

Owners Beware: Jurisdictional Problems with Agreements to Extend Statutory Warranties!

Bannermans Lawyers have for some time been warning Owners to be wary of agreements offered by builders and developers to extend Home Building Act (“HBA”) warranties, to stave off legal proceedings for defective work (sometimes referred to as “standstill agreements”).

A recent NCAT decision highlights to reason why such agreements can leave Owners high and dry when it comes to enforcing such warranties. In *Vella v Mir* [2019] NSWCATAP 28, the Tribunal’s Appeals Panel explained the jurisdictional problems involved, starting with the source of its jurisdiction as set out at s.48K of the HBA:

(7) The Tribunal does not have jurisdiction in respect of a building claim arising from a breach of a statutory warranty implied under Part 2C if the date on which the claim is lodged is after the end of the period within which proceedings for a breach of the statutory warranty must be commenced (as provided by section 18E).

It is a mistake to think that parties can extend the jurisdiction merely by an agreement between themselves:

“[47] Jurisdiction is not conferred on the Tribunal by the consent of the parties or by the failure of a respondent to raise the issue of jurisdiction. The Tribunal must determine whether it has jurisdiction to consider and determine an application. In Australian Education Union v Lawler [2008] FCAFC 135 the Court held:

It is well-established that there will be no estoppel against an attempt by a party to hold a public authority or official within the relevant designated statutory jurisdiction or other limits.” [Emphasis Added]

The onus is on an applicant to establish that the Tribunal has jurisdiction to hear and determine a claim. In building defects cases, that applicant will be building owners, who will likely find that a mere agreement to extend existing statutory warranties will fail before the Tribunal.

The safest way for Owners to protect their warranties is to commence legal proceedings within time. Failing that, a new contract – to perform identified rectification work needs to be put in place – one which will give rise to new statutory warranties and invoke NCAT’s jurisdiction.

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