

Client Alert



October 2011

Amendments to the New South Wales Home Building Act

Developers take note

The *Home Building Amendment Act 2011* makes wide ranging changes to the *Home Building Act 1989* (NSW) (Act). This legal alert addresses some of those changes with important implications for the liability of developers of residential building projects.

Under the changes:

- a land owner who develops its land through a joint venture arrangement will now be considered to be a *developer* under the Act and therefore liable under statutory warranty provisions;
- developers and builders will no longer be able to attempt to rely on Part 4 of the *Civil Liability Act 2002* (NSW) to apportion their liability to other parties; and
- the maximum duration of the developer's and builder's liability for breaches of statutory warranties will be reduced from seven to six years post practical completion.

Changes to the meaning of *developer* and proportionate liability will apply to both current and future contracts. Changes affecting the liability period will apply to new contracts entered into after 1 February 2012.

These changes were introduced under the Home Building Amendment Act 2011 on 25 October 2011. Some other parts of the Home Building Amendment Act remain to be proclaimed.

Meaning of *developer*

Following the Court of Appeal's decision in *Ace Woollahra Pty Ltd v The Owners – Strata Plan 61424* [2010] NSWCA 101 there has been some controversy surrounding the respective liabilities of builders and developers for defective or incomplete work. The Court of Appeal's interpretation of *developer* under the Act meant that to be classed as a *developer*, the relevant party must have a contract with the builder.

Consider the following situation – the owner of a property enters into a joint venture arrangement with another party to develop the owner's property. The non land owning party, in turn, enters into a building contract with a builder. Following the Court of Appeal's *Ace Woollahra* decision, the owner of the property does not fall within the definition of a *developer* under the Act. Arguably, this created a loophole by exempting the land owning party in these circumstances from liability under the statutory warranty provisions of the Act.

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The amendment to the definition of *developer* seeks to redress this loophole. The definition of *developer* has been changed to include an owner (or a future owner) of four or more units in a development, regardless of whether the owner has entered into a contract with a builder.

Proportionate liability

In the 2010 case of *Owners Corporation SP 72357 v Dasco Constructions Pty Ltd*, the Supreme Court held that a builder defending claims against breaches of statutory warranties under the Act is able to apportion its liability to a subcontractor (*concurrent wrongdoer*), to the extent that the other *concurrent wrongdoer* contributed to the claimant's loss.¹

The apportionment of liability reflects the respective contribution of each *concurrent wrongdoer* to the claimant's loss. Liability can be apportioned to any third party *concurrent wrongdoer* as defined in the *Civil Liability Act 2002* (NSW). If liability is apportioned, this will oblige the claimant purchaser to incur the cost of pursuing multiple parties. The claimant purchaser also assumes the risk that liability could be allocated to persons or companies who are dead, insolvent or cannot be located, leaving the claimant purchaser unable to recover its loss.

The recent amendments to the Act specifically exclude statutory warranty claims from apportionment under the Civil Liability Act. Developers and builders will therefore no longer be able to attempt to reduce their liability under the Act in this way.

Statutory warranty periods

The amendments to the Act will reduce the duration of the statutory warranties provided by the builder and developer to:

- six years for structural defects; and
- two years for non structural defects.

These periods reflect the standard periods of cover available under Home Owners Warranty insurance policies. The reduction of statutory warranty period for structural defects to six years post completion is consistent with the six year limitation period for breach of a simple contract (as opposed to the twelve year limitation period that applies to a deed).

While the amendments have a retrospective effect on all existing contracts, they do not apply to existing claims or proceedings.

¹ It should be noted that, on the basis of the Full Court of the Tasmanian Supreme Court's decision in *Aquagenics Pty Ltd v Break O' Day* (2010) 26 BCL 263 (not cited in *Dasco*), there is a strong argument that by virtue of the operation of s3A(2) of the *Civil Liability Act 2002* (NSW) (which is identical to the Tasmanian provisions considered in that case), the Civil Liability Act's proportionate liability provisions would not have applied to a detailed construction contract in any event.