HOME BUILDING AMENDMENT ACT—HERE WE GO AGAIN …

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In late October 2011, the *Home Building Amendment Act* (the *Amendment Act*) was passed. While it's purpose is clear from it's title, what is not so clear is whether this is the final word on this particular piece of legislation.

Given the *Home Building Act* has now been amended 49 times since 5 July 2000 and the Home Building Regulation has been amended over 80 times in the last 10 years, it must be said that further amendments in the near future remain very likely.

These latest amendments commence in two stages. The first stage commences on 25 October 2011 (October Amendments) and the second set of amendments begins on 1 February 2012 (February Amendments).

OCTOBER AMENDMENTS

Limitations on insurance claims

Written notification

The *Amendment Act* amends the *Home Building Act* by inserting the concept of a 'delayed claim'. In short, where an insurance claim under a Home Owners Warranty (HOW) insurance policy cannot be made because an insured event has not occurred (ie the builder, owner builder or developer has not died, disappeared, become insolvent or failed to comply with a money order of a Court or the Consumer Tenancy and Trader Tribunal), a claim can be made after the period of insurance (as a delayed claim) but only if the loss was properly notified to the insurer during the period of insurance (or within 6 months after the loss becomes apparent in the case of a loss that became apparent in the last 6 months of the period of insurance) and the beneficiary under the contract of insurance making the claim diligently pursued the enforcement of the statutory warranty concerned after the loss became apparent.

'Properly notified' only occurs if the notice was given in writing and provides such information as may be reasonably necessary to put the insurer on notice as to the nature and circumstances of the loss.

There is some history surrounding this amendment. Justice McDougall's decision in the NSW Supreme Court in *The Owners—Strata Plan No 57504 v BIGCorp* [2008] NSWSC 1022 drew attention to a number of clauses found in many HOW insurance policies and the fact that these clauses were void. In short, that decision found that there was no explicit statutory limit on when a claim could be made. This decision remained unchanged by the NSW Court of Appeal decision in *BIGCorp v The Owners—Strata Plan No 57504* [2010] NSWCA 23 (2 March 2010).

In 2009, following the lower court decision, the NSW Parliament amended the *Home Building Act* and enacted section 103BA, which sought to retrospectively stop such open–ended coverage. Consequently, coverage under HOW insurance policies depended upon beneficiaries notifying the insurer within the minimum periods specified by section 103B or any longer period that might be specified in the contract (or if the loss becomes apparent during the last 6 months of the period of insurance, within 6 months of the loss becoming apparent).

This latest amendment goes further than the above 2009 amendment in that it:

• requires claims to be made (rather than notifications) during the period of insurance (or if a loss becomes apparent in the last 6 months of the period of insurance, the claim (rather than notification) is to be made within 6 months after the loss becomes apparent (extended claim period)); and

• provides direction as to what steps a beneficiary should take in circumstances where an insured event has not yet occurred and a claim cannot be made.

Grace period—First resort policies

For HOW insurance policies issued between 1 May 1997 and 30 June 2002 (i.e. the so–called first resort policies), the requirement (under section 103BA of the amended *Home Building Act*) that a claim be made during the required claim period is satisfied (where no claim was made but proper notification had occurred during the required claim period) if a claim is made by 25 April 2012.

Grace period—Last resort policies

For HOW insurance policies issued from 1 July 2002 (i.e. the so–called last resort policies), the requirement (under section 103BB(3)(a) of the amended *Home Building Act*) that a loss be properly notified to an insurer during the required notification period is satisfied in the case of a loss that was notified (but not properly notified only because it was not notified in writing) during the required notification period and before 25 October 2010 if the loss is properly notified by 25 April 2012.

The *Amendment Act* therefore provides a more detailed codification of the steps to be taken by an insured where loss arises from defective residential building work setting out when a claim should be made and if it cannot, or has not been made, then what steps must be taken.

'Related' losses

Regulation 63(3) of the Home Building Regulation is omitted and replaced with a new regulation 63(3) and (4).

The effect of the amendment is that where a beneficiary gives notice of a loss to the insurer, the beneficiary is presumed to have given notice under the insurance contract of every loss that was caused by the same defect as caused the notified loss. This provision has obvious and significant advantages for consumers.

Ten year limit

Section 103BC of the amended *Home Building Act* is a sunset provision on claims stating that no HOW insurance policy entered into before 1 July 2010 will provide coverage unless a claim in respect of the loss is made to the insurer within 10 years after the work insured was completed.

Meaning of completion

The *Amendment Act* attempts to more precisely define the completion of residential building work.

This is important given section 103B(2) provides that a contract of insurance must provide insurance cover for a period of not less than (a) 6 years after completion of the work for loss arising from a structural defect, or (b) 2 years after completion of the work for loss arising otherwise than from a structural defect and the above comments on section 103BC of the amended *Home Building Act*. The concept of completion is therefore quite important in determining the extent of coverage.

Regulation 61 of the Home Building Regulation, which contained a definition of 'completion', has been repealed and section 3B of the *Home Building Act*, containing a new definition of completion, has been inserted.

Under the new definition, there are a series of cascading definitions of completion. In short, completion occurs on the date that the work is complete within the meaning of the contract under which the work was done.If the contract does not provide for when the work is complete (or there is no contract), the completion of the residential building work occurs on practical completion of the work. Section 3B(3)(a)–(d) set out a series of dates the earliest of which can be established is practical completion of the residential building work.

Meaning of developer

Section 3A has been amended and section 3A(1A) inserted into the Home Building Act. In short, these provisions make the owner of the land a developer even if the residential building work is done pursuant to a contract with another entity.

These amendments address the facts which arose in *Ace Woollahra Pty Ltd v The Owners—Strata Plan No 61424 & Anor* [2010] NSWCA 101 where there was a joint venture agreement between two parties, one of whom owned the land and the other contracted with a builder complete residential building work. Justice Einstein held that the owners corporation was a person entitled to the benefit of a statutory warranty enforceable against the builder by operation of section 18D of the *Home Building Act* (notwithstanding the fact that the owner of the land, being the owners corporation's predecessor in title, did not contract with the builder).

However, the Court of Appeal overturned the lower court decision of Justice Einstein. The Court of Appeal disagreed with this purposive interpretation of section 18D of the *Home Building Act* and held that Justice Einstein erred in holding that section 18D of the *Home Building Act* entitled the owners corporation to take proceedings directly against the builder for breach of statutory warranties.

These amendments extend the benefit of statutory warranties such that an owners corporation, in the above circumstances, could sue the builder.