

Bannermans Lawyers

Building Defects

Update

Home Building Amendment Bill 2011

Urgent action required to preserve rights

The *Home Building Amendment Bill 2011* was introduced into the Legislative Assembly on 12 October 2011. If assented to in its current form it will have a wide reaching impact on current and future home warranty claims against builders, developers and insurers. There are also changes proposed regarding new construction contracts and home warranty insurance. The following issues are those that may require urgent action by owners corporations before the date of assent.

Completion – Statutory warranties

Currently owners corporations have 7 years to commence *Home Building Act 1989* building defects proceedings following completion of the work. Completion has not previously been defined and its meaning has been controversial.

There has been a push for a definition that gives certainty as to when the date of completion is, so that an owners corporation can know and plan for a deadline by which it would need to commence proceedings to preserve its rights. The common sense solution would be to say that strata plan works are completed when the strata plan is registered. Then all parties would know where they stand in relation to the limitation issues. Instead, the Bill proposes to insert the section noted below to define completion. It will generally be impossible for owners corporations to identify the correct date of completion. If the answer does not come out of the building contract, which is rare, the completion date will generally be earlier than one would usually expect and turn on evidence in possession of the builder which an owners corporation will discover a long time after commencing proceedings.

3B Date of completion of residential building work

- (1) The completion of residential building work occurs on the date that the work is complete within the meaning of the contract under which the work was done.*
- (2) If the contract does not provide for when work is complete (or there is no contract), the completion of residential building work occurs on **practical completion** of the work, which is*

when the work is completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose.

- (3) *It is to be presumed (unless an earlier date for practical completion can be established) that practical completion of residential building work occurred on the earliest of whichever of the following dates can be established for the work:*
- (a) *the date on which the contractor handed over possession of the work to the owner,*
 - (b) *the date on which the contractor last attended the site to carry out work (other than work to remedy any defect that does not affect practical completion),*
 - (c) *the date of issue of an occupation certificate under the Environmental Planning and Assessment Act 1979 that authorises commencement of the use or occupation of the work,*
 - (d) *(in the case of owner-builder work) the date that is 18 months after the issue of the owner-builder permit for the work.*
- (4) *If residential building work comprises the construction of 2 or more buildings each of which is reasonably capable of being used and occupied separately, practical completion of the individual buildings can occur at different times (so that practical completion of any one building does not require practical completion of all the buildings).*
- (5) *This section applies for the purposes of determining when completion of residential building work occurs for the purposes of any provision of this Act, the regulations or a contract of home warranty insurance.*

Recommendation: Owners corporations that are anywhere near the end of the time to commence proceedings against builder or developers should do so immediately in order to avoid the new completion definition which if anything will bring forward the limitation date. The proposed completion definition will not apply to proceedings commenced before the date of assent. Thus to avoid the proposed definition of completion an owners corporation must commence proceedings before the date of assent.

Completion – home warranty insurance

The proposed definition of completion is also to apply instead of the current definition of completion relevant to home warranty insurance policies thus in many matters it will bring forward the expiry of the period of cover to an earlier date than an owners corporation will usually be able to identify.

Recommendation: The proposed completion definition will not apply to insurance claims already appealed. Thus to avoid a reduction in the period of insurance, any owners corporations that are in a position to appeal their home warranty insurance claim should consider whether to do before the date of assent.

Claims must be made during period of cover

The Bill proposes to require that home warranty insurance claims (as opposed to notifications) be made during the period of insurance. There is a 6 month grace period proposed for first resort

insurance claims in relation to losses that were properly notified during the period of cover but not claimed during the period of cover.

If an owners corporation has last resort insurance and the builder has died, disappeared or become insolvent during the period of cover, the Bill proposes to only allow an insurance claim made during the period of cover. Thus, an owners corporation cannot delay making a claim in the belief that it has notified the insurer and can claim later. There is no grace period proposed. The exception to this will be if the trigger allowing a claim (e.g.: insolvency) occurs during the last 6 months of the period cover.

Recommendation: Any owners corporation with last resort insurance that has notified but not claimed and is 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

The Bill proposes to prevent owners corporations with last resort insurance from making claims unless they “*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.

Unlike clause 58A of the Home Building Regulation, this new restriction does not limit the insurer’s position to reducing its liability due any prejudice it suffers. 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, owners corporations will need to sue them to judgment and then wind them up, or they will not be able to claim upon the insurance.

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

Recommendation: Under the current form of the Bill, 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 should be invalid.

10 year “long stop” limit on claims

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

If an owners corporation with a last resort policy notifies an insurer within time but cannot make a claim within 10 years due to the builder vigorously defending and dragging out proceedings, the owners corporation will not be able to claim upon the insurance after it eventually bankrupts or winds up the builder.

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 forwards), 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 will be written out of existence by the current form of the Bill. 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 whether to do so.

Proportionate liability

On a positive note, the Bill proposes to exempt statutory warranty claims from proportionate liability and prevent developers from avoiding statutory warranty liabilities by not being a party to a building contract. Unfortunately, the proposed changes will not apply to proceedings commenced prior to the date of assent. In those matters, the position will remain uncertain and to be determined by the Court.

Recommendation: In some circumstances where an owners corporation is ready to commence proceedings against a builder or developer and there are no impending limitation date issues, it could be in the owners corporation’s interest to defer commencing proceedings until after the date of assent, but it needs to bear in mind the requirement to diligently pursue as mentioned above.

Urgent action required

The above are the urgent works which may be required by an owners corporation before the date of assent. There are many other issues to consider and many further urgent actions owners corporations may need to take after the assent.

It is anticipated that the Bill will be assented to in November 2011, leaving only a few short weeks for owners corporations to seek urgent advice and take steps to preserve their rights.

Further information and updates in relation to the Bill will be provided shortly.

