

## Combined Construction & Warranty Period Terms of Indemnity Provided under the SB Fidelity Unit Trust

### How to read these Terms

- The Indemnity provided to a Named Beneficiary and their successors in title provides an indemnity for the types of loss, and for the amounts of loss, described in clause 1.
- Clause 2 explains the period for which the indemnity is provided
- The Indemnity provided does not indemnify you for the types of losses set out in clause 3.
- Your entitlement to the 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.
- In some cases, the indemnity may be limited by clause 6.
- Various and phrases have the meanings explained in clause 7.

## 1. Cover

### 1.1 Residential building work

(a) Subject to these Terms and in accordance with the Act and the Regulations, the Secure Build will indemnify you if you suffer the following losses or damage in respect of the Work covered by these Terms:

(i) loss or damage resulting from non-completion of the Work because of:

1. the insolvency, death or disappearance of the Contractor; or
2. the suspension of the Contactor's licence pursuant to section 42A of the Act.

(ii) loss or damage arising from a breach of a statutory warranty, being loss or damage in respect of which you cannot recover compensation from the Contractor or have the Contractor rectify because of:

1. the insolvency, death or disappearance of the Contractor; or
2. the suspension of the Contactor's licence pursuant to section 42A of the Act.

(b) Subject to these Terms and in accordance with the Act and the Regulation and without limiting paragraph (a), you will be indemnified for the following loss or damage, being loss or damage in respect of which you cannot recover compensation from the Contractor, or have the Contractor rectify, because of the insolvency, death or disappearance of the Contractor or the suspension of the Contactor's licence pursuant to section 42A of the Act:

(i) loss or damage resulting from faulty design, where the design was provided by the Contractor;

(ii) loss or damage resulting from non-completion of the Work because of early termination of the Contract because of the Contractor'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 Contractor for the loss or damage or in taking action to rectify the loss or damage.

(c) You will also be indemnified for any acts and omissions of all persons contracted by the Contractor or other person to perform the work resulting in the loss or damage referred to in paragraph (a) or (b).

## 1.2 Amount of Indemnity

(a) At our discretion, we will either make good the loss or damage by engaging or paying a Contractor 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 indemnity limits set out in subclause 1.3.

(b) Subject to paragraph (c), and except where clause 6 applies (to residential flat building work), you will not be indemnified for more than \$340,000 (or such other amount as may be prescribed by the Act and the Regulations at the time the Building Unit Certificate was issued) in the aggregate for all claims made arising during the 'construction period' and more than \$340,000 (or such other amount as may be prescribed by the Act and the Regulation at the time the Building Unit Certificate was issued) in the aggregate for all claims made arising during the 'warranty period'.

(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 indemnity 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 Indemnity limits on cover

(a) If an indemnity claim is in respect of loss or damage resulting from non-completion of the work, you will not be indemnified for more than 20% of the contract price (including any agreed variation to the contract price) for the work.

(b) You will not be indemnified for the amount of a deposit that exceeds the maximum payment permitted by section 8 of the Act (10% of the contract price).

(c) We will not be liable to indemnify you for the amount of any part of a progress payment that exceeds the amount specified for such a payment under the Building Contract or that has not been approved by SecureBuild.

(d) All references in these Terms to dollar amounts and the contract price are inclusive of goods and services tax (GST).

## 2. Period of Indemnity

### 2.1 "Construction Period" (Non-completion & Defects)

In respect of loss or damage arising from non-completion of the Work, you will be indemnified for a period of not less than 12 months after the failure to commence, or cessation of, the Work.

### 2.2 "Warranty Period" (Major Defects)

In respect of loss or damage arising from a major defect, you will be indemnified for a period of six years after the completion of the Work or the end of the Building Contract, whichever is the later.

### 2.3 "Warranty Period" (Minor defects)

In respect of loss or damage arising other than from a major defect or non-completion of the Work, you will be indemnified for a period of two years after the completion of the Work or the end of the Building Contract, whichever is the later.

### 2.4 Completion of the work

(a) The completion of the Work occurs on the date that the Work is complete within the meaning of the Building Contract under which the Work was done.

(b) If the Building Contract does not provide for when Work is complete (or there is no contract), the completion of the Work occurs on "practical completion" of the Work, which is 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.

(c) It is to be presumed (unless an earlier date for practical completion can be established) that practical completion of the Work occurred on the earliest of whichever of the following dates can be established for the Work: or

- (i) the date on which the Contractor handed over possession of the Work to you,
- (ii) the date on which the Contractor last attended the site to carry out work (other than work to remedy any defect that does not affect practical completion),
- (iii) the date of issue of an occupation certificate under the Environmental Planning and

Assessment Act 1979 that authorises commencement of the use or occupation of the Work,

(d) If the 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).

(e) This clause 2.4 does not apply to the completion of new buildings in strata schemes. The date of completion of new buildings in strata schemes is the date defined in clause 3C of the Act.

### 3. Loss and damage for which we will not indemnify you

You will not be indemnified for:

(a) claims that may otherwise arise under the Building 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) a nuclear event;

(v) failure by you to maintain appropriate protection against pest infestation or exposure of natural timbers;

(vi) consequential loss, including, without limitation, loss of rent or other income, loss of enjoyment, loss of business opportunity, inconvenience or distress;

(vii) 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 Contractor;

(viii) 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;

(ix) a claim in relation to a defect in, or the repair of damage to, a structural 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;

(x) damage caused by the normal drying out of the Work if the Contractor has taken all reasonable precautions in allowing for the normal drying out when carrying out the Work;

(xi) damage due to or made worse by your failure to take reasonable and timely action to minimise the damage;

(xii) 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;

(xiii) 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;

(xiv) a claim in relation to a defect due to a faulty design provided by you;

(xv) an interest in the Work that is not your interest. The indemnity is personal to you and your successors in title.

(xvi) any claim by the Contractor;

(xvii) a claim by any person who is, in relation to the Work, a Developer or the holder of a contractor licence (as defined in the Act) or another person who does residential building work in relation to the Work other than under a Building Contract, or a company that is related (within the meaning the Corporations Act 2001 (Cth)) to any of those persons; and

(xviii) a claim for Work that is not residential building Work as defined under the Act.

### 4. Claims conditions

#### 4.1 Payments to the Contractor

(a) The payment of a deposit to the Contractor is not to exceed 10% of the Contract price.

(b) No payments, other than the deposit, are to be made to the Contractor without first receiving approval from SecureBuild to make those payments.

#### 4.2 Access to your building site

SecureBuild will only indemnify you provide SecureBuild building inspector(s) or other authorised representatives of SecureBuild, are to be given access to the work to carry out any inspections. SecureBuild considers necessary.

#### 4.3 Notifying us

(a) We may reduce the amount we will indemnify you for if you make payments to the Contractor without SecureBuild's approval. Should the Contractor seek payment from you:

- (i) In excess of the stage payment plan set out in the Contract; or
- (ii) In advance of Work to being completed; or
- (iii) Without SecureBuild having inspected the Work as required,

you are required to notify SecureBuild immediately.

(b) We will only indemnify you in respect of loss of which you become aware (or ought reasonably to be aware) and which is notified to us within the period the indemnity is provided for, other than loss described in paragraph (c).

(c) If you become aware (or ought reasonably to be aware) within the last six months of the period of cover of a loss that does not arise from non-completion of Work, then we will only indemnify you if it is notified to us within six months of the date you became aware (or ought reasonably to be aware) of the loss.

(d) Despite subclause (c), there is no extended claim period for loss that:

- (i) Arises from non-completion of the Work; or
- (ii) Arises from a breach of statutory warranty that is covered by a construction period policy or indemnity issued or granted by a third party to you.

(e) We may not reduce our liability under the indemnity or reduce any amount otherwise payable in respect of a claim, merely because of a delay by you in notifying us of a claim:

(i) if the claim is notified to us within six months after you first become aware (or ought reasonably to be aware), of the fact or circumstance giving rise to the claim; or

(ii) if the claim is for loss or damage resulting from non-completion of Work and is notified to us within 12 months after the later of:

- (1) the date of the Building Contract;
- (2) the date provided in the Building Contract for commencement of Work; or
- (3) the date on which work ceased,

but we may reduce our liability under the indemnity or reduce any amount otherwise payable in respect of a claim notified outside of these periods.

(f) If you notify us of a major defect or other defect, you are taken for the purposes of these Terms to have given notice of every defect to which the defect is directly or indirectly related, whether or not the claim in respect of the defect that was actually notified has been settled.

(g) A loss is properly notified to us only if we have been given notice in writing of the loss and the notice provides such information as may be reasonably necessary to put the provider on notice as to the nature and circumstances of the loss.

#### 4.4 Evidence of Cover Builders Unit certificate

(a) If we have provided to you or another person a Builders Unit Certificate/ Evidence of cover certificate evidencing an indemnity 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 refuse to indemnify you solely because the issue price for the Building Unit was not paid.

(b) If we have provided to you or another person a Building Unit Certificate evidencing an indemnity for the Work, or if we have otherwise accepted to indemnify you, we are not entitled to refuse to pay a claim in respect of Work done after the Building Contract has commenced or to refuse to indemnify you solely because the Building Contract was entered into before the Building Unit was issued..

## 5. General conditions

### 5.1 Non-disclosure or misrepresentation

(a) We are not entitled to either refuse to indemnify you in respect of a claim under the indemnity or to refuse to indemnify you on the ground that the Building Unit issued on the basis of a misrepresentation or non-disclosure by the Contractor.

(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 indemnify you for 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 the level of our liability to you under our indemnity 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 clause 4, if you suffer loss or damage arising from non-completion or a breach of a statutory warranty in respect of the Work, you must take steps to enforce completion or the statutory warranty and if you fail to take sufficient action we may reduce our liability under our indemnity to you by an amount that fairly represents the extent to which our interests have been prejudiced.

Note: for example, you might do this by lodging a complaint with NSW Fair Trading, lodging a home building division application with the NSW Civil & Administrative Tribunal or by commencing court proceedings to try to have the Contractor finish any incomplete work or rectify any defective work.

(b) You must give us any reasonable assistance, information or documents which we request. This

includes giving us and our nominated contractor reasonable access to inspect, rectify or complete the Work unless you have reasonable grounds to refuse access.

## 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, our indemnity will not indemnify you for more than \$340,000 (or such other amount as may be prescribed by the Act and the Regulations at the time the relevant Building Unit Certificate is issued) 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 Regulations at the time the Building Unit Certificate is issued) in the aggregate for all claims made in respect of each dwelling in the building.

(d) In this clause, '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.

## 7. Terms with special meanings

In these terms the words or phrases in bold the meanings 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.

**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, but does not include a claim that the Regulations declares not to be a building claim.

**Building claim order** means an order of a court or the NSW

**Building Unit Certificate** means a certificate for a Building Unit issued by the Trust and which nominates you as the Nominated Person as the beneficiary of the Indemnity

**Building Contract** means a contract between the Contractor and you for the Work

**Civil & 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 contractor pursuant to which the work is done or is to be done.

**Contractor** means the individual or entity named as the contractor in the Building Unit Certificate

**Developer** means an individual, a partnership or a corporation on whose behalf residential building work is done:

- (a) in connection with an existing or proposed dwelling in a building or residential development where four or more of the existing or proposed dwellings are or will be owned by the individual, partnership or corporation, or
- (b) in connection with an existing or proposed retirement village or accommodation specially designed for the disabled where all of the residential units are or will be owned by the individual, partnership or corporation.

A company that owns a building under a company title scheme is not a developer for the purposes of the policy.

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

**Dwelling** means the dwelling(s) (as defined under the Act) and described in the Evidence of Cover certificate.

**Evidence of Cover** the evidence of cover certified in the relevant Building Unit Certificate.

**Indemnity** means the indemnity granted to you by the Trust upon the issue of the Building Unit Certificate the terms of which are set out in these Terms

**Insolvency** means:

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

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

**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 regulations as a major defect, or
- (c) the use of a building product (within the meaning of the Building Products (Safety) Act 2017) in contravention of that Act.

For the purposes of the definition of a major defect, a "major element" of a building means:

- (a) an 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, floors, walls, roofs, columns and beams), or
  - (b) a fire safety system, or
  - (c) waterproofing, or
  - (d) any other element that is prescribed by the Regulations as a major element of a building.
- Period of cover means the period of cover specified in clause 2.

**Regulations** means the Home Building Regulations 2004 (NSW), as amended from time to time.

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

**Residential flat building** has the same meaning as in section 62T(2) of the Act or Regulations.

**Residential flat building work** means work the subject of clause 6 of these Terms

**SecureBuild** means SB Fidelity Ltd as a trustee of the SB Fidelity Unit Trust

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

- (a) a warranty 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) a warranty that all materials supplied by the holder or person 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) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
- (d) a warranty 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) a warranty 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, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,  
(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

**We, our or us** means SecureBuild a provider licensed by the NSW Government to provide alternative indemnity products.

**Work** means the residential building work which is done or is to be done by the Contractor under the Building Contract.

**You or your** means the person on whose behalf the work is done or is to be done, and any successor in title to that person.