When the Home Warranty Insurers Come Knocking

Home warranty insurers in NSW have paid out over $400 million since 2002. Premiums would have been only a fraction of that. It is small wonder that private insurers want out, and that for the foreseeable future consumer protection for residential building defects will have to be provided by the state government through its public insurance arm SICorp.

It has been bad business for private insurers. Still is. Now the premiums have stopped, but the claims go on. Private insurers face the prospect of receiving further claims up to 1 July 2016. Even then it could take three to four years to flush their backlog of claims through the system.

Private insurers want this business off their books. With no future interest in selling home warranty insurance, it might be expected that they will be less concerned with their reputations amongst consumers of the product, and take an even harder line in denying liability, and keeping payouts to a minimum. Their preference will increasingly be to settle claims on a basis that releases them from future liability, rather than committing to programmes of defect rectification. The logic of cost benefit analysis would suggest a settlement strategy which pays out using available easy money from someone else, rather than incur the expense of experts and lawyers to arrive at a rigorous assessment. Often the easiest money available is the bonds and guarantees directors (or members of their friends or families) have put up to secure home warranty insurance for their companies.

The idea of insurers paying out more than they have to runs counter to common experience; yet in some cases where bonds and guarantees have been called up we have found this to be so. If you have offered a personal guarantee, to secure home warranty insurance for a company, and a call is made against it you should immediately request that the insurer provide full details of the relevant claim including: the claimant's alleged rights of recovery, the defects, the rectification and cost. You should consider obtaining legal advice as to whether the insurer's assessment of the claim has been rigorous, and fully taken account of matters such as:

- time limitations,
- any failure by the insured to enforce statutory warranties,
- rights of subrogation to hold other parties liable,
- exclusions under the relevant policy,
- taking account of common property / lot owner property distinctions,
- mitigation and maintenance issues, and
- the basis and calculation of quantum.

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Of course the terms of the personal guarantee must also be reviewed, together with the circumstances it was entered into (e.g. duress). Do not take it for granted that the insurer is entitled to have recourse to the guarantee or bond. Seek advice.

Key takeaways

- Home warranty insurers in NSW have faced significant financial losses, leading to a shift in consumer protection responsibilities.
- Private insurers may take a harder line in denying claims as they seek to offload their liabilities.
- Consumers should not assume that insurers will act in their best interests when claims are made against personal guarantees.
- Legal advice is crucial to ensure that all aspects of a claim are thoroughly assessed.
- Understanding the terms of personal guarantees is essential before accepting liability.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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