

HOME BUILDING ACT AMENDMENT: DECREASED LIABILITIES OR FAIRER PLAYING FIELD?



Home Building Amendment Act 2014 (HBAA) contains significant amendments that will affect all participants in the home building construction industry. Most amendments are effective from 15 January 2015, however, some amendments relating to contracts for residential building work will not take effect until 1 March 2015.

The most important amendments are:

- A new definition of defects (15 January 2015).
- Duties on beneficiaries of statutory warranties (1 March 2015).
- Statutory warranties now passed through to subcontractors (1 March 2015).
- Builders may rely on experts (15 January 2015).
- New completion dates for strata schemes (15 January 2015).

Defects – check your defect classification

The HBAA replaces the definition of ‘structural defect’ (limitation period of six years) with ‘major defect’. The definition of ‘major defect’ effectively increases the threshold needed for a defect to qualify for the six year limitation period and, as such, has the potential to decrease the limitation period from six to two years.

In order to qualify as a ‘major defect’, the defect must:

1. Be a defect in a major element of a building. A major element includes any internal or external load bearing component, fire safety system, waterproofing or any other major element as described in the regulations.
2. Be attributable to a defective design, workmanship, materials or a failure to comply with structural performance requirements of the National Construction Code.



The defences upon which a builder may rely to refute a claim for a breach of a statutory warranty have been expanded to include reliance by the builder on a relevant professional.

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3. Cause or be likely to cause inability to inhabit or use the building for its intended purpose, the destruction of (or part of) the building or threat of collapse of (or part of) the building.

Developers and purchasers should be especially wary if defects have been identified to ensure that the defects are properly classified and commence any action before the limitation period expires.

Duties of a beneficiary of a statutory warranty

A person suffering loss as a result of a breach of a statutory warranty will now have a duty to:

1. Mitigate their loss. There is no assistance as to what a beneficiary must do in order to 'mitigate' their loss.
2. Make reasonable efforts to notify the person responsible for the breach within six months after the breach becomes apparent.

3. Not unreasonably refuse access by the person in breach to gain access for the purpose of rectifying the breach.

While a failure of an owner of any of these duties is not fatal to an owner claiming a breach of statutory warranty, the court or tribunal may take into account any failure to comply with the above duties when making its decision in relation to a breach of a statutory warranty. In the interest of protecting any claim for a statutory breach, owners should ensure that they comply with these duties when they come into effect from 1 March 2015.

Application of warranties to all residential building contracts

From 1 March 2015, statutory warranties will be implied into all contracts for residential building work. This includes any subcontracts under which a principal contractor contracts with a subcontractor to do all or any part of the residential building works.

Builders' defences

The defences upon which a builder may rely to refute a claim for a breach of a statutory warranty have been expanded to include reliance by the builder on a relevant professional. A defence may be available if:

1. The instructions provided by the person for whom the work was being done was contrary to previous written advice provided by the builder.
2. The builder relied upon instructions given by a person who is a relevant professional who is independent of the builder (including an architect, engineer or surveyor, or a person who has expert or specialised qualifications in respect of residential building work).

Strata completion date

The statutory warranty periods commence on the date of completion of the relevant works. In the case of residential building work comprising the construction of a new building in a strata scheme, the date of completion of the works is the date that an occupation certificate is issued for the occupation and use of the whole building.

This extends the date from which the statutory warranty period begins for strata title property and provides additional time for owners corporations to ensure defects are identified and dealt with within the appropriate timeframes.

Conclusion

Construction industry participants should ensure that they review their contract terms to reflect the changes in legislation, and developers and owners should immediately reassess any current defect liability issues to ensure that they are not time barred.



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HFw's construction and property lawyers have specialist experience across all phases of large property development projects, from drafting and negotiating land access agreements, design and construction contracts, and financing arrangements as well as managing all facets of complex disputes. We assist a broad range of clients including builders, developers and owners in navigating and complying with regulatory regimes, both at State and Federal level.

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