

## Have you suffered loss in the sale of a building with faulty or defective building work?

Did you know that under section 5(1) of the *Building Services (Complaints Resolution and Administration) Act 2011* (WA) (Complaints Act), a previous owner of a building can bring a claim against the builder for unsatisfactory or faulty building work. However, although you have the right to bring the claim, you may not get much out of it.

### Projects, Construction & Engineering Update

In *Twinbrook Corporation Pty Ltd v WMP Pty Ltd* (2012) the Western Australian Supreme Court considered whether a developer claiming an order for payment for faulty building work in 3 strata units, could be entitled to any payment for the 2 units which it had already sold. The developer brought the claim under section 12A of the *Builder's Registration Act 1939* (WA) (Old Building Act), which has since been replaced by the Complaints Act.

In *Twinbrook*, the Court examined section 12A(1a)(b) of the Old Building Act, which provided that a payment could be made to "the person for whom the building work was carried out". The developer argued that this wouldn't need to be the current owner, and referred to some earlier tribunal decisions that suggested a previous owner could be entitled to an order for payment, in certain circumstances.

After considering a number of difficulties in a policy that allowed previous owners to a payment for such a claim, the Court commented that it "doubted the correctness" of those earlier tribunal views. The Court said that the "the most obvious way of dealing with this problem is to limit any claim to the current owner". However the Court acknowledged that if its interpretation was wrong, payments should be limited to previous owners who had incurred some loss or liability. In this case, the developer admitted it hadn't incurred such loss.

#### The New Complaints Act (2011)

While the Old Building Act says that a payment must be to an "owner" or "person for whom building work was done", the new Complaints Act says that a payment may be to an "aggrieved person".

#### Who does this affect?

- Current and previous property owners
- Building Developers

#### Article Highlights

- Previous property owners may now be eligible for claims of faulty workmanship if they incurred costs from rectifying the unsatisfactory work.
- Evidence may be difficult to attain if the previous owner has corrected the faulty workmanship prior to selling the property.
- A potential claim must be lodged within six years of the completed works.



The Complaints Act doesn't define "aggrieved person", however there could be an argument that a person who has:

- sold their property at a reduced value because of faulty building work; or
  - incurred the costs of remedying faulty building work prior to selling the property,
- would be an 'aggrieved person', even though they are no longer the owner of the building.

### So what does this mean for you?

Unfortunately, it isn't clear whether a former owner could be entitled to an order for payment under the new Complaints Act. If the Courts, State Administrative Tribunal and the Building Commission adopt the position in Twinbrook, it could be difficult or unlikely. However, it appears your position will be better if you can prove you have suffered loss. Keep in mind there may be evidentiary difficulties in:

- establishing that a purchaser took the defects into account in their offer (and what the amount would have been otherwise); and/or
- proving workmanship defects in already rectified works.

If you have a potential claim against a builder for unsatisfactory or faulty building work, you should seek legal advice before selling the property. You should also know that you need to bring the claim within 6 years of the builder doing the building work, and it doesn't matter if the work was done before the Complaints Act came into effect in 2011.

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