THE HOME BUILDING ACT: RECENT AMENDMENTS EXPLAINED

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The next article in this two-part series will go on to consider licensing matters and the Home Building Compensation Fund.

There would be few laws in NSW that have been amended as frequently as the *Home Building Act* ('the Act') and *Home Building Regulation*. Since 2000, they have been amended more than 55 and 65 times respectively.

The *Home Building Act* governs an area in which two potentially competing areas meet – consumer affairs and the residential building industry.

The purchase of housing is the largest expense incurred by most Australians and home ownership is still considered the 'great Australian dream'. The residential building industry employs a large number of people and is one of the largest sectors of the NSW economy.

Consequently, ensuring that consumer interests are protected and keeping the economy stimulated is a balancing act on which much depends.

About the *Home Building Act*

The Act regulates, inter alia, the content of residential building contracts, statutory warranties which are implied into residential building contracts, the licensing of persons completing residential building work, dispute resolution and the insurance of residential building work.

Each of these areas is affected by the *Home Building Amendment Act 2014* (the '2014 Amendments'), which is the subject of these two articles. The 2014 Amendments commenced in two tranches: on 15 January 2015 and 1 March 2015.

Most of the changes occurred in the first tranche of amendments and include a new definition of completion as well as addressing statutory warranties, licensing and the Home Building Compensation Fund. The second tranche of amendments generally addresses the requirements for contracts for residential building work.

The number and breadth of the 2014 Amendments are quite extensive and require detailed study for a full understanding. This article and its sequel in the next edition of the *LSJ* are only an introduction to some of these amendments. To understand all the amendments, the legislation itself must be reviewed. The previous major amendment of the Act occurred in October 2011 (the 2011 Amendments) and also commenced in two tranches – on 25 October 2011 and 1 February 2012. Given some elements of the 2014 Amendments are retrospective and otherS are not, understanding the application of the transitional provisions is also important.

Snapshot

- This article, the first of a two-part series, considers the completion and statutory warranty aspects of the *Home Building Amendment Act 2014*.
- Many of the latest amendments to the Act are to the advantage of contractors. Consequently, home owners will need to pay even closer attention to ensure the rights that remain are exercised within time. In particular, close attention will need to be paid to the retrospective application of the 2014 Amendments.

1. Completion

While the 2011 Amendments saw the introduction of s 3B regarding the date of completion of residential building work, the 2014 Amendments see the introduction, on 15 January 2015, of s 3C regarding the date of completion of new buildings in strata schemes. Section 3C only applies to new buildings and sets completion as the date of issue of an occupation certificate that authorises the occupation and use of the whole of the building unless some other event, prescribed by the regulations as constituting the completion of the work, has occurred. The *Home Building Regulation 2014* is currently silent on such other events.

Finally, if a contract to do residential building work comprises the construction of two or more separate buildings, the date of completion of that work is to be determined as if there were a separate contract for each separate building (with each contract on the same terms as the primary contract) so that the work for each building will have a separate completion date.

2. Statutory warranties

The amendments relating to statutory warranties are probably the most controversial, particularly in the light of the decision of the High Court of Australia on 8 October 2014 in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor [2014] HCA 36* (see the November 2014 edition of the *LSJ* for a summary of this case). This decision curtailed the rights of apartment owners to sue builders in negligence, making apartment owners more reliant upon statutory warranties under the Act to the extent they are available. Indeed, Gageler J in obiter at [186] held that if 'legal protection is now to be extended, it is best done by legislative extension of those statutory forms of protection'.

Section 18B of the Act sets out a number of statutory warranties that are implied into every contract to do residential building work and are intended to set a minimum standard for residential building work and protect consumers. Up until 1 February 2012, legal proceedings for a breach of a statutory warranty needed to be commenced within seven years of completion. On 1 February 2012, the period in which to commence legal proceedings was reduced from seven to six years for structural defects and two years for non-structural defects and applied to building contracts entered into from 1 February 2012.

Change to section 18B (a) Statutory warranty

Prior to the 2014 Amendments, the statutory warranty found in section 18B(a) of the Act was as follows:

'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'.

Section 18B(a) now reads as:

'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'.

Given that the meaning of the previous phrase was settled and relatively well known, it is unclear why this change has been made. If anything, the new term introduces an element of ambiguity and subjectivity which may weaken the strength of the warranty.

This amendment occurred on 1 March 2015. Section 121(1)(b) of Part 20 of Schedule 4 of the *Home Building Amendment Act 2014* (being a Savings and Transitional provision) provides that an amendment made by the amending Act extends to a contract to do residential building work entered into before the commencement of the amendment (including a contract completed before that commencement) unless court or tribunal proceedings were commenced before 1 March 2015. Therefore, on the face of the 2014 Amendments, this amendment appears to be retrospective. However, in order for this amendment to apply in that way, the common law presumption against retrospectivity must be overcome.

Major defects

On 15 January 2015, the concept of a 'major defect' was introduced to replace the concept of a 'structural defect'. However, the definition of 'major defect' does not include the words 'results in, or is likely to result in, the destruction of, or physical damage to, the building or any part of the building', which were included in the definition of 'structural defect'.

These words were important, given their breadth, as many defects would not have fallen within the definition of a 'structural defect' but for the presence of these words.

The introduction of the concept of 'major element' is also new. A defect, to be a 'major defect', must be a defect in a 'major element'. A 'major element' of a building means:

- an internal or external load-bearing component of a building that is essential to the stability or the building or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams); or
- a fire safety system; or
- waterproofing; or
- any other element that is prescribed by the regulations as a major element of a building.

The Office of Fair Trading takes the view that the inclusion, for the first time, of explicit references to 'fire safety system' and 'waterproofing' in the Act as part of the definition of a 'major element' lengthens the period within which owners may claim for defects in 'fire safety systems' and 'waterproofing'.

However, in order for a defect to be a 'major defect', not only must that defect be in a 'major element', under s 18E(4)(a), it also must cause or be likely to cause:

- the inability to inhabit or use the building (or part of the building) for its intended purpose; or
- the destruction of the building or any part of the building; or
- a threat of collapse of the building or any part of the building.

Few buildings would have defects that would result in such outcomes. Consequently, most buildings with defects will have 'non-structural defects' only, and two years from completion to commence legal proceedings in relation to those 'non-structural defects'.

Given:

- the difficulty in satisfying the criteria in section 18E(4)(a);
- the removal of the words 'results in, or is likely to result in, the destruction of, or physical damage to, the building or any part of the building'; and
- most serious defects take more than two years to manifest;

many building owners are likely to be worse off under the new regime, notwithstanding the explicit inclusion of 'fire safety systems' and 'waterproofing' as building elements which might be categorised as major defects.

Finally, the retrospectivity provisions of the 2014 Amendments relating to 'major defect' result in this provision applying retrospectively to 1 February 2012 unless court or tribunal proceedings were commenced prior to 15 January 2015.

Owners of buildings arising from contracts entered into before 1 February 2012 will still have a period of seven years in which to commence legal proceedings.

Duties of person having benefit of statutory warranty

An entirely new section (s 18BA) has been introduced which restricts the benefits of the statutory warranties. In short, there are now duties:

- on a party to the contract who suffers loss arising from a breach of statutory warranty to mitigate that loss;
- to make reasonable efforts to provide written notice of the breach to the builder within six months of the breach becoming apparent (s 18BA(4) states that a breach becomes apparent when any person entitled to the benefit of the warranty first becomes aware – or ought reasonably to have become aware – of the breach); and
- that an owner must not unreasonably refuse such access as may reasonably be required to rectify the breach.

Further, failure to comply with the above duties may be taken into account by a court or tribunal. Section 18BA came into force on 1 March 2015 and does not apply in respect of contracts entered into before 1 March 2015. However, it should be noted that the NSW Office of Fair Trading website incorrectly had numerous references to these provisions commencing on 15 January 2015.

Subcontractors

Section 18B(2) implies statutory warranties into subcontracts thereby providing 'back to back' protection for contractors.

Defences

From 15 January 2015, s 18F has been amended to introduce defences for contractors who breach a statutory warranty on the basis that the deficiencies complained of arise from:

- instructions given, by the person for whom the work was contracted to be done, contrary to the advice of the contractor, being written advice given before the work was completed; or
- reasonable reliance on instructions given by a person who is a relevant professional acting for the person for whom the work was contracted.

Conclusion

It is unclear how many of the amendments, such as the new statutory warranty in section 18B(a), will impact on residential building work in NSW as they are new and untested provisions. Many of the latest amendments are to the advantage of contractors and consequently, home owners will need to pay even closer attention to their rights. **LSJ**