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HOME BUILDING ACT AMENDMENTS

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HOME BUILDING ACT AMENDMENTS
WHAT SHOULD YOU BE AWARE OF?

Introduction

On 9 May 2014 the *Home Building Amendment Bill 2014* was introduced to the Legislative Assembly of the New South Wales Parliament. It passed that House on 14 May 2014.

The object of the Bill is to amend the *Home Building Act 1989* ("HBA") in connection with matters including:

- Penalties for unlicensed work;
- Contracts to do residential building work or specialist work;
- Contracts to supply kit homes;
- Statutory warranties implied into contracts;
- Provisions relating to contractor licences, supervisor certificates and tradesperson certificates including broadening the grounds for disqualification;
- Notification of insolvency, winding-up or de-registration of licence holders;
- Owner building;
- Resolution of building disputes;
- Disciplinary proceedings;
- Home warranty insurance;
- Owner builder kit homes and requirements for obtaining contractor licences;
- Other minor consequential or ancillary matters.

The HBA is an act with which strata title lawyers need to be familiar. Building defects are one of the largest areas of complaint from those living in strata schemes in this State. Unfortunately for those practicing in the area, the HBA is one of the most frequently amended pieces of legislation in New South Wales.

The emphasis of this paper is on the amendment of those areas of the HBA which are most commonly used by strata lawyers. This paper is not designed as a general overview of the HBA and the amendments and assumes a basic knowledge of the HBA from a strata perspective.

AREAS OF AMENDMENT

WARRANTIES AS TO RESIDENTIAL BUILDING WORK

Section 18B of the HBA implies six (6) warranties into every contract to do residential building work by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract. Those warranties are enforceable by an owners corporation, as successor in title, against the builder and developer of a residential strata scheme (s18C and s18D of the HBA). Currently those rights may be exercised against the builder and developer for all breaches of the statutory warranties for a period of seven (7) years from the date of completion of the residential building work for construction contracts entered into before 1 February 2012 and, for contracts entered into on or after that date, for a period of two (2) years from the date of completion of the residential building work for all non-structural defects and a period of six (6) years from that date for all structural defects.

The Bill introduces a number of changes to the current statutory position.

Proper and Workmanlike Manner

The statutory warranty contained in s18B(a) of the HBA is in the following terms:

> *"(a) a warranty that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract,"*

The Bill will amend the warranty to the following terms:

> *"(a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,"*

The purpose of the amendment is to bring the terminology of the legislation into line with that contained in the Australian Consumer Law. The Australian Consumer Law guarantees that if a person supplies, in trade or commerce, services to a consumer, the services will be rendered with due care and skill (s60 *Australian Consumer Law*).

While consistency is an admirable legislative objective the proper and workmanlike standard has been implied into building contracts since *Harmer v Cornelius (1848) 5 CB (NS) 236; 141 ER 94* and has been the subject of much judicial interpretation in Australia over a lengthy period of time (*Riverside Motors Pty Ltd v Abrahams [1945] VLR 45; Foster v AT Brine & Sons Pty Ltd [1972] WAR 157; Cassidy v Engwirda Construction Co (No 2) [1968] Qd R 159*). There is very little judicial consideration of the term "due care and skill" in the context of building work, however, the new test appears unlikely to result in a standard which is significantly different to the current standard.

Statutory Warranties Implied into Sub-Contracts

So as to remove any doubt, the Bill inserts s18B(2) which provides that the statutory warranties are not limited to contracts to do residential building work for an owner of land but are also implied into sub-contracts entered into by the principal contractor who contracts to do the residential building work.
An owners corporation as successor in title to a developer (as defined by s3A of the HBA and which includes both the party contracting to do the residential building work and the owner of the land on which the residential building work is done) will be entitled to enforce those warranties against the subcontractor by operation of s18C and s18D of the HBA.

Duty to Mitigate

Under the HBA there is debate as to whether the duty to mitigate imposed on a contracting party applies to the owners corporation as a successor in title in circumstances where it is enforcing the implied term of a contract in respect of which it is not a party. S18D(1) of the HBA entitles the owners corporation to the same rights as its predecessor in title in respect of the statutory warranty but does that place on it the same obligations as its predecessor and, in particular, the obligation to mitigate its loss.

Prudent lawyers act on the basis that the duty exists and provide the builder/developer with a reasonable opportunity to undertake rectification. That obligation will now be given statutory enshrinement in s18BA of the Bill. It confirms the duty to mitigate between contracting parties and extends that duty to those other parties who also have the benefit of the statutory warranty and are entitled to the same rights as the party to the contract in respect of those warranties (s18BA(2)).

Section 18BA(3) sets out further duties on a person entitled to the benefit of the statutory warranties:

"The following duties apply to a person who has the benefit of a statutory warranty but do not limit any duty the person has to mitigate loss arising from breach of a statutory warranty:

(a) when a breach of the statutory warranty becomes apparent, the person must make reasonable efforts to ensure that a person against whom the warranty can be enforced is given notice in writing of the breach within 6 months after the breach becomes apparent,

(b) the person must not unreasonably refuse a person who is in breach of the statutory warranty such access to the residential building work concerned as that person may reasonably require for the purpose of or in connection with rectifying the breach (the ***duty to allow reasonable access****)."*

The section goes on to provide that a breach of warranty becomes apparent when any person entitled to the benefit of the warranty first becomes aware (or ought reasonably to become aware) of the breach. That will be a question of fact in each case.

Where there is a failure to mitigate or to comply with the duties in s18BA(3) of the Bill the section provides that is a matter which a court or a tribunal may take into account in any proceedings concerning a breach of a statutory warranty. This will lead to courts and tribunals considering the current body of law relating to the effect which a duty to mitigate has on the outcome of the proceedings.

How a failure to provide the notice contemplated by s18BA(3)(a) will impact on the determination of the court or tribunal is a matter which will remain to be seen.

Proceedings for Breach of Warranties

Date for Commencement of Proceedings

The Bill redefines the date of completion of residential building work. This will affect the period within which proceedings for breach of statutory warranties may be brought pursuant to s18E of the HBA.

A strata specific definition is contained in s3C of the Bill for residential building work comprising the construction of a new building in a strata scheme (within the meaning of the *Strata Schemes Management Act 1996*) where the issue of an occupation certificate is required to authorise

commencement of the use or occupation of the building. In those circumstances the date of completion of residential building work will be the date of issue of an occupation certificate that authorises the occupation and use of the whole building unless some other event occurs which is prescribed by the regulations as constituting completion of the work.

Subject to any events prescribed by regulation, the Bill allows a much greater degree of certainty for all practitioners in determining the date of completion of strata building work and the limitation periods for commencing action under s18E of the HBA.

The current definition provides a presumption for the date of the issue of an occupation certificate authorizing commencement of the use of the residential building work which is rebuttable by earlier dates such as:

a) The date completion of the residential building work occurs within the meaning of the contract under which the work was done.

b) If the contract does not provide for when work is complete (or there is no contract), the date the work is completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose.

c) the date on which the contractor handed over possession of the work to the owner.

d) the date on which the contractor last attended the site to carry out work (other than work to remedy any defect that does not affect practical completion).

The problem for strata practitioners is that the owners corporation rarely has the information necessary to make a precise determination of the alternate dates. The amendment provides a welcome degree of certainty.

Section 3C of the Bill deals with the situation where a strata scheme comprises two or more separate buildings. It provides that the date of completion of the residential building work is to be determined as if there were a separate contract for each separate building so that the work for each building will have a separate completion date. A separate building is defined as one reasonably capable of being used and occupied separately from any other building. In practice this will mean that where there is a staged development, either statutory or otherwise, the date of completion will be the date of the occupation certificate for each building within the scheme for defects within that building.

Major Defects

S18E(1)(b) of the HBA currently provides a warranty period of six (6) years for a breach that results in a structural defect and two (2) years in any other case. Regulation 71 defines a structural defect.

The Bill replaces the concept of structural defect with that of a major defect and takes the definition from the regulations to the Act at s18E:

> (3) The regulations may prescribe defects in a building that are not (despite any other provision of this section) a major defect.

(4) In this section:

major defect means:

(a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause:

(i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or

(ii) the destruction of the building or any part of the building, or

(iii) a threat of collapse of the building or any part of the building, or

(b) a defect of a kind that is prescribed by the regulations as a major defect.

Note. The definition of ***major defect*** also applies for the purposes of section 103B (Period of cover).

major element of a building means:

(a) an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or

(b) a fire safety system, or

(c) waterproofing, or

(d) any other element that is prescribed by the regulations as a major

(e) element of a building.

While it is refreshing to see fire safety systems included as part of the definition of a major element in respect of which a major defect may occur, the definition of major defect appears to be more restrictive than the current definition of a structural defect in Regulation 71.

Under the current regulation a structural defect means, amongst other things, a defect in a structural element of a building that is attributable to defective design, defective or faulty workmanship or defective materials (or any combination of these) that results in or is likely to result in physical damage to the building or any part of the building (Regulation 71(1)(c)(ii)). This part of the regulation is currently used to make claim for defects relating to structural elements of a building, which include waterproofing that forms part of the external walls or roof of the building, and which cause physical damage to the building. These defects may not cause the building or any part of the building to be closed or prohibited from being used, prevent the continued practical use of the building or any part of the building, result in the destruction of the building or any part of the building or result in a threat of imminent collapse that may

reasonably be considered to cause destruction of the building. The removal of the physical damage criteria will mean that a major defect test will be a higher one than the structural defect test in the current legislation.

Fire safety systems and waterproofing defects are rarely likely to cause the destruction of a building or threaten its collapse. Whether they will cause or be likely to cause an inability to inhabit or use the building for its intended purpose is something which will depend on the facts of the case. While fire safety defects place occupants at greater risk in the case of fire do they cause an inability to inhabit or use the building for residential purposes? Almost all buildings with fire safety defects continue to be occupied while the defects remain unrepaired. Will a fire safety defect require the issue of an order by council under s121 of the *Environmental Planning and Assessment Act 1979* to cease using the premises in order to make it a major defect? If so, such orders are extremely rarely made by councils.

The reservation of a right to further prescribe major defects and major elements by regulation may see these issues resolved.

Defences

The existing statutory defence for proceedings for breach of a statutory warranty is one where the builder or developer must prove that the deficiencies complained of arose from instructions by the person for whom the work was done contrary to the written advice of the builder. This is a defence of which builders are rarely able to avail themselves.

The Bill preserves the existing statutory defence adding a requirement that the advice in writing to be given before the work was performed but also adds a defence of reasonable reliance on the instructions given by a person who is a professional acting for the person for whom the work was contracted to be done and who is independent of the defendant being instructions given in writing before the work was done or confirmed in writing after the work was done.

The relevant professional is independent if not engaged by the defendant to provide any service or do any work in connection with the residential building work provided that he was not engaged on the basis of a recommendation or a referral by the defendant or was within three (3) years before the instructions been a close associate of the defendant.

A relevant professional is a person who represents himself or herself to be an architect, engineer or surveyor, to have expert or specialised qualifications or knowledge in respect of residential building work or any particular aspect of residential building work or represents himself or herself to be engaged in a profession or to possess a qualification that is recognised by the regulations as qualifying a person as a relevant professional.

Generally, the availability of this defence will mean that it is imperative that owners corporations, when contracting relevant professionals in relation to residential building work, ensure that the relevant professional has complete and comprehensive professional indemnity insurance to cover the work being undertaken.

The defence will be more problematic for owners corporations when raised by a builder in defence of a claim by an owners corporation, as successor in title to a developer, for a breach of the statutory warranties in the original construction of the scheme. The owners corporation may have no knowledge of the facts giving rise to such a defence.

RESOLVING BUILDING DISPUTES

Rectification of Defective Work is the Preferred Option

Section 48MA of the Bill requires a court or tribunal determining a building claim under the HBA involving an allegation of defective residential building work or specialist work by a party to the proceedings to have regard to the principle that rectification of the defective work by that party is the preferred outcome. There is further provision that the tribunal can make an order to resolve a building dispute even if it is not the order that the applicant asked for. These amendments will mean more rectification orders and fewer damages awards.

The Bill also makes ancillary amendments to the existing provisions of Part 3A of the HBA which are designed to make rectification orders more effective.

- The concept of a staged rectification order being an order which specifies stages in which the requirements of the order are to be complied with is introduced in s48E(3)(a)(i).

- A rectification may also now be amended by a further order.

- It will be a condition of every contractor licence that the contractor must comply with the requirements of a rectification order (which will make a builder's non-compliance with the rectification order grounds for the taking of disciplinary action).

Insurance

The Bill makes the following amendments to the HBA relating to insurance of residential building work:

(a) a reference to the disappearance of a contractor, supplier or owner-builder is a reference to disappearance from Australia (s90(2),

(b) residential building work done under a contract must be insured in the name under which the person contracted to do the work (rather than in the name of the person who contracted to do the work) (s92),

(c) increasing the maximum penalty for a second or subsequent offence by an individual of uninsured contracting for residential building work or specialist work to 500 penalty units or imprisonment for a term not exceeding 12 months, or both (s92(2A)),

(d) providing that a contract of insurance in relation to residential building work done by a person (whether or not under contract) extends to any residential building work done by the same

person by way of rectification of the same original work (and thus that a separate contract of insurance is not required in relation to the rectification work) (s92(5), s96(3B)(4)),

(e) by omitting a provision that provides that if the holder of a contractor licence enters into a contract to do residential building work and a contract of insurance is in force in relation to the work, the contract of insurance is taken to extend to any residential building work under the contract at the address stated in the certificate of insurance (s92B),

(f) allow claims for work done by a partnership where one member is insolvent and the licence has been cancelled, by clarifying the meaning of ***building claim order*** in a provision providing that a contract of insurance in relation to residential building work must include provision that deems the suspension of a contractor's licence to constitute the insolvency of the contractor for the purposes of the application of the policy to any loss that is the subject of a building claim order made against the contractor that remains unsatisfied, so that an insurance policy must cover loss that is the subject of an outstanding order by a court or the Tribunal in relation to a building claim (s99(3), 100(2)),

(g) by providing for the keeping of a register of insurance particulars that can be accessed by beneficiaries or potential purchasers of property (including details of the builder, the site and any successful claims on the insurance and the amount of those claims) (s102A),

(h) by providing for the period of cover of an insurance contract to be referable to the occurrence of a major defect (as defined in the statutory warranty provisions of the Act) in residential building work, rather than a structural defect (s103B),

(i) by renaming home warranty insurance as insurance under the Home Building Compensation Fund (s89G(d)),

(j) by renaming the Home Warranty Insurance Scheme Board as the Home Building Compensation Fund Board (89E),

(k) by providing that a claim for non-completion of work can be made as a delayed claim to allow beneficiaries to continue to pursue a contractor for breach of statutory warranties that involve a claim for defective work as well as a non-completion claim beyond 12 months after the work ceased.

CONTRACTS FOR RESIDENTIAL BUILDING WORK

The Bill makes a number of changes to the requirements relating to new contracts. These provisions will be relevant to owners corporations and lot owners entering into contracts for the remediation of defective building work and for general maintenance and repair contracts during the life of the strata scheme.

The five (5) day cooling off period in which a person may rescind a contract for residential building work will no longer apply where the contract is supplied and fully prepared by or on behalf of the person who contracts with the holder of the contractor licence and no part of it is supplied by the holder of the contractor licence. This will remove an owners corporation's rights where it has fully prepared the

building contract without any content from the builder such as where the contract is entered into pursuant to a tender without variation.

Contracts to do residential building work may now have a maximum deposit of 10% of the contract price regardless of the contract price. This is an increase from 5% where the contract price is more than $20,000 (s8).

Part 1 Schedule 2 of the Bill provides for terms which must be contained in every contract for the performance of residential building work:

> "***Plans and specifications***
>
> *(1) All plans and specifications for work to be done under this contract, including any variations to those plans and specifications, are taken to form part of this contract.*
> *(2) Any agreement to vary this contract, or to vary the plans and specifications for work to be done under this contract, must be in writing signed by or on behalf of each party to this contract.*
> *(3) This clause only applies to a contract to which section 7AA (Consumer information) of the Home Building Act 1989 applies.*
>
> ***Quality of construction***
>
> *(1) All work done under this contract will comply with:*
>
> *(a) the Building Code of Australia (to the extent required under the Environmental Planning and Assessment Act 1979, including any regulation or other instrument made under that Act), and*
> *(b) all other relevant codes, standards and specifications that the work is required to comply with under any law, and*
> *(c) the conditions of any relevant development consent or complying development certificate.*
>
> *(2) Despite subclause (1), this contract may limit the liability of the contractor for a failure to comply with subclause (1) if the failure relates solely to:*
>
> *(a) a design or specification prepared by or on behalf of the owner (but not by or on behalf of the contractor), or*
> *(b) a design or specification required by the owner, if the contractor has advised the owner in writing that the design or specification contravenes subclause (1).*"

In s8A the Bill makes provision for maximum progress claims where the contract price exceeds an amount that will be prescribed in the regulations or the reasonable cost of the labour and materials exceeds the prescribed amount.

The progress payment is authorised only if it is a payment of the following kind:

(a) A progress payment of a specified amount or specified percentage of the contract sum that is payable following completion of a specified stage of the work, with the work that comprises that stage described in clear and plain language.

(b) A progress payment for labour and materials in respect of work already performed or costs already incurred (and which may include the addition of a margin), with provision for a claim for payment to be supported by such invoices, receipts or other documents as may be reasonably necessary to support the claim and with payment intervals fixed by the contract or on an "as invoiced" basis or a progress payment authorised by the regulations.

The contract may provide for more than one kind of authorised progress payment.

The Act provides that a person must not demand or receive a progress payment under a contract to which the section applies unless the progress payment is authorised under the section or enter into a contract to which the section applies under which the person is entitled to demand or receive payment of a progress payment unless the progress payment is authorised under the section.

The section does not apply to:

(a) A contract between parties who each hold a contractor's licence for work that each party is authorised to do by that licence;

(b) A contract to do specialist work that is not also residential building work; and

(c) A progress payment for residential building work under a construction contract to which the *Building and Construction Industry Security of Payment Act 1999* ("SOPA") applies.

Construction contracts for work performed for the owners corporation on its common property will inevitably be subject to the SOPA. The exemption for residential building work s7 of SOPA relates only to "a construction contract for the carrying out of residential building work ..... on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in .....". As a corporate body an owners corporation does not reside in its common property. Accordingly, owners corporations will not receive the benefit of s8A of the Bill.

Owners corporations are constrained in their ability to use s10(1) and s94(1) of the HBA by the decision of His Honour Hodgson JA, with whom Giles JA and Mason P agreed, in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor [2000] NSWCA 394*;

> "*In my opinion, the civil consequences for an unlicensed contractor for its breach of s.4 are those set out in s.10, and not any wider deprivation of remedies. In my opinion this is confirmed by the different provisions of s.94, which explicitly precludes, in the event of breach of the insurance provisions, the obtaining of a quantum meruit unless a court considers it just and equitable. In my opinion, the remedy given by [SOPA] is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract: it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus it is not affected by s.10 of the HBA.*"

ANCILLARY MATTERS

Dual Occupancies

Section 32 of the Bill prohibits an owner builder permit issuing for residential building work relating to a dual occupancy as defined in the principal local environmental planning instrument prescribed by the *Standard Instrument (Local Environment Plans) Order 2006* unless the Chief Executive is satisfied that special circumstances exist that justify an owner builder permit authorising the holder to do that work.

This is likely to reduce the number of two lot strata schemes which currently comprise 28.5% of all strata schemes in New South Wales.

Application of Provisions to Specialist Work

In its application to specialist work the Bill provides that the HBA will not be limited to specialist work that is residential building work but will extend to specialist work that is not residential building work, for example, commercial and industrial (s3D). Specialist work is defined within the Bill to mean "plumbing and drainage work, other than roof plumbing work, gasfitting work, electrical wiring work and any work declared by the regulations to be refrigeration work or air conditioning work".

Plumbing and drainage work means plumbing and drainage work within the meaning of the *Plumbing and Drainage Act 2011* or any plumbing work or drainage work that, because of a relevant law, can be done lawfully only by the holder of an endorsed contractor licence, a supervisor or a tradesperson certificate or some other specified person or water plumbing work comprising the construction of or work on a fire suppression system that is connected to or is to be connected to a water main.

The Plumbing and Drainage Act 2011 defines plumbing and drainage work to mean:

(a) *"(a) the construction of, or work on, a plumbing installation that connects, directly or indirectly, with a network utility operator's water supply system, downstream from the point of connection to a network utility operator's water supply system, or*

(b) *the construction of, or work on, a plumbing installation that connects, directly or indirectly, with any other water supply system, if the construction or work is residential building work within the meaning of the Home Building Act 1989 , or*
(c) *the construction of, or work on, a sanitary plumbing system, or*
(d) *the construction of, or work on, a sanitary drainage system upstream from its point of connection to:*
    i. *a system for the disposal of sewerage, or*
    ii. *a system for the re-use of sewerage or other wastewater, or*
    iii. *an on-site wastewater management or treatment system, or*
    iv. *a network utility operator's sewerage system, or*
(e) *any other type of construction or work declared by the regulations to be plumbing and drainage work.*

(2) A ***"plumbing installation"*** *means an installation that conveys, or controls the conveyance of, water but does not include anything connected to, extending or situated beyond the outlet from a fixture, fitting or pressurised line.*

(3) A
***"sanitary plumbing system"** means an assembly of pipes, fittings, fixtures and appliances used to collect and convey sewage to a sanitary drainage system.*

(4) A
***"sanitary drainage system"** means an assembly of pipes, fittings and apparatus (usually located below ground level) used to collect and convey the discharge from a sanitary plumbing system, together with discharge from fixtures directly connected to a drain, to a sewer.*"

Electrical wiring work is defined in the *Electricity (Consumer Safety) Act 2004* to mean:

> *"The actual physical work of installing, repairing, altering, removing or adding to an electrical installation or the supervising of that work."*

Gasfitting work is defined in the *Gas Supply Act 1996* to mean:

" *.... any work involved in:*
(a) the installation, alteration, extension or repair of a gas installation, or
(b) the installation, alteration, extension, removal or repair of a flue, or
(c) the connection of a gas installation to, or the disconnection of a gas installation from, a gas supply point, or
(d) the connection of a gas appliance to, or the disconnection of a gas appliance from, a gas installation (otherwise than where the point of connection is a gas outlet socket), or
(e) the connection of a gas container, gas regulator or gas appliance to, or the disconnection of a gas container, gas regulator or gas appliance from, a gas installation (otherwise than where it is designed to be readily detachable from the installation whether by the use of a tool, mechanical force or otherwise)."

This will be of benefit to non-residential owners corporations when they contract to do specialist work but will not provide an avenue of recourse for defective specialist work performed in connection with the construction of a non-residential scheme because the benefit of the statutory warranties which flow to an owners corporation as successor in title and which under s18B(2) of the Bill will extend to sub-contractors of the original principal contractor, does so only where the principal contractor contracted to do residential building work for an owner of land.

OPERATION OF THE AMENDMENTS

The provisions relating to the enactment of the Bill are to be found at paragraph [128] of the Bill and will be inserted at the end of Schedule 4 of the HBA.

Except as otherwise stated by the Act or regulations the amending Act extends to:

(a) residential building work or specialist work commenced or completed before the commencement of the amendment, and
(b) a contract to do residential building work or specialist work entered into before the commencement of the amendment (including a contract completed before that commencement), and

(c) a contract of insurance entered into before the commencement of the amendment, and

(d) a loss, liability, claim or dispute that arose before the commencement of the amendment, and

(e) an application for a licence or certificate that is pending on the commencement of the amendment.

However, an amendment made by the amending Act does not apply to or in respect of:

(a) proceedings commenced in a court or tribunal before the commencement of the amendment (whether or not the proceedings were finally determined before that commencement), or

(b) a claim made before the commencement of the amendment under a contract of insurance (whether or not the claim was finalised before that commencement).

Amendments relating to the form of contracts for residential building work will not apply to contracts entered into before the commencement of the amendment.

The duties of a person having the benefit of a statutory warranty under s18BA do not apply to contracts entered into before the commencement of the section. This will presumably apply to the extension of the duty to mitigate to non-contracting persons or parties who have the benefit of the statutory warranty such as owners corporations.

The new defences contained in s18F do not apply to contracts entered into before the commencement of the amendment.

The amendment to s95 and the terms of the home warranty insurance policy (and s97 and s101 and their operation in respect of s95) will not apply to contracts of insurance in force before the commencement of the amendment.

The definition of residential building work and dwelling will not apply to contracts to do residential building work entered into before the commencement of the amendments.

The amendment to the terms of the statutory warranty contained in s18B(a) of the Act and the new definition of the date of completion will be retrospective except where proceedings have been commenced or a claim under a home warranty insurance policy commenced before the date of the amendment.

Practitioners acting for owners corporations need to consider the following matters immediately.

- Owners corporations which currently have a right of action based on a structural defect as defined in Regulation 71 need to consider whether that defect will be a major defect as defined in s18E(4) of the Bill.
- Where a structural defect will not be a major defect and where less than 2 years have passed since the date of the issue of the occupation certificate for the work, the owners corporation must

- ensure that it moves to commence proceedings or commence its insurance claim, as appropriate, before the passing of the two year period.
- Where a structural defect will not be a major defect and where more than 2 years have passed since the date of the issue of the occupation certificate for the work the owners corporation should move to commence proceedings or commence its insurance claim, as appropriate, before the commencement of the amendments so as to preserve its rights in relation to that defect.
- Where an owners corporation has clear preference for damages as opposed to rectification by the builder it should commence proceedings for breach of any statutory warranty before the commencement of the amendments.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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