

Bannermans Lawyers

Building Defects

Alert

Alert – Urgent action required

The Home Building Amendment Bill 2011 ('the Bill') discussed in our urgent 14 October 2011 update has been rushed through Parliament. We had been advised that the earliest it would be passed was 9 November 2011. However it was passed without amendment on 19 October 2011.

Some of the worst aspects of the Bill will apply as soon as the Governor gives assent to the Bill. Assent is normally given within about a week. However, all owners corporations should be prepared for the possibility that the assent of the Bill will also be rushed through.

Please [click here](#) to view a further copy of our 14 October 2011 update.

New definition for completion for both statutory warranty claims and home warranty insurance

The new definition for completion affects the time limits under home warranty insurance policies and for commencing proceedings under the statutory warranties (i.e. against builder and developers). It will apply from assent of the Bill unless proceedings have already been commenced.

If anything, the new completion definition will bring forward the date of 'completion'. If that is a risk for you and you can immediately commence proceedings, you should do so to avoid the unfavourable completion definition applying to you.

The circumstances that could see you being at risk include (without limitation):

1. You are near the end of the 7 year period to commence proceedings under the statutory warranties. For example, you may have several months to commence proceedings under

the current law but already be out of time to commence under the new law, which will apply if you do not commence proceedings before assent.

2. You may have notified your insurer or claimed against your insurer within time under the current law. However, if the new law applies and brings the completion date forward, you may have notified or claimed out of time. In that event, your rights against the insurer will be wiped out. You will go from having a valid insurance claim to having no insurance claim.

Home warranty insurance claims must be made during the period of cover

If you have first resort insurance and you have properly notified your insurer of your losses but not yet claimed upon the insurer, there will be a 6 month grace period from assent of the Bill to make your claim upon the insurer.

If you have last resort insurance and the builder has died, disappeared or become insolvent during the period of cover, but you have not yet made your claim upon the insurer, you should do so immediately. If you do not make your claim before the Bill is assented to and the period of insurance has now expired, your right to insurance cover may be wiped out. It should also be noted that the period of insurance expiry date may have been brought forward by the new completion definition.

Recommendation: Any owners corporation with last resort insurance that has not claimed and is now able to claim because a builder has (probably since notification) died, disappeared or become insolvent should immediately submit its insurance claim. If it does not do so before the date of assent it may no longer be able to claim upon the insurance.

Diligently pursue

If you have last resort insurance, the new law will prevent you from making claims unless you “*diligently pursue*” the breach of the statutory warranties. This new requirement will only apply to last resort insurance claims where a claim is made outside the period of cover. Under the amended Act, a last resort insurance claim can only be made outside the period of cover if:

1. You ‘properly notified’ a loss during the period of cover but could not claim it during the period of cover as the builder did not die, disappear or become insolvent until after the period of cover expired; or
2. The builder died, disappeared or became insolvent in the last six months of the period of cover; or
3. A particular loss first became apparent during the last 6 months of the period of cover, in which case you can notify and claim that loss within 6 months of it first becoming apparent.

This new provision intends to prevent claims being made at all. Thus, if any recovery target still exists, even if it is a \$2 company no longer trading, you may need to sue them to judgment and then wind them up to preserve your right to claim upon the insurance.

NB: The insurance provides cover for the reasonable costs of pursuing builders but not for the reasonable costs of pursuing developers.

Recommendation: This unfair provision will not apply to claims already made. Thus, if an owners corporation has notified but not claimed under a last resort insurance claim, and the period of cover has now expired and it can claim upon insurance, it should do so before the date of assent to avoid the diligently pursue limitation possibly applying to a claim.

NB: There is a reasonable argument that this provision of the Bill is inconsistent with section 54 of the *Insurance Contracts Act 1984 (Cth)* in which case, it may be invalid.

10 year “long stop” limit on home warranty insurance claims

The new law will not allow any insurance claim (whether first or last resort) to be made more than 10 years after the completion of the work.

Recommendation: If an owners corporation has not yet made its home warranty claim and it is possible that it is now anywhere near 10 years since completion of the works (noting the new definition of completion will tend to bring that forward), the owners corporation should consider immediately making its insurance claim before the date of assent.

Defects directly or indirectly related

The provision in all insurance policies since 1997 that losses directly or indirectly related to defects notified in time are deemed to have been notified in time has been written out of existence. The cynical re-writing of this provision will not apply to proceedings already commenced against insurers.

Recommendation: To rely upon the longstanding directly or indirectly related extension to the insurance, an owners corporation that is in a position to commence proceedings against the insurer before the date of consent, should consider doing so. If an owners corporation needs to rely upon the directly or indirectly related extension on any significant issues, the owners corporation should, if possible, immediately commence proceedings against the insurer.

Please note that this update only focuses on urgent steps that need to be taken to preserve the rights of owners corporations in some circumstances. There are other very disappointing aspects of the Bill that are not issues for immediate action to preserve rights. We will be reporting further on those other aspects in the near future.