Home Building Amendment Bill 2011: What Does It Mean For You?

The New South Wales Government's latest round of amendments to the Home Building Act 1989 has zeroed in on strata practices in building defects claims. Such claims are now more complicated and require specialist assistance more than ever.

This paper briefly comments on some aspects of the following;

1. The rights lost on and from 25 October 2011.
2. Urgent action required to preserve rights.
3. Changes to building contracts from 1 February 2012.
4. Changes to home warranty insurance from 1 February 2012.
5. The future for managing building defects claims.

Strata Landscape

Strata building defects claims are often pursued very slowly and not always in the right direction for reasons including

1. Schemes not knowing who all the relevant parties are, such as, the home warranty insurer, builder and developer.
2. Schemes usually move at a glacial speed and take action at the last minute due to lack of organisation, expertise and a general reluctance to spend money unless absolutely necessary.
3. Uncertainty and confusion within schemes as to who should be doing what.
4. Builders, developers and insurers are often responding to defects claims more than 7 years after completion, which is part of the drive for the loss of rights mentioned below.

Rights lost on and from 25 October 2011

The amendments, which are the first for this sector from the newly elected government, seem to have been rushed through parliament. One wonders whether it was intentional and how these amendments promote the advertised outcome of encouraging building in New South Wales, which partially depends upon consumer confidence in new units. The rights lost from 25 October 2011 are explained below.

- In any matter where proceedings were not commenced prior to 25 October 2011, the time available to notify and make an insurance claim or commence proceedings against builders, developers or subcontractors has probably been significantly reduced. The new definition of completion is unhelpful. The only certainty is that it will tend to bring forward the limitation dates and schemes will not know what those dates are. The new definition is as follows.

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"3B Date of completion of residential building work

1. The completion of residential building work occurs on the date that the work is complete within the meaning of the contract under which the work was done.
2. If the contract does not provide for when work is complete (or there is no contract), the completion of residential building work occurs on **practical completion** of the work, which is when the work is completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose.
3. It is to be presumed (unless an earlier date for practical completion can be established) that practical completion of residential building work occurred on the earliest of whichever of the following dates can be established for the work:
    a. the date on which the contractor handed over possession of the work to the owner,
    b. the date on which the contractor last attended the site to carry out work (other than work to remedy any defect that does not affect practical completion),
    c. the date of issue of an occupation certificate under the Environmental Planning and Assessment Act 1979 that authorises commencement of the use or occupation of the work
    d. (in the case of owner-builder work) the date that is 18 months after the issue of the owner-builder permit for the work.
4. If residential building work comprises the construction of 2 or more buildings each of which is reasonably capable of being used and occupied separately, practical completion of the individual buildings can occur at different times (so that practical completion of any one building does not require practical completion of all the buildings).
5. This section applies for the purposes of determining when completion of residential building work occurs for the purposes of any provision of this Act, the regulations or a contract of home warranty insurance.

- For first resort insurance, claims now need to be made during the period of cover. Schemes have lost the right to notify the insurer within the period of cover and then make a claim after the period of cover (subject to the grace period for first resort claims discussed below).
- For last resort insurance where the builder dies, disappears or becomes insolvent prior to the last 6 months of the period of cover, claims now need to be made during the period of cover. Schemes have lost the right to make a claim outside the period of cover if the builder died, disappeared or became insolvent prior to the last 6 months of the period of cover. The lack of a grace period for this is either unintentional or disgraceful
- For last resort insurance, if the builder does not die, disappear or become insolvent prior to the last six months of the period of cover, the scheme can make a claim after the period of insurance but will not be entitled to indemnity unless it "diligently pursued" enforcement of the statutory warranties. We query whether this amendment is void for inconsistency with section 54 of the Insurance Contracts Act 1984 (C'th).
- For insurance policies issued under the Home Building Regulation 2004 where proceedings have not been commenced against an insurer by 25 October 2011, schemes have lost the right to deemed notice within time for losses which are directly and indirectly related to defects notified within time.

The same right may have been lost for policies issued under the earlier Regulation where proceedings had not been commenced against the insurer prior to 25 October 2011.

- Schemes may need to check policies to ensure that they have not lost the right to make insurance claims more than 10 years after completion of the works regardless of the circumstances, such as, the builder intentionally delaying the defect proceedings or winding up proceedings.
- Where an insurance claim was not made by 25 October 2011, schemes have lost the right to rely on notifications where notifications do not sufficiently specify the nature and circumstances of the loss.
- Certain developers have lost the right to make home warranty insurance claims due to the types of permitted excluded beneficiaries being expanded.
- Where proceedings have not been commenced, by way of clarification, land-owning developers have lost the right to avoid their statutory warranty liabilities by not being party to a building contract.
- Where proceedings have not been commenced, by way of clarification, builders and developers have lost the potential right to rely upon proportionate liability.

Urgent Action Required

In respect of the rights taken away, the New South Wales Government has allowed two 6 month grace periods which traverse the Christmas Period. However, as mentioned above it has imposed significant over-arching obligations which will have a very significant impact on consumer rights in the years to come. These are explained below.

1. For first resort insurance, if a claim has not been made before 25 October 2011 but the loss was "properly notified" to the insurer during the period of cover, the scheme may make the claim before 25 April 2012 (6 month grace period).
2. For last resort insurance, where notification of the nature and circumstances of the loss has been made other than by written notification, schemes must notify in writing before 25 April 2012 (6 month grace period in relation to non-written notification). This has very limited application, as the vast majority of notifications are made in writing.
3. A major over-arching feature for schemes who may seek to rely upon last resort insurance outside the 2 and 6 year periods of cover (if the builder does not die, or become insolvent prior to the last 6 months of the relevant period of cover) is the need to establish that the scheme has "diligently pursued" the enforcement of the statutory warranties from when it ought to or did become aware of the defect(s). This will have a huge impact for those schemes given the usual strata landscape described above.

The term "diligently pursue" is not yet defined. However, the amendments contemplate that it will be defined at some time in the future.

Speculating, we anticipate that the diligent pursuit requirement will not be met where:

a. Action was not taken because the identity of the builder, developer or insurer was not known.
b. Motions, advice or investigations are deferred:
    A. to protect relationships with the builder or developer; or
    B. because the developer was still in control or influential at the time; or
    C. to continue to allow the builder to pretend to offer to return to site to rectify over an unreasonable period of time; or

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D. to appease individuals who:
    i. do not want to spend the money; or
    ii. are not affected personally;

c. Because the members of the scheme are too busy at this point in time to deal with the issues; or
d. Because the scheme does not know what to do.

Speculating again, we anticipate that the diligent pursuit requirement would be met where a scheme:

a. Promptly investigates, seeks advice and pursues defects as soon as they become apparent;
b. Actively pursues defect claims by commencing proceedings and efficiently putting on all of its evidence against builders and/or developers;
c. Complies with Tribunal or Court timetables where reasonably practicable;
d. Obtains evidence in reply and presses matters to settlement or hearing in a timely manner; and
e. Addresses any issues that arise during proceedings in a diligent and timely manner.

Changes to building contracts entered into from 1 February 2012

A huge concern for schemes created in the future, where the building contract was entered into after proclamation (anticipated 1 February 2012), is that the statutory warranty periods for claims against the builder, developer or sub-contractor will be reduced from 7 years for all defects to 2 years for non-structural defects and 6 years for structural defects. Where a defect becomes apparent in the last six months of the warranty period, then there will, for that defect only, be six months to commence from when the defect becomes apparent.

Having the building contract is critical for ascertaining whether the warranty period is 7 years from completion or 2 years for non-structural and 6 years for structural defects. This is ridiculous as it is very rare for schemes to have a copy of the contract and it is not specifically identified as a document the developer must provide at or before the first annual general meeting. Many schemes will be in a position where they will not know when "completion" was or how many years after "completion" they have to commence proceedings.

Many typical and important defects in future strata schemes will have 2 year warranties. They will include most of the usual fire safety defects prevalent in strata buildings due to poor certification practices and the limitations of annual fire safety statement inspections, despite the usual expectations of schemes that they have been properly investigated and reported on annually. Defective membranes in shower trays, another common problem will probably also have a 2 year warranty.

The convoluted and vague definition of "structural defect" from the Home Building Regulation 2004 is extracted below. We expect the courts will at some point clarify how it should be applied.

71 Meaning of "structural defect"

1. For the purposes of section 103B (2) of the Act, **structural defect** means any defect in a structural element of a building that is attributable to defective design, defective or faulty workmanship or defective materials (or any combination of these) and that:
    a. results in, or is likely to result in, the building or any part of the building being required by or under any law to be closed or prohibited from being used, or

b. prevents, or is likely to prevent, the continued practical use of the building or any part of the building, or
c. results in, or is likely to result in:
    i. the destruction of the building or any part of the building, or
    ii. physical damage to the building or any part of the building, or
d. results in, or is likely to result in, a threat of imminent collapse that may reasonably be considered to cause destruction of the building or physical damage to the building or any part of the building.

2. In subclause (1): **structural element of a building** means:
    a. any internal or external load-bearing component of the building that is essential to the stability of the building or any part of it, including things such as foundations, floors, walls, roofs, columns and beams, and
    b. any component (including weatherproofing) that forms part of the external walls or roof of the building

Schemes may need to become aware of and commence proceedings in relation to building defects within 2 years from completion. That may be difficult noting that 2 years from completion will almost always be less than, and sometimes much less than, 2 years from the date of strata plan registration.

In line with construction cost increases, the threshold for when home warranty insurance is required and where a cooling-off period applies will be increased from $12,000 to $20,000. There seems to be the possibility of optional insurance for works below $20,000.

There are less rigorous *"short form"* contract requirements for works between $1,000 and $5,000 which must:

1. Be in writing and dated and signed by or on behalf of each of the parties;
2. Contain the names of the parties including the contractor's licence number;
3. Contain a description and any plans and specifications for the work; and
4. Contain the contract price if known.

Changes to home warranty insurance from 1 February 2012

For contracts of insurance entered into after proclamation (anticipated 1 February 2012):

1. The minimum amount of home warranty insurance cover will be increased from $300,000 to $340,000 per dwelling in line with increases in construction costs.
2. Insignificantly, the excess for making a home warranty insurance claim will be reduced from $500 to $250.

The future for managing building defect claims

As noted above, this area has now become vastly more complex. Schemes need to react quickly to the changing landscape.

1. Schemes should immediately consider urgently obtaining specialist advice on what steps may need to be taken in relation to the new time limit issues, grace periods expiring on 25 April

2012, re-issuing of notifications, making claims, commence proceedings etc arising out of these amendments. The following draft motion may be suitable (depending on the circumstances):

The executive committee/owners corporation resolves to seek legal advice in relation to time limits, required steps and relevant parties for any building defects claims.

Note (not part of motion): The owners corporation has a mandatory obligation to repair and maintain the common property including building defects which can be varied by law. If building defects exist then another party may be held accountable to rectify or pay the loss, such as, builders, developers, certifiers, Home Warranty insurers, contractors, subcontractors, designers or engineers.

There are key dates and steps required to be undertaken in order to claim for the loss or rectification. Such time limits, without limitation, range from immediately to 45 days, 6 months, 12 months, 2 years, 6 years, 7 years and 10 years, starting from different points in time. Failure to comply with these time limits may result in denial of the claim or liability or reduction in the amount otherwise ordinarily recoverable.

It is not part of the strata managing agent's agreement with the scheme to provide legal advice on building defects nor is it sufficiently qualified to do so.

2. Schemes should have a procedure for identifying defects and commencing proceedings if necessary within the first 2 years. Consider an audit approach rather than ad hoc responses to complaints when they arise.
3. Schemes must ensure that the development documentation that was to be handed over at the first annual general meeting, but was not, is promptly obtained.
4. Remember that a scheme with last resort insurance suing a builder cannot let the matter drag out. If the scheme has not made the builder insolvent and then made the insurance claim within 10 years, it will need to check the terms of the insurance to check that the insurance rights have not been be lost.
5. Be aware of the new short form building contracts for works between $1,000 - $5,000 from 1 February 2012.
6. Schemes should consider obtaining specialist advice on drafting new construction/rectification contracts so as to best protect the scheme's position.

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