

2 FEBRUARY, 2015

2015 HOME BUILDING ACT REFORMS

INTRODUCTION

Major changes to the home building legislation commenced on 15 January 2015. Those changes will affect most players in the residential building sector such as builders, subcontractors, tradespeople, owners, owners corporations, property investors, property developers and owner-builders.

The type of building work that is covered by the reforms includes:

- residential building work;
- specialist work;
- contracts to do work;
- contracts for insurance; and
- losses, liabilities, claims and disputes occurring before the start of the amendments.

However, if proceedings were commenced or an insurance claim was lodged before 15 January 2015, those proceedings or claim will not be impacted by the changes.

IMPACT ON BUILDERS AND SUBCONTRACTORS

PENALTIES FOR UNLICENSED WORK

New penalties have been introduced for:

- hiring unlicensed people;
- performing unlicensed work; or
- even offering to do unlicensed work.

The fines can reach up to \$110,000 for a first offence and \$55,000 and jail time for 12 months for a second offence.

It is no defence to say that you did not know a person that you hired was unlicensed or that they told you they had a licence. Accordingly, head contractors are urged to carry out full licence checks on all subcontractors and tradespeople. Periodic checks should continue to be done just in case licences expiry during the term they are hired for.

Builders should also note that they will not be protected by their D&O insurance policy as almost all such policies cannot offer protection when for jail time.

PENALTIES FOR FAILING TO BE INSURED

The same penalties apply where there is a failure to obtain Home Owners Warranty Insurance or insurance under the Home Building Compensation Fund. This insurance is required where the contract price for residential building work is or is reasonably expected to be \$20,000 building work. Demolition work or work under \$1000 is excluded.

NEW TEST FOR MAJOR DEFECTS

The test for determining whether a defect is a major defect a six-year warranty period ('major defect') has tightened and there are thus fewer major defects.

The new test for major defects is whether the defect is a defect in load-bearing component of the building that is essential to the building's stability or any part of it or in a fire safety or waterproofing element and whether the defect causes or is likely to cause part of the building to be unusable or destroyed/collapsed.

Wall and floor cracking and façade issues are no longer major defects while fire safety defects and internal waterproofing are now considered major defects.

OWNERS TO NOTIFY BUILDERS WITHIN 6 MONTHS OF A DEFECT BECOMING KNOWN

Where there is a statutory warranty claim, owners are required to notify the builder within 6 months of the defect becoming apparent. Access must also be given for rectification work to be undertaken.

NO SEPARATE INSURANCE CONTRACT

No separate insurance contract is required for rectification work where the same person who carried out original work is doing the rectification work.

This favours builders who do not have to pay for a separate insurance scheme when doing rectification work.

SUBCONTRACTORS LIABLE FOR STATUTORY WARRANTIES

Subcontractors will now be responsible to builders for breach of statutory warranties.

NEW DEFENCE FOR BREACH OF STATUTORY WARRANTY

If there is a breach of statutory warranty, there is a new defence which provides that you are not liable if you reasonably relied on the written instructions of an independent professional acting for the person for whom the work was contracted. In order to use this defence ensure that you keep records of all instructions relied upon.

BUILDER OBLIGATIONS AFTER BECOMING INSOLVENCY, WINDING UP OR DEREGISTRATION

If a builder or subcontractor becomes insolvent, then within 7 days of becoming insolvent, winding up or becoming deregistered, they must notify the Commissioner of Fair Trading. A failure to do so may result in a fine of up to \$110,000 and criminal charges.

CONTRACTOR LICENSES, SUPERVISOR CERTIFICATES AND TRADEPERSON CERTIFICATES

Persons who are not a “fit and proper person” may be disqualified from having their licence or certificate.

A person will not be a “fit and proper person” if they have received numerous complaints, warnings, penalty notices, home warranty insurance claims or are the subject of many claims brought under construction legislation.

EXCLUDED WORKS

Work which is not considered residential building work under the new definition of residential building work includes:

- internal paintwork as a stand-alone project;
- tiling;
- demolition;
- installation or maintenance of any fixed apparatus (lift, escalator, inclinator, garage door);
- project management involving the supervision of residential building work by an architect or a person who has relevant licence; and
- work prohibited under another Act without the person having authority.

Thus, for these works, the usual residential building requirements will not apply.

IMPACT ON PROPERTY DEVELOPERS AND OWNERS WHO ENGAGES DEVELOPERS

UNLICENSED WORK

If developers engage unlicensed people to do

work, the penalties referred to above will apply to them.

CHANGES TO DEFECT LIABILITY AND RECTIFICATION

Developers should keep in mind following changes:

- the tightening of the ‘major defect’ test which will reduce exposure to warranty claims;
- the new rule for the start of the warranty period which will impact defences to statutory warranty claims; and
- new defences which are based on reliance on instructions, which should prompt developers to ensure that their bookkeeping systems are up to scratch.

The emphasis on rectification works which will allow developers control in relation to rectification costs.

IMPACT ON OWNERS, OWNERS CORPORATIONS, PROPERTY INVESTORS, STRATA MANAGERS

STATUTORY WARRANTY PERIOD

Since there will be fewer major defects under the new legislation, owners will have to take the ordinary route with warranty claims.

In order to prevent being time barred, owners should perform regular, thorough investigations and commence proceedings, if necessary, before the two-year time period lapses.

DEFECT NOTIFICATION

If owner does not comply with the requirements for rectification work, i.e. notify the builder, mitigate any consequent loss and allow the builder reasonable access to the land, it may have adverse consequences in Court or at a tribunal. Thus, owners should

ensure that regularly check their properties for defects (such as every six months) and notify the builder immediately.

COMPLETION DATES

Residential buildings, pools, tennis courts, detached garages under a strata scheme are deemed to have been completed on the date of issuance of occupation certificate.

Since there may be time bars in place, commencing from the date of completion, owners need to keep of the expiration dates of limitation periods.

HOME WARRANTY INSURANCE

Owners can obtain insurance where:

- the builder's or tradesperson's licence is suspended;
- partnership work is done and one member is insolvent; or
- a delayed claim is made for the non-completion of work.

Owners should remember to check the register of insurance matters to check whether their builder has had any successful insurance claims brought against them.

IMPACT ON OWNER-BUILDERS

Owner builders must now undertake safety training and obtain a construction induction "white card" under the Work, Health and Safety Act 2011 and cannot obtain home warranty insurance.

Clearly, the reforms made to the *Home Building Act 1989* (NSW) have a major impact on subcontractors, tradespeople, owners, owners corporations, property investors, property developers and owner-builders.

DEFENCES

Builders have a defence for statutory warranties when they reasonably relied on instructions given by someone acting for the owner or when the owner gave them instructions which went against the builder's advice.

Owners should remind those acting on their behalf not to instruct builders or to accept liability if claims are brought against the owner.

To avoid accidentally providing faulty or contradictory advice, subsequent purchasers should request a copy of all instructions from builders and developers.

For more information

For more information on this case or for general advice on security of payment issues, contact our Principal Solicitor/ Director

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