

Fire Safety Upgrade Orders

Council, or other consent authority, has the power to issue orders to the owner of a building requiring them to do such things as are necessary to promote adequate fire safety in the building under Sections 9.34, 9.35, 9.36 and Schedule 5, Parts 1-3 of the Environmental Planning and Assessment Act 1979 (NSW).

Orders can include that work must be completed to bring the building into compliance with the Building Code of Australia and that the property must not be occupied until that time. The person issuing the order will set a timeframe for compliance with the order and may also require that the owner pay the costs associated with monitoring compliance with the order.

In a number of cases, orders issued by council have included unnecessary or unreasonable requirements about the nature and extent of the work required and the time period for compliance. Accordingly, it is important for owners to be aware of their rights in relation to such orders.

Most importantly, owners should be aware that before an order is issued the person issuing it must send a “notice of intention” to the owner including details of what the order will require and the time for compliance. Following receipt of the notice of intention, the owner can make representations to the issuing person regarding the proposed content or timeframes in the orders which the issuing person is required to consider.

Once a fire safety upgrade order is made, an owner may challenge all or part of an order in the Land and Environment Court within 28 days of receipt of the order.

What this means is that if you receive a notice of intention to issue a fire order, you should immediately consider whether to obtain expert advice on the proposed terms of the order, especially if you believe that the orders relate to building defects and not lack of maintenance. In this way you may:

- avoid the costs associated with compliance with a fire order in circumstances where the work is unnecessary;
- minimise the risk of being unable to comply with an order in circumstances where the time for compliance is unreasonable; and
- have the necessary evidence to claim the cost of compliance from the person responsible for the defects the subject of the order.

Identifying defects within warranty periods

Where a residential property is constructed that contains defects, the owner will usually try to have the original builder either return to rectify those defects or pay the cost of having another contractor rectify the defects.

Regardless of whether the owner contracted directly with the builder or bought the property from a developer, the owner’s simplest course of action will usually be to claim against the builder (and developer) for breach of the statutory warranties in the Home Building Act 1989 (NSW) (Act) which are implied into almost every residential building contract.

However, there are strict time periods in which proceedings can be commenced ranging from 2 years to 10 years. These time periods are complex and depend on many things including the nature of the defects and the date the construction contract was entered. Legal advice should be sought in relation to these time periods as they are sometimes difficult to ascertain and the law in this area changes regularly.

Many types of defect can take months if not years to become apparent to an owner, thus putting the owner outside the periods in which to commence proceedings before they are even aware of the defects. One way to avoid this situation is for owners to arrange expert inspections of their property once the relevant time periods have been ascertained to ensure defects are identified and that statutory warranty claims can be made within time against the builder and developer if there are defects.

Claim against those who have caused missed time limits

The good news for an owner who becomes aware of defects in a property after the time limits for a statutory warranty claim against the builder or developer has expired is that there may be another way to recover the cost of the necessary defect rectification work.

These may include claiming against the certifiers of the property at the time of construction and, where the defects are in the fire services, the certifiers engaged to provide annual fire safety statements for the building. The key issue will be whether the terms of the certificates issued were misleading and deceptive and/or in breach of the contract between the owner and the certifier.

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