

Home Building Amendment Bill 2004

New South Wales

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to make miscellaneous amendments to the *Home Building Act 1989* (the **Principal Act**):

- (a) to underpin the requirements relating to the provision of home warranty insurance contained in Part 6 of the Principal Act in various respects so as to facilitate the provision of such insurance, and
- (b) to enhance the licensing and certification provisions concerning the issue, renewal and restoration of contractor licences and other authorities under the Principal Act so that the Commissioner for Fair Trading, Department of Commerce (who in the Principal Act is called the **Director-General**) can better prevent inappropriate persons from holding authorities, and
- (c) to expand the grounds for the taking of disciplinary action against holders of contractor licences and other authorities under the Principal Act, to enable the Director-General to suspend such authorities pending disciplinary action and to increase the amount of the penalty that may be imposed by the Director-General if the Director-General is satisfied a ground for disciplinary action has been established, and
- (d) to increase the maximum penalties for offences under the Principal Act and regulations and to increase the monetary penalty that may be imposed against a corporation by way of disciplinary action, and
- (e) to enable proceedings for a breach of the Principal Act to be dealt with summarily either before a Local Court or the Supreme Court, and
- (f) to create new offences relating to unlicensed contracting and supplying of kit homes and the lending of authorities, and
- (g) to require persons in control of work at a building site to supply the names and addresses of persons undertaking work at the site at the request of an authorised officer, and
- (h) to constitute a Home Warranty Insurance Scheme Board, and
- (i) to reconstitute the Home Building Advisory Council, and
- (j) to modify provisions enabling a contract of sale for the sale of land on which residential building work is, or is to be, done to be voided if a certificate of insurance evidencing a contract of insurance required under Part 6 of the Principal Act is not attached to the contract of sale at the time it is entered into, and
- (k) to enable the Director-General to remove false, erroneous, misleading or unfairly prejudicial particulars about the holders of authorities from, or to otherwise amend the particulars in, the register kept under section 120 of the Principal Act, and
- (l) to provide for the service of documents by post in the same manner as they may be served under the *Fair Trading Act 1987*, and
- (m) to insert savings and transitional provisions.

The Bill makes various other minor, consequential or ancillary amendments to the Principal Act. It also makes consequential amendments to the *Home Building Regulation 2004* and the *Fair Trading Act 1987*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Home*

Building Act 1989 set out in Schedules 1–7.

Clause 4 is a formal provision that gives effect to the amendments to the *Home Building Regulation 2004* set out in Schedule 8.

Clause 5 is a formal provision that gives effect to the amendments to the Acts and regulations set out in Schedule 9.

Schedule 1 Amendments relating to insurance

Part 6 of the Principal Act protects consumers of residential building services and subsequent purchasers by requiring builders, owner-builders, developers and persons supplying or erecting kit homes to take out home warranty insurance in respect of certain work.

Schedule 1 contains a number of amendments to underpin the requirements relating to the provision of home warranty insurance contained in Part 6. These include the following:

Section 103A of the Principal Act enables the Minister to approve kinds of insurance, and insurers, for the purposes of Part 6 of the Act subject to any conditions that may be imposed by the regulations or the Minister. **Schedule 1 [5]** inserts section 103A (7) into the Principal Act to enable the Minister to enter into an *insurance industry deed* with insurers approved, or seeking approval, as insurers under Part 6. It is intended that the deed will set out the parameters for the conduct of the home warranty insurance business of the insurers and for the exercise by the government of its powers under the Act.

Schedule 1 [1] and [2] contain consequential amendments.

Schedule 5 [2] provides for the constitution of a Home Warranty Insurance Scheme Board comprising the Director-General and 5 persons appointed by the Minister who have knowledge of or experience in insurance products or commerce. **Schedule 1 [3] and [4]** amend section 103A to provide that the Minister is only to approve a kind of insurance, or an insurer, for the purposes of Part 6 or to revoke or vary an approval after consultation with the Board.

Schedule 1 [6] and [7] contain amendments to the Principal Act to facilitate the exchange of information relevant to the provision of home warranty insurance between insurers and between insurers and the Director-General. **Schedule 1 [6]** amends section 103AC (Information regarding insurers) to enable the Director-General to require an insurer to give the Director-General information about particular claimants and insured persons whether or not the claimants or insured persons consent to the giving of the information. **Schedule 1 [7]** inserts proposed section 103AD. The section makes it a condition of the approval of an insurer under section 103A of the Principal Act that, if an application is made to the insurer for home warranty insurance or the insurer has provided home warranty insurance to a person, the insurer must disclose certain information that is relevant to the provision of the insurance to another insurer to which the person applies for such insurance or which provides such insurance if requested to do so by the other insurer. The proposed section extends to information obtained before the commencement of the amendment (see proposed clause 77 of Schedule 4 to the Principal Act (**Schedule 7 [2]**)).

Schedule 1 [8] inserts proposed section 103EA into the Principal Act to make it an offence to make a false or misleading statement or to omit any matter or thing without which a statement is misleading in an application to an insurer for home warranty insurance.

Schedule 1 [10] inserts proposed section 121A into the Principal Act to provide for the secrecy of certain information obtained from insurers under, or in connection with the administration or execution of, Part 6 of the Principal Act. **Schedule 1 [9]** contains a consequential amendment to section 121 of the Principal Act.

Schedule 2 Amendments relating to authorities

Part 3 of the Principal Act contains provisions relating to the issue, renewal,

restoration, cancellation and suspension of authorities under the Act (that is, contractor licences, building consultancy licences, owner-builder permits and supervisor and tradesperson certificates). Part 4A provides for the review of certain decisions relating to these matters by the Administrative Decisions Tribunal.

Schedule 2 contains amendments to those Parts and some related provisions elsewhere in the Act to enhance the licensing and certification provisions concerning authorities so that the Director-General can prevent inappropriate persons from holding authorities.

Schedule 2 [4], [10], [12] and [19] amend sections 20, 25, 32B and 40, respectively, to enable the Director-General to reject an application for a contractor licence, building consultancy licence, supervisor certificate or tradesperson certificate, or an application to renew or restore such an authority, if the applicant is not a fit and proper person to hold the authority. The Director-General is required in considering whether an applicant is fit and proper to take into account whether the applicant is of good repute, having regard to character, honesty and integrity. Provision is also made for such an application to be rejected if the applicant is disqualified by the Principal Act or the regulations from holding the authority. **Schedule 2 [5], [8], [9], [11], [13], [16], [20] and [22]–[24]** make consequential amendments.

Schedule 2 [6], [14] and [19] insert sections 20 (6), 32B (5) and 40 (1) into the Principal Act to (among other things) enable the Director-General to reject an application for a contractor licence or building consultancy licence or application to renew or restore an authority on the ground that the Director-General considers that a close associate of the applicant who would not be a fit and proper person to hold a licence or other authority exercises a significant influence over the applicant or the operation and management of the applicant's business. **Schedule 2 [3]** inserts proposed section 3AA into the Principal Act to define **close associate** for the purposes of the provisions and **Schedule 2 [1]** inserts a signpost to the definition. Proposed sections 20 (6) and 32B (5) also enable the Director-General to reject an application for a contractor licence or building consultancy licence on the ground that an employee or proposed employee of the applicant is disqualified from holding a licence, has had an application for an authority rejected on a ground relating to his or her character, honesty or integrity or has had an authority cancelled or suspended on any disciplinary ground or if there are reasonable grounds to believe that the application has been made with the intention of avoiding disclosure of any relevant past misconduct of the applicant or a close associate of the applicant. **Schedule 2 [1]** makes a consequential amendment to insert a definition of **authority**.

Schedule 2 [2] replaces the definition of **officer** in section 3 of the Principal Act to expand the definition to include a person who is an officer of a corporation, within the meaning of the *Corporations Act 2001* of the Commonwealth, and not just a director of a corporation or a person concerned in the management of a corporation as at present. An example of the effect of this is that, under section 54 of the Principal Act, a wider group of individuals who are officers of a corporation that is the holder of a contractor licence or building consultancy licence may be found guilty of improper conduct for the actions of the corporation.

Schedule 2 [7] and [15] amend sections 22 and 32D, respectively, of the Principal Act to make it clear that contractor licences and building consultancy licences held by a corporation may be cancelled if the corporation is wound up voluntarily, not only if it is wound up by court order.

Schedule 2 [17] inserts proposed section 34 into the Principal Act to make it an offence for an applicant for an authority, or for the variation, renewal or restoration of an authority, to fail to notify the Director-General of changes in the particulars or information accompanying the application.

Schedule 2 [18] inserts proposed section 35 into the Principal Act to enable the Director-General to require an applicant for a contractor licence or a close associate

of the applicant to authorise a third party to provide certain information or to produce certain records to specified persons or to consent to the party giving the Director-General financial and other confidential information concerning the applicant or close associate.

Schedule 2 [21] amends section 40 of the Principal Act to expand the grounds on which the Director-General may reject an application for the renewal or restoration of a contractor licence or building consultancy licence to include the grounds that an employee or proposed employee of the applicant is disqualified from holding such a licence, has had an application for such a licence rejected on a ground relating to his or her character, honesty or integrity or has had such a licence cancelled or suspended on a disciplinary ground.

Schedule 2 [25] and [26] amend section 83B of the Principal Act to enable decisions relating to the renewal or restoration of authorities to be reviewed by the Administrative Decisions Tribunal.

Schedule 2 [27]–[29] contain amendments to section 127 of the Principal Act to enable any person authorised for that purpose by the Director-General to obtain information about the financial solvency of an applicant for, or holder of, a contractor licence, building consultancy licence, supervisor or tradesperson certificate or a close associate of such an applicant or holder. Proposed section 127 (8) makes it clear that an authorised person is not, in obtaining information under section 127, required to comply with specified provisions of the *Privacy and Personal Information Protection Act 1998*.

Schedule 3 Amendments relating to disciplinary action

Part 4 of the Principal Act sets out grounds on which disciplinary action may be taken against the holder of an authority under the Act and describes the nature of such disciplinary action.

Schedule 3 contains provisions to expand the grounds for the taking of disciplinary action, enables the Director-General to suspend an authority pending a decision as to whether to take disciplinary action and increases the maximum amount of the penalty that may be imposed by the Director-General if the Director-General is satisfied that a ground for disciplinary action against a corporation that holds an authority has been established.

Schedule 3 [2] amends section 51 of the Principal Act to make it improper conduct for the holder of an authority to commit an offence under section 307A (False or misleading applications) or 307B (False or misleading information) of the *Crimes Act 1900* and so a ground for taking disciplinary action against a holder of an authority who, for example, makes a false statement in an application to renew the authority.

Schedule 3 [3] amends section 51 of the Principal Act to make the holder of a contractor licence or supervisor or tradesperson certificate becoming disqualified by the Act or regulations from holding the licence or certificate improper conduct and so a ground for taking disciplinary action against the holder.

Under sections 56 and 56A of the Principal Act, the Director-General may take disciplinary action under section 62 of the Act against the holder of a contractor licence or holder of a building consultancy licence if the holder is guilty of improper conduct.

Schedule 3 [4] and [5] amend section 51 of the Principal Act to make it improper conduct for the holder of a contractor licence or building consultancy licence to employ a person (or, if the holder of a contractor licence, to engage a person under a contract for services) knowing the person is disqualified from holding a licence, has had an application for an authority (as to be defined by a definition of **authority** to be inserted by **Schedule 2 [1]**) rejected on a ground relating to the person's character, honesty or integrity or has an authority cancelled or suspended on a disciplinary

ground. **Schedule 3 [6]** inserts section 51 (4) into the Principal Act to make it a defence to a complaint that the holder of a licence has been guilty of such improper conduct if, before employing or engaging the person concerned, the holder obtained the approval of the Director-General to the employment or engagement.

Section 54 of the Principal Act makes an individual who is a member of a partnership or an officer of a corporation that is the holder of a contractor licence guilty of improper conduct if the holder does certain things.

Schedule 3 [7] amends section 54 to expand the provisions to cover individuals who are members of a partnership or officers of a corporation that is the holder of a building consultancy licence.

Schedule 3 [8] amends section 56 of the Principal Act to expand the grounds for taking disciplinary action against the holder of a contractor licence to include the following grounds:

- (a) that the holder does not meet the standards of financial solvency determined by the Director-General to be appropriate to the class of licence held,
- (b) that, in the opinion of the Director-General, there is a risk to the public that the holder will be unable (whether or not for a reason relating to the financial solvency of the holder) to carry out work that the holder has contracted to do (whether before or after the commencement of the proposed paragraph),
- (c) that the licence was improperly obtained,
- (d) that the Director-General 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,
- (e) that the holder has knowingly done any residential building work or specialist work before the relevant principal certifying authority has carried out any critical stage inspection required to be carried out under section 109E (3) (d) of the *Environmental Planning and Assessment Act 1979* in relation to the work or has failed to give any notification required under that Act in relation to such an inspection.

Schedule 3 [9] amends section 56A of the Principal Act to expand the grounds for taking disciplinary action against the holder of a building consultancy licence to include the following grounds:

- (a) that the licence was improperly obtained,
- (b) that the Director-General 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,
- (c) that an employee of the holder is disqualified from holding such a licence, has had an application for such a licence rejected on a ground relating to his or her character, honesty or integrity or has had such a licence cancelled or suspended on a disciplinary ground.

Schedule 3 [10] amends section 57 of the Principal Act to expand the grounds for taking disciplinary action against the holder of a supervisor or tradesperson certificate to include the following grounds:

- (a) that the certificate was improperly obtained,
- (b) that the Director-General has become aware of information about the holder that, if known at the time the application for the certificate was determined, would have been grounds for rejecting the application.

Schedule 3 [11] inserts proposed section 61A into the Principal Act to enable the Director-General to suspend an authority, when a show cause notice is served, pending a determination as to whether to take disciplinary action against the holder of the authority. Section 61A will replace section 83 of the Act which enables the District Court to suspend a contractor licence at the request of the Director-General.

Schedule 3 [1] makes a consequential amendment to update a reference to section 83 in a note to section 22B of the Principal Act. **Schedule 3 [13]** makes a consequential

amendment to repeal Division 5 of Part 4 of the Principal Act (which contains section 83) and **Schedule 3 [14]** amends section 83B of the Principal Act to enable the Administrative Decisions Tribunal to review decisions under proposed section 61A.

Schedule 3 [12] amends section 62 of the Principal Act to increase from \$22,000 to \$50,000 the maximum penalty that the Director-General may impose against the holder of an authority that is a corporation when satisfied that disciplinary action should be taken against the holder.

Schedule 4 Amendments relating to offences and penalties

Schedule 4 contains amendments to the Principal Act to increase the maximum penalties for certain offences by corporations from 200 to 1,000 penalty units (\$110,000) and to increase other maximum penalties, to enable the regulations to create an offence punishable, if committed by a corporation, by a maximum penalty of 200 penalty units, to enable proceedings for a breach of the Principal Act to be dealt with summarily either before a Local Court or the Supreme Court and to create new offences relating to unlicensed contracting or supplying and the lending of authorities. Provision is also made to require persons in control of work at a building site to supply the names and addresses of persons undertaking work at the site on request.

Schedule 4 [1], [3], [4], [6] and [11] amend various sections of the Principal Act to increase the maximum penalties for offences, and to enable the regulations to create offences punishable by the maximum penalties, as described above.

Schedule 4 [2] amends section 4 of the Principal Act to make it an offence for the holder of a contractor licence or a developer to contract with an unlicensed person to undertake building work for the holder or developer of a kind that would normally require the person to be licensed.

Schedule 4 [5] amends section 16A of the Principal Act to make it an offence for the holder of a contractor licence to contract with a person to supply a kit home if the person does not hold a licence to supply a kit home of that kind.

Schedule 4 [6] amends section 18H of the Principal Act to make it an offence for the holder of a building consultancy licence to contract with another person to do building consultancy work for the holder if the person does not hold a licence to do work of that kind.

Schedule 4 [7] inserts proposed section 32AA into the Principal Act to make it an offence for the holder of an owner-builder permit to contract with another person to do residential building work for the holder if the person does not hold a licence to do work of that kind.

Schedule 4 [8] inserts proposed section 46A into the Principal Act to make it an offence to lend an authority to another person or permit another person to use an authority.

Schedule 4 [9] inserts proposed section 127A into the Principal Act to enable a person authorised by the Director-General to request a person who has control over the carrying out of residential building work or specialist work at a building site, or an owner-builder, to state the name and address of each person undertaking work at the site or for the owner-builder.

Schedule 4 [10] amends section 139 of the Principal Act to enable proceedings for a breach of the Act to be dealt with summarily either before a Local Court or the Supreme Court. If proceedings are brought in a Local Court, the maximum penalty that the Court will be able to impose is 200 penalty units.

Schedule 5 Amendments relating to Home Warranty

Insurance Scheme Board and Home Building Advisory Council

Schedule 5 contains amendments to the Principal Act to constitute the Home Warranty Insurance Scheme Board and the Home Building Advisory Council.

Schedule 5 [1] amends section 3 of the Principal Act to insert definitions of **Advisory Council** and **Scheme Board**.

Schedule 5 [2] inserts proposed Division 1 (sections 89E–89G) into Part 6 of the Principal Act.

Section 89E constitutes the Home Warranty Insurance Scheme Board (the **Scheme Board**).

Section 89F provides for the Scheme Board to comprise the Director-General and 5 persons appointed by the Minister who have knowledge of or experience in relation to insurance products or commerce.

Section 89G sets out the functions of the Scheme Board. These include advising the Minister with respect to the approval of kinds of insurance, and insurers, under Part 6 of the Principal Act, monitoring the scheme established by the Part with respect to home warranty insurance and providing advice and recommendations with respect to the scheme.

Schedule 5 [3] inserts proposed Part 7B (sections 115B–115D) into the Principal Act.

Section 115B constitutes the Home Building Advisory Council (the **Advisory Council**).

Section 115C sets out the functions of the Advisory Council. These are to advise the Minister on such consumer-related and trader-related issues relating to the home building industry as it thinks fit or as are referred to it by the Minister or the Scheme Board and to provide advice to the Minister with respect to any other matter referred to it by the Minister.

Section 115D provides for the Advisory Council to consist of at least 14 members. These are to include the Chairperson and Deputy Chairperson of the Scheme Board, the Director-General or his or her nominee, members appointed by the Minister to represent the insurance industry, the building industry, building industry employees and the interests of consumers and holders of contractor licences, a legal practitioner appointed by the Minister and such other persons with appropriate qualifications or experience as may be appointed by the Minister.

Schedule 5 [4] inserts proposed Schedule 1 into the Principal Act. It contains provisions relating to the membership and procedure of the Scheme Board and Advisory Council.

Schedule 6 Miscellaneous amendments

Schedule 6 contains amendments to modify provisions enabling a contract for the sale of land on which residential building work is, or is to be done, to be voided if a certificate of insurance evidencing a contract of insurance required under Part 6 of the Principal Act is not attached to the contract of sale at the time it is entered into, to enable the Director-General to remove certain information from the register recording particulars about authorities, to provide for the service of documents by post in the same manner as they may be served under the *Fair Trading Act 1987* and to update the definition of **Director-General**.

Schedule 6 [1] replaces the definition of **Director-General** in section 3 of the Principal Act to reflect current administrative arrangements.

Sections 95, 96 and 96A of the Principal Act make it an offence for an owner-builder, developer or other person carrying out or having residential building work done on the owner-builder's, developer's or person's behalf to enter into a contract for the sale of land on which residential building work has been done, or is to be done, unless a certificate of insurance evidencing that the person who did or does the work was insured as required under Part 6 is attached to the contract of sale. If an owner-builder, developer or other person contravenes this requirement, the contract is voidable at the option of the purchaser before the completion of the contract.

Schedule 6 [3], [5] and [7] amend sections 95, 96 and 96A, respectively, of the Principal Act so that the contract of sale will not be voidable if the owner-builder,

developer or other person obtained a contract of insurance before entering into the contract and, before completion of the contract, serves on the purchaser (or a legal practitioner acting on the purchaser's behalf) a certificate of insurance evidencing the contract of insurance required under Part 6 for the residential building work concerned. **Schedule 6 [2], [4] and [6]** contain consequential amendments.

Schedule 6 [8] amends section 120 of the Principal Act to enable the Director-General to remove false, erroneous, misleading or unfairly prejudicial particulars about the holders of authorities from, or to otherwise amend the particulars in, the register kept under the section.

Schedule 6 [9] and [10] amend section 123 of the Principal Act to enable documents to be served by posting them in a letter to the last known address of an individual or the address last known as the principal place of business of a corporation, respectively.

Schedule 7 Amendments inserting savings and transitional provisions

Schedule 7 contains an amendment to Schedule 4 to the Principal Act to enable the making of savings and transitional regulations (**Schedule 7 [1]**) and an amendment to insert savings and transitional provisions relating to amendments contained elsewhere in the Bill (**Schedule 7 [2]**).

Schedule 8 Amendment of Home Building Regulation 2004

Schedule 8 makes amendments to the *Home Building Regulation 2004* that are consequential on amendments contained in Schedule 2 to the proposed Act relating to the issue, renewal and restoration of authorities. It also increases the penalties for certain offences against the regulation.

Schedule 9 Amendment of other Acts and regulations

Schedule 9 contains amendments to the *Fair Trading Act 1987* and various other Acts and regulations.

Schedule 9.4 amends the *Fair Trading Act 1987* to omit provisions in that Act that are superseded by provisions inserted by **Schedule 5 [3]** to the Bill reconstituting the Home Building Advisory Council and to make it clear that persons who are members of the Council as constituted under that Act cease to hold office on the commencement of the amendments.

Schedule 9.1–9.3 and 9.5–9.9 amend various Acts and regulations to update references to certificates of registration under the Principal Act (such certificates are now known as tradesperson certificates).