

THE HOME BUILDING ACT: RECENT AMENDMENTS EXPLAINED (PART 2)

By Christopher Kerin



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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 predecessor, which looked at the completion and statutory warranty aspects of the amendments (see the April edition of the *LSJ*), can only really serve as an introduction to some of these amendments to the Act. 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

- The first article of this two-part series on the *Home Building Amendment Act 2014*, (published in the April edition of the *LSJ*), considered the completion and statutory warranty aspects of the amendments that came into force earlier this year.
- This follow-up article examines changes to licensing; the Home Building Compensation Fund; and some new contractual requirements outlined in the Act.
- Many of these latest amendments to the Act are to the advantage of contractors. Therefore, home owners will need to pay even closer attention to the timely exercise of their rights.
- In particular, close attention will need to be paid to the retrospective application of the 2014 Amendments.

Licensing

In the main, the 2014 Amendments transfer elements of the licensing regime from the *Home Building Regulation* to the Act.

The threshold as to when a licence is required for building and general trade work has been raised from over \$1000 of work to over \$5000.

An individual who contracts to do any residential building or specialist work without a contractor licence might be subject to a penalty of up to \$22,000, or \$110,000 for a corporation.

The 2014 Amendments add to this a new sentencing option of up to 12 months imprisonment or a penalty of up to \$55,000 or both for a second or subsequent offence for unlicensed contracting.

Home Building Compensation Fund

The statutory scheme largely remains the same, but home warranty insurance is now referred to as 'insurance under the Home Building Compensation Fund'.

A register of insurance certificates will be created by the NSW Self Insurance Corporation (SICorp), which will assist consumers in checking that their certificate is genuine and indicate whether there have been previous claims on the property. Further, identifying existing policies will be easier and relieve the difficulties successors in title occasionally have when insurance certificates are misplaced or cannot be found. However, this register will only apply to insurance certificates issued on or after 1 July 2010.

A welcome clarification has been made indicating that a contract of insurance for residential building work will extend to cover work completed by a person seeking to rectify original work.

Where a contractor fails to comply with an order of a court or tribunal to pay an amount of money in respect of a building claim by the due date, the licence of the contractor is suspended and such suspension shall constitute the insolvency of the contractor for insurance purposes.

It should be noted that the draft Home Building Regulation 2014 circulated in 2014 is not the same as the version proclaimed. For example, the intended clarification of the meaning of 'diligently pursue' in relation to a delayed claim was not included in the version that came into force, although this amendment could still occur at some point in the future.

Finally, there is a real question as to the retrospective application of the statutory warranty amendments to home owners warranty insurance contracts. On the face of the *Home Building Amendment Act 2014*, the 2014 Amendments apply to all insurance contracts entered into from 1 July 2002 as section 121(1)(c) of part 20 of schedule 4 of the Act (being a Savings and Transitional Provision) provides that:

'an amendment made by the amending Act extends to ... a contract of insurance entered into before the commencement of the amendment'. Section 121(2) provides that these amendments do not apply to or in respect of proceedings commenced in a court or tribunal or a claim made before the commencement of the amendments.

As the change in home owners warranty insurance coverage from seven years to six years for structural defects, and two years for non-structural defects, took place on 1 July 2002, the amendment appears to be retrospective to 1 July 2002. However, in order for this interpretation to be upheld, the common law presumption against retrospectivity needs to be overcome such that every home owner's warranty insurance contract entered into over the last 13 years is amended retrospectively.

Disputes

From 15 January 2015, s 48MA requires courts or tribunals to consider rectification as the preferred outcome when determining a building claim.

Contractual requirements

Contracts must include a statement

that the contract may be terminated in circumstances provided by the general law and that this does not prevent the parties agreeing to additional circumstances in which the contract may be terminated.

The small job contract was introduced with the 2011 Amendments for works valued between \$1001 and \$5000. The 2014 Amendments result in the threshold value for small job contracts increasing to works valued at over \$5000.

The threshold for contracts with the more extensive general contract requirements prescribed under s 7 of the Act has increased from \$5000 to \$20,000.

The maximum deposit where the contract price is over \$20,000 will increase from 5 per cent to 10 per cent.

Finally, under s 8A, which came into force on 1 March 2015, where the contract price is over \$20,000, the 2014 Amendments introduce the concept of a maximum progress payment. It would appear that this provision is designed to prevent claims being made that are based on the elapse of time rather than completion of work. However, this

provision does not apply to progress payments for residential building work to which the *Building and Construction Industry Security of Payment Act 1999* applies.

Conclusion

The 2014 Amendments follow on in the general direction of the 2011 Amendments.

It is unclear how many of the amendments, such as the new statutory warranty in s 18B(a), will impact on residential building work in NSW as they are new and untested provisions.

Many of the latest amendments to the Act are to the advantage of contractors. Therefore, home owners will need to pay even closer attention to their rights in order to ensure what rights remain are exercised within time. In particular, close attention will need to be paid to the retrospective application of the 2014 Amendments.

It remains to be seen how the courts interpret these provisions, however, one thing is clear given the history of the *Home Building Act* – it will not be long until further amendments are made. **LSJ**

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