

## Statutory Warranties and Residential Building Insurance

### Executive Summary

Statutory Warranties*	Structural and Non-Structural Defects – statutory warranty periods are 6 and 2 years, respectively, from completion	Completion is no later than the date the occupation certificate is issued	Available to successors in title to the developer (ie lot owners and owners corporations)	Primarily address workmanship issues not design
Residential Building Insurance*	Last resort only (ie builder must be dead, disappeared or insolvent)	Coverage of at least \$85,000 per dwelling. \$500 excess for each claim	Claim to be made within 90 days of awareness of existence of grounds for claim	Coverage is for 5 years from issue of certificate of occupancy

\* only for residential buildings of 3 storeys or less (excluding basement carparking)

### 1. Residential Building Work

In the ACT, if an apartment building is more than 3 storeys in height (excluding the basement carparking) the work completed in constructing that building does not come within the definition of “residential building work” under section 84 of the Building Act. We have attached excerpts from the relevant legislation to this Fact Sheet for reference purposes.

Section 84 of the Building Act 2004 states:

**residential building** means a building intended mainly for private residential use, or a part of such a building, if—

(a) the building has no more than 3 storeys at any point, excluding any storey used exclusively for parking; or

(b) for a part of a building—the part provides structural support, or is a structurally integral

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*adjunct, to the building.*

**residential building work** means building work in relation to a residential building.

## 2. Statutory Warranties

Section 88(1) of the Building Act states that statutory warranties will be implied into every contract for the sale of a residential building and every contract to carry out residential building work. Consequently, statutory warranties under the Building Act do not apply to buildings of more than 3 storeys in height (not including carparking).

Section 88(2) sets out the warranties which are provided by the builder. They are:

- (a) *that the residential building work has been or will be carried out in accordance with the Building Act;*
- (b) *that the work has been or will be carried out in a proper and skilful way and—*
  - (i) *in accordance with the approved plans; or*
  - (ii) *if the work involves or involved handling asbestos or disturbing friable asbestos—in accordance with approved plans that comply with the Building Act in relation to the asbestos;*
- (c) *that good and proper materials for the work have been or will be used in carrying out the work;*
- (d) *if the work has not been completed, and the contract does not state a date by which, or a period within which, the work is to be completed—that the work will be carried out with reasonable promptness;*
- (e) *if the owner of the land where the work is being or is to be carried out is not the builder, and the owner expressly makes known to the builder, or an employee or agent of the builder, the particular purpose for which the work is required, or the result that the owner desires to be achieved by the work, so as to show that the owner is relying on the builder's skill and judgment—that the work and any material used in carrying out the work is or will be reasonably fit for the purpose or of such a nature and quality that they might reasonably be expected to achieve the result.*

Section 88(3) provides that successors in title to the developer are also able to rely upon the statutory warranties (ie lot owners and the owners corporation).

Section 88(4) provides that the periods over which the statutory warranties apply are prescribed by the Building (General) Regulations 2008. Regulation 38(1) of the Building (General) Regulations provides that the periods over which statutory warranties apply are:

- (a) for residential building work in relation to a structural element of a building – 6 years after the completion day for the work; or*
- (b) for residential building work in relation to a non-structural element of a building – 2 years after the completion day for the work.*

Regulation 38(2) provides definitions for non-structural element and structural element.

Section 85(1) provides that completion day means the day the work is completed or the day the contract relating to the work ends, whichever is the later. Section 85(2) states that, without limiting subsection (1), the work is taken to have been completed no later than the day a certificate of occupancy (if any) is issued for the work.

Section 87 sets out residential building work where statutory warranties will not be implied.

### **3. Residential Building Insurance (Approved Fidelity Fund Schemes will be the subject of a separate Fact Sheet)**

Residential building insurance (as opposed to the building insurance policy which forms part of the residential strata insurance policy) is only mandatory for work that costs more than \$12,000 and falls within the definition of residential building work. It is of course possible that a builder obtains residential building insurance notwithstanding there being no requirement to do so. However, in the light of the additional cost to a builder of doing so and no direct benefit arising to that builder in doing so, it is unlikely that many, if any, builders would obtain residential building insurance when not required to do so.

Residential building insurance is "last resort" insurance and may not be immediately available. That is, a claim event does not arise until the builder has either died, disappeared or become insolvent. However, if the builder has not died, disappeared or become insolvent within the period of coverage, the insurer should be notified of a potential claim before the period of coverage expires.

Section 90(1)(b) and regulation 39 provide that the total amount of insurance cover is at least \$85,000 for each dwelling that forms part of the work.

Section 90(1)(c) and regulation 40 provide that the period of insurance cover begins on the day the certifier for the work issues a building commencement notice and ends 5 years after the day a certificate of occupancy is issued for the work.

Section 90(1)(g) provides that the residential building insurance policy insures the owners (if the builder is not the owner) and the owner's successors in title (ie the lot owners and owners corporation) against the risk of loss resulting from a breach of a statutory warranty.

Section 90(1)(i) and regulation 41 provide that a claim may only be made within 90 days after the claimant becomes aware of the existence of grounds for the claim. Section 91(1) provides for an excess of \$500 for each claim.

Finally, it is important to ensure that the policy issued reflects the above legislative requirements.

## **Building Act 2004**

### **Part 6 Residential buildings—statutory warranties, insurance and fidelity certificates**

#### **Division 6.1 Interpretation—pt 6**

##### **84 Definitions—pt 6**

In this part:

*actuary*, for an approved scheme, does not include a special actuary.

*approval criteria* means the requirements determined under section 99 (Approval criteria for schemes).

*approved scheme* means a fidelity fund scheme approved under section 96.

*builder*, in relation to residential building work or a residential building, means the entity stated to be the builder in the commencement notice for the building work or building.

*building* does not include paving or a structure that is a fence, retaining wall, outdoor swimming pool, outdoor ornamental pond, mast, antenna, aerial, advertising device, notice or sign.

*building work* does not include work in relation to the demolition of a whole building.

*complying residential building work insurance* means an insurance policy issued in relation to residential building work that complies with section 90.

*cost*, of building work, means the cost of the work as worked out under section 86.

*fidelity certificate*, for building work, means a certificate issued for the building work by the trustees of an approved scheme.

*fidelity fund scheme* means a scheme for a building industry fidelity fund established under a trust deed.

*prudential standards* means the standards determined under section 103.

*residential building* means a building intended mainly for private residential use, or a part of such a building, if—

- (a) the building has no more than 3 storeys at any point, excluding any storey used exclusively for parking; or
- (b) for a part of a building—the part provides structural support, or is a structurally integral adjunct, to the building.

##### **Examples**

- 1 A building has shops on its ground storey, a hotel on its 2nd storey and private residential units on its 3rd storey. It is not a residential building because it is not used mainly for private residential use.
- 2 A building has 2 wings, which are structurally independent of each other. The north wing has 3 storeys including the ground storey. The south wing has 6 storeys including the ground storey. All storeys contain residential units. The north wing is a residential building. The south wing is not a residential building because it is 6 storeys.
- 3 A building has 2 wings that are dependent on each other for structural support. The north wing has 3 storeys including the ground storey. All storeys contain residential units. The lower 3 storeys of the south wing are structurally integrated with the north wing. A structural instability in any of the lower

3 storeys in the south wing could compromise the structural integrity of both wings of the building. The south wing storeys that are higher than the north wing are structurally independent of the north wing. The north wing of the building is a residential building. The lower 3 storeys of the south wing are a residential building to the extent that they are a structurally integral adjunct to the building as a whole. The upper 3 storeys of the south wing are not a residential building because they are over 3 storeys and not a structurally integral adjunct to the building.

- 4 A 4-storey residence has a parking garage as its ground storey. A structural instability in the garage could compromise the building's structural integrity. The garage is a residential building because it is a structurally integral adjunct to the building and the building is a residential building.
- 5 A single storey residence has a garage attached at the side. The roof trusses of the building span across the residence and garage in a single span. A structural instability in the garage could compromise the structural integrity of the roof trusses and, because of that, compromise the structural integrity of the building. The garage is a residential building because it is a structurally integral adjunct to the building and the building is a residential building.
- 6 A single storey residence has a garage attached at the side and under the same roofline as the residence. The garage is mainly used for cars and is not for residential use. No structural elements of the residence depend on the garage for structural integrity. A structural instability in the garage could not compromise the structural integrity of the residence. The garage is not a residential building because it is not a structurally integral adjunct to a building intended primarily for residential use. The residence, apart from the garage, is a residential building.

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

**residential building work** means building work in relation to a residential building.

**special actuary**—see section 122 (Special actuary to investigate liabilities).

**storey** does not include a storey below the ground storey.

## 85 **Meaning of *completion day* for pt 6**

- (1) In this part:

**completion day**, for residential building work, means the day the work is completed or the day the contract relating to the work ends, whichever is the later.

- (2) Without limiting subsection (1), the work is taken to have been completed no later than the day a certificate of occupancy (if any) is issued for the work.

## 86 **Cost of building work for pt 6**

- (1) For this part, the **cost** of building work is—

- (a) if a contract has been entered into for carrying out of the building work—the cost of the work as fixed by the contract; or
- (b) in any other case—
  - (i) an amount agreed between the construction occupations registrar and the builder; or
  - (ii) if an amount is not agreed—an amount worked out by the registrar.

- (2) For subsection (1), the **cost** of building work—

- (a) includes the cost of any engineering service in relation to the land where the building work is to be carried out; but
- (b) does not include the cost of the land where the building work is to be carried out.

## **Division 6.2                      Statutory warranties**

### **87                      Residential building work to which pt 6 does not apply**

- (1) This part does not apply in relation to residential building work—
  - (a) carried out or to be carried out by or for the Territory or the Commonwealth, a Territory authority or an authority established under a Commonwealth Act; or
  - (b) in relation to which an owner-builders licence has been granted; or
  - (c) if the cost of the work is less than the amount prescribed under the regulations; or
  - (d) in relation to a building or dwelling other than a class 1 or class 2 building.
- (2) Subsection (1) (d) does not prevent this part from applying in relation to residential building work carried out in relation to a garage that provides structural support for, or is a structurally integral adjunct to, a class 1 or class 2 building.

### **88                      Statutory warranties**

- (1) By force of this section, every contract for the sale of a residential building, and every contract to carry out residential building work to which the builder is a party, is taken to contain a warranty under this section.
- (2) The builder warrants the following:
  - (a) that the residential building work has been or will be carried out in accordance with this Act;
  - (b) that the work has been or will be carried out in a proper and skilful way and—
    - (i) in accordance with the approved plans; or
    - (ii) if the work involves or involved handling asbestos or disturbing friable asbestos—in accordance with approved plans that comply with this Act in relation to the asbestos;
  - (c) that good and proper materials for the work have been or will be used in carrying out the work;
  - (d) if the work has not been completed, and the contract does not state a date by which, or a period within which, the work is to be completed—that the work will be carried out with reasonable promptness;
  - (e) if the owner of the land where the work is being or is to be carried out is not the builder, and the owner expressly makes known to the builder, or an employee or agent of the builder, the particular purpose for which the work is required, or the result that the owner desires to be achieved by the work, so as to show that the owner is relying on the builder's skill and judgment—that the work and any material used in carrying out the work is or will be reasonably fit for the purpose or of such a nature and quality that they might reasonably be expected to achieve the result.
- (3) Each of the owner's successors in title succeeds to the rights of the owner in relation to the statutory warranties.
- (4) The warranties end at the end of the period prescribed under the regulations after the completion day for the work.

(5) In subsection (2):

*owner* means—

- (a) for a contract mentioned in subsection (1) for the sale of a residential building—the person to whom title in the land where the building was built is transferred under the contract; or
- (b) for a contract mentioned in subsection (1) to carry out residential building work—the owner of the land where the work is to be carried out under the contract.

## **89 Builder's liability**

This Act does not limit the liability a builder would have to anyone apart from this Act.

## **Division 6.3 Residential building insurance**

### **90 Complying residential building work insurance**

- (1) An insurance policy issued for residential building work complies with this section if—
  - (a) it is issued by an authorised insurer; and
  - (b) it provides for a total amount of insurance cover of at least the amount prescribed under the regulations, or the cost of the work, whichever is less, for each dwelling that forms part of the work; and
  - (c) if the builder is not the owner of the land where the work is to be carried out—it insures the owner and the owner's successors in title for the period beginning on the day the certifier for the work issues a building commencement notice under section 37 for the work and ending at the end of the period prescribed under the regulations after the day a certificate of occupancy is issued for the work; and
  - (d) if the builder is the owner of the land where the work is to be carried out—it insures the builder's successors in title for the period beginning on the day the title in the land is transferred to someone else and ending at the end of the period prescribed under the regulations after the day a certificate of occupancy is issued for the work; and
  - (e) the whole of the premium payable for the period has been paid; and
  - (f) it insures the owner (if the builder is not the owner) and the owner's successors in title against the risk of being unable to enforce or recover under the contract under which the work has been, is being or is to be carried out because of the insolvency, disappearance or death of the builder; and
  - (g) it insures the owner (if the builder is not the owner) and the owner's successors in title against the risk of loss resulting from a breach of a statutory warranty; and
  - (h) it insures the owner (if the owner is not the builder) and the owner's successors in title against the risk of loss resulting, because of the builder's negligence, from subsidence of the land; and
  - (i) it provides that a claim under it may only be made within the period prescribed under the regulations, or a stated longer period after the claimant becomes aware of the existence of grounds for the claim; and
  - (j) the form of the policy has been approved in writing by the construction occupations registrar.



- (2) However, if the owner is a developer, the insurance is taken to comply with subsection (1) (c), (f), (g) or (h) if it insures the owner's successors in title, even though it does not insure the owner.
- (3) To remove any doubt, an insurance policy issued in relation to residential building work may exclude claims other than those in circumstances in which the builder is insolvent, dead or has disappeared.
- (4) In this section:

**developer**, for residential building work, means a person for whom the work is done in a building or residential development where 4 or more of the existing or proposed dwellings are or will be owned by the person.

**insolvent**—a builder is taken to be insolvent if—

- (a) for a builder who is an individual—the builder is bankrupt or personally insolvent; or
- (b) for a builder who is a corporation—the builder is being wound up, has had a receiver or other controller appointed, has entered into a deed of company arrangement with its creditors or is otherwise under external administration under the Corporations Act, chapter 5.

*Note* **Bankrupt or personally insolvent**—see the [Legislation Act](#), dictionary, pt 1.

## **91 Provisions of residential building insurance policies**

- (1) A complying residential building insurance policy may provide that the authorised insurer who issues the policy is not liable for the amount prescribed under the regulations, or the stated lesser amount, of each claim.
- (2) In calculating the amount of the premium payable in relation to a complying residential building insurance policy, the value of the work is taken to be equal to the cost of the work.
- (3) A provision, stipulation, covenant or agreement that negatives, limits or modifies or purports to negative, limit or modify the operation of this part is void.
- (4) A complying residential building insurance policy—
  - (a) is not be taken to be invalid only because it contains a term, condition or warranty not contained in the form of policy approved by the construction occupations registrar; but
  - (b) a term, condition or warranty mentioned in paragraph (a) is void.

## **92 Builder's misrepresentation etc does not prevent liability**

An authorised insurer is not entitled to avoid liability under a complying residential building insurance policy only because the policy was obtained by misrepresentation or nondisclosure by the builder.

## **93 Claims if builder insolvent and work unfinished**

- (1) This section applies if—
  - (a) a builder is not the owner of the land where the builder is carrying out residential building work; and
  - (b) the builder fails to complete the work because the builder becomes insolvent; and

- (c) the owner has paid the builder part or all of the cost of the work; and
  - (d) the work is insured under a complying residential building insurance policy.
- (2) The owner is not entitled to recover from the insurer any amount by which the amount paid exceeds the cost of the work done.
- (3) However, if the owner has paid a deposit on the work and the cost of any work done is less than the amount of the deposit, the owner may recover from the insurer the lesser of the following amounts:
- (a) the amount of the deposit less the cost of any work done;
  - (b) the amount prescribed under the regulations less the cost of any work done.
- (4) In this section:

*deposit*, in relation to residential building work, means an amount that was paid or payable by the owner to the builder, under the contract to carry out the work, before the beginning of the work.

*insolvent*—see section 90 (4).

## **94 Recovery from builder**

- (1) This section applies if—
- (a) a court gives judgment in favour of a person in relation to a matter for which the person is insured under a complying residential building insurance policy; and
  - (b) the insurer is a party to the proceeding in which the judgment is given; and
  - (c) the judgment is not satisfied in full within 30 days after the day judgment is entered.
- (2) The judgment creditor may apply to the court for a direction that judgment be entered in favour of the creditor against the authorised insurer who issued the policy.
- (3) The judgment creditor must give the insurer at least 7 days written notice of his or her intention to make an application.
- (4) A judgment entered against an authorised insurer is enforceable only to the extent that it had not been satisfied at the time the judgment was entered.
- (5) An authorised insurer may, in addition to any other right or remedy, recover from a builder in relation to whose work a complying residential building insurance policy was issued so much of the following as the insurer has paid under or because of the policy:
- (a) any judgment entered or obtained against the insurer; and
  - (b) any amounts paid by the insurer in payment, settlement or compromise of a claim or judgment against the builder or of a judgment entered or obtained against the insurer; and
  - (c) the costs of, and expenses reasonably incurred by, the insurer.

## **95 Duties of insurers**

- (1) A person commits an offence if—
- (a) the person has been an authorised insurer in the business of issuing residential building insurance policies; and

- (b) the person ceases to be in that business, or the person's authority to carry on insurance business is cancelled under the *Insurance Act 1973* (Cwlth); and
- (c) the person fails to notify the construction occupations registrar of the cessation or cancellation within 7 days after the day of cessation or cancellation.

Maximum penalty: 50 penalty units.

- (2) An offence under subsection (1) is a strict liability offence.
- (3) An authorised insurer must not represent that an insurance policy issued or to be issued by the insurer is complying residential building work insurance if the insurer knows that it is not.

Maximum penalty: 250 penalty units.

- (4) On or before 31 July in each year, an authorised insurer must give a written statement to the construction occupations registrar in relation to claims on residential building insurance policies dealt with by the insurer in the financial year ending on the previous 30 June, stating the following:
  - (a) the number of claims;
  - (b) the amount of each claim;
  - (c) the number of claims that were paid;
  - (d) the amount paid on each claim;
  - (e) if a claim was rejected—the reason for its rejection.

Maximum penalty: 100 penalty units.

- (5) An offence against subsection (4) is a strict liability offence.

## **Building (General) Regulation 2008**

### **Part 4 Residential buildings—statutory warranties, insurance and fidelity certificates**

#### **37 Building work to which pt 6 does not apply**

The [Act](#), part 6 (Residential buildings—statutory warranties, insurance and fidelity certificates) does not apply to residential building work if the cost of the work is less than \$12 000.

#### **38 End of statutory warranties—Act, s 88 (4)**

- (1) The period for the end of a warranty is—
  - (a) for residential building work in relation to a structural element of a building—6 years after the completion day for the work; or
  - (b) for residential building work in relation to a non-structural element of a building—2 years after the completion day for the work.

- (2) In this section:

*non-structural element*, of a building, means a component of the building that is not a structural element.

*structural element*, of a building, means—

- (a) a load-bearing component of the building (whether internal or external) that is essential to the stability of the building or part of it; or
- (b) a component (including weatherproofing) forming part of the external walls or roof of the building.

#### **Examples—par (a)**

a foundation, floor, wall, roof, column or beam

*Note* An example is part of the regulation, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

#### **39 Minimum insurance for residential building work—Act, s 90 (1) (b)**

The amount for insurance cover is \$85 000.

#### **40 Period of insurance for residential building work—Act, s 90 (1) (c) and (d)**

The period is 5 years.

#### **41 Period of claims for residential building work—Act, s 90 (1) (i)**

The period is 90 days.

#### **42 Amount insurer not liable for—Act, s 91 (1)**

The amount is \$500.

#### **43 If builder defaults and work less than deposit paid—Act, s 93 (3) (b)**

The amount is \$10 000.