



## NSW Legislative Council Hansard

### Home Building Amendment (Statutory Warranties) Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 15 November 2006.

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#### Second Reading

**The Hon. HENRY TSANG** (Parliamentary Secretary) [12.22 a.m.], on behalf of the Hon. John Della Bosca: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

#### Leave granted.

The building of a new home or the undertaking of major additions is a daunting task for most of us. Statistically it is the largest financial transaction that most consumers undertake.

There is often not much room for error.

The financial consequences arising from faulty building work can be extremely serious. It is essential, therefore, that home owners have access to fair and appropriate legal remedies to help them recover the costs of rectifying faults in their dwelling should they arise.

This bill has been brought before Parliament following a recent decision of the New South Wales Court of Appeal relating to the rights of consumers to take action for a breach of a statutory warranty of the kind specified in the Home Building Act 1989.

The Government has introduced this bill because it appreciates that left unchecked the Court's decision will have significant financial implications for consumers as well as the home warranty insurers.

The amendments will clarify that a second claim can be brought in particular circumstances...where the consumer did not know about the defects, which are distinct from the first.

In 1996 the Government amended the Home Building Act to provide for certain statutory warranties that apply in building contracts between consumers and building contractors.

These warranties relate to the workmanship, materials, completion time and fitness for purpose of the building work. The warranties also apply to the benefit of successors in title to the home owner who had the work done, except to the extent that the former owner has enforced the warranty in respect of the building work.

The statutory warranties cannot be excluded or limited in any way by a clause in the building contract or other document.

The period for taking proceedings to enforce a breach of a statutory warranty is 7 years from:

the completion of the work; or

if the work is not completed, from the date for completion specified in the building contract, or if there is no such date, the date of contract.

In August 2006 the Court of Appeal delivered judgment in *Honeywood* as executrix of the estate of the late Neville Honeywood v. Munnings & Anor [2006] New South WalesCA 215.

In that case, the homeowners sued their builder, Mr Honeywood, for alleged defective work in their dwelling. These were the second proceedings instituted by the consumers, the first being an action in the former Consumer Claims Tribunal in 1999.

Mr and Mrs Munnings discovered what they allege are further defects not apparent at the time they first brought action in the Tribunal and in September 2001 they commenced a second proceedings in the then Fair Trading Tribunal limited to these alleged new defects.

This second legal action was subsequently referred to the Court of Appeal on a question of law.

The Court in August this year held that a second action based on a breach of the same statutory warranty could

not be brought. It was held this was so regardless of the seriousness of the later defect or even if the home owner was not aware of later occurring latent defects when bringing the first action.

As a result, the new action by the consumers was dismissed.

The basis of the Court's decision is that all defects due to poor workmanship and the use of poor materials at different times during construction formed part of one composite breach of contract when the builder delivered possession of the dwelling.

An application to the High Court for leave to appeal against the Court of Appeal's decision has been made by the homeowners

However, regardless of the outcome of that application the Government believes that the decision of the Court of Appeal has wide-ranging consequences for consumers and that legislative action should be taken immediately to clarify the rights of consumers.

The need to provide consumers with an ability to take further legal action stems from the nature of building faults. Defects in building work often do not become apparent until some time after the completion of the work. In some cases these may be serious structural faults.

That defects or deficiencies may not become apparent for some time after completion of the job is recognised in the 7 years period allowed in the Act to take legal proceedings for a breach of statutory warranty. The home warranty insurance scheme, which is based on the statutory warranties, also provides 6 years cover in respect of structural defects.

The fact that home warranty insurance was taken out over the project may be of no assistance to a consumer faced with further defects.

Under the insurance scheme a claim may be lodged where the builder becomes insolvent, dies or disappears. Where the builder is still active consumers must seek re-imburement for the cost of rectifying defects from the builder through legal action.

If they are barred from taking further legal proceedings for latent defects, consumers have no remedy available and must meet the cost of fixing the defects from their own pockets.

Failure to address the Court of Appeal's recent decision will likely result in an increase in the complexity and cost of legal proceedings as consumers instruct their building experts to undertake a detailed inspection of every aspect of the job to ensure that no problem is missed.

Of course, if the homeowner failed to identify any evidence of further, quite separate defects, when taking an initial action against a builder, it would likely be very difficult to have a builder remedy any defects that may appear in the future.

Earlier on in a warranty, those subsequent defects may be invisible.

One or two years later they can prove very expensive.

The Court of Appeal's decision also has flow on effects to the private home warranty insurers and the Building Insurers' Guarantee Corporation that administers claims under the HIH rescue scheme established by the Government in 2001.

Where a claim is paid, the insurers and the Corporation will normally seek recovery from the builder. Because the insurers and the Corporation are, in effect, exercising the rights of the claimants against the builder, the fact that there were earlier legal proceedings between the claimant and the builder contractor will prevent later insurance recovery proceedings.

Inability to recover claim payments will most likely flow through to higher premiums for all consumers. The settlement of claims will also be delayed because of the need of claimants to identify all defects, present or potential, in the job.

I now turn to the provisions of the bill.

The bill amends section 18E of the Home Building Act 1989. This section prescribes the time period for the taking of legal proceedings for a breach of a statutory warranty. Proposed sub-section (2) provides that the fact that a person has enforced one of the warranties under the Act in proceedings in relation to a particular deficiency in the work does not prevent the person from enforcing the same warranty in subsequent proceedings for a deficiency of a different kind.

The subsection applies where:

- (a) the deficiency in the subsequent proceedings was in existence when the building work was completed;
- (b) the home owner 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
- (c) the subsequent proceedings are brought within the seven year limitation period.

The bill also amends section 18D to clarify its operation. section 18D extends the benefit of the statutory warranties to a successor in title to the person who had the work done. Proposed new subsection (2) is intended to make it clear that the section does not give a successor in title a right to enforce a statutory warranty in relation to a deficiency in the work if the warranty has already been enforced in relation to that particular deficiency by the predecessor.

The amendments are proposed to commence on the date of assent of the Amendment Act. The savings and transitional provisions extend the operation of these amendments to breaches of warranty that occurred before the date of assent.

The amendments will also apply to subsequent proceedings to enforce a statutory warranty commenced before the date of assent that have not been heard.

The amendments contained in the bill will ensure that consumers have appropriate recourse to legal action in the case of latent defects.

Where proceedings are brought in respect of such defects the Consumer, Trader and Tenancy Tribunal and the courts will need to be satisfied that the matters contained in section 18E have been established.

In particular, that the home owner did not know, and could not reasonably be expected to have known of the existence of these later defects at the conclusion of the earlier proceedings.

This will provide an effective test to prevent further legal proceedings for issues that, in fairness to the contractor, should have been covered by the first proceedings.

While there is a need to implement this legislation as soon as possible—to prevent affected homeowners from being disadvantaged—the Government has nevertheless consulted key parties. Groups consulted include the Housing Industry Association, Master Builders Association and the Insurance Council of Australia.

During consultation a number of issues were raised by stakeholders some which would broaden the focus of this legislation which is to address the effects of the Court of Appeal decision.

Other issues included matters such as bringing the seven year statutory warranty period into line with the time periods for home warranty insurance.

It is not appropriate to deal with such matters at this time. However, the Government will be carefully examining all the issues raised and undertaking further consultation with industry and other interested parties on related issues...for possible future action.

I commend the bill to the House.