

# POLICY OF INSURANCE UNDER THE HOME BUILDING COMPENSATION FUND

## A. How to read the policy

- (i) The **policy** covers **you** for the types of loss, and for the amounts of loss, described in clause 1.
- (ii) Clause 2 explains the period for which the **policy** provides cover.
- (iii) The **policy** does not cover **you** for the losses set out in clause 3.
- (iv) **Your** entitlement to indemnity is subject to conditions. In particular, **you** must comply with the obligations relating to claims in clause 4 and the general obligations set out in clause 5.
- (v) In some cases, cover under the **policy** may be limited by clause 6.
- (vi) Words and phrases appearing in bold have the special meanings explained in clause 7.
- (vii) Limitations on and exclusions of liability provided for in this **policy** are intended to comply with the **Act** and **Regulation**, and to the extent that they do not they are to be read as if complying with the relevant part(s) of the **Act** and/or **Regulation** dealing with the applicable limitation(s) or exclusion(s).

## 1. Cover

### 1.1 Residential building work

- (a) Subject to the terms of the **policy** and in accordance with the **Act** and the **Regulation**, the **policy** will cover **you** if **you** suffer the following losses or damage in respect of the **work** covered by this **policy**:
  - (i) loss or damage resulting from non-completion of the **work** because of the **insolvency**, death or **disappearance** of the **builder**; and
  - (ii) loss or damage arising from a breach of a **statutory warranty** by the **builder**, being loss or damage in respect of which **you** cannot recover compensation from the **builder** or have the **builder** rectify because of the **insolvency**, death or **disappearance** of the **builder**.
- (b) Subject to the terms of the **policy**, in accordance with the **Act** and the **Regulation** and without limiting paragraph (a), the **policy** will cover **you** for the following loss or damage, being loss or damage in respect of which **you** cannot recover compensation from the **builder**, or have the **builder** rectify, because of the **insolvency**, death or **disappearance** of the **builder**:
  - (i) loss or damage resulting from faulty design, where the design was provided by the **builder**;
  - (ii) loss or damage resulting from non-completion of the **work** because of early termination of the **contract** because of the **builder's** wrongful failure or refusal to complete the **work**;
  - (iii) the cost of alternative accommodation, removal and storage costs reasonably and necessarily incurred as a result of an event referred to in paragraph (a);
  - (iv) the loss of a deposit or progress payment due to an event referred to in paragraph (a); and
  - (v) any legal or other reasonable costs incurred by **you** in seeking to recover compensation from the **builder** for the loss or damage or in taking action to rectify the loss or damage.
- (c) The **policy** will also cover **you** for any acts and omissions of all persons contracted by the **builder** to perform the **work** resulting in the loss or damage referred to in paragraph (a) or (b).

- (d) The cover under this clause extends to any **residential building work** performed by the **builder** by way of rectification of the **work** after completion (as provided at clause 2.4) of the **work**.

### 1.2 Amount of cover

- (a) At **our** discretion, **we** will either make good the loss or damage by engaging or paying a builder to repair or rectify the loss or damage, or pay to **you** the amount of that loss or damage, subject to paragraphs (b) and (c) and the limits on cover set out in subclause 1.3.
- (b) Subject to paragraph (c), and except where clause 6 applies (to **residential flat building work**), the **policy** will not cover **you** for more than \$340,000 (or such other amount as may be prescribed by the **Act** and the **Regulation** at the time the **policy** is entered into) in the aggregate for all claims made.
- (c) In respect of a **dwelling** in a building or complex containing more than one **dwelling**, the amount referred to in paragraph (b) may be reduced by not more than an amount calculated by dividing the amount of any claim paid by **us** in relation to **common property** of the building or complex, by the number of **dwellings** contained in the building or complex.

### 1.3 General limits on cover

- (a) **You** must meet the first \$250 of each claim made.
- (b) If the claim is in respect of loss or damage resulting from non-completion of the **work**, the **policy** will not cover **you** for an amount of loss or damage more than 20% of the **contract price** (including any agreed variation to the **contract price**) for the **work**.
- (c) The **policy** will not cover **you** for the amount of a deposit that exceeds the maximum payment permitted by section 8 of the **Act**.
- (d) **We** will not be liable for the amount of any part of a progress payment that exceeds the amount specified for such a payment in section 8A of the **Act**.
- (e) **We** will not be liable for any part of the amount of a deposit, if the deposit has not been paid.
- (f) If **residential building work** has not commenced, the loss or damage indemnified against under the **policy** is limited to the loss of any deposit paid.
- (g) All references in the **policy** to dollar amounts and the **contract price** are inclusive of any applicable goods and services tax (GST).

## 2. Period of insurance

### 2.1 Non-completion

In respect of loss or damage arising from non-completion of the **work**, the **policy** provides cover for a period of 12 months after the failure to commence, or cessation of, the **work**.

### 2.2 Major defects

In respect of loss or damage arising from a **major defect**, the **policy** provides cover for a period of six years after the completion of the **work** or such other period as may be prescribed by the **Act** and the **Regulation**.

### 2.3 Other loss and damage

In respect of loss or damage arising other than from a **major defect** or non-completion of the **work**, the **policy** provides cover for a period of two years after the completion of the **work** or such other period as may be prescribed by the **Act** and the **Regulation**.

### 2.4 Completion of the work

**Work** is taken to be complete:

- (a) In respect of residential building work other than the construction of a new building in a **strata scheme**:
  - (i) On the date that the **work** is completed within the meaning of the **contract** under which the **work** was done; or
  - (ii) If:

- i. The **contract** does not provide for when **work** is completed;
- ii. There is no **contract**; or
- iii. In any other case,

On the date of **practical completion**.

- (b) In respect of paragraph (a), if **residential building work** comprises the construction of 2 or more buildings each of which is reasonably capable of being used and occupied separately, **practical completion** of the individual buildings can occur at different times (so that **practical completion** of any one building does not require **practical completion** of all the buildings).
- (c) In respect of **residential building work** comprising the construction of a new building in a **strata scheme**:
  - (i) On the date of issue of an **occupation certificate** that authorises the occupation and use of the whole of the building, unless paragraph (ii) applies, or
  - (ii) The occurrence of some other event that is prescribed by the **Regulation** as constituting completion of the **work**.
- (d) In respect of paragraph (c), if a **contract** to do **residential building work** (the *primary contract*) comprises the construction of 2 or more separate buildings, the date of completion of the **work** is to be determined as if there was a separate **contract** for each separate building (with each contract on the same terms as the primary contract) so that the **work** for each building will have a separate completion date. For the purposes of this paragraph, a building is separate if it is reasonably capable of being used and occupied separately from any other building.

- (g) a claim in relation to an appliance or apparatus (such as a dishwasher or air conditioning unit) if the claim is made after the expiry of the manufacturer's warranty period for the appliance or apparatus concerned, or, if there is no warranty period, outside the reasonable lifetime of the appliance or apparatus;
- (h) a claim in relation to damage to **work** or materials that is made outside the reasonable lifetime of that **work** or materials or the manufacturer's warranty period for the materials; or
- (i) a claim in relation to a defect due to a faulty design provided by **you**;
- (j) work that:
  - (i) is not **residential building work**; and/or
  - (ii) did not require a certificate of insurance under Part 6 of the **Act**;
 regardless of whether a valid insurance certificate has been issued for it.

- 3.2 The **policy** does not cover an interest in the **work** that is not **your** interest and **we** are not liable under the **policy** to any person other than **you**.
- 3.3 The **policy** does not cover any claim by the **builder**.
- 3.4 The **policy** does not cover a claim by any person who is, in relation to the **work**:
  - (a) a **developer**; or
  - (b) a holder of a contractor licence (as defined in the **Act**) who carried out **residential building work**; or
  - (c) a person who does **residential building work** other than under a contract (including an **owner-builder**).
- 3.5 The **policy** does not cover a claim by any person who is a company or a body corporate that is a related company, a related body corporate or a related party (within the meaning of s.50 or s.228 of the *Corporations Act 2001* (Cth)) to any of the persons at paragraphs 3.3 or 3.4 above that are a corporate person,
- 3.6 Paragraphs 3.3, 3.4 and 3.5 apply notwithstanding if that person is named as a beneficiary under the **policy**.

### 3. Loss and damage for which the policy provides no cover

3.1 The **policy** will not cover **you** for:

- (a) claims that may otherwise arise under the **contract** in the nature of liquidated damages for delay or damages for delay, however this limitation does not extend to any increase in rectification costs caused by the effluxion of time;
- (b) a claim for loss or damage resulting from any of the following:
  - (i) war;
  - (ii) an **act of terrorism**;
  - (iii) civil unrest;
  - (iv) asbestos contamination or removal;
  - (v) a nuclear event;
  - (vi) risks normally insured under a policy for public liability or contract works;
  - (vii) an act of God or nature;
  - (viii) failure by **you** to maintain appropriate protection against pest infestation or exposure of natural timbers;
  - (ix) consequential loss, including, without limitation, loss of rent or other income, loss of enjoyment, loss of business opportunity, inconvenience or distress; or
  - (x) malfunction in any mechanical or electrical equipment or appliance, if **we** prove that the malfunction is not attributable to the workmanship of, or installation by, the **builder**;
- (c) loss or damage that could reasonably be expected to result from fair wear and tear of the **work**, or from **your** failure to maintain the **work**;
- (d) a claim in relation to a defect in, or the repair of damage to, a **major element** in the non-residential part of a building that supports or gives access to the residential part, unless it is a defect or damage that adversely affects the structure of the residential part or the access to it;
- (e) a claim in relation to damage caused by the normal drying out of the **work** if the **builder** has taken all reasonable precautions in allowing for the normal drying out when carrying out the **work**;
- (f) a claim in relation to damage due to or made worse by **your** failure to take reasonable and timely action to minimise the damage;

### 4. Claims conditions

#### 4.1 Making a claim

- (a) The **policy** provides cover in respect of loss giving rise to a claim only if **you** make a claim in respect of the loss during the **period of insurance**.
- (b) Except in the case of claims arising from non-completion of **work**, **you** may make a claim in respect of a loss that becomes apparent in the last six months of the **period of insurance** within six months after the loss becomes apparent.
- (c) If the **insolvency**, death or **disappearance** of the builder does not occur until after the expiry of the **period of insurance** (or occurs during the last six months of the **period of insurance**), **you** may make a claim after the **period of insurance** in respect of a loss which becomes apparent during the **period of insurance**, provided that:
  - (i) **you** notify **us** of the loss during the **period of insurance** (or, if the loss becomes apparent within the last six months of the **period of insurance**, within six months after the loss became apparent), with the notification setting out such information as may be reasonably necessary to put **us** on notice as to the nature and circumstances of the loss;
  - (ii) any notification which **you** give under paragraph 4.1(c)(i) must be in writing and in such form as may be prescribed by the **Regulation** from time to time; and
  - (iii) since the loss became apparent, **you** have diligently pursued the enforcement of the **statutory warranty** concerned in respect of the loss.

#### 4.2 Awareness of facts and circumstances giving rise to a claim

- (a) **We** may not reduce **our** liability under the **policy** or reduce any amount otherwise payable in respect of a claim, merely because of a delay by **you** in notifying **us** of the claim, if the claim is notified to **us**:
- (i) unless paragraph 4.2(a)(ii) applies, within six months after **you** first become aware (or ought reasonably become aware), of the fact or circumstance under which the claim arises; or
  - (ii) if the claim is for loss or damage resulting from non-completion of **work**, within 12 months after the later of:
    - i. the date of the **contract**;
    - ii. the date provided in the **contract** for commencement of **work**; or
    - iii. the date on which **work** ceased,
 but **we** may reduce **our** liability under the **policy** or reduce any amount otherwise payable in respect of a claim notified outside of these periods.
- (b) If **you** notify **us** of a loss, **you** are taken for the purposes of this clause to have given notice of every loss that was caused by the same defect as caused the loss of which **you** notified **us**, whether or not a claim in respect of the notified loss has been settled.

#### 4.3 Certificate of insurance

- (a) If **we** have provided to **you** or another person a certificate of insurance evidencing insurance for the **work**, or if **we** have otherwise accepted cover, **we** are not entitled to refuse to pay a claim in respect of the **work** or to cancel the **policy** solely because the premium was not paid.
- (b) If **we** have provided to **you** or another person a certificate of insurance evidencing insurance for the **work**, or if **we** have otherwise accepted cover, **we** are not entitled to refuse to pay a claim in respect of **work** done after the **contract** has commenced or to cancel the **policy** solely because the **contract** was entered into before the **period of insurance** commenced.

### 5. General conditions

#### 5.1 Non-disclosure or misrepresentation

- (a) **We** are not entitled to either refuse to pay a claim under the **policy** or to cancel the **policy** on the ground that the **policy** was obtained by misrepresentation or non-disclosure by the **builder**.
- (b) When **you** provide information to **us**, including when **you** answer **our** questions, **you** must be honest and ensure that the information that **you** provide to **us** is accurate and complete.

#### 5.2 Recovery

- (a) If **we** pay a claim, **we** are entitled to be subrogated to **your** rights against any person in relation to the claim to the extent of the amount paid by **us**. **You** must provide **us** with reasonable assistance to recover damages or contribution from any other person.
- (b) **You** must not limit or exclude **your** rights against a person from whom **you** might otherwise be able to recover in respect of loss or damage. If **you** do, **we** may reduce **our** liability to **you** to the extent that **we** cannot recover from that other person as a result of the limitation or exclusion by **you**.

#### 5.3 Other conditions

- (a) Without limiting **your** obligations under subclause 4.1, if **you** suffer loss or damage arising from a breach of a **statutory warranty** in respect of the **work**, **you** must act to enforce the **statutory warranty** and if **you** fail to take sufficient action **we** may reduce **our** liability by an amount that fairly represents the extent to which **our** interests have been prejudiced
- (b) **You** must give **us** any assistance, information or documents which **we** request. This includes giving **us** and **our** nominated builder reasonable access to inspect, rectify or complete the **work** unless **you** have reasonable grounds to refuse access.
- (c) Subject to the terms of the **policy** and in accordance with the **Act** and **Regulation**, **we** are taken to have accepted liability for a claim if written notice of **our** decision in relation to the claim is not given to **you** within:
  - i) 90 days of the lodging of the claim with **us**, or
  - ii) such further time as may be agreed between **you** and **us**.

- (d) Deemed acceptance under this clause does not operate:
  - i) In respect of a claim for loss or damage that is not covered under or is able to be excluded under the **policy**;
  - ii) To give rise to liability on **our** part for a loss or damage that is not covered under or is able to be excluded under the **policy**;
  - iii) Otherwise to give rise to a right, entitlement or cover under the **policy** other than as provided under the **policy**
- (e) The **policy** is subject to the laws of New South Wales.

### 6. Residential flat building work

- (a) This clause applies to the following **work** in relation to an existing single **residential flat building** where the **contract price** (inclusive of GST) exceeds \$20,000:
  - (i) **work** on the **common property** of the existing single **residential flat building** (where the building comprises strata, community scheme or company title home units), and
  - (ii) **work** on an existing single **residential flat building** if the whole building is owned by the same person.
- (b) If the amount obtained by dividing the **contract price** by the number of **dwellings** in the building does not exceed \$20,000, the **policy** will not cover **you** for more than \$340,000 (or such other amount as may be prescribed by the **Act** and the **Regulation** at the time the **policy** is entered into) in the aggregate for all claims made.
- (c) If the amount obtained by dividing the **contract price** by the number of **dwellings** in the building exceeds \$20,000, the **policy** will not cover **you** for more than \$340,000 (or such other amount as may be prescribed by the **Act** and the **Regulation** at the time the **policy** is entered into) in the aggregate for all claims made in respect of each **dwelling** in the building.
- (d) In this clause:
  - (i) 'dwelling', in relation to a strata, community scheme or company title home unit, includes any garage or storage area that is included in the same title as the unit.
  - (ii) 'residential flat building' means any building containing two or more **dwellings**.

### 7. Terms with special meanings

In the **policy** the words in bold have the meaning indicated below.

**Act** means the *Home Building Act 1989* (NSW) as amended from time to time.

**Act of terrorism** means an act that, having regard to the nature of the act, and the context in which the act was done, it is reasonable to characterise as an act of terrorism.

**Builder** means the builder described in the **insurance application**.

**Building claim** means a claim for:

- (a) the payment of a specified sum of money;
- (b) the supply of specified services;
- (c) relief from payment of a specified sum of money;
- (d) the delivery, return or replacement of specified goods or goods of a specified description; or
- (e) a combination of two or more of the remedies referred to in paragraphs (a) to (d),

that arises from a supply of building goods or services whether under a **contract** or not, or that arises under a contract that is collateral to a contract for the supply of building goods or services, and includes a claim for the payment of an unspecified sum of money that arises from a supply of building goods or services as defined in section 48A of the **Act**. It does not include a claim that the **Regulation** declares not to be a building claim.

**Building claim order** means an order of a court or the New South Wales Civil and Administrative Tribunal in respect of a **building claim**.

**Common property** means:

- (a) common property within the meaning of the *Strata Schemes (Freehold Development) Act 1973* (NSW) or the *Strata Schemes (Leasehold Development) Act 1986* (NSW), or
- (b) association property within the meaning of the *Community Land Development Act 1989* (NSW).

**Contract** means a contract between **you** and the **builder** pursuant to which the **work** is done or is to be done.

**Contract price** has the same meaning as it does under the **Act**.

**Developer** has the same meaning as it does under the **Act**.

**Disappearance** means disappearance from Australia and includes a reference to the fact that, after due search and inquiry, the **builder** cannot be found in Australia.

**Dwelling** means the dwelling(s) (as defined under the **Act**) described in the **insurance application**.

**Insolvency** means:

- (a) in relation to an individual, that the individual is insolvent under administration (within the meaning of the *Corporations Act 2001* (Cth));
- (b) in relation to a corporation, that the corporation is an externally-administered body corporate within the meaning of the **Act**; or
- (c) in relation to a partnership, the insolvency of any of the partners.

For the purposes of the application of the **policy** to any loss that is the subject of a **building claim order** made against the **builder** that remains unsatisfied, **insolvency** includes the suspension of the **builder's** licence under section 42A of the **Act**.

**Insurance application** means the application form completed by **you** or the **builder** applying for this insurance.

**Major defect** means

- a) a defect in a **major element** of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the **National Construction Code** (or any combination of these) and that causes or is likely to cause:
  - i) the inability to inhabit or use the building (or part of the building) for its intended purpose; or
  - ii) the destruction of the building or any part of the building; or
  - iii) a threat of collapse of the building or any part of the building; or
- b) a defect of a kind that is prescribed by the **Regulation** as a major defect.

For the purposes of this definition of **major defect**, '**major element**' of a building means:

- (a) any internal or external load-bearing component of a building that is essential to the stability of the building or any part of it, (including but not limited to foundations and footings, walls, roofs, columns and beams); or
- (b) a fire safety system; or
- (c) waterproofing; or
- (d) any other element that is prescribed by the **Regulation** as a major element of a building.

**National Construction Code** means the National Construction Code produced and maintained by the Australian Building Codes Board, as in force from time to time.

**Occupation certificate** means an occupation certificate under the *Environmental Planning and Assessment Act 1979*.

**Owner-builder** means a person who does **owner-builder work** (as defined by section 29 of the **Act**) and who is issued an **owner-builder permit** for that work, or was required to obtain an **owner-builder permit** for that work.

**Owner-builder permit** has the same meaning as it does under the **Act**.

**Period of insurance** means the period of cover specified in clause 2.

**Policy** means this policy wording, any endorsements and the certificate of insurance.

**Practical completion** of the **work** occurs when the work is completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose. Unless an earlier date for **practical completion** can be established, it is presumed that **practical completion** occurs on the earliest of whichever of the following dates can be established for the **work**:

- (a) the date on which the **builder** handed over possession of the **work** to **you**;
- (b) the date on which the **builder** last attended the site to carry out **work** (other than **work** to remedy any defect that does not affect practical completion); or
- (c) the date of issue of an **occupation certificate** that authorises commencement of the use or occupation of the **work**.

**Regulation** means the *Home Building Regulation 2014* (NSW), as amended from time to time.

**Residential building work** has the same meaning as it does under the **Act**.

**Residential flat building work** means **work** the subject of Clause 6 of this **policy**.

**Statutory warranty** means any of the following warranties:

- (a) that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract;
- (b) that all materials supplied will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) that the work will be done in accordance with, and will comply with, the **Act** and any other law;
- (d) that the work will be done with due diligence and within the time stipulated in the contract or, if no time is stipulated, within a reasonable time;
- (e) that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling,
- (f) the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling; and
- (g) that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if you expressly made known to the builder (or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the builder), the particular purpose for which the work was required or the result that you desired the work to achieve, so as to show that you relied on the builder's skill and judgment.

**Strata scheme** means a freehold strata scheme or a leasehold strata scheme as defined by, and within the meaning of, the *Strata Schemes Management Act 1996* (NSW).

**We, our** or **us** means the NSW Self Insurance Corporation incorporated under the *NSW Self Insurance Corporation Act 2004* (NSW).

**Work** means the **residential building work** which is done or is to be done by the **builder** to the **dwelling** under the **contract**.

**You** or **your** means the person on whose behalf the **work** is done or is to be done including any owner of the land at the time the **contract** is entered into, on which **residential building work** is done, and any successor in title to that person.