BUILDER GONE BUST? A CRITICAL STEP FOR A SUCCESSFUL HOME WARRANTY INSURANCE CLAIM

Further to our article "Builder gone bust? Making the most of Home Warranty Insurance" we have noticed that many clients miss a critical step that cannot be rectified.

If an owner cannot claim upon home warranty insurance during the relevant period of insurance due to the builder not yet 'falling over', an owner must *"properly notify"* the home warranty insurer of the loss resulting from defects during the period of insurance. If an owner does not do that, the owner's right to claim upon the home warranty insurance later when the builder does 'fall over' will be lost.

Such a failure to notify a home warranty insurer is not something that can be cured by section 54 of the *Insurance Contracts Act 1984 (Cth)* if the failure to notify caused limited or no prejudice to the insurer. That is because such a failure to notify is seen as putting an owner's insurance claim outside the scope of the insurance cover. It is not just a matter of the owner not complying with a term of the insurance policy. That was recently confirmed in *Drummond v Gordian Runoff Limited ACN 052 179 647* [2024] NSWCA 239 in which the NSW Court of Appeal held that the insured could not rely on section 54 of the *Insurance Contracts Act 1984* (Cth) to dispute the insurer's denial of the home warranty insurance claim when the insurer was not notified within the relevant period of insurance under the *Home Building Act 1989 (NSW)*.

Icare has a template form for notifying loss to Icare. That form can be used but it is not mandatory to use that form. The form asks for a brief description of each defects and supporting documents if necessary. Great care should be taken when notifying loss to a home warranty insurer so that the insurer cannot later argue that it was not *"properly notified"* of a loss as the information provided did not provide enough information for the insurer to be on notice of the *"nature and circumstances of the loss"* (see s103BB(7) of the *Home Building Act 1989 (NSW)*).

Owners should also bear in mind that verbal notification of a loss to a home warranty insurer is not sufficient.

Another notification time issue

Most home warranty insurance policies allow the insurer to reduce its liability to an owner if the owner does not notify a loss to an insurer within 6 months of the loss being known or reasonably discoverable to the owner **and** the delay in notifying the insurer causes prejudice to the insurer.

It is unusual for an insurer to seek to reduce its liability on that basis. However, owners are always better off avoiding that risk and ensuring that they notify the insurer of each defect within 6 months of the defect being known or reasonably discoverable to the owner.

We hope that this helps owners or owners corporations with some of the critical steps for making a successful home warranty insurance claim.

if you need any assistance with a claim for a loss arising from residential building, please feel free to reach out to one of our construction team lawyers.

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Key takeaways

- Homeowners must properly notify their home warranty insurer of defects to maintain their rights to claim.
- Failure to notify within the relevant period can result in losing the right to claim, as confirmed by recent court rulings.
- Verbal notifications are insufficient; written notifications with detailed descriptions are necessary.
- Insurers may reduce liability if claims are not reported within 6 months of the loss being known.
- Using the Icare template for notifications is recommended to ensure proper communication with insurers.

****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.*

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