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INFORMATION SHEET

FROM THE IR/LEGAL DESK

Defective Workmanship: Your Rights and Obligations

Recently HIA has noticed an increase in the number of payment disputes over building work.

A common justification given by clients for refusing to make payment for work done is that the work is not to their satisfaction. It is therefore helpful to clearly know exactly what your rights and obligations are in relation to defective workmanship.

Defects Liability Period

The *Home Building Contracts Act 1991 (WA)* provides that it is a term of every home building contract that the builder is required to rectify at the cost of the builder all defects notified to them by the owner within 4 months (or 120 days) after the date of practical completion. "Defect" is defined under the relevant law to mean:

- a failure to perform the home building work in a proper and workmanlike manner and in accordance with the contract; or
- to supply materials that are of merchantable quality and reasonably fit for the purpose for which the owner required the home building work to be performed.

If the Builder does not make good on any defects notified to them by the client during the defects liability period then the client can make a complaint to the Building Commission for an order that the builder perform rectification work.

At practical completion, the builder is to be paid in full and upon the client taking possession and the defects liability period commences. There is a mistaken belief that if there is any defect in the work, the client does not have to pay the money which is due. HIA often receives calls from members advising that their clients have said that they will withhold payment because minor rectification work has not been completed. This would generally constitute a breach of contract on the part of the client.

Practical completion does not mean that the work has to be perfect in every way; rather, it means that it is complete in a way that does not prevent it from being reasonably capable of being used for its intended purpose. The work is to be performed in accordance with the plans and specifications, and to industry standards, not the 'client's standard'.

Where a payment dispute arises, HIA strongly recommends that the builder does not hand over the keys to their client. Retaining possession of the keys is one of the few protections which a builder has available to secure payment. Handing over the keys would substantially reduce the builder's negotiating position in relation to the non-payment.

DISCLAIMER - The above is intended to provide general information in summary form. The contents do not constitute specific advice and should not be relied upon as such. Formal specific advice should be sought by members with respect to particular matters before taking action.

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Statutory Warranty

A related issue is that of defects which arise after the defects liability period has expired. Under the *Building Services (Complaint Resolution and Administration) Act 2011*, a builder can be liable for faulty and defective work for a period of up to 6 years after the completion of the works.

There is again a mistaken belief that the 6 year period is a "structural warranty" and only refers to structural defects. However, this is not the case. The 6 year period operates as a limitation period within which a client can make a complaint to the Building Commission in relation to all faulty and defective work, including plumbing work.

However, not all problems which might potentially arise during the 6 year period would be caused by faulty workmanship. Replacement of items that are damaged due to everyday wear and tear or something which the owner does to it will generally not be the builder's responsibility. Instead, the builder would only be responsible when the problem occurs due to faulty or unsatisfactory workmanship.

Generally, a client will contact the builder and bring the workmanship issues to their attention. The best practice for responding is to send a representative along in 'good faith' to assess the building work and then make a decision as to whether you have any liability for performing rectification work.

Should you require any assistance with these topics then please call Michael O'Kane, HIA Workplace Advisor (Western Australia) on 9492 9200