

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

Overview of Bill

Part 2C of the Home Building Act 1989 (the Principal Act) sets out the statutory warranties relating to work and materials that are implied in every contract to do residential building work entered into by the holder of a contractor licence or a person required to hold a contractor licence before entering into a contract (a contractor).

Under section 18D of the Principal Act, the statutory warranties are extended to successors in title unless a predecessor in title has enforced the warranty in the same respect. Section 18E of the Principal Act permits proceedings for a breach of statutory warranty to be commenced for up to 7 years after completion of the work or, if the work is not completed, the completion date or the date of the contract (if there is no completion date).

In the recent decision of the Court of Appeal in *Honeywood as executrix of the estate of the late Neville Honeywood v Munnings & Anor* [2006] NSWCA 215, the Court held that the enactment of Part 2C did not disclose an intention on the part of Parliament to displace a principle applied by the Supreme Court in *Onerati v Phillips Constructions Pty Limited (In liq)* (1989) 16 NSWLR 730 (the Onerati principle).

Application of the principle operates to prevent a person who has previously taken legal proceedings in the Consumer, Trader and Tenancy Tribunal or a court against a contractor for breach of a statutory warranty because of a deficiency in work or materials from bringing further proceedings for breach of warranty in respect of a different deficiency that existed at the time of completion of the work. The later proceedings cannot be brought even if the person was not aware of the deficiency concerned at the time of bringing the first proceedings—the deficiencies are treated as one composite breach of warranty.

The object of this Bill is to amend the Principal Act:

- (a) to displace the Onerati principle by enabling a person to bring proceedings to recover with respect to several but distinct deficiencies arising from breach of the same statutory warranty providing certain requirements are met, and
- (b) to clarify the effect of section 18D of the Act in relation to the entitlement of a successor in title to take the benefit of the statutory warranty of a predecessor in title.

It is intended that the proposed amendments will, without the need for specific provision, flow through to private insurers in the exercise of their rights of subrogation in proceedings to enforce statutory warranties of persons insured by them who are entitled to the benefit of the warranties.

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 the date of assent to the Act.

Clause 3 is a formal provision that gives effect to the amendments to the Principal Act.

Clause 4 provides for the repeal of the proposed Act after the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the Interpretation Act 1987 provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments

Schedule 1 [3] inserts section 18E (2) into the Principal Act to achieve the object of displacing the Onerati principle. It ensures that a person who has enforced a statutory warranty in proceedings in relation to a particular deficiency in work is not prevented from enforcing the same warranty in subsequent proceedings for deficiency of a

different kind in the work if the deficiency the subject of the subsequent proceedings was in existence when the work to which the warranty relates was completed, the person did not know, and could not reasonably be expected to have known, of the existence of the deficiency at the conclusion of the earlier proceedings and the subsequent proceedings are brought within the period referred to in the section.

Schedule 1 [1] and [2] amend section 18D of the Principal Act to make it clear that the successor in title to a person entitled to the benefit of a statutory warranty is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty but cannot enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency by the person's predecessor in title.

Schedule 1 [4] amends Schedule 4 to the Principal Act to enable the making of regulations of a savings and transitional nature.

Schedule 1 [5] inserts savings and transitional provisions. Part 2C as amended will apply to and in respect of proceedings to enforce a statutory warranty commenced after the commencement of the amendments that are subsequent to earlier proceedings to enforce the same warranty that were finally disposed of before that commencement.

It will also apply to or in respect of subsequent proceedings to enforce a statutory warranty commenced before that commencement that have not been heard.