Northern Beaches
CONSTRUCTION LAWYERS

ISSUE 6

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Extended protection mooted for Owners Corporations

The Government has said that it intends to introduce an over-arching duty of care on the part of 'building professionals', to be owed to Owners Corporations.

An owners corporation is a creature of statute.

It comes into existence on the registration of the strata plan, and after the common property, which is vested in it, has been built.

The OC is not a party to the building contract and, did not in any real sense, rely upon anyone during the construction process, in relation to the quality of the building work.

The Government's plans to overhaul its building laws were announced last month and are based on the Shergold Weir report of February 2018.

The recommendations in that report, and the Government's proposed statutory response, are discussed overleaf.

Combustible Cladding update

In November 2017, the NSW Government legislated to 'ban' ACP with retrospective effect by the introduction of the *Building Products (Safety) Act 2017* (see December 2017 news).

In August 2018 the Commissioner issued a Building Product Use Ban (the **Ban**) for external cladding with a core comprising more than 30% polyethylene.

The Ban is retrospective and took effect on 15 August 2018.

Implementation of the Ban is now underway in NSW and further legislation has been introduced.

The Fire Safety and External Wall Cladding Taskforce has undertaken an audit of multi-storey residential buildings in NSW.

And last month, State and Federal Building Ministers agreed in principle to a nationwide ban on ACP in new constructions. Continued overleaf

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Extended protection mooted for Owners Corporations

The High Court, in *Brookfield Multiplex Ltd v the Owners Strata Plan 61288 [2014] HCA 36* held that a builder did not owe an owners corporation a duty of care in relation to the quality of the work. In other words, a builder of a strata scheme is not liable to an owners corporation for building defects later found in common property.

Some relief may be available under the *Home Building Act 1989* (**HBA**). Sections 18C and 18D give a successor in title to a person that would have a claim under the HBA, the benefit of the s18B statutory warranties. So, in certain circumstances, an OC may be able to enforce the statutory warranties against the builder and the developer.

Such claims are often thwarted by insolvency, associated company contracting and a lack of Home Compensation Fund Insurance for buildings over three storeys.

In August 2017 the Government commissioned an independent report into the building industry by Professor Peter Shergold and Bronwyn Weir. Their February 2018 report contained 24 recommendations over ten categories relating to compliance and enforcement systems, including the registration and training of building practitioners, the roles and responsibilities of regulators, the role of fire authorities and inspection regimes.

Implementation of the report recommendations took on further urgency when significant structural defects emerged at the Opal Tower in Homebush on Christmas Eve 2018.

Last month, the Government published its response to the Shergold Weir report, indicating that it will support the majority of the recommendations and that four major reforms were to be implemented across the industry.

First, a Building Commissioner is to be appointed to act as the consolidated building regulator in NSW.

Second, compliance reporting is to be overhauled including that designers (including engineers) declare that building plans specify a building will comply with the BCA, and builders declare that buildings have been built according to their plans.

Third, there will be mandatory registration of building designers and builders.

Fourth, the imposition of an over arching tortious liability on building practitioners to owners' corporations and subsequent titleholders of residential developments, as well as unsophisticated construction clients.'

The imposition of a statutory duty of care will be no easy task. It will involve a significant re-allocation of responsibilities and because there can be no reliance on the builder by the OC the exact nature of the duty of care will require identification.

Currently, the apportionment rules under the *Civil Liability Act 2002* do not apply to statutory warranty claims. This may well be problematic because of the number of potential defendants in any case.

An alternative solution may have been to reintroduce the requirement that all dwellings carry HCFI, irrespective of their height. Another may have been to close the loophole whereby a developer can avoid liability under s18C if it did not contract directly with the builder.

In the interim we await further responses from the Government.

"We're making tough new laws to ensure buildings meet Australian Standards, and to guarantee that people who build and design buildings have the proper qualifications to do so.

This plan will ensure those who control the risks—building practitioners—are held responsible for their work."

Matt Kean, Minister for Innovation & Better Regulation

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Continuing reform—combustible cladding

Compliance with the Ban will be costly, but so will be non-compliance with the Ban.

It is unclear whether a Council will adopt a performance solution determined by an expert over complete removal of the ACP. There is no specific legislative requirement for a Council to adopt the former.

Liability

ACP is now a major defect and owners of buildings less than 6 years old may be able to obtain relief under the HBA against the builder and/or developer.

The cost of compliance for buildings more than 6 years old is likely to fall to the building owners.

As discussed on page 2 OCs currently face difficulties with reliance arguments on building professionals outside the HBA.

It is currently unclear whether the NSW Government will provide financial assistance to home owners bearing the costs of compliance, unlike Victoria which has recently introduced a cladding replacement loan scheme.

The in-principle mooted nationwide ban is subject to a cost-benefit analysis to assess the impact of the proposed ban on the industry and an appropriate timeframe for implementation. The report is expected by July 2019.

Further legislation

The Environmental Planning and Assessment Amendments (Identification of Buildings with Combustible Cladding) Regulation 2018 (NSW) requires owners of buildings affected and not affected by the Ban to register online. New buildings must be registered within four months of occupation.

The State Environmental Planning Policy Amendment (Exempt Development Cladding and Decorative Work) 2018 (NSW) amends various SEPPs relating to the approval process for new cladding, recladding and decorative work.

Reform to Security of Payment Legislation

Last year the Federal Government commissioned a review of its nationwide Security of Payment laws. The resulting "Murray Report' made 86 recommendations including the adoption of a national frame-work and the extension of the laws to residenial building work.

Currently it is only subcontractors working for a builder on a residential site that can make a claim and only if their progress claims are stated to be made under the Act.

Some of the recommendations will shortly be given legislative force when the *Building and Construction Security of Payment Amendment Act 2018* receives assent.

Whilst the legislation has not been extended to apply uniform-ly to all residential sites the amendments seek to improve the operation of the Act. There are several key reforms. Three of interest are set out below.

First, the entitlement to receive a progress claim will no longer be triggered by a reference date.

The entitlement will now arise when work is performed. The amendment aims to prevent payments being delayed by the imposition of a contractual reference date.

Second, all claims must now state that they are made under the Act, returning the regime to that of April 2014.

Third, the maximum payment period reduces from 30 to 20 days, allowing faster cashflows.

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Appeal Panel revisits limitation periods for defective work

In *Hutchings v Hope [2019]* NSWCATAP 59, the Appeal Panel clarified whether the two year limitation period found in section 18E of the *Home Building Act 1989 (***HBA***)* altered the six year limitation period for breach of contract found in section 14 (1) of the *Limitation Act 1969 (NSW).*

Claims for breach of the statutory warranties implied by section 18B of the HBA can be made for periods of 2 or 6 years after completion of the work. The section 18E limitation period is six years for major defects but just two years for all other defects, known as non-major or minor defects.

However, it is not uncommon for the wording of the implied statutory warranties to be repeated either verbatim or substantially in standard building contracts. The effect is that the statutory warranties become express terms of those contracts.

First instance

A builder, Mr Hope, sued home owners Mr & Mrs Hutchings for unpaid monies and the home owners sued the builder for overcharges and defective work.

The contract set out, expressly, warranties that were equivalent to the statutory warranties contained in the HBA.

The Tribunal at first instance rejected the claim for non-major defects on the basis that they were outside the two year time limit for those defects contained in the HBA, even though the claim was expressed as a simple claim for breach of an express term of the contract to which a 6 year limitation would normally apply.

The Appeal Panel

The home owners appealed. The question for the Appeal Panel, in circumstances where the breach of contract complained of related to non-major defects, was whether the two year non-major defects limitation period took precedence over the 6 year breach of contract limitation period.

The Appeal Panel, constituted by President Justice Armstrong and Principal Member Harrowell said that the first instance approach was wrong, and said:

"[54] Both parties agreed that the HB Act did not operate to limit a right of action by an original contracting party under an express provision in the contract in this way. That is, a right of action for breach of an express term, not being a claim for claim for breach of statutory warranty under s18E, could be brought within 6 years from when the cause of action accrues, whether or not the express warranty is wholly or partly in the same terms as the statutory warranty implied by s 18B.

[55] This concession appears properly made."

The practical effect of this decision is that home owners who have (a) contracted directly with a builder, and (b) under a contract which expressly sets out the statutory warranties, now have the certainty of claiming damages for minor defects for up to 6 years in a court of competent jurisdiction.

The *Civil Liability Act 2002* applies to contractual claims but not to statutory warranty claims. So, in theory, a builder may be able to invoke the apportionment provisions in defence of contractual claims for damages for minor defects.

However, in practice, distinguishing between minor and major defects, and therefore claims in breach of contract or s18B may not be that easy, leading to arguments as to what claims the apportionment provisions apply.

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Disputes Between Neighbours —Trees and Hedges

I deal with a variety of disputes between neighbours. These can arise for many reasons including dividing fences or retaining walls in disrepair, encroaching garages, nuisance claims of noise and pollution, use of right of ways, high hedges and overhanging branches.

In this issue I deal with tree disputes, an issue that arises so often it has its own legislation. The *Trees (Disputes Between Neighbours) Act 2006 (NSW)* (**Act**) empowers the Land and Environment Court to resolve disputes between neighbours about trees and hedges.

The term 'tree' is defined broadly and includes '*any woody perennial plant, any plant resembling a tree in form and size, and any other plant prescribed by the Regulation'*.

Liability does not depend on the fault of the adjoining owner or the foreseeability of damage because there is no duty of care to breach in these circumstances. The Act removed the prior right of a neighour to sue in nuisance for tree disputes.

The types of matters that can be adjudicated by the Court include those where:

- tree branches are overhanging, a dead tree requires removal or roots have grown onto a neighbour's property,
- there is injury to a person as a result of a tree,
- high hedges are blocking sunlight or views from a neighbour's property.

The first step is to attempt agreement with the neighbour because the Court will not make an order unless the applicant has made a reasonable effort to reach agreement prior to taking court action. If after attempts at resolution the dispute remains, the applicant must give the adjoining land owner, and if appropriate the Council, and any other person likely to be affected by the order, 21 days' notice of its intention to apply to the Court. If agreement remains elusive after 21 days the applicant can then seek orders to remedy, restrain or prevent damage to property, or prevent injury to any person from the Court.

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