

Key Changes to Security of Payment Regulation 2020 from 1 March 2021



What you need to know

The *Building and Construction Industry Security of Payment Act 1999* (NSW) ("**SOP Act**") regulates the payment requirements in the building and construction industry that builders, subcontractors, principals, and **now homeowners** must follow.

On 1 September 2020, the *Building and Construction Industry Security of Payment Regulation 2020* (NSW) ("**BCPR regulations**") commenced, repealing the previous 2008 Regulation. While most of the new BCPR regulations came into effect on 1 September 2020, some key changes in relation to residential construction projects also came into effect on **1 March 2021**.

One of the changes is the removal of the owner occupier contract ("**OOC**") exemption from the SOP Act. This change means that builders are now entitled to recover payment from homeowners under the SOP Act including via adjudication.

Overview of the 2020 Regulation

Prior to 1 March 2021, the BCPR Regulation had two primary functions in its role of providing support to the SOP Act:

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- to improve the level of protection provided to subcontractors in the industry, to ensure that they, as well as the builder, receive payment for their work.
- to exempt OOC from the SOP Act.

For reference, OOC are those where the homeowner intends to live on the premises being built.

Since the 1 March 2021, OOC are no longer exempt from the SOP Act. While the previous exemption meant that builders could not utilise the SOP Act to recover outstanding progress claims if a homeowner has not paid them for their work, this is no longer the case

What do the 1 March 2021 changes mean?

The regulations changed when Schedule 2 of the BCPR came into effect on 1 March 2021. Importantly, Schedule 2 of the BCPR excludes OOC's as being exempt. . The effect of the change means that OOC's are now subject to the operation of the SOP Act and therefore, residential builders have a statutory right to payment and the adjudication of claims.

Homeowners will still be able to bring building claims to the NSW Courts or Tribunals, however such claims will not delay a residential builder's entitlement to payment under the SOP Act.

In this regard, if a residential builder has been awarded an Adjudication Determination, the homeowner must pay the amount owed to the builder before the Tribunal or Court comes to a decision.

The removal of the home-owner exemption will hopefully save builders time and money by not having to go through the extensive and costly process of Tribunal or Court proceedings in order to obtain any outstanding payment for their work.

As for homeowners entering OOC, it is important to become familiar with the SOP Act and its procedural requirements surrounding the lodgement of payment schedules, disputing payment claims, and the consequences that may arise from failing to follow the SOP Act.

Concluding Remarks

It is extremely important that any party planning to enter into an OOC from 1 March 2021 is aware of the relevant changes and their implications, especially:

- the removal of OOC as an exempt party from the SOP Act; and
- progress payments under an OOC now becoming due and payable:
 - (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or;
 - (b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

To ensure that they are in the best possible position to utilise the 1 March 2021 changes to the BCPR, builders should request legal advice on amending their OOC to include the safeguards from the SOP Act.

Builders should specifically inform themselves of the rules surrounding progress payment claims and due dates for payment, as they will be applicable as well.

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