

# Reform in Residential Construction in NSW

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## Introduction

In May this year, the *Building Services Corporation Legislation Amendment Act* 1996 came into force in New South Wales governing residential building work. Residential building work broadly encompasses any form of construction (including work involving any trade), maintenance or renovation work in relation to any residential dwelling and the supply of kit homes. The provisions apply equally to contracts between major developers and contractors and consumers and contractors.

The *Act* amends the *Building Services Corporation Act* 1989 (“the *BSC Act*”), which has been renamed the “*Home Building Act*”. The amendments include:

- more stringent requirements for residential building contracts;
- introduction of statutory warranties in residential building contracts;
- requirements for developers and builders to give warranties to current and future purchasers;
- privatisation of the existing insurance scheme;
- changes to dispute resolution procedures;
- changes to licensing requirements; and
- replacement of the Building Services Corporation (“BSC”) by the Fair Trading Administration Corporation.

## New Requirements For Residential Building Contracts

The *BSC Act* required residential building contracts to be in writing and to contain the name of the licence holder and its licence number. The amending *Act* requires further features, the most notable being that the contract price must be shown in a prominent position on the front page of the contract. If the contract price is not known, or if the contract price may be varied under the contract, a warning and explanation of the effect of any provision which will vary the contract price must also be placed next to the contract price. Statutory warranties must also be included in the contract.

Contractors will not be able to enforce the contract or claim an entitlement for damages under the contract if they fail to adhere to these and other requirements. They may also be fined up to \$2,000.

Arbitration clauses in residential building contracts are void.

Contractors have a caveatable interest on the land on which the contract work is or will be carried out. This interest arises where the holder of a licence under the *Act* has a judgment from a court or a tribunal against another party to the building contract. The caveatable interest does not depend on the land owner being a party to the contract. The dispute need only involve a contract for work on the land.

## Statutory Warranties

The contractor is required to insert statutory warranties in the contract. However, even if these warranties are not included in the contract, the consumer or developer with whom the contractor is contracting, is able to take advantage of them because they are implied into every residential building contract.

Briefly summarised, the following statutory warranties apply to contracts entered into after the *Act* came into force:

- a warranty that the work will be performed in a proper and workmanlike manner;
- a warranty that all materials will be good and suitable for the purpose for which they are used and that they are new, unless otherwise stated in the contract;
- a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time;
- a warranty that the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation; and
- a warranty that the work and any materials used during the work will be reasonably fit for the specified purpose or result.

The warranties apply not only to the consumer or developer who enters into the contract, but also to any future purchasers, for seven years from the date of completion of work. If the work is not completed, the seven year limitation period runs from the date for completion specified or determined in accordance with

the contract, or if there is no such date, from the date of the contract.

The amending *Act* provides a statutory defence for contractors in breach of a warranty, if the contractor can prove that the work was done on specific instructions, against the written advice of the contractor.

Organisations which produce standard form contracts for residential building work are currently revising them. In future, it will not be possible to use the old standard forms for residential construction of any magnitude, from houses to unit buildings.

### **Insurance Scheme**

Under the *BSC Act*, residential building work was insured under a government scheme against defects and non-completion. The amending *Act* privatises the insurance scheme. All contracts for residential building work must be insured if the contract price exceeds \$5,000. The form of insurance and the insurer must be approved by the Minister. The insurance will cover breach of a statutory warranty and non-completion of work and is for the benefit of persons for whom work is carried out.

Developers of four or more dwellings must ensure that an insurance certificate is attached to contracts for the sale of land.

Contractors must ensure that an insurance certificate is attached to building contracts. A fine of up to \$10,000 applies for failure to comply with these requirements. In addition, the contractor will have no remedy under the contract and no right to payment.

### **Dispute Resolution Procedures**

Due to the privatisation of the insurance scheme, the role of the Department of Fair Trading will be slightly altered. However, consumers will still be able to contact the Department of Fair Trading for assistance. The Department may then attempt to resolve the dispute itself, or refer the matter to mediation, the Building Disputes Tribunal, the Commercial Tribunal or the Courts.

### **Changes To Licensing Requirements**

The Department of Fair Trading will no longer assess the financial position or business management capacity of applicants for licences, or current licence-holders at the time of renewal. This is a result of the privatisation of the insurance scheme. It was considered that such a test could be more efficiently and properly performed by private insurers.

A requirement for contractors to carry professional indemnity or similar insurance will also be introduced. In the absence of this insurance, their licence will lapse.

### **Conclusion**

The changes in New South Wales in many ways mirror the changes that were implemented in Victoria last year by the *Domestic Building Contract and Tribunal Act*. The trend across the country appears to be greater regulation of the residential building industry.

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