



# NSW Legislative Council Hansard

## Home Building Amendment Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 8 December 2004.

### Second Reading

**The Hon. JOHN DELLA BOSCA** (Special Minister of State, Minister for Commerce, Minister for Industrial Relations, Assistant Treasurer, and Minister for the Central Coast) [5.50 p.m.]: I move:

That this bill be now read a second time.

As the second reading speech is lengthy and as it has already been delivered in the other House, I seek leave to have the second reading speech incorporated in *Hansard*.

#### Leave granted.

The Home Building Amendment Bill builds on the Government's wide-ranging reforms for the home building industry that have been introduced over the past three years. The bill covers two main areas. The first relates to the governance arrangements for the insurers operating in the home warranty insurance market. These new arrangements will bring about greater accountability on the part of insurers and a more transparent and efficient scheme for consumers and traders. The second relates to the licensing and disciplinary regime for builders and tradespeople. A number of reforms are proposed to remove unscrupulous operators from the system and to prevent their re-emergence either as, or behind, another legal entity.

In May 2003 the Minister for Commerce announced an inquiry into the Home Warranty Insurance Scheme. The inquiry, which was chaired by Mr Richard Grellman, was asked to consider a range of options for the delivery of this important product and to make recommendations on the best way forward. The inquiry consulted extensively with builders, consumers and other parties. The inquiry submitted its final report in September 2003. Among its recommendations were the establishment of a scheme board and advisory council and a system to regulate insurers, the creation of an Industry Deed to assist the entry of insurers and the strengthening of the building licensing processes. Following the release of the inquiry's report, an Interim Scheme Board was established to provide advice on the implementation of the recommendations.

The Interim Scheme Board membership comprises persons with extensive knowledge of insurance, and provides an excellent mix of experience and skills to oversee the development of the new regime for home warranty insurance. The Interim Scheme Board, with the support of the Office of Fair Trading Home Building Service, has consulted extensively. Based on the board's recommendations, the Government proposes to put in place a range of legislative and administrative changes. New governance arrangements for insurers are part of these. A permanent Home Warranty Insurance Scheme Board will be established to continue the work already started by the interim board. The scheme board will be a high-level specialist advisory body focusing on home warranty insurance.

The membership of the board will be drawn from persons with skills in general insurance, insurance products and commerce. Its role will be to monitor the operation of the scheme and to make recommendations to the Minister on possible changes. It will also provide advice on the operating conditions for insurers. The existing Home Building Advisory Council will be re-established in the Home Building Act 1989 and its functions will be amended to reflect its additional role in relation to traders. It will have representation from the insurance industry and non-aligned builders in addition to industry body representation. Consumer representatives will also be appointed.

The development of Market Practice Guidelines and Claims Handling Guidelines was one of the recommendations of the inquiry. Following consultation with insurers, Market Practice Guidelines have now been established and operate as part of the conditions of approval for insurers. Insurers will have to disclose premium and underwriting guidelines, provide reasons for decisions, implement service standards and establish complaint-handling processes. These will enable insurer compliance to be monitored against performance indicators. The Claims Handling Guidelines and complementary data collection proposals are currently being prepared for discussion with insurers, the building industry and other stakeholders.

In this context the bill contains some proposals that exempt the operation of certain provisions in the Privacy and Personal Protection of Information Act 1998. These exemptions are necessary to facilitate the obtaining of information and use of material relevant to the operation of the Home Warranty Insurance Scheme. They will also facilitate the use of information under the changes to the licensing and disciplinary regime. An Industry Deed will be entered into between the Government and the insurers. The deed will indicate the insurers' and the Government's commitment to the scheme. The Government will agree not to amend the legislative scheme without proper consultation, and the insurers will agree to make a long-term commitment to underwriting home warranty insurance in New South Wales.

As a result of the Government's actions CGU Insurance entered the home warranty market in May this year and another insurer, Lumley General Insurance, has also been approved to provide warranty insurance, therefore providing further competition among insurers and greater choice for builders. As I foreshadowed, the bill proposes a range of measures designed to further tighten the licensing provisions and help stamp out phoenix company activities. Significant increases in penalties under the Act are also proposed. Members will be well aware of the hardship that unscrupulous traders have

caused for consumers, subcontractors and suppliers. Over the past four years the requirements for licensing have been progressively tightened, and these changes will make it even harder for the shonks to operate in this industry.

A number of the proposals replicate provisions recently introduced in relation to the property, stock and business agents legislation and other licensing schemes. They will enable the Commissioner for Fair Trading to more effectively prevent inappropriate persons from being involved in the industry and to take effective disciplinary action to remove unscrupulous and incompetent traders. These changes, coupled with the increases to penalties under the Act and the stabilisation of the insurance scheme, will ensure that consumer protection will be significantly enhanced. I now turn to the provisions of the bill.

As I mentioned, a Home Warranty Insurance Scheme Board will be established under the Home Building Act. Its role will be to offer high-level specialist advice on home warranty insurance. The scheme board will have the following functions: to advise the Minister with respect to the approval of kinds of insurance, and insurers; to advise the Minister on the conditions of approval of insurers; to advise the Minister on variations to approvals of insurers; to monitor the operation of the scheme and to make recommendations with respect to the scheme; and to provide advice to the Minister on any other matter referred to it by the Minister. The scheme board will comprise five part-time independent members appointed by the Minister, as well as the Director-General of the Department of Commerce or nominee.

The members of the scheme board appointed by the Minister must have knowledge or experience in insurance products or commerce. A reconstituted Home Building Advisory Council will be established. The Home Building Advisory Council is currently established under the Fair Trading Act 1987. The council will provide advice on consumer-related and, in the future, trader-related issues. As the council will be working closely with the scheme board and because their memberships will overlap it is also proposed that the council be re-established in the Home Building Act.

The council will consist of at least 14 members including: the chair and deputy chair of the scheme board; the Director-General of the Department of Commerce or nominee; two representatives from the insurance industry appointed by the Minister, in consultation with the Insurance Council of Australia; two representatives of the building industry, appointed in consultation with the Master Builders Association and the Housing Industry Association; two persons appointed after consultation with the Labor Council to represent the interests of building industry employees; two persons holding a contractor licence; two consumer representatives; and one legal representative, appointed in consultation with the councils of the Law Society and Bar Association. In the case of both the scheme board and the advisory council, similar provisions will govern the appointment of members and the procedure of meetings as currently apply to the other advisory councils established under the Fair Trading Act.

I mentioned previously that market practice guidelines have been established that deal with issues such as underwriting requirements, service standards for insurers and the transparency of the insurance process. The market practice guidelines have been made part of the operating conditions for insurers under section 103A of the Act. A range of other conditions may apply. To ensure that the Minister has the benefit of high-level advice on the formulation of any conditions of approval, the Act will require that before imposing any conditions of approval on insurers the Minister must firstly consult with the scheme board. The Minister will also have to consult with the board before approving insurers, or varying or revoking an approval. Under the new insurance scheme builders will continue to be able to obtain insurance from more than one insurer. However, it is necessary to ensure that builders do not use this process to obtain greater insurance coverage than is appropriate, having regard to their financial and operational capacity.

The bill therefore provides for insurers to be able to exchange between each other relevant insurance information about licence holders. Relevant insurance information will include information concerning the business, commercial, professional or financial affairs of applicants for home warranty insurance. To ensure that insurers are legally entitled to exchange information of this kind, the bill provides that an insurer who is requested by another to provide relevant insurance information is required and authorised by the Act to disclose the information, despite section 121 of the Act or any other law of the State or any other jurisdiction with respect to the privacy of such information that would otherwise prohibit that disclosure. Section 121 of the Act prohibits the disclosure of trade secrets, information that is of commercial value or information concerning the business or financial affairs of the person from whom the information was obtained, unless the consent of the person is given or other legal excuse applies.

As part of the new governance arrangements, insurers will be required to provide information to the commissioner relating to their business operations as well as information concerning individual builders and claimants. Section 103AC currently provides for the provision of such information to the commissioner. However, where the information relates to individual claimants or insured persons, the consent of those persons was previously required. It is proposed that section 103AC be amended to remove the need for such consent. Access to this kind of information is necessary for the commissioner to deal effectively with disputes and protect the public.

As I said at the outset, the bill provides for a number of enhancements to the existing licensing regime that will further assist in preventing unscrupulous traders from operating within the industry. These will enable the Commissioner for Fair Trading to more effectively prevent inappropriate persons from being involved in the industry and to take disciplinary action to prevent such persons from continuing to be associated with the industry. The bill extends the definition of "officer" in the Act to include a person who is an officer of a corporation within the meaning of the Corporations Act 2001 rather than being linked only to a director or person who is concerned in the management of a company, as is the position now under the Home Building Act.

In a manner similar to that taken under the property, stock and business agents legislation, the Home Building Regulation will specify persons who are disqualified from holding a licence. This will include persons convicted within the last 10 years of an offence involving dishonesty. However, the commissioner may determine that an offence committed by a person

should be ignored because of the time that has passed since the offence was committed or the triviality of the act or omission that gave rise to the offence. The commissioner will be required to reject an application for a licence if the applicant is disqualified from holding a licence, if the applicant is a mentally incapacitated person or if the commissioner is not satisfied the applicant is a fit and proper person to hold the licence. Similar provisions will apply to applications for building consultancy licences, supervisor certificates and tradesperson certificates.

The commissioner will also be able to reject a licence application if satisfied that there are reasonable grounds to believe that the application has been made with the intention of avoiding disclosure of the applicant's, or a close associate of the applicant's, past conduct as the holder of a contractor licence. This proposal is intended to prevent the current practice by some licensees who seek to use the licensing regime to mislead consumers as to their compliance record through linking themselves to other entities. A licence may be refused if the commissioner considers that a close associate of the applicant, who would not be a fit and proper person to hold a licence, exercises a significant influence over the applicant or the operation and management of the applicant's business.

This provision will ensure that persons who are not of good repute will not be able to become involved in the business of a licence holder in circumstances where they are able to effectively control that business without necessarily being a director or officer concerned in the management of the business. A close associate will be defined in new section 3AA. It includes a partner, agent or employee of the applicant or licence holder. It also includes a person who bears a prescribed relationship to the applicant such as a spouse, de facto partner, child, grandchild, sibling, parent or grandparent.

Another ground for refusing a licence application is where an employee or proposed employee of the applicant is disqualified from holding a licence, has had an application for a licence rejected on a ground relating to his or her character, honesty or integrity, or has had a licence cancelled or suspended on any disciplinary ground. This proposal is intended to prevent disqualified persons from continuing to operate in the industry under the umbrella of another licensee, in particular in circumstances where the disqualified person can exercise day-to-day control of operations or receive significant benefits from the corporate or other structure of the licensee without necessarily holding a position concerned in the management of the licence.

However, the commissioner will be empowered to approve of persons working as employees when considered appropriate. Applicants for licences and certificates will be required to notify the Commissioner for Fair Trading of any changes in the state of affairs of the licence applicant before the application is determined. This will place a responsibility on applicants to disclose matters of importance, in particular solvency issues, or risk licence suspension or revocation. The commissioner will be able, by notice in writing, to require an applicant for a licence or a close associate of the applicant to provide information relevant to the investigation of the application.

The commissioner will also be able to require an applicant or close associate to provide such authorities and consents to enable the commissioner to obtain information, including financial and other confidential information from other persons. If a requirement under this provision is not complied with the application may be deferred while non-compliance continues. The power of the commissioner to obtain information from persons by notice in writing under section 127 of the Act will be expanded to enable the commissioner to obtain information relating to the financial solvency of both licence holders and applicants for a licence. The intention of the regime is to identify licence applicants with poor financial compliance records that place themselves, consumers and others at risk.

A number of reforms to the disciplinary provisions are contained in the bill. Part 4 of the Home Building Act establishes the disciplinary regime for licence holders. Normally, a period of time is given for the licensee to make submissions and to provide evidence with respect to the matters to which the notice relates. During this time the licensee may continue to operate until such time as a determination is made by the commissioner. This can leave consumers and others exposed to loss in dealing with the licensee in the intervening period. The bill therefore amends the Act to introduce a power similar to that contained in the Property, Stock and Business Agents Act 2002. The commissioner will be able, by notice in writing, to suspend a licence pending a determination of whether to take disciplinary action. Such a suspension applies only if the commissioner is satisfied that the grounds for disciplinary action specified in the notice to show cause would, if established, justify the suspension or cancellation of the licence.

The suspension may not be imposed for more than 60 days. A suspension may be revoked at any time by notice in writing. The proposed suspension power does not affect any power to suspend a licence under the Fair Trading Act. Additional grounds will be available for disciplinary purposes. These include: that the holder becomes a disqualified person; the holder does not meet the required standards of financial solvency; there is a risk to the public that the licensee will be unable to carry out work under contract; the licence was improperly obtained; or that the commissioner has become aware of information about the licensee that, if known at the time the application for the licence was determined, would have been grounds for rejecting the application. The grounds for disciplinary action will also include employing a person where the licence holder knows that the person is disqualified from holding a licence, has had an application for a licence rejected on a ground relating to the person's character, honesty or integrity, or had a licence cancelled or suspended on a disciplinary ground.

Disciplinary action will also be available if a licensee fails to comply with requirements relating to mandatory inspections. In July 2002 the Joint Select Committee on the Quality of Buildings recommended that mandatory critical stage inspections be required to be carried out by the principal certifying authority, council or accredited certifier. The mandatory stages would vary depending on the type of building work. The Environmental Planning and Assessment Regulation 2000 provides that to allow a principal certifying authority time to carry out critical stage inspections, the building contractor for a building site must notify the principal certifying authority at least 48 hours before building work is commenced at the site if a critical stage inspection is required before commencement of the work.

It is essential that the builder comply with this requirement as serious ramifications may ensue if a mandatory inspection is missed and the work proceeds. Failure to undertake the required inspections, particularly at the footings stage, can lead to serious problems with the work and may result in protracted building disputes, which may cost consumers many thousands of dollars. To reflect the importance of this requirement the bill amends the Act to expressly provide that it is a ground of improper conduct under the disciplinary provisions should a licensee either knowingly fail to inform the principal certifying authority of a mandatory inspection or has proceeded with the building work in the absence of an inspection taking place.

All the new licensing requirements and disciplinary powers accruing to the commissioner that I have outlined will be subject to review on application to the Administrative Decisions Tribunal. In addition to the new disciplinary powers, the bill makes a number of changes to the offence provisions. One of the Government's election commitments was to increase penalties for contractors who breach the Home Building Act. In accordance with this commitment a comprehensive review was undertaken of the penalties that apply. The bill proposes that the maximum penalties under the Home Building Act be made equivalent to those under the Fair Trading Act, that is, 200 penalty units or \$22,000 for an individual and 1,000 penalty units or \$110,000 for a corporation.

The review also noted that some penalties do not reflect the seriousness of the offence. For example, it is proposed to increase the maximum penalty for breaching the maximum deposit requirements from 40 penalty units to 200 penalty units for individuals and 1,000 penalty units for corporations. Penalties for lesser offences, such as failure to provide a consumer brochure at the time a contract is entered into, will be doubled for corporations. It is proposed that proceedings for offences under the Home Building Act be dealt with in a similar manner to that which operates under the Fair Trading Act. In this regard proceedings for an offence against the Act would be disposed of summarily either before a Local Court or the Supreme Court in its summary jurisdiction.

Proceedings for a breach of the Home Building Regulation would continue to be disposed of summarily before a Local Court. The maximum monetary penalty that may be imposed by a Local Court for an offence against the Home Building Act would be 200 penalty units—the current maximum penalty provided in the Act. The review of penalties also included those under the disciplinary provisions. The bill increases from \$22,000 to \$50,000 the maximum monetary penalty that the commissioner may impose on a corporation under the disciplinary provisions. This amount is in line with the maximum monetary penalty that the Minister may currently impose on an insurer for breach of the conditions of approval. No increase is proposed for individuals.

As well as raising the existing maximum penalties for breaches of the Act, certain new offences will be created. It will be an offence to lend a licence. The proposal will bring the Home Building Act into line with legislation introduced in relation to real estate agents. The maximum penalty would be equal to that for doing work without a licence—currently 200 penalty units or \$22,000. The bill makes it an offence punishable by a penalty of 200 penalty units for individuals and 1,000 penalty units for corporations for a licence holder or owner-builder to contract with an unlicensed person to do work that requires a licence. This is intended to bring to an end the situation where builders use unlicensed persons as subcontractors. This proposal will support existing licensees and improve the quality of construction.

It will also be an offence for a person who has control over the doing of building or specialist work to fail or refuse to advise an authorised person of the name and residential address of each subcontractor undertaking the work or to state a name and address the person knows is false. A maximum penalty of 200 penalty units will apply. Contractors who provide false or misleading information in connection with an application for home warranty insurance will also be subject to a maximum penalty of 200 penalty units. A number of other miscellaneous reforms are proposed by the bill. Section 120 of the Act requires the commissioner to maintain a public register of licences, certificates and permits issued under the Act.

The register also records adverse information relating to licence and certificate holders, including the results of any relevant disciplinary determination, the results of prosecutions, details of penalty notices issued, the number of insurance claims paid, instances of non-compliance with tribunal orders, details of public warnings and any cancellation or suspension of the licence, certificate or permit under the Act or any other Act. This information is provided to assist consumers in deciding whether to engage a builder or tradesperson. The information contained on the register is available on line for the public.

Under the Act there is no ability given to the commissioner to remove a particular from the register where it is discovered that the retention of that matter on the register is misleading or otherwise operates unfairly against the licensee. For example, one of the matters recorded is the number of insurance claims paid. In a small number of cases it has been found that the claim was paid without any fault on the part of the licensee or the claim should not have been paid. This normally occurs where new information comes to light after the claim is paid and the claim noted on the register. In these circumstances it is prejudicial for the builder that the register continues to record the claim. It is also of no assistance to consumers who may otherwise wish to engage that builder.

The bill therefore gives the commissioner power to remove or amend a particular on the register where it is shown to the satisfaction of the commissioner to be, or is to the knowledge or opinion of the commissioner, to be false, erroneous, misleading or unfairly prejudicial to the licence or certificate holder. Section 123 of the Home Building Act provides for the service of notices and other documents under the Act. The bill brings the service provisions into line with those in the Fair Trading Act and the Interpretation Act, which include posting documents by normal mail. Pursuant to section 96A of the Home Building Act a developer must not enter into a contract for the sale of a dwelling in a project unless a certificate of home warranty insurance obtained by the builder is attached.

Failure to attach the certificate of insurance is an offence subject to a maximum penalty of \$22,000. The Act also provides that if a developer contravenes this requirement the sale contract is voidable at the option of the purchaser before the completion of the contract. A similar right for a purchaser to rescind applies in relation to the sale of properties by owner-builders and builders. The purpose of such provisions is to protect consumers against uninsured building work. However,

the section can operate unfairly against a developer, owner-builder or builder where the required insurance has, in fact, been taken out over the building project but that due to an oversight the certificate of insurance was not attached to the contract for sale at the time of exchange of contracts.

To address this situation, while at the same time seeking to protect consumers against uninsured work, it is proposed to amend the Act to provide that if a developer, owner-builder or builder contravenes the requirement to attach an insurance certificate, notwithstanding that insurance has been obtained, the right of rescission will apply but only if a certificate of insurance is not served on the purchaser or the purchaser's legal representative prior to completion of the sale under the contract. While the proposed change addresses the inadvertent omission by the developer, owner-builder or builder the penalty provision for failure to attach the certificate will remain. I commend the bill to the House.