

11 May 2009

IMPORTANT CHANGES TO THE HOME BUILDING ACT 1989 AFFECTING OWNERS, BUILDERS AND INSURERS!

SUMMARY

The Home Building Act 1989 (**the Act**) has recently been amended to:

- (a) provide for the automatic suspension of a Builders Licence if a Builder fails to comply with a monetary order of the Consumer Trader and Tenancy Tribunal (**CTTT**) or order of a Court;
- (b) introduce a fourth trigger for Home Owners Warranty claims; and
- (c) confirm that Statutory Warranties under the Act are not extinguished by earlier legal proceedings.

These amendments which commenced on 1 April 2009 provide additional protection for home owners against building contractors for breaches of statutory warranties.

For Building Contractors the changes introduce serious consequences which can result in the suspension of their Builders Licence as well as a claim under a policy of Home Owners Warranty Insurance.

The changes also introduce a new level of risk for Home Owners Warranty Insurers who are now required to indemnify beneficiaries for losses arising as a result of a breach of a statutory warranty.

AUTOMATIC LICENCE SUSPENSION

Non Compliance with Money Order

From 1 April 2009, a Building Contractor who fails to comply with an order by the Court or the CTTT to pay money in respect of a building claim faces an automatic suspension of their licence.

Strengthening of Home Owners Rights

Home Owners with problems with residential building works are able to access the dispute resolution procedures administered by the Department of Fair Trading which involves inspections and mediation.

If mediation fails, a Home Owner can lodge a claim with the CTTT or directly with a Court.

The CTTT can order the Contractor to undertake work or pay compensation (known as a money order).

Courts on the other hand can order Contractors to pay money.

Before the recent amendments, if the Contractor failed to comply with the money order of the CTTT or judgment of the Court, the Home Owner had to take legal action to enforce the order and/or judgment or have the Contractor made insolvent so as to trigger a claim under the Home Owners Warranty Insurance Scheme.

The new changes have strengthened the rights of a Home Owner to recover a money order or judgment from the Builder by providing for the suspension of the Building Licence if the Builder does not comply with the order of the CTTT or the Court and a new trigger for Home Owners Warranty Claim.

Notification to Commissioner

As part of the new changes, the CTTT must inform the Commissioner for Fair Trading (**the Commissioner**) of any order made by the CTTT as soon as practicable after the Order has been made.

If the holder of a licence is ordered by a Court to pay money, Section 48V of the Act now requires a licence holder to notify the Commissioner in writing of the following:

- the amount of money ordered to be paid;
- the date on which the money is due to be paid if such a date is specified in the order;

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- the name of the person to whom the money is to be paid; and
- such other particulars as may be prescribed by the regulations.

Penalties apply should the licence holder fail to comply with this requirement within 7 days after the order is made.

Any other party to the Court proceedings also has the right to notify the Commissioner of the making and terms of the Order.

What Notice is Given by Commissioner to Licence Holders?

According to Guidelines published by the Commissioner, on receipt of notification from either the Tribunal, Licence Holder or other person as the case may be, the Commissioner will notify the Licence Holder in writing:

- of the date that the Licence will be suspended if the Licence Holder does not provide the Office of Fair Trading with evidence of having complied with the Order;
- that the suspension of the Licence may in turn possibly trigger a claim under any Home Warranty Insurance policy that might be in place for the work which was the subject of the Tribunal or Court proceedings, as the case may be, that had resulted in the Order being made.
- of the capacity of the Minister to defer the commencement of the suspension in the circumstances in which the Commissioner will consider a suspension; and
- that the Administrative Decisions Tribunal being unable to review a decision by the Commissioner to defer, or not to defer, the operation of the suspension.

What Notice is Given to Home Insurer?

The Guidelines also provide that the Commissioner will notify all insurers with which the Licence Holder

holds and had previously held eligibility for Home Warranty Insurance of the intention to suspend the Licence unless evidence is provided to the Office of Fair Trading of the Licence Holder having complied with the Order.

If the order is not complied with and no application has been made to defer the operation of the suspension by the date notified to the Licence Holder, the Licence will be suspended and the Licence Holder and Insurer will be notified accordingly.

When Does Suspension of Licence Take Effect?

According to the Section 42A (4) of the Act the suspension of the Licence takes effect:

- (a) 28 days after the due date for payment when amount of money; or
- (b) if the Commissioner is provided with a copy of an Order staying the operation of the decision the Court or the Tribunal pending an appeal against a decision before the end of the 28 day period, as soon as a decision of the Court or Tribunal is confirmed on appeal.

Can the Suspension be Deferred?

The Guidelines state that the Commissioner will consider a request to defer the operation of the suspension of a Licence in the following three circumstances:

- (a) where the Licence Holder provides evidence before the date of expiry of the Licence satisfying the Commissioner that the Licence Holder has complied with the Order to pay an amount of money in respect of a Building Claim;
- (b) where the Licence Holder has lodged an appeal against the decision to a higher Court and the Court has stayed the operation of the decision; or
- (c) where the Licence Holder provides evidence that the party to whom they have been ordered to pay money has voluntarily accepted an alternative arrangement – such as a payment plan or arrangements for the relevant work to be rectified.

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The Guidelines indicate that a request for deferral of suspension of the Licence based upon other than the above three circumstances will be considered on individual merit.

The Guidelines however contain the following caution:

"submissions as to the impact of the suspension of a licence on the personal or business circumstances of the Licence Holder (and/or associated parties) or submissions as to the validity of the decision of the Tribunal or Court will not be accepted as warranting the deferral of the suspension of a licence..."

In addition the Guidelines provide that:

- (a) any request for deferral of suspension must be made in writing and *"should be received by the Office of Fair Trading before the date that the suspension is due to come into effect"*;
- (b) the Commissioner may temporarily defer operation of the suspension while considering a request for deferral;
- (c) the Commissioner will notify all insurers with whom the Licence Holder holds and has previously held eligibility for Home Warranty insurance or any application for deferral of the suspension and notify the Licence Holder and the insurer/s of the outcome of the application.

NEW TRIGGER FOR HOME OWNERS WARRANTY CLAIMS

The new amendments also provide Home Owners with the ability to make a Home Warranty Insurance Claim as soon as the Licence Holder has their Building Licence suspended for non-compliance with a money order.

Previously a Home Owner could only access Home Owners Warranty Insurance if the Building Contractor became insolvent, disappeared or died.

Commonly known as the "Last Resort Cover" this form of insurance applies where there is no longer a Building Contractor to build, complete or rectify the contracted work.

Under the new amendments, insurers will be required to provide an insurance contract that allows a claim to be made by Home Owners and their successors in title on suspension for non-compliance with an order of the Tribunal or Court as though the Building Contractor had died, disappeared or became insolvent.

Other Features of Changes

Other important features of the amendments as summarised in the Second Reading Speech include the following:

- (a) that the trigger of the Licence suspension, failure to comply with an Order of a Tribunal/Court only provides relief to the claimant and not every other client of the Builder;
- (b) that the insurer is only required to accept liability for the claim where a Contractor has failed to comply with a monetary order of the Tribunal or Court;
- (c) if an insurer pays a claim, the insurer is entitled to recover from the Contractor as a debt the amount paid by the insurer under the claim including costs; and
- (d) if after the claim has been paid, the Contractor complies with the Order of the Tribunal or Court or completed the residential building work, the Insurer is entitled to recover from the Home Owner as beneficiary the amount paid by the insurer under the Claim.

Second Reading Speech

According to the Second Reading Speech:

"the proposed provisions will facilitate more timely access to Home Warranty Insurance and will create an incentive for Building Contractors to act appropriately when ordered to pay compensation to Home Owners...the Governments Bill is consistent with

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recommendation 18 of the Enquiry into the operation of the Home Building Service....as follows:

That the NSW Government adopt the recommendation of the Home Warranty Insurance Scheme Board to introduce an additional trigger to enable consumers to access insurance without having to pursue a Builders bankruptcy or insolvency..."

AMENDMENTS TO SECTION 18E OF THE ACT

The other amendment introduced to the Home Building Act is inclusion of a new Section 18(E)(2) to clarify an earlier amendment that had been made to that Section after the decision of the Supreme Court of Appeal in the case of *Honeywood as Executrix of the Estate of the late Neville Honeywood v Munnings and Anor [2006] NSW CA215*.

That decision had the potential to prevent Home Owners from commencing proceedings for structural defects that arose after the completion of earlier legal proceedings for less serious defects.

To overcome this problem, the Act was amended in November 2006 to confirm that statutory warranties were not extinguished by earlier legal proceedings.

Following that amendment, the issue arose as to whether the amendments were limited to legal proceedings, and did not apply to statutory warranties that had been resolved by way of an out of Court settlement.

The latest amendments now make it clear that a Home Owner is able to commence proceedings for a breach of the statutory warranty in relation to a different deficiency even if a previous breach of the statutory warranty had been resolved through legal proceedings or out of Court settlement.

CONCLUSION

According to the Government the amendments are an important enhancement to the Home Warranty Insurance Scheme under the Act. Home Owners are now given better rights to ensure that builders complies with their obligations.

In making the changes, the Government has recognised deficiencies in the last resort insurance scheme and has attempted to assist Home Owners by providing an additional trigger for an insurance claim without the Home Owner having to prove that the Builder is insolvent, has disappeared or in the case of an individual has died.

What all this means for Builders is that they are required to exercise greater vigilance in the performance of their contractual and statutory obligations as the consequences of a failure to comply with these obligations are long and far reaching.

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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