

MORE CHANGES TO THE HOME BUILDING ACT 1989 ! COMMENCING 19 MAY 2009

The Government Amends Again!!

The Government has acted again to amend the Home Building Act 1989 (**the Act**) and Regulations.

This is the third substantial amendment in the last 6 months with effect from 19 May 2009.

The most recent amendments are changes and refinements to previous amendments which commenced on 19 December 2008 and 1 April 2009.

Repeal of Clause 63A of Regulations

One of the key changes is the repeal of the controversial Regulation 63A which had commenced on 19 December 2008.

Regulation 63A was introduced in response to the decision of the *Strata Plan 57504 v The Building Insurers Guarantee Corporation (2008) NSW SC 1022*.

The effect of that decision was that there were no time limits on notifying an insurance claim.

The December 2008 amendments introduced r63A following concerns by the insurance industry that the Supreme Court decision potentially exposed insurers to an open ended liability for defects which appear 20 or 30 years after a home was completed.

This was because the decision of the Supreme Court identified that although section 103B of the Act specified a minimum period of insurance cover, there was no explicit statutory limit on when a claim could be made.

The concern arising from the decision was that as long as the loss occurred in the period of insurance, a claim could be made at any time.

Regulation 63A was inserted into the regulations which created a limit on when a new claim could be made and provided that:

- for non completion of work the limit was 12 months; and
- for other losses the limit was 6 months after the beneficiary became aware or ought reasonably to have become aware of the circumstances giving rise to the claim.

Regulation 63A however was problematic and created a new range of issues which needed to be addressed and was heavily criticised for removing protection to home owners.

In the Second Reading Speech for the May 2009 amending legislation, the Government acknowledged that r63A was only an interim measure until Parliament had the opportunity of considering appropriate legislation.

The new amendments have resulted in the repeal of r63A.

The amendments now introduce section 103BA in place of r63A.

As a result of these latest changes:

- The requirement to make a claim within the 6 to 12 month period stated in r63A has been removed;
- A loss now needs to be notified within the period of insurance cover prescribed by s103B;
- The amendments have retroactive application and s103BA applies to insurance policies entered into since 1 May 1997;



This newsletter provides a summary and general overview only. It is not intended to be comprehensive nor does it constitute legal advice.

Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 2004
Liability limited by a scheme approved under Professional Standards Legislation

- Anyone who was prevented from making a claim by reason of r63A, but who would be able to make a claim under s103BA, is now provided a period of grace to notify the loss to the insurer.

The period of grace commenced on 19 May 2009;

- For the purposes of claims, under s103BA the loss must become apparent and be notified to the insurer within the period of insurance. What seems unclear in these amendments however is what time limit actually applies for the submission of an insurance claim; and
- A loss becomes apparent when a beneficiary under the Contract first becomes aware (or ought reasonably have become aware) of the loss.

Amendments to New Trigger for Home Owners Warranty Claims

Earlier this year amendments were also made to the Act to provide home owners with the ability to make a Home Warranty insurance claim as soon as the licence holder had their building licence suspended for non compliance with a money order.

Under those amendments, insurers were 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 a Tribunal or Court as though the building contractor had died, disappeared or become insolvent.

This new trigger for Home Owners Warranty claims were part of changes effective from 1 April 2009 that a building contractor who failed to comply with an order of a Court or Tribunal to pay money in respect of the building claim faced an automatic suspension of their licence.

The Government has further refined those amendments by extending the coverage of insurance contracts to any matter included in the money order which would have the effect of including a "building claim" under Section 48A of the Act.

This amendment has the effect of applying to any loss that is the subject of a building claim order made against the contractor that remains unsatisfied and not just the payment of money.

The latest amendments apply to insurance claims arising from suspension of a contractors licence for contracts of insurance entered into on or after 19 May 2009.

The amendments also provide that the fourth trigger operates on the same basis as if the contractor were insolvent.

That is, the insurers liability will be limited to losses that would have been covered in the event that the contractor was insolvent.

New Amendments – Beneficiaries Cannot Be Idle

The latest amendments also include the insertion of Regulation 58A which provides that an insurer can include provisions in an insurance contract reducing its liability of the amount payable on a claim if the beneficiary fails to enforce a statutory warranty.

The amount of the reduction is limited to the extent that the beneficiary's failure has prejudiced the interest of the insurer.

Under the last resort scheme, a Home Owners (including a Strata) Corporation is principally responsible for enforcing statutory warranties.

As a result of these changes, the beneficiary cannot remain idle waiting for the builder to die, disappear or become insolvent before making an insurance claim.



This newsletter provides a summary and general overview only. It is not intended to be comprehensive nor does it constitute legal advice.

Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 2004
Liability limited by a scheme approved under Professional Standards Legislation

Conclusion

These changes represent a further attempt by the Government to clarify the changes in what is already a fragmented piece of legislation.

In making the amendments the Government is seeking to restore some balance to the rights of home owners given what may have been hastily drafted amendments late last year.

The latest change of amendments raise a number of questions which will ultimately be the subject of a review of a Court or Tribunal so as to understand precisely how they are to operate in practice.

This is particularly the case in the retroactive application of s103BA of the Act and the uncertainty which still exists as to the time limits for the submission of insurance claims.

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



This newsletter provides a summary and general overview only. It is not intended to be comprehensive nor does it constitute legal advice.

Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 2004
Liability limited by a scheme approved under Professional Standards Legislation