

IMPORTANT AMENDMENTS TO THE HOME BUILDING ACT 1989 (NSW) PASSED BY NSW PARLIAMENT

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Residential building claims for defective works have continued to grow significantly over the last decade, resulting in an increased focus on legislative reform in the NSW construction industry, most notably in respect of the *Home Building Act 1989* (HBA).

Against the background of a weak residential construction market in 2011, the NSW Government sought to respond to the most pressing concerns of home owners and industry by introducing amendments to the HBA designed to “cut red tape”. The *Home Building Amendment Act 2011* (NSW) introduced a package of reforms affecting home warranty insurance and claims, enforcement of statutory warranties and proportionate liability. However, these amendments only represented an initial step in the reform of the HBA, with more wide-reaching reforms now passed following a comprehensive consultation process during 2012 and 2013.

The *Home Building Amendment Bill 2014* (NSW) (the Bill) had its second reading in the NSW Parliament on 6 May 2014, with its stated intention being “to ensure home building laws reflect current practice and reduce any unnecessary red tape for industry while providing consumers with appropriate protection”. The Bill was passed unamended by the NSW Parliament on 28 May 2014 and, once proclaimed, will significantly amend the HBA. The key aspects of the reforms are noted below.

“STRUCTURAL DEFECT” NOW “MAJOR DEFECT”

The statutory warranties regime is the basis of the consumer protection framework in the HBA and creates legally enforceable standards for workmanship, enabling consumers to pursue remedies in the event of defective work.

The definition of “*structural defect*” in section 18E of the HBA has been reworked and replaced with a new concept of “*major defect*”.

Previously, statutory warranties covered work for 6 years from completion for “*structural*” defects, and 2 years for other breaches of warranties. Consequently, a claim falling outside the two year protection period might have been significant or, indeed, “*major*” but, critically, not “*structural*”. The Bill attempts to address what was seen to be an unsatisfactory position leading to inconsistent court and tribunal decisions in certain circumstances.

Whether a defect constitutes a major defect (attracting a 6 year warranty period) will be a two limb test, the first limb being whether the defect is in a major element of a building (either a structural load bearing component, a fire safety system or waterproofing). The Bill also provides a regulation making power to prescribe additional major elements (or additional major defects). In this respect, the scope of the major defects definition is wider than the old definition for structural defects. However, the second limb requires that the defect, to be deemed “*major*”, must cause or be likely to cause: a building to be uninhabitable or

unusable, the destruction of the building (or part thereof) or a threat of collapse of the building (or part thereof).

The second limb narrows things considerably and the “*severity of damage*” requirement has come under fire from some consumer advocates on the basis that many defects will now be left with only a 2 year warranty period.

DEFENCE OF REASONABLE RELIANCE ON RELEVANT PROFESSIONAL

A new defence under s18F has been provided to builders for future projects. It will be a defence to a claim for breach of statutory warranty if the builder can prove the deficiencies complained of arise from its reasonable reliance on written instructions given by a “*relevant professional*” acting for the home owner and the professional is independent of the builder. This is likely to lead to an increase in the involvement of professionals such as engineers and architects in the sphere of home building defect disputes.

COMPLETION DATE CLARIFIED FOR STRATA SCHEMES

Importantly for owners corporations (not parties to the original building contract), a new definition of completion of building work for strata schemes has been included, being the date on which an occupation certificate is issued for the whole building. This provides owners corporations with certainty as to when their building defect warranty periods expire, albeit that the new definition will apply only to contracts entered into after proclamation of the Bill.

DUTY TO MITIGATE

New section 18BA imposes a positive statutory duty on homeowners who claim under a statutory warranty to mitigate their loss, including a duty to not unreasonably refuse a builder access to a building site to rectify defective work. Homeowners also are required to make reasonable efforts to notify a builder in writing of an alleged breach within 6 months of a defect being apparent.

SUBCONTRACTORS RESPONSIBLE

New subsection 18B(2) provides that the statutory warranties are implied into every contract to do residential building work, including subcontracts. This means that where a breach of the statutory warranties relates to work performed by a subcontractor, the subcontractor may be liable to the principal contractor for that breach.

RECTIFICATION PREFERRED OVER COMPENSATION

New section 48MA requires courts and tribunals to have regard to the principle that rectification of defective work by the party responsible (as opposed to payment of compensation) is the preferred outcome in building disputes.

HOME WARRANTY INSURANCE

A number of changes have been made to provisions relating to insurance of residential building work. Most notably, rectification works performed by the original builder for no additional payment will not require a separate home warranty insurance policy to be issued as the work will continue to be covered under the original policy.

The Bill also clarifies the definition of “*disappeared*” as meaning a contractor, supplier or owner-builder cannot be found in Australia, in response to previously inconsistent judicial interpretation.

A Home Warranty Insurance public certificates register will be made available to combat the use of false insurance certificates.

OTHER AMENDMENTS

The Bill contains a raft of other reforms relating to building contracts, license obligations, disciplinary proceedings, owner-builder obligations, penalties for unlicensed work and rectification orders to name a few. For more details of all amendments contained in the Bill, please [click here](#) to view the Explanatory Note.

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