

Building Defects Claim Update – High Court hands down decision in Brookfield Case

In a Nutshell

On 8 October 2014, the High Court in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36* (“the Brookfield case”) found that a builder did not owe a duty of care to an owners corporation in a serviced apartment complex (not residential building works) where sophisticated parties had negotiated rectification clauses.

The High Court held that a duty of care continues to exist if the principles in *Bryan v Maloney* are satisfied.

The decision is not conclusive with respect to negligence claims for:

1. Residential building works;
2. Claims where the builder and developer are the same party; or
3. Claims against designers or certifiers.

Impact on Owners Corporations

This decision highlights the need for owners when negotiating contracts to purchase non-residential lots to carefully negotiate the terms of any defect rectification clauses in the common property.

Although this decision is not conclusive in respect of residential building works, owners will need to ensure that they:

1. Utilise the statutory warranties, including by:
 - a. Becoming aware of defects within the relevant periods and notifying the relevant insurers;
 - b. Before 1 December 2014–
 - i. Lodging insurance claims; and
 - ii. Commencing Court or Tribunal proceedings (to avoid the sweeping adverse retrospective changes to the statutory warranties which are expected to commence on 1 December 2014, see links below); or
 - c. If unable to perform paragraph (b) above by 1 December 2014:
 - i. Making any insurance claims within the appropriate periods; and

- ii. Commencing Court or Tribunal proceedings within the statutory warranty periods; and
2. Take care when framing remedial works contracts to ensure that they have adequate contractual protections against builders where works are undertaken.

The decision does not remove other remedies available such as misleading and deceptive conduct.

For further information on changes to the statutory warranties see our articles –

1. [Time and Building Reforms may affect Owners and Owners Corporations: Why Owners Need to Consider Action Now!](#); and
2. [Building Defect Warranty Claims - Retrospective Changes - Draft Home Building Regulation 2014.](#)

**Prepared by Bannermans Lawyers
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