

A Loophole to 4 Extra Years on an Owners Defects Warranty?

The statutory warranty period for “minor defects” under the Home Building Act 1989 (“HBA”) is only 2 years.

However, in a recent case, *Hutching v Hope* [2019] NSWCA 59, the Tribunal’s Appeals Panel highlighted the distinction between the limitation periods for statutory warranties, and the limitation period for breach of contract – which is 6 years from the date the cause of action arises.

Therefore, if a contract contains terms identical to the statutory warranties the Owners may be able to sue for either damages with respect to “minor defects” within the 2 year statutory basis, or the same “minor defects” within 6 years on a breach of contract basis. It should be noted that NCAT only has jurisdiction for claims brought within 3 years, so it may be necessary to file with the courts.

The risk that statutory warranties will also become contract terms is increased by subsection 7(2)(f) of the HBA, which requires that applicable statutory warranties be expressly incorporated into residential building contracts. Careful contract drafting is required to avoid unwanted consequences.

The two main standard form contracts put out by builders’ organisations attempts to restrict the contract inclusion of the warranties to their statutory form, and therefore retain only the statutory liability period for “minor defects” by drafting thus:

The Housing Industry Association (HIA) form prefaces the warranties with the words:

“To the extent required by the Home Building Act”

The Master Builders Association (MBA) BC4 form uses the following preface:

“Pursuant to s.18B of the Home Building Act 1989 ...”

The more consumer friendly NSW Fair Trading form merely uses “Statutory Warranties” as a subheading to the warranties, but notes:

“These warranties do not in any way reduce or limit the contractor’s obligations in relation to workmanship, materials, completion or other matters specified in Clauses 2 and 3 or elsewhere in this contract. No provision of this contract can reduce, restrict or remove these statutory warranties.”

The effect of these qualifications is yet to be tested in either the courts or a relevant tribunal. The HIA and MBA forms probably do enough to ensure the contract does not offer anything beyond the statutory warranties. However, references to clauses 2 and 3 in the Fair Trading proviso point out

that there will normally be other clauses, which whilst not identical to the warranties may nevertheless cover a claim for defects within 6 years.

For owners, the ideal situation is to draft contracts so that the warranties appear without qualification and without references to statutory provisions.

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