

According to the Court, this would require the defendant to plead and then prove the elements required to avail itself of the limitation of liability that is afforded by Part IVAA.

If you have any queries or require further information about these topics or any other matter, please contact us via any of the contact points listed below.

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Noble Lawyers practices in all areas of construction law. The firm acts for all parties to disputes including owners and developers but prefers to act for builders and sub-contractors, both commercial and domestic.

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