# Building Defects: Who Pays?

## Overview of Building Defects in Strata Complexes

Building defects represent a significant challenge for strata owners in New South Wales, often emerging long after construction is completed. A study found that approximately 85% of strata owners face costly building defects, primarily due to factors such as poor construction practices, non-compliance with regulations, and the use of inferior materials. These defects can adversely affect both the safety and value of properties. Legal protections exist under the Home Building Act 1989, but they do not fully safeguard owners, especially in older buildings. Strata owners must remain vigilant and proactive in identifying and managing potential defects to mitigate long-term risks and costs.

## Home Building Act 1989

### Legal Protections for Owners

The Home Building Act 1989 aims to protect residential property owners from defective building work by mandating warranties in all contracts for residential building work. Key features include:

- Warranties: These warranties ensure that construction work is performed with due care, skill, and in accordance with specified plans. They are automatically included in contracts, even if not explicitly stated.
- Transferability: Warranties benefit future property owners, including those in strata schemes.
- Duration: Warranties for building defects last between two and six years from the completion date, depending on the type of defect to commence your litigation. After this period, recovery rights are forfeited, however there are a couple of technical extensions that we suggest you get some advice on prior to relying upon, as difficulties are frequently associated.
- Claims Process: If defects are proven (often requiring expert evidence), builders or developers may find it difficult to defend claims unless they can show the defect arose from a design fault.
- Tribunal Claims: Disputes under the Home Building Act 1989 involving sums less than $750,000 are handled by the NSW Civil and Administrative Tribunal (NCAT), which typically orders rectification rather than monetary damages.

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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- Builder Insolvency: A significant risk exists that owners may not recover losses if builders or developers become insolvent.

## Home Owners Warranty Insurance

To address builder insolvency risks, residential building contracts must include Home Owners Warranty Insurance, which serves as a safety net recovering costs when builders cannot complete work or rectify defects. This insurance is effective only when:

- The builder becomes insolvent, dies, disappears, or has their license suspended due to non-compliance with an NCAT order.
- Owners must promptly notify insurers of defects (even when a claim has not been made); late notifications may lead to denial of coverage.

## Strata Schemes of Four or More Storeys

For strata buildings of four or more storeys, Home Owners Warranty Insurance are not required since 2003. However, since January 1, 2018, a Strata Building Bond and Inspection Scheme (SBBIS) has been implemented by NSW Fair Trading. This scheme mandates that developers lodge a bond equivalent to 2% of building costs with NSW Fair Trading. To recover this bond:

- Developers must obtain defect reports from approved consultants within specified timeframes.
- If defects are identified during final inspections, bond funds can be used for rectification costs.

## Decennial (ten year) liability insurance (DLI)

In the alternative to the SBBIS, in the last 12 to 18 some developers opted to obtain a decennial (10 year) insurance policy in lieu of the 2% bond scheme. Only a small take has occurred to date as it may be relevant in the medium term for 4 or more storeys buildings.

## Design and Building Practitioners Act 2020

The Design and Building Practitioners Act 2020 (NSW) expands potential negligence claims related to building defects. Key aspects include:

- Duty of Care: All parties involved in construction owe a duty of care to avoid causing economic loss due to defects. This duty extends beyond builders to designers and project managers.
- Professional Indemnity Insurance: Many construction professionals carry insurance that can provide financial recourse for successful claims.
- Limitation Period: Owners have six years from when a defect (or defects) becomes first apparent to file claims.



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- Retrospective Application: The duty of care applies retroactively to defects identified after 2014 however claims are subject to a 10 year long stop limitation period.
- Exemptions: Certifiers are exempt from this duty under the new legislation, leading owners to consider common law negligence claims against them.

## Who Pays? – The Owners Pay!

Ultimately, owners bear the financial burden of rectifying building defects. The legal and insurance frameworks do not offer complete protection; many owners lose recovery rights by failing to act within required timeframes provided under the relevant legislative frameworks.

### Proactive Measures for Strata Owners

Strata owners should take several proactive steps to manage potential building defects effectively:

1. Obtain Early Legal Advice: Understand warranty expiration dates based on when building work was completed.
2. Verify Insurance Coverage: Confirm whether Home Owners Warranty Insurance is in place and identify the insurer.
3. Monitor Bond Requirements: Ensure compliance with the Strata Building Bond and Inspection Scheme if applicable.
4. Conduct Building Reports: Obtain independent building reports well before warranty expiration—typically six months prior.
5. Document Defects: Keep detailed records of reported defects by lot owners, including photographs and repair documentation.
6. Communicate with Builders/Developers: Provide defect reports before warranty expiration and demand rectification responses.
7. Initiate Legal Proceedings if Necessary: If builders fail to address significant defects before warranties expire, commence legal proceedings promptly to preserve recovery rights.

By following these measures, owners can better navigate the complexities of building defect claims and protect their investments against potential losses. Seeking expert legal advice is crucial whenever uncertainties arise regarding rights or obligations under these frameworks.

## Bannermans Contact

For building defects advice or enquiries please contact Bannermans on 02 9929 0226 or at enquiries@bannermans.com.au. Our specialist team of building defect lawyers can help guide owners through the defect rectification process and provide preliminary advice to understand their recovery rights. Before undertaking this process, if the committee have questions regarding their defects or the process involved Bannermans would be happy to offer a 15-minute complimentary consultation with one of our defects experts.



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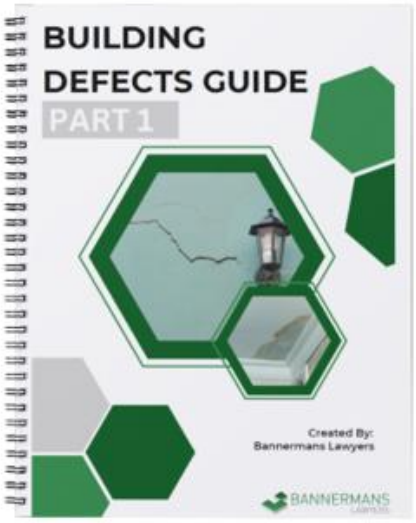
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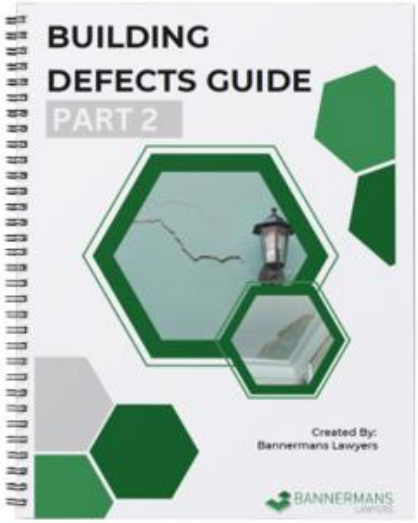
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### Key takeaways

- Approximately 85% of strata owners in NSW face costly building defects due to poor construction practices.
- The Home Building Act 1989 provides warranties for construction work, lasting between two and six years.
- Home Owners Warranty Insurance is mandatory for residential building contracts to protect against builder insolvency.

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P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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- Strata buildings of four or more storeys are not required to have Home Owners Warranty Insurance since 2003.
- The Design and Building Practitioners Act 2020 expands potential negligence claims related to building defects.

****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**
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