BUILDING DEFECTS GUIDE

PART 1



Created By:
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ABOUT THE AUTHOR



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David Bannerman is the principal of Bannermans Lawyers, Sydney's leading Strata Law firm, providing specialised legal services for the Strata industry, the Development industry, the Construction industry and the insurance industry.

He is an Accredited Property Law Specialist with the Law Society of New South Wales and has over 15 years extensive experience in all aspects of property law and building litigation.

David has a keen interest in education and training. He demonstrates his commitment by regularly presenting education seminars to lawyers, experts, certifiers and strata managers. Additionally, David is a Director of Strata Community Australia (NSW) and Chairman of the Ethics Committee.

His experience of the industry and in the courts enables him to identify issues and provide solutions at the highest level.

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WHAT IS A BUILDING DEFECT?

Building defects are an ever-present risk. Building defects are not always apparent. Very often they are latent, and only become a problem years after the construction work. It is essential that all strata owners manage this risk by understanding the potential avenues for recovering such costs, and the pro-active management steps necessary to protect any such rights.

WHAT IS A "MAJOR" DEFECT?

"**major defec**t" means-

(a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause--

(i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or

(ii) the destruction of the building or any part of the building, or

(iii) a threat of collapse of the building or any part of the building, or

(b) a defect of a kind that is prescribed by the regulations as a major defect, or

(c) the use of a building product (within the meaning of the Building Products (Safety) Act 2017) in contravention of that Act.

Note : The definition of "major defect" also applies for the purposes of section 103B (Period of cover).

"major element" of a building means-

(a) an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or

(b) a fire safety system, or

(c) waterproofing, or

(d) any other element that is prescribed by the regulations as a major element of a building.

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WHAT IS A "MINOR" DEFECT?

Unlike the definition of “major defect”, the Home Building Act 1989 (HBA) does not define the terms “minor defect” or “non-major defect”.

A non-major defect can be interpreted as defects that do not make the building uninhabitable or dangerous to live in. They are usually simple or cosmetic that affect how a lot or common property may look or function.

Non-major defects can include (but not limited to):

- Thin cracks;
- Corrosion;
- Blemishes;
- Wall dents;
- Uneven finishes;
- Functionality of fittings and fixtures; and
- General deterioration.

A non-major defect is any defect that is not a major defect.

WHO IS RESPONSIBLE?

During the statutory warranty period under the HBA, both the original builder and developer are jointly and severally liable to rectify the defect(s) at their own cost. A “developer” is defined under section 3A and is essentially the owner of the land at the time of the development.



WHAT HAPPENS IF THE DEFECT IS ON COMMON PROPERTY?

Notwithstanding the statutory warranties imposed under the HBA, Owners Corporations will rarely avoid the cost of rectifying building defects to the common property. Unfortunately, the various legal and insurance avenues available do not provide strata owners with a complete safety net.

However, there are various options that should first be explored. Some of these include:

- Establishing whether Home Owners Warranty Insurance is applicable for the construction of the building;
- Obtaining confirmation from NSW Fair Trading that the developer has lodged the required Strata Building Bond and Inspection Scheme and that it applies;
- Lodging a complaint with NSW Fair Trading against the builder and/or developer;
- Checking the statutory warranties for rectifying defects with the builder and developer;
- Entering into a contract with the builder and/or developer to rectify building defects; and
- If necessary, commencing legal proceedings.



DOES IT DIFFER IF I LIVE IN A HOUSE OR IN STRATA?

The statutory warranties apply to “residential building works”, so owners in houses or units have the same legal recourse under the HBA.

The only difference between claims in strata and non-strata include:

- Lot owners have legal recourse in strata only for lot property defects.
- Lot owners can make a complaint about the builder to NSW Fair Trading about common property defects but cannot commence proceedings for those common property defects.
- An Owners Corporation has legal recourse only for common property defects.
- There is no distinction between lot property and common property in non-strata properties.
- An owner of a house will usually have a contract with the builder whereas owners in strata will usually not. Therefore, owners of non-strata properties will also have recourse for breach of contract.



WHAT IS A STATUTORY LIMITATION PERIOD AND HOW DO I WORK IT OUT?

One of the key areas where owners need guidance is determining what their rights are and what hindrances are present to obtaining rectification of defects.

Consumer protection is set out in the NSW Home Building Act 1989, which has undergone numerous amendments over the years in relation to statutory warranty periods which has the result of creating a potential minefield for lot owners and owners corporations to navigate.

Owners corporations should always seek guidance in relation to the statutory warranty periods that are applicable to enforcing their rights. The present state of the NSW Home Building Act 1989 sets out two statutory warranty periods which may potentially apply to residential buildings in NSW:

- 2 years from completion (plus 6 months where a defect becomes apparent during the last 6 months of the warranty period); or

- 6 years from completion (plus 6 months where a defect becomes apparent during the last 6 months of the warranty period).

The
These issues are further explored in our article Building Defects Overview.



WHAT IS THE PROCESS OF RECTIFYING DEFECTS?

1. Bannermans providing advice and determining who is responsible for the defect and the statutory warranty period.
2. Bannermans attempting to settle and resolve the defects claim prior to litigation.
3. As a last resort Bannermans to commence litigation to resolve defects.

SHOULD NEW OWNERS CORPORATIONS OBTAIN BUILDING DEFECTS REPORTS?

Yes. Whilst defects in some cases are easily identifiable, what is often the case is that defects are not known until they manifest physical signs or rectification efforts are undertaken and expose further issues.

If the defect can be proven (usually by expert evidence) then historically it is difficult for a builder or developer to defend a claim. The most notable defence is if the defect arises from a design fault, which the builder drew attention to.

Bannermans Lawyers encourages owners corporations to keep records of building defects reported by lot owners. If urgent repair is required keep a detailed record of the defect and related repairs, including photographs.

Seeking to obtain a building defect report serves two overall functions; it identifies defects that owners may not be aware of and pinpoints the rectification work necessary and potential costs to rectify these defects. Obtaining a building defect report sooner rather than later will allow owners corporations to take appropriate action within the relevant statutory periods.

These issues are further explored in our article Should New Owners Corporations Obtain Building Defects Reports?

WHERE DOES INSURANCE COME INTO THE PICTURE?



Building contracts for residential building work are required to include Home Owners Warranty Insurance where the strata scheme building is three storeys or less. The insurance is intended to cover the owners for the costs of rectifying defects.

Where claims are being made by the Owners Corporation against a builder or developer, it is important to notify the insurer of the claim, insurance may be denied in circumstances where notice is not given or notice is out of time.

At present, Home Owners Warranty Insurance is provided by a government instrumentality, iCare, providing a maximum cover per dwelling of:

- $300,000 if issues before 1 February 2012;
- $340,000 for all other policies.

If the strata scheme or building is over four or more storeys, the Strata Building Bond and Inspection Scheme may apply, which commenced in 1 January 2018 to provide funds to the owners for remediation of defects. This is explained further below.

A strata's insurance policy for the building does not cover building defects. It is only the Home Owners Warranty Insurance that covers building defects.

Home Owners Warranty Insurance is last resort insurance. The circumstances that will give rise to claims under Home Owners Warranty Insurance are in the event of the death, disappearance or insolvency of the builder.



IS THERE A WAY TO PREVENT OR STAY ON TOP OF THIS?

We suggest the following actions to be undertaken to avoid losing recovery rights within the required time periods:

- Obtain early legal advice as to the date on which building work was completed and recording and diarising the dates on which the warranty periods will expire.
- Establishing whether there is Home Owners Warranty Insurance, and if so identify the relevant insurer.
- If Strata Building Bond and Inspection Scheme applies, obtaining confirmation from NSW Fair Trading that the developer has lodged the required bond and diarising the dates for building reports.
- Lodge a complaint with NSW Fair Trading against the builder and/or developer.
- Keep a record of building defects reported by the lot owners. If urgent repair is needed, keep a detailed record of the defect and related repairs.
- Enter into a settlement agreement with the builder and/or developer.
- If all fails, commence proceedings.



WHAT HAPPENS IF A TENANT DOES NOT MAKE ME AWARE OF A DEFECT?

If your tenant does not make you aware of defects in your apartment, and the statutory warranty periods have expired, you cannot seek the rectification of those defects from the builder and/or developer under the HBA. This cost will likely be borne by you if it is a lot property defect or borne by the Owners Corporation if it is a common property defect.

Dependent on the terms of the tenancy agreement, a tenant usually has an obligation to notify the landlord of damage to the premises as soon as possible and if not notified and the damage was known to the tenant, the tenant may be liable for any amount of the damage that was caused because of the failure to notify.

However, owners should undertake their own due diligence and inspect their property to identify any potential building defects prior to the expiry of the statutory warranty periods.



WHAT HAPPENS TO MY TENANT IF A DEFECT IS FOUND?

Tenants have the right to reasonable peace, comfort and privacy when renting. The law restricts when and how often landlords, agents or their authorised persons can enter the property while it is rented. However, if a defect is found in the property it is reasonable to request access to the lot to inspect the defect to ascertain how it should be fixed and assess the damage.

Depending on the type of defect, your tenant may be asked to vacate the premises to allow the defect to be rectified. This scenario should include a reduction of rent or payment of alternative accommodation, which is a cost to be borne by you (if it is a lot property defect) or the Owners Corporation (if it is a common property defect).

WHAT DO I DO IF MY STATUTORY WARRANTY PERIOD HAS PASSED?

If the statutory warranty periods have expired, including the 6 month extension, you cannot make a claim under the HBA, but may be able to pursue a claim against a relevant entity under the Design and Building Practitioners Act 2021 for the carrying out of negligent building works.



ARE THERE ANY PROPOSED REFORMS THAT I NEED TO BE AWARE OF?

After years of rising concern about declining standards of residential property construction and narrowing of options available to strata owners corporations and lot owners in defective buildings, the NSW Government has passed reform legislation, the Design and Building Practitioners Act 2020 (NSW) ("DBP Act").

Some of the DBP Act commenced on 11 June 2020, we draw your attention to Part 4, which imposes a new statutory duty of care on builders and certain designers, manufacturers, suppliers and supervisors. This is a duty of care owed to current and future owners to avoid economic loss caused by defects in respect of certain buildings. The rest of the DBP Act is scheduled to commence later in 2021.

Under the DBP Act, specified parties owe a duty to current and future owners "to exercise reasonable care to avoid economic loss caused by defects ... in or related to a building for which the work is done and arising from the construction work".

The duty of care extends retrospectively to when the economic loss first became apparent within the 10 years before or after June 2020 and extends liability to persons carrying out construction work, designers, manufacturers & suppliers of building products and supervisors, coordinators and project managers of construction work.

On 1 September 2020 the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) ("Residential Apartments Act") commenced. In conjunction with the existing NSW Home Building Act 1989, these legislative instruments hope to create a more consumer friendly construction industry, and thus avoid high rise defect disasters such as Opal Towers and Mascot Towers.



ARE THERE ANY PROPOSED REFORMS THAT I NEED TO BE AWARE OF (CONTINUED)?

Whilst the DBP Act takes the big stick to building professionals in terms of processes and penalties, and the Residential Apartments Act does the same for developers, it seems that certifiers of building quality have escaped regulatory reform.

Under the Residential Apartments Act, the NSW Building Commissioner and his team, can be delegated by the Secretary of Consumer Affairs to enter building sites, inspect works and require the production of documents, if not satisfied those delegated may issue stop work orders or rectification orders.

Given the above, Bannermans Lawyers suggest lot owners and owners corporations with defects need to take legal advice about whether they may have claims under the recent reforms, even if they would previously have been out of time to pursue claims.

These issues are further explored in Bannermans Lawyers articles

Building Commissioners New Powers

Owners Given New Retrospective Rights to Claim Money for Defects



ARE THERE ANY UPCOMING LEGISLATIVE CHANGES THAT I NEED TO KNOW ABOUT

REFORMING BUILDING LAWS IN NSW - DRAFT BUILDING BILL 2022

The NSW Government plans on replacing the Home Building Act 1989 (NSW) altogether.

As a part of this plan, a draft Building Bill 2022 was issued for public consultation.

The consultation closed on Friday 25 November 2022. A final report from the NSW Government is yet to be issued.

Notably, the draft Building Bill 2022 proposes to expand the definition of 'developer' to include persons who facilitate home building work to be carried out on three or more self-contained dwellings, who are currently outside the definition of developer and proposes to replace the term 'major defect' with the term 'serious defect'.

These proposed new laws are available on Fair Trading NSW's website.

Reforming building laws in NSW



WHAT DO I NEED TO KNOW ABOUT THE BUILDING BOND SCHEME?

Builders and developers of new multi-storey buildings (defined as two or more separate dwellings which exceed three storeys in height) are exempt from having to obtain insurance under the Home Building Compensation Fund (Home Owners Warranty Insurance) under the NSW Home Building Act 1989.

This has led to circumstances, where owners of multi-storey buildings were unable to claim against the insurers, even if the defects are discovered within the statutory warranty period, when the builder or developer dies, goes missing, or becomes insolvent.

Division 3 (sections 207-211) of the SSMA introduced a building bond scheme for new multi-storey buildings from 1 January 2018.

The defect bond scheme applies to contracts for building works in the construction of new residential or part-residential (mix used) strata buildings entered into after 1 January 2018 and where there is no contract, building works in the construction of new strata buildings commenced on or after 1 January 2018.

The building bond must be provided prior to the issue of an occupation certificate. The amount of the building bond is to be 2% of the contract price of the building work. This sum is adjusted accordingly if the developer only performed part of the building work.

The owners corporation is able to claim the costs of rectification from the bond if the final occupation report identifies building defects, or if the owners corporation makes an application to the Department of Fair Trading with the consent of the developer.



WHAT DO I NEED TO KNOW ABOUT THE BUILDING BOND SCHEME (CONTINUED)?

However, the scheme is not faultless and Bannermans Lawyers are able to assist owners rights to claim from the builders and developers before the expiry of the statutory warranty period under the NSW Home Building Act 1989 if they suspect any discrepancies and cannot agree to rectify the defects.

These issues are further explored in our article:

Update On The 2% Bond Scheme.

HOW CAN MY STRATA MANAGER HELP ME?

Strata managing agents provide a broad range of services to their owners corporation clients, ranging from accounting and other administration to property repairs and maintenance. Their role frequently necessitates involvement in highly specialised areas.

Strata managing agents are a good point of call for information regarding the strata scheme and can be the first point of action in pursuing a defect claim against the builder or developer. Strata managing agents can also keep logs and diaries of repair items and past defects and information regarding statutory warranty periods.

Finally, strata managing agents are useful in liaising between the Owners Corporation and legal practitioners and are usually aware of the statutory warranty periods and the requirements under the Strata Schemes Management Act 2015 relating to building defects.

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WHAT HAPPENS IF THE PREVIOUS OWNER IGNORED THE DEFECT?

Unfortunately, a claim cannot be brought after the expiry of the statutory warranty periods even if you were not made aware of the defect. Depending on the terms of the contract, you may have a claim against the previous owner for breach of contract or another cause of action, however a prospective purchaser has an obligation to undertake their own due diligence of the property.

WHAT IF I DO NOTHING ABOUT IT?

Failing to properly deal with building defects can result in the diminishment of your property value, insurer's no longer offering cover and can also lead to further economic loss.

In the case of defects in strata, if outside the relevant statutory warranty period the defects will become the burden of either the lot owners (if lot property defects) or the Owners Corporation to rectify at their own expense.

Major defects can be expensive to rectify and can pose a serious threat if ignored. If major defects are left unattended, they can lead to the inability to use or inhabit the building, potential destruction of the building or serious threat of collapse. All these ramifications not only affect the value of your property but can also pose serious risk to your personal safety.



WHAT LEGISLATIVE INSTRUMENTS CAN BE RELIED UPON TO RECOVER FROM DEFECTS IN NSW?

- NSW Home Building Act 1989;
- Design and Building Practitioners Act 2020 (NSW);
- Strata Schemes Management Act 2015 (NSW), which governs the 'Strata Building Bond and Inspection Scheme'; and
- Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW).

These are further explored in ours article Building Defects: Who Pays?

HOW CAN WE HELP?

Bannermans Lawyers can provide you with the expert legal advice you need in relation to building defects as we understand that your home or investment property is one of your most important assets.

For a FREE 15 minute consultation on how we can help resolve your defects in a cost effective and efficient manner CLICK HERE.

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