

CHANGES TO THE HOME BUILDING REGULATIONS 2004

INTRODUCTION OF NEW TIME LIMIT FOR HOME OWNERS WARRANTY CLAIMS

Nature of Changes

Recent changes to the Home Building Regulations 2004 (“**the Regulations**”) have imposed a 6 month time limit on claims made under the Home Owners Warranty Insurance Scheme.

Commencing on 19 December 2008, the changes have resulted in the insertion of clause 63A into the Regulations which now require a Home Owner to make an insurance claim no later than 6 months after the Home Owner

“becomes aware or ought reasonably to have become aware of the fact or circumstance under which the claim arises or no later than 6 months after the end of the period of cover which ever is the earlier...”

Supreme Court Decision

The changes have been made as a result of the decision of Justice McDougall in *Owners Strata Plan 57504 v Building Insurers Guarantee Corporation [2008] NSWSC 1022*.

That case related to a claim made by an Owners Corporation for breaches of Home Owner Warranties by a Builder.

The Home Warranty Insurer was HIH and the claim was made against Bigcorp which was established to indemnify HIH policy holders after the collapse of HIH.

Bigcorp argued that the Owners Corporation did not notify its claim within the time required by the policy.

The Owners Corporation argued that the claims were made within time and/or alternatively that the time limits imposed by the policy were void because they were in conflict with the Home Building Act 1989.

The Supreme Court found in favour of the Owners Corporation and His Honour Justice McDougall held that the clause in the HIH policy imposing the time limits for notification and judgement of the claim was void.

Consequences of Decision

A consequence of the decision, was that the time limits contained in the HIH and FAI policies no longer exist. This consequence had wider implications as the potential claims to be reopened against Home Warranty Insurers which had previously been “out of time”.

The implications of the decision were far reaching for insurers who had been operating on the basis that both the claim and loss had to fall within the period of cover set out in Section 103B of the Home Building Act 1989.

Government Response

In response to the decision and following recommendations by the Office of Fair Trading, the Government inserted Clause 63A into the Regulations.

On a most extreme interpretation of Clause 63A requires that a claim be made within 6 months of the completion of building works.

This is because Clause 63A(4) states:

“...this clause only applies to a claim made after the commencement of this clause and extends to a claim made after that commencement in respect of a loss arising before that commencement...”

In defect claims the “loss” for a building owner generally arises at the time that the defective work is performed, not when the defect appears.

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In most cases, the defective work is performed at the time of construction.

This means that under Clause 63A the claim for indemnity under a policy of insurance for breach of a statutory warranty due to defective work would have to be made by a Home Owner within 6 months after the building is completed or on a less restrictive interpretation within 6 months of “*awareness of defects*”

Problems with Changes

The changes raise a number of difficulties including the following:

- (a) at the time of this article many Home Owners of new homes constructed or complete in December 2008 will soon be out of time for the making of claims in respect of defects.
- (b) Where as Home Owners may have the assumed that they had up to 6 years for major structural defects or 2 years or minor defects to enforce their rights. Clause 36A may mean that they may not be entitled to an indemnity if they dispute this limitation period if they have not satisfied the claim within the prescribed time.
- (c) the right to make a claim for insurance in respect of works performed after 1 July 2002 arises if the Builder is insolvent, dead or has disappeared or as a result of recent amendments to the Home Building Act 1989, if the Builders licence has been automatically suspended by reason of a failure to comply with a monetary order.

Clause 63A imposes a new requirement on Home Owners to submit a claim within 6 months of the “*loss*” (ie. work being completed) or with 6 months of “*awareness of the defects, seemingly without regard to the insolvency, death, disappearance of the Builder or the suspensions of the Builders licence*”.

Assuming that the last resort triggers to a claim and Clause 63A of the Regulations can be read together, Home Owners will have to obtain experts reports and a judgment and wind up the Builders in insolvency within the 6 month claim notification period before the entitlement to submit a claim could arise.

This is simply unrealistic .

Even if Home Owners were well aware of their rights, they would simply run out of time and become barred from making a claim if they failed to satisfy all the requirements to establish the insolvency, disappearance or death within the 6 month claim notification period.

Clause 63A is Badly Worded

Clause 63A was inserted into the Regulations without consultation with industry and as a consequence has been poorly worded and rewritten in obviously unintended consequences

Pressure has been placed in the Government by the opposition to review and amend Clause 63A to restore some balance in favour of the Home Owner.

If you would like any further information on this topic, please contact David Glinatsis on 8239 6502 or david.glinatsis@kreissonlegal.com.au

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