RECENT CHANGES TO THE HOME BUILDING ACT

1. Introduction

The Home Building Act, 1989 (NSW) has been known as the Home Building Act since 1 May 1997 following the commencement of Building Services Corporation Legislation Amendment Act, 1996.

In the period since its introduction there have been numerous changes to the Act, some significant, roughly every 2 years.

As a result, it is particularly important to always pay regard to the transitional provisions and the Regulations, as provisions which have been repealed, even for some considerable time, can continue to have effect.

The amendments to the Act which I am discussing in this paper are those contained within the Home Building Amendment Act 2014 ("**amending Act**"), which was passed by NSW parliament on 28 May 2014 and received royal assent on 5 June 2014.

The amending Act subsequently came into effect in three stages: on 31 December 2014, 15 January 2015 and 1 March 2015 and will have a significant impact on all stakeholders in the building and construction industry.

It should be noted that the number of changes that have been made by the amending Act are considerable. The amending Act extends to some 50 pages. Accordingly, it is not viable to cover all of the changes in detail within the scope of this paper. As a result, this paper has only sought to deal with some of the more significant amendments.

2. Transitional provisions

The changes under the amending Act do not apply where proceedings were commenced in a court or tribunal before the commencement of the amendment. Nor do they apply to an insurance claim made before the commencement of the amendment under a contract of insurance.

Where a contract is entered into before the changes commenced (on 1 March 2015), the new requirements for the form of contract will not apply nor will the new duties of persons having the benefit of the statutory warranties.

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3. Licensing requirements

Under the previous Act, builders and tradesmen engaged in works with a contract value of less than $1,000 were not required to hold a building licence. From 15 January 2015 under the amending Act, that threshold has been increased to $5,000. However, as before, this threshold does not apply to specialist work such as plumbing, electrical work etc. for which a licence is always required.

4. Maximum Deposits (Section 8)

Under the existing Act, the maximum deposit for residential building work was 10% for contracts up to $20,000 and 5% for contracts greater than $20,000. From the commencement of the amending Act, a flat 10% will apply to residential building contracts of any value. Note that deposits beyond these amounts expose the contractor to heavy fines - $22,000 for an individual and $110,000 for a corporation.

5. Progress Payments (Section 8A)

The amending Act contains an entirely new provision dealing with progress payments.

Section 8A provides that, for other than a construction contract which is covered by the Building and Construction Industry Security of Payment Act, 1999 (NSW), a progress payment is authorised only if it is one of the following kinds of authorised progress payments:

- The progress payment of a specified amount or specified percentage of the contract price that is payable following completion of a specified stage of the work. That stage must be described in clear and plain language; or

- The progress payment for labour and materials in respect of work already performed or costs already incurred, including any margin, with all supporting documentation such as invoices, receipts etc.

This section applies to all contract with a value greater than $20,000. A person is not entitled to demand or receive payment of a progress payment unless the progress payment is authorised under this section.

Note that demanding or receiving progress payments other than in accordance with the above, exposes the contractor to heavy fines - $22,000 for an individual and $110,000 for a corporation.

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This amendment does not apply in respect of a contract entered into before the commencement of the amending Act on 1 March 2015.

6. Form of Contracts (Sections 7 and 7AAA)

Under s.7AAA of the previous Act, the threshold for when a 'small works' written contract was required was for work valued over $1,000. Under the amending Act, for contracts entered into after 1 March 2015 that threshold has been increased to contracts with a value greater than $5,000 but less than $20,000.

Under s.7 of the previous Act, the threshold for when a more detailed written contract was required was $5,000. Under the amending Act, for contracts entered into after 1 March 2015, that threshold has been increased to contracts with a value greater than $20,000.

The overall effect is that the more relaxed 'small works' written contracts will be used far more widely. These small works contracts provide less protection to the Owner in that there is no cooling off period, no mandatory contract price warnings, no requirements for checklists etc.

Section 7 of the amending Act imposes a number of other new minimum requirements:

- A maximum deposit of 10% (as discussed above);
- Progress payments (as discussed above);
- A termination statement to the effect that the contract may be terminated in the circumstances provided by the general law and that this does not prevent the parties agreeing to additional circumstances in which the contract may be terminated; and
- Changes to the statutory warranties (as discussed below)

Failure by contractors to enter into contracts after 1 March 2015 which comply with the amending Act may result in fines up to $110,000, jail for up to 12 months, suspension, cancellation or restrictions imposed on contractor licences as well as statutory bars to the recovery of payment due to the non-compliant contract. Accordingly, it is important that all builders and developers ensure that any new contracts that they enter into after 1 March 2015 take into account the amendments to the Act.

7. Statutory warranties (Section 18B)

Section 18B(a) has been modified such that whereas it previously provided that "*the work will be performed in a proper and workmanlike manner*", it now provides that "*the work will be done with due care and skill*". This change has been made so as to use language that is

consistent with the Australian Consumer Law. Otherwise, this change seems to be of no real practical effect.

Regardless, all form of contracts that are entered into after 1 March 2015 need to be updated to reflect this change in terminology so as to avoid the possibility of being fined.

8. Defects (Section 18E)

Prior to 1 February 2012, proceedings for breach of a statutory warranty had to be commenced within 7 years after the completion of the work to which it relates.

From 1 February 2012, until the amending Act came into operation, proceedings for breach of a statutory had to be commenced within 6 years in the case of a "structural defect", and 2 years in any other case.

Under the amending Act, the term "structural defect" has now been replaced, from 15 January 2015, with the term "major defect in residential building work" (**major defect**). The definition of a major defect consists of two parts. Firstly, it must be a 'major element' such as 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 a fire safety system, or waterproofing. Secondly, the defect must be such that it causes, or is likely to cause, all or part of the building to become uninhabitable for its intended purpose, destroyed or in threat of collapse.

In part, the definition of 'major defect' is more restrictive than the definition of 'structural defect' in that it does not includes any component (including weatherproofing) that forms part of the external walls or roof of the building. Accordingly, defects such as cracks to walls and floors and a leaking tiled roof may no longer be considered to be a major defect under the amending Act.

However, the definition of 'major defect' has also been widened to expressly include fire safety defects as well as internal waterproofing. These are very common forms of defects especially in large residential developments.

It should be noted that the transitional provisions referred to in Section 2 above apply. This means that this provision applies to contracts entered into before the amending Act came into operation, unless proceedings had been commenced, or an insurance claim was made, before the amendment.

9. Duty of Owners (Section 18BA)

Under the amending Act, a new provision has been inserted (section 18BA), which imposes various duties on persons having the benefit of the statutory warranties ("**Owner**").

The Owner has a duty to mitigate its loss. The duty to mitigate loss extends to a person who has the benefit of the statutory warranties and therefore includes successors in title (i.e. subsequent purchasers) and non-contracting owners.

However, the onus of establishing a failure to mitigate is on the party alleging the failure.

When a breach of a statutory warranty becomes apparent, the Owner is now under a duty to make a reasonable effort to notify the relevant person, such as the developer, builder and/or tradesperson, of the breach within 6 months after the breach becomes apparent.

The Owner is also under a duty to not unreasonably refuse access to the relevant person for the purposes of rectifying the breach.

In the event that any failure to comply with a duty is established in proceedings before a court of tribunal, then any such failure is a matter that the court or tribunal may take into account. However, if the failure is a failure to comply with the duty to allow reasonable access, then the court or tribunal **must** take the failure into account.

Under s.48O(2) of the amended Act, a tribunal can make an order for rectification work to be undertaken even if the applicant is not seeking such an order. Under the previous Act, no order to that effect could be made unless the applicant sought such an order.

Under s.48MA of the amended Act, a court or tribunal determining a building claim which involves an allegation of defective work is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome.

The above changes to Act not only impose onerous duties on the Owner, but will also clearly benefit builders as they will be able to mitigate rectification costs by undertaking the work themselves. Previously, the Owner could refuse to provide access simply because it did not like the builder and/or did not want the builder to return.

A further benefit to the builder is that under s.92(5) of the amending Act, a contract of insurance that is still in effect extends to any rectification work undertaken by the builder. This means that a separate contract of insurance is not required in relation to the rectification work.

It should be noted that the duties do not apply in respect of a contract entered into before the commencement of the amending Act on 1 March 2015.

10. Defences to breaches of statutory warranties (Section 18F)

Under the previous Act, the builder had a defence against the statutory warranties if it could prove that the breach of which the Owner complained arose from instructions given by the Owner, which were contrary to the advice in writing of the builder.

Under the amended Act, it is also a defence where a builder relies on written instructions given by a relevant professional (architect, engineer, surveyor, building expert etc) acting for the Owner and who is independent of the builder, before the work was done or confirmed in writing by the relevant professional after the work was done.

A relevant professional is someone who is independent of the builder in the sense that he was:

a) not engaged by the builder to provide any service or do any work for the builder;
b) not engaged on the basis of a recommendation or referral by the builder; or
c) not within the previous 3 years, a close associate of the defendant.

This new defence is not available for a contract entered into before the commencement of the amending Act on 15 January 2015.

11. Date of completion of new buildings in strata schemes (Section 3C)

Under s.3B of the previous Act, completion occurred on the date that the work was completed within the meaning of the contract under which the work was done. Alternatively, if the contract did not provide for when the work was complete, then it was taken to have occurred on practical completion which was presumed to be the earlier of:

a) the date the contractor handed over possession;
b) the date the contractor last attended the site;
c) the date of issue of an occupation certificate; or
d) the date that is 18 months after the issue of an owner-builder permit.

Unsurprisingly, there were numerous disputes as to the date when a building had been completed, particularly in relation to strata schemes, where the situation was distinctly unclear.

Under s.3C of the amending Act, which only applies to strata schemes, completion is achieved on the date of issue of an occupation certificate that authorises the occupation and use of the whole of a building. It needs to be borne in my mind though, that the relevant occupation certificate may be an interim occupation certificate and not just the final occupation certificate. If there is more than one building in the strata scheme, then each building is considered separately as if there was a separate contract for each separate building. This means that the date of completion of two or more buildings in a strata scheme may be different.

This amendment became effective on 15 January 2015 and will apply retrospectively unless caught by the general exceptions referred to above.

12. Owner-builders (Sections 31, 32 and 95)

Under the amending Act, from 15 January 2015 an owner-builder is required to complete an owner-builder course for building work valued over $20,000. Previously, the value of the building work had to be over $12,000.

Although owner-builders were previously required to have a valid construction induction card, under the amending Act this card must now be provided as part of the application for an owner-builder permit.

Whereas previously owner-builder permits were issued for a dwelling comprising a dual occupancy, owner-builder permits will generally not be issued for such occupancies except under special circumstances.

Whereas under the previous Act, an owner-builder was required to obtain Home Owners Warranty Insurance for any work that was undertaken as an owner-builder, s.95 now provides that such insurance (which is now called "insurance under the Home Building Compensation Fund"), cannot be entered into in relation to owner-builder work which is carried out by an owner-builder. However, the owner-builder must disclose that fact in their contract for sale. Otherwise the contract is voidable at the option of the purchaser before the completion of the contract. It should be noted that insurance under the Home Building Compensation Fund is still required when the work is done under a contract between the person who contracts to do the work and the owner-builder and the value of the work is over $20,000.

13. Changes to the definition of residential building work (Schedule 1)

Under the amending Act, internal painting work done does not fall within the definition of 'residential building work' unless it is part of the work to be done under a contract to do residential building work. The inclusion of this exception adds to the list of exceptions which include demolition, carpeting, lifts, escalators, garage doors and some supervision and architectural services.

14. Mandatory notification of insolvency, winding up or deregistration

Under s.22 of the amending Act, a holder of a contractor licence is required to notify NSW Fair Trading within 7 days if it becomes bankrupt or insolvent, wound up or is deregistered. Once that notification is given, NSW Fair Trading must cancel the contractor licence except in certain limited circumstances including where the licence is subject to a condition that the holder not

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do work if the contract price exceeds $20,000 or there is no evident risk to the public that the licensee will be unable to complete any contract.

Failure to notify within this period could result in a fine of $110,000 and possible jail time can apply to directors and those involved in managing the corporation.

In order to address the ongoing problem of companies being wound up after accruing large amounts of debt, with the controlling person setting up a new company, the eligibility requirements for obtaining new building licences have now become more strict. A person can now be disqualified from holding a licence or certificate if they are not a "fit and proper person"

15. Summary

In summary, the changes which have been made under the amending Act are clearly more favourable to the Builder, so long as the Builder takes immediate steps to implement the necessary changes.

Overall, the Owner appears to be worse off as a result of these amendments because:

a. The Builder can now ask for double the deposit that he was previously allowed for contracts greater than $20,000, before even undertaking any work;
b. Aside from specialist work, the Builder need not be licensed so long as the value of the residential work is less than $5,000;
c. The small works written contract, which provides less protection to the Owners, will be more extensively used as it will apply to contracts with a value less than $20,000
d. The Builder does not need to take out insurance under the Home Building Compensation Fund unless the value of the residential work is greater than $20,000;
e. The definition of major defects has been, for the most part, narrowed from the previous definition of structural defects;
f. The Builder's defences to breaches of statutory warranties have been increased; and
g. The Owner, or any other person with the benefit of the statutory warranties now has an express duty to mitigate its loss. This includes allowing the Builder access to rectify its defects.

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Postscript

The National Australia Construction Code (NCC) 2015 will adopted Australia wide on 1 May 2015. The NCC includes the Building Code of Australia, Plumbing Code of Australia, a Guide to the BCA and Performance Requirements extracted from the NCC. Whereas previous versions of the BCA cost about $400, these are now available free online at the following website.

http://services.abcb.gov.au/NCCOnline/Publications/Publications?year=NCCOnline.Web.Models.PublicationYear

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