

## The good, the bad and the \$110,000 fine for unauthorised payments for home building work

February 11, 2015 | Written by David McElveney and Paul Morgan

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The New South Wales Government has continued its drive to tighten laws regarding construction work in the state. Hot on the heels of changes to the Security of Payment regime, the Home Building Act has been amended, ostensibly with a view to clamping down on unlicensed and uninsured contracting. Some of the changes go further and are worthy of close scrutiny.

Significant changes have been made to the laws in New South Wales regarding home building work. The changes are a mixed bag for contractors doing home building work as well as for those who engage them.

In June 2014, the *Home Building Amendment Act 2014* was passed, which foreshadowed wide-ranging changes to the *Home Building Act 1989*. The changes come into force in three phases, the first of which took effect from 31 December 2014 and the second of which took effect from 15 January 2015. The third phase will come into effect from 1 March 2015.

From 31 December 2014, owner builder work no longer requires a contract of home building insurance to be in place, but any contract for sale of the relevant property must include a "consumer warning" in the required form about the absence of insurance.

From 15 January 2015:-

- The threshold for requiring an owner-builder permit has been increased to AUD 10,000. An owner-builder licence will no longer be granted to applicants who have held an owner-builder licence in the preceding five years. Applicants for owner builder permits must now list on the owner builder permit application the names of any other owners of the relevant property who have held an owner-builder licence in the preceding five years.
- The contract sum threshold above which general works require a building licence has increased from AUD 1,000 to AUD 5,000.
- The Act no longer applies to contracts for internal paintwork or work to tennis courts, ponds or water features. The contractor is not required to have a licence unless the work is done as part of other home building work, which other work requires a licence under the Act and Regulations.
- In respect of claims for breach of statutory warranty, the limitation period for newly defined "major defects" will be six years but for any other defects the limitation period will be only two years. This is a shift away from longer warranty periods which previously applied to visible "structural defects", to longer periods only for defects which could cause an entire building to be compromised.

- Accordingly, the new definition, "major defects", replaces "structural defects". The following definitions have been inserted into the Act.

"major defect means:

(a) *a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause:*

(i) *the inability to inhabit or use the building (or part of the building) for its intended purpose, or*

(ii) *the destruction of the building or any part of the building, or*

(iii) *a threat of collapse of the building or any part of the building, or*

(b) *a defect of a kind that is prescribed by the regulations as a major defect.*

*Note. The definition of major defect also applies for the purposes of section 103B (Period of cover).*

major element of a building means:

(a) *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*

(b) *a fire safety system, or*

(c) *waterproofing, or*

(d) *any other element that is prescribed by the regulations as a major element of a building."*

- A sentencing option of up to 12 months in prison is now available for second or subsequent offences of unlicensed contracting or failing to hold required statutory insurance.
- In relation to works in respect of a strata title scheme, completion of such work is now deemed to occur on the date of issue of an occupation certificate which allows the whole of the building to be occupied.
- Various reporting requirements have been introduced where licence holding companies are closed down. The requirements are directed to identifying the occurrence of licence holding companies being placed into liquidation (or some other form of external administration other than voluntary administration) and within three years the directors of that licence holding company apply for a new licence; a practice known as "phoenixing", from the analogy that a "phoenix" company rises from the ashes of the old company.
- Licensees will now have an express statutory defence to a claim for breach of a statutory warranty if the licensee relied on directions by a professional engaged by the owner. The existence of this new defence will require care by purchasers of property where home building work has been carried out to ensure that the purchaser is made aware of any statutory warranty entitlements which may have been impaired or compromised by directions given to the relevant licence holder by professionals engaged by the vendor.
- There are new provisions which make it clear that orders for rectification of defects are to be preferred over orders for payments and compensation, which may be ordered even where the owner may not wish to afford an opportunity for rectification.

Further major changes are due on 1 March 2015:

- The existing statutory warranty requiring work to be performed in a "*proper and workmanlike manner*" will be replaced by a duty that work will be "*done with due care and skill*".
- Owners and owner's corporations will be required to notify the developer or builder within six months of the date they become aware of a defect or breach and must communicate their loss. This duty could pose particular challenges for those owning investment properties which are not regularly inspected. Furthermore, owners will be under a duty to allow a person in breach of a statutory warranty such property access as they reasonably require in connection with rectifying the breach.
- There will be additional formal contractual requirements where the contract sum is greater than AUD 20,000. In particular, contracts will require details of progress payments to be made and must contain an explanation of the employing parties' termination rights.
- For contracts where the contract sum is greater than AUD 20,000, the Act now prohibits demanding or receiving progress payments unless the progress payments are "authorised". The Act provides that progress payments will be "authorised" if they are:

*"a) for a specified amount or specified percentage of the contract price that is payable following completion of a specified stage of the work, with the work that comprises that stage described in clear and plain language;*

*b) progress payment for labour and materials in respect of work already performed or costs already incurred (and which may include the addition of a margin), with provision for a claim for payment to be supported by such invoices, receipts or other documents as may be reasonably necessary to support the claim and with payment intervals fixed by the contract or on an "as invoiced" basis; or*

*c) a progress payment authorised by the regulations."*

- Where a builder receives a payment which is not "authorised" by the Act, then the builder is liable to a fine of up to AUD 110,000 for companies and AUD 22,000 for individuals.

These changes are of significant application to both contractors and those engaging contractors to carry out home building work. Consequences for contractors can include weighty fines and/or imprisonment. For home owners (and home purchasers), the changes could mean losing the ability to recover in respect of defective work.

For further information, please contact [David McElveney](#) or [Paul Morgan](#).

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