



Construction Alert December 2009

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Changes to NSW home owners warranty insurance

On 8 November 2009, the NSW Government announced major structural reforms to the Home Warranty Insurance Scheme.

In NSW, home warranty insurance provides cover to consumers of up to \$300,000 in circumstances where their builder is no longer capable or willing to complete a project or rectify defective work.

The change relates to the Government underwriting and capitalising the Home Warranty Insurance Scheme, which will be fully funded by premiums.

It will commence on 1 July 2010.

Details of the new scheme

The new scheme will be:

- underwritten and capitalised by the NSW Government
- funded by home warranty insurance premiums
- managed by Treasury through the Self Insurance Corporation
- operated by the private sector (by way of a competitive tender) for the provision of services in relation to the issue of project certificates, collection of premium and claims handling.

Why the change?

Since the inception of the privately operated scheme, the home warranty insurance market has been beset with problems, significantly the collapse of FAI / HIH. There has also been a substantial contraction of the market following the global financial crisis. Earlier this year, two major providers of the insurance (Lumley General and CGU Insurance Limited) announced their exit from the market. It is likely others will leave the market. As a consequence an increasing number of residential builders in NSW are unable to obtain cover, or obtain cover on suitable terms. This creates uncertainty in the residential construction industry. In NSW this is a \$20 billion industry employing 250,000 people.

Existing builders insured with Lumley and CGU

Currently CGU and Lumley insure around 2,500 builders. Those with CGU will have to obtain eligibility with another insurer prior to 1 December 2009 and those with Lumley General by 1 January 2010, regardless of these future changes.

Transitional provisions will be in place to ensure the continued provision of home warranty insurance by the three remaining insurers (Vero, QBE and Calliden) until such time as the new arrangements come into effect which is expected to take six months.





Are there difficulties in obtaining insurance? How does this affect you?

The Department of Fair Trading encourages builders who are finding it difficult to obtain insurance to contact them and discuss it with them. New builders, with low equity or a track record, are usually worst affected. Under the new scheme, the plan is to incorporate a “managed” cover. This type of cover is designed to assist new entrants to the industry or existing builders who have low equity in their business, obtain cover.

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Claimants want to be in a position to get their money as soon as possible. However, getting into a position to enforce any successful adjudication application, or enforcing your rights where no payment schedule has been served, can raise some tricky issues for a Claimant, and ultimately slow the process down of getting paid.

Two recent decisions of the Supreme Court of NSW dealing with the *Building and Construction Industry Security of Payment Act* NSW 1999, illustrate some salient considerations for Claimants.

In *Parkview v Fortia* [2009] NSWSC 1065, Parkview as construction manager proceeded straight to the Court seeking

Once at Court, Fortia alleged that Parkview were not entitled to summary judgment because Parkview’s purported payment claim did not comply with the requirements of the *Security of Payment Act*. They also alleged that Fortia was merely an investor in the project, and not a person who is liable to make payment to Parkview for the construction work or related goods and services, for the purposes of that Act.

Essentially, for Parkview to be successful it had to convince the Court that Fortia’s defences were ‘hopeless to the extent that they should not be permitted to go to trial’ - the so called *General Steel Industries* test. Justice McDougall was not convinced and said ‘*there is a question to be tried as to whether... the payment claim in question does comply with section 17(2) (a)*’. Accordingly, Parkview’s application for summary judgment was dismissed.

In *Project v TQM* [2009] NSWSC 699, the contractor, TQM, had served on Project a statutory demand claiming an amount of \$43,115 which had been awarded to it as a result of an adjudication under the Act. Project sought an order setting aside the statutory demand on the basis that it had an off-setting claim for, among other things, defective work.

TQM argued that to set aside the statutory demand on that basis would be inconsistent with the ‘*pay now, argue later*’ philosophy of the Act.

Associate Justice Macready set aside the statutory demand. He cited the well established line of authority that a creditor’s statutory demand founded upon a debt arising from an adjudication does not preclude the setting up of an off-setting claim under the *Corporations Act* on an application to set aside the demand. He also found that a Commonwealth statute should not be limited by the *Security of Payment Act*, a State Act, is a powerful reason to permit the off-setting claim.

What does this all mean?

The cases are a reminder that while the mechanisms in the Act for claiming payment and proceeding to adjudication may be relatively straightforward and known to most industry participants, actually getting the money in maybe fraught with its own complications and difficulties. Claimants need to carefully consider what



Security of Payment: enforcing an entitlement to get paid

Given that *Security of Payment* legislation has been a fact of life for the east coast states for some time now, most industry participants are well aware of the matters which need to be considered in making payment claims, and putting on payment schedules and dealing with any consequential adjudication.

summary judgment when *Fortia* failed to put on a payment schedule in response to *Parkview*’s payment claim.

As many readers will know, where a respondent fails to serve a payment schedule a Claimant in NSW has 2 options; if they want to go to adjudication, they need to effectively give the respondent another chance to put on a payment schedule (by serving what is termed a Section 17 notice), or they can approach the Court alleging the full amount of the payment claim is due and owing. Parkview did the latter.



options are available to them for enforcing a successful judgment or claiming summary judgment absent a payment schedule.

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South Australia introduces Security of Payment legislation

Two Building and Construction Industry Security of Payment Bills have been put before the South Australian Parliament, both based on the NSW model. The Bill introduced by Mr Kenyon MP was passed by the House of Assembly on 3 December 2009 following amendments made by the Legislative Committee.

The amendments have the effect of ensuring that the Bill does not apply to: a construction contract that forms part of a loan agreement, contract of guarantee or a contract of insurance under which a financial institution undertakes to lend, repay or guarantee money, or provide indemnity with respect to construction work carried out under the construction contract; and, a construction contract for domestic building work where the party who has requested the work resides or proposes to reside in the property. This excludes owner-builders from the Bill.

Key industry stakeholder groups were consulted during the drafting process including the MBA, HIA and Civil Contractors Association. The date of implementation is expected to be announced once Parliament re-convenes in 2010.

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International Arbitrations in Sydney

There has been a lot of press this year about Arbitration. Much of it has been generated from the push to promote Sydney as a hub for International Arbitrations. Commonly this has been the

domain of Singapore, Hong Kong, London and New York.

The New South Wales Attorney General, John Hatzistergos has been promoting a new regulatory framework to attract international arbitrations to Sydney including amendments to the International Arbitrations Act 1974. Sydney is viewed as a suitable venue, being a major trading capital in the Asia-Pacific region, home to many major law firms and the forum of most of Australia's largest civil cases.

So, what do we mean by Arbitration? Arbitration is a form of alternative dispute resolution where the parties to a dispute have agreed (usually in the commercial agreement between them) that in the event disputes arise between them, it will be determined through arbitration as opposed to going to a Court of Law.

parties to an agreement determine the processes for dispute resolution which they consider best serves their purposes. It also has the advantage of being conducted in private, is usually quicker (and hence cheaper) than the Court system and also more certain, as appeal rights are generally limited.

Significantly, it is particularly appropriate for international transactions, where the choice and forum of applicable law may be in doubt and enforcing judgments may be difficult. Arbitration by-passes these problems because the parties have by agreement, determined the applicable rules of the process and you can ascertain if countries are signatories to the New York Convention.

However, the decision to arbitrate requires agreement between the parties, and



Rules for that arbitration are usually the model rules under the Act, and the commercial agreement usually specifies the venue of the arbitration, the processes and procedures for running the arbitration, and sometimes the identity of the arbitrator(s). The decision of the arbitrator is usually agreed to be binding.

The advantages of arbitration are that the

therefore has to be a matter which is determined and negotiated at the time of drafting the commercial agreement between the parties. If the parties fail to do so, especially with respect to cross border transactions, then uncertainties as to applicable legal systems, choice of law and forum, and most importantly, enforcing successful judgments, arise.



Certainly, the construction industry in Australia, both in international and domestic transactions, has not been shy of arbitrations. It is fair to say though, at least for domestic arbitrations, there are fewer now than has been the case in the past decades. This may be explained in part by some legislative changes prohibiting arbitration for some disputes, such as the *Home Building Act NSW 1997* with respect to residential building disputes. Other explanations may be the increased efficiency of the specialist construction lists within the District and Supreme Courts, which result in cases proceeding to a hearing more quickly than was the case in the past, and hence with greater savings in legal costs.

At the end of the day, Australia does have stable, efficient and familiar court systems which parties to a dispute are generally

comfortable with as being the forum to resolve their dispute.

However, for certain commercial transactions and disputes, Arbitration will hold some fundamental advantages for the parties, depending upon their particular circumstances. Limited appeal rights brings with it closure to a dispute and hence greater certainty. The confidential and private nature of Arbitration, usually keeps the dispute out of the press. Choice of venue, forum, processes and procedures usually assists in keeping legal spend under control.

Finally, accessibility to an arbitrator to determine disputes in a timely and efficient manner, means the parties spend minimal time being distracted by a dispute, and can turn their attention to money making enterprises.

What does this all mean?

So the next time you are negotiating your commercial agreements pay particular attention to what is proposed as being the dispute resolution forum and processes. Think about whether Arbitration would be appropriate. A well drafted process, which meets your requirements, whether that includes a mandatory mediation, culminating in Arbitration or legal proceedings, can assist you enormously in any dispute which may arise between the parties.

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