

# Builder Gone Bust?

## Making the most of Home Owner Warranty Insurance?

When faced with defective residential building works and a builder unable to satisfy a claim, focus will obviously shift to home owner warranty insurance. However, having been intended as a last resort measure, this is subject to some significant limitations:

- **Contracts covered** – The Home Building Act 1989 (“Act”) requires a contractor performing residential building work with a GST inclusive contract price of \$20,000 or more to have home owner warranty insurance (“HOWI”).
- **Buildings covered** – This only applies to buildings with 3 storeys or less, with some scope to artificially inflate the number of storeys.
- **Trigger events** – HOWI provides some cover if the builder dies, becomes insolvent, disappears, with insolvency deemed if the builder’s licence is suspended as a result of failure to satisfy a building claim order.

There are also some potential traps, where failing to take action or taking the wrong action can prejudice cover. Particular problems we have seen include:

- **Trigger events, e.g.:**
  - Where the builder is not dead or insolvent, but unwilling and/or unable to rectify defects or satisfy a claim, potentially necessitating pointless proceedings against the builder prior to recourse to HOWI.
  - Where suspension of builder’s licence does not result in deemed insolvency, e.g. where it relates to failure to satisfy an order in favour of another client of the builder.
- **Issues with insurer, e.g.:**
  - Where there is dispute as to whether a defect is a major defect and hence a dispute in relation to the insurance period.
  - Where the parties are at odds as to the required scope of works to rectify the relevant defects, i.e. the insurer does not accept the owner’s scope of works.
  - Where the issues concern incomplete works and/or unjustified price variations, which may be disputed by the builder and hence also the insurer.

- Notification/time limit issues, e.g.:
  - Where the builder has failed to give or delayed giving notice of specified matters to the insurer.
  - Where the insurer alleges failure by the owner to satisfy the notification and other requirements for pursuing, after the period of insurance expires, a claim which became apparent during the period of insurance.
  - Tight time frames within which adverse insurer decisions must be appealed can cause problems.

To minimise these risks, we suggest the following:

- Evidence – Ensure that your position is supported by evidence from appropriate experts. Apart from the essential role it will play in court or tribunal proceedings, this will assist greatly with disputes with the insurer, e.g. disputes as to:
  - Whether a defect is a major defect.
  - Whether works are incomplete, bearing in mind that this will likely be capped at 20% of the contract price.
  - The required scope of works to rectify the defects.
- Notifications:
  - Immediately notify your insurer of any loss that you have suffered that relates to your policy, even prior to the occurrence of a trigger event.
  - Notify the insurer of the relevant facts and circumstances you became aware of, as soon as practical after you become aware of them.
  - Be wary of situations where, in hindsight, it will be considered that you ought reasonably have been aware of something, i.e. carry out appropriate investigations to ensure you are not unaware of such things.
  - Be careful when dealing with incomplete works claims. The period of cover for making non-completion claims runs from 12 months from when the builder fails to commence or ceases the work. Further, there is no extended claim period in relation to a loss that arises from non-completion of work.
  - Be particularly careful when approaching the end of the warranty period. This could be extended if you become aware of the loss within the final six months of the warranty period. You may also be able to make a ‘delayed claim’ after the warranty period has expired, but will need to demonstrate that you diligently pursued the builder to rectify the problem and that you properly notified the insurer in writing during the warranty period.

- Remember the jurisdictional requirement of a claim on the insurer within 10 years of completion of the work.
- Appeals – Be aware of time limits to appeal against adverse insure decisions:
  - The period in which an insurer is required to determine a claim (i.e. 45 or 90 days, depending on when the policy was issued) will start when the insurer receives the claim information.
  - You must appeal the insurer’s decision within 45 days from the date written notice of a decision is given to you, although an extension may be possible if the Tribunal or Court grants leave due to “special circumstances”.

We have considerable experience with these issues and can assist you to traverse them and minimise the risk of having to address building defect issues without recourse to a claim against the builder or insurer.

**Prepared by Bannermans Lawyers**  
**27 August 2020**