

Alert – Home Building Act changes to Residential Building Contracts – effective from 1 March 2015

In a Nutshell

As a result of changes to the Home Building Act 1989 (NSW) (the Act) residential building work contracts entered into from 1 March 2015 must be compliant with new requirements introduced from that date.

Broadly, residential building work involves:

1. The construction of a dwelling, or
2. Making of alterations or additions to a dwelling, or
3. Repairing, renovation, decoration or protective treatment of a dwelling

Residential building work is subject to specific inclusions and exclusions as set out in the Act, e.g.:

1. from 1 March 2015, the installation of floor tiles are now residential building work; and
2. from 1 March 2015, stand alone contracts for internal painting, concrete tennis courts, or water features, are not residential building work.

If non-compliant contracts are entered into there is a possibility that:

1. Builders will be unable to claim progress payments;
2. Those contracts or part of those contracts may be unenforceable under section 10 of the Act; or
3. Builders may be liable to pay fines arising from offence proceedings.

Action to Take

Owners Corporations undertaking remedial works, repair or maintenance should seek advice to ensure that the contracts meet with the new requirements.

With the extension of statutory warranties to subcontracts, Owners Corporations should ensure that their contracts afford sufficient control over the appointment of subcontractors, and the identification of subcontractors and description of subcontracted works to Owners Corporations.

1 March 2015 Changes

1. Statutory warranties will be implied into subcontracts, accordingly Owners Corporations should consider negotiating sufficient contract clauses to allow for control over the appointment of subcontractors (where appropriate) and/or notification of works that are subcontracted and the identity of subcontractors.
2. Maximum Deposit which may be claimed increased to 10% across all residential building contracts.

Note: if deposit exceeds 10% contractor licence holders face a fine of up to \$110,000 for a corporation or \$22,000 for an individual.

3. For contract works over \$20,000, and where the Building and Construction Industry Security of Payment Act 1999 (NSW) ("the SOP Act") does not apply, in order to claim progress payments contracts will need to either have:
 - a. a progress payment schedule that complies with the new provisions – in particular one which describes in clear and plain language the progress stages, with progress payments to be made following completion of the stages; or
 - b. in the case of progress payments for labour and materials in respect of work already performed or costs already incurred –
 - i. provision that a claim be supported by invoices, receipts or other reasonably necessary documents; and either
 - ii. payment intervals fixed by the contract; or
 - iii. payments specified by the contract to be on an 'as invoiced' basis.

Note: the SOP Act does not apply to properties in which the contracting party intends to reside. Accordingly, the progress payment requirements don't apply to remedial works arranged by schemes for common property, but may apply to works to lot property in single residences that are not an investment property.

Note: If non-compliant contracts are signed or progress payments are demanded under a non-compliant contract then contractor licence holders face fines of up to \$110,000 for a corporation or \$22,000 for an individual

4. A statement that the contract may be terminated in the circumstances provided by the general law must be included.

Note: if this requirement is not met contract licence holders face a fine of up to \$8,800 for a corporation or \$4,400 for an individual

5. For contracts over \$20,000 a new consumer checklist must be included.

Note: if this requirement is not met contractor licence holders face a fine of up to \$8,800 for a corporation or \$4,400 for an individual

6. For contracts over \$20,000 there must be no term that provides that residential building work under the contract was taken to have commenced prior to the residential building work being performed on the land.

Note: if this requirement is not met contractor licence holders face a fine of up to \$8,800 for a corporation or \$4,400 for an individual

7. The mandatory terms set out in Part 1 of Schedule 2 to the Act must be included for contracts to do residential building work.

Note: if this requirement is not met contractor licence holders face a fine of up to \$8,800 for a corporation or \$4,400 for an individual

8. The wording of the statutory warranty set out in section 18B(a) of the Act has changed so that a warranty must be provided that work will be performed with due care and skill and in accordance with the plans and specifications set out in the contract.

Note: if this requirement is not met contractor licence holders face a fine of up to \$8,800 for a corporation or \$4,400 for an individual

9. The Fair Trading Consumer Guide published by Fair Trading NSW which must be included in residential building contracts will be updated from 1 March 2015. Fair Trading NSW has published a preview of the March 2015 update on its website ([Consumer Building Guide](#)) and has stated that while builders should use the updated guide it will not take any enforcement action against builders who use older version of the guide during the first half of 2015.

Note: if this requirement is not met contractor licence holders face a fine of up to \$4,400 for a corporation or \$2,200 for an individual— although note Fair Trading NSW will not bring enforcement proceedings where 2014 version of the guide is used in the first half of 2015.

Key takeaways

- Residential building contracts must comply with new requirements from 1 March 2015.
- Statutory warranties are now implied into subcontracts.
- The maximum deposit for residential building contracts has increased to 10%.
- Non-compliant contracts may lead to significant fines for builders.
- A consumer checklist is now required for contracts over \$20,000.

****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.*

Prepared by Bannermans Lawyers
2 March 2015