

## **Changes to the Home Building Act 1989 (NSW)**

The changes to the Home Building Act 1989 (NSW) (*the Act*), came into force on 15 January 2015, with further amendments coming into force on 1 March 2015. The amendments set out 5 key changes to the Act which is detailed below.

### **Defect Classification:**

The classification of a defect dictates the time period in which the defect must be brought to the attention of the contractor. The amendments replace the definition “structural defect” with “major defect.” The warranty period for both a “major defect” and “structural defect” is 6 years.

“Major defect” is now defined as any flaw that makes the building uninhabitable or likely to collapse.

In its effect, the new definition sets a higher standard to establish a major defect. Some defects classified under the old “structural defect” definition may not reach the requisite threshold of a “major defect” and therefore, they will be re-classified as a “minor defect” which only allows a two year warranty period instead of a 6 year warranty period.

This means that owner builders will have less time to bring a claim against a contractor/builder for many defects that have been reclassified under the amendments.

### **Duties of the Beneficiary of a statutory warranty:**

New imposed duties now fall on the beneficiary of a warranty period to:

- Mitigate their loss in respect of a breach of warranty of defect;
- Make reasonable efforts to notify the builder and or developer of a defect within 6 months of the breach becoming apparent; and
- Allow the builder/ developer reasonable access to the property so they may rectify the breach.

Owner builders must take positive steps to mitigate their loss and allow reasonable access to rectify the defect. Failure to do so may provide a reason for the court to reject a claim for any defective work done to the development.

### **Diligent Pursuit:**

An Owner Corporation (being the beneficiary of the warranty period) has the right to make a claim under home warranty insurance outside the warranty period if:

- The relevant insurance contract was entered into on or after 1 July 2002;

- The builder had not died, disappeared or become insolvent within the warranty period;
- The Owners Corporation has properly notified the builder of the breach, within the warranty period;
- The Owners Corporation diligently pursued enforcement of the statutory warranties; and
- A claim in respect of the loss is made to the insurer within 10 years after the work insured was completed.

Therefore, provided that the owner builder has made a genuine attempt to notify the builder within the warranty period and they have satisfied the above qualifications, then a claim may still be bought against a builder even if the warranty period for the defect has expired.

### **Completion:**

A new definition for date of completion has been introduced and specifies it as either being:

- The date of issue of an occupation certificate that authorises the occupation and use of the whole of the building; or
- The occurrence of some other event that is prescribed by the regulations as constituting completion of the work.

### **Defence to Statutory Warranty Claims:**

Section 18F introduces a new defence for builders, which expands on their previous entitled defence.

*“reasonable reliance by the defendant on instructions given by a person who is a relevant professional acting for the person for whom the work was contracted to be done and who is independent of the defendant, being instructions given in writing before the work was done or confirmed in writing after the work was done.”*

In other words, the defendant builder may rely on a third party contractor’s instructions, provided that the third party is a professional, was hired by the owner builder for the development and the instruction to the defendant builder were made in writing before the defective work was carried out.

If you believe that these changes have affected your rights to either claim against a builder or defend against a claim, contact the Eakin McCaffery Cox Property or Litigation teams. We will be able to further explain the amendments and advise you on how these changes may apply to your case.

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