



New South Wales

Home Building Amendment (Insurance) Bill 2002

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

- (a) to provide that the home building insurance required to be provided under the *Home Building Act 1989* for residential building work, the supply of kit homes and for certain other work is last resort insurance (that is, a person is covered under a home building insurance policy only if the person cannot enforce or recover against the builder or supplier because the builder or supplier is insolvent or dead or has disappeared),
- (b) to limit the period of home building insurance cover for structural defects to 6 years and for non-structural defects to 2 years,
- (c) to provide that home building insurance contracts may limit liability for non-completion of building work to 20% of the contract price for the work,
- (d) to clarify the operation of certain provisions of the *Home Building Act 1989* and to make minor changes to that Act of a statute law revision nature.

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 giving effect to the amendments to the *Home Building Act 1989* set out in Schedules 1 and 3.1.

Clause 4 is a formal provision giving effect to the amendments to the *Home Building Regulation 1997* set out in Schedules 2 and 3.2.

Clause 5 repeals uncommenced provisions that deal with the approval of insurance and insurers.

Schedule 1 Amendments to Home Building Act 1989 relating to insurance

Insurance cover of last resort

The *Home Building Act 1989* currently provides that the insurance cover for non-completion of residential building work is last resort insurance cover (ie the insurance cover applies if the builder has died or is insolvent or cannot be found). However, the cover in relation to loss arising from a breach of a statutory warranty (as set out in section 18B of the Act) is not currently expressed as last resort cover.

Schedule 1 [4] provides that a contract of insurance in relation to residential building work must insure against the risk of the insured person not being able to enforce or recover against a builder for a breach of a statutory warranty because of the insolvency, death or disappearance of the contractor.

Schedule 1 [6] and [7] make similar amendments in relation to the insurance cover for supply of kit homes and for owner-builder work.

Schedule 1 [3] and [5] amend provisions relating to last resort insurance cover for non-completion or non-supply so that they refer to the insolvency, death or disappearance of the contractor or supplier rather than to the contractor or supplier not being able to be found after due search and inquiry. **Schedule 1 [1]** is a consequential amendment.

Limitation of insurance cover

At present, section 103B (2) of the Act requires that a contract of insurance must provide insurance cover for any loss (other than for non-completion) for a period of not less than 7 years after the completion of the work or the supply of the kit home, or the end of the contract relating to the work or supply, whichever is the later.

Schedule 1 [9] provides that in the case of loss arising from a structural defect, a contract of insurance must provide insurance cover for a period of not less than 6 years after the completion of the work or the supply of the kit home, or the end of the contract relating to the work or supply, whichever is the later. In the case of a loss arising otherwise than from a structural defect, the period of cover will be 2 years. **Schedule 1 [2]** is a consequential amendment.

Schedule 1 [10] enables the period for which insurance cover must be provided to be varied by the regulations.

Approval of alternative schemes or arrangements

Schedule 1 [8] provides that the requirements in relation to contracts of insurance for home building work do not apply if the relevant work or supply is covered by a home building indemnity scheme, or other arrangement, approved by the Minister (eg an industry-based indemnity scheme or a similar scheme that could be administered by the Building Insurers' Guarantee Corporation). The regulations may make provision for or with respect to such an approved scheme or arrangement, including provision for the functions of the Guarantee Corporation in relation to the administration of an approved scheme or arrangement.

Schedule 1 [11]–[14] make consequential amendments to facilitate the administration by the Guarantee Corporation of any such approved scheme or arrangement.

Savings and transitional provisions

Schedule 1 [15] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

Schedule 1 [16] provides that the amendments to the Act in relation to home building insurance do not apply to existing contracts of insurance.

Schedule 2 Amendments to Home Building Regulation 1997 relating to insurance

Schedule 2 [2]–[6] provide that the losses indemnified under a contract of insurance are to be indemnified as a last resort only (ie if the beneficiaries under the contract cannot enforce or recover against the builder or supplier because the builder or supplier has died, is insolvent or has disappeared). **Schedule 2 [1]** is a consequential amendment.

Schedule 2 [7] provides that the loss or damage indemnified under an insurance contract include any legal or other reasonable costs incurred by a person who is covered by the contract in seeking to enforce or recover against the builder or supplier concerned.

Schedule 2 [8] provides that a contract of insurance may limit liability resulting from non-completion of building work to an amount that is 20% of the contract price for the work.

Schedule 2 [9] is consequential on the recent increase from \$5,000 to \$12,000 in the threshold for works requiring home building insurance.

Schedule 2 [10] defines *structural defect* for the purposes of the provision of the Act that sets the period of insurance cover for losses arising from structural defects and the period for those losses arising otherwise than from structural defects (see section 103B (2) of the Act (as amended by **Schedule 1 [9]**).

Schedule 2 [11] provides that the amendments to the *Home Building Regulation 1997* referred to in Schedule 2 to the proposed Act do not apply to existing contracts of insurance.

Schedule 3 Other miscellaneous amendments

Amendments to Home Building Act 1989

Schedule 3.1 [1] makes it clear that the definition of *building claim* in section 48A of the Act includes an appeal against a decision of an insurer under a contract of insurance.

Schedule 3.1 [2] removes superfluous words in relation to the making of applications to the Consumer, Trader and Tenancy Tribunal for the determination of building claims. Section 24 of the *Consumer, Trader and Tenancy Tribunal Act 2001* provides for the making of applications to that Tribunal.

Schedule 3.1 [3] makes it clear that, if the Building Insurers' Guarantee Corporation pays an amount to a beneficiary under the indemnity provided by Part 6A of the Act and the beneficiary's rights in respect of the matter covered by the indemnity are assigned to the Guarantee Corporation, the assignment includes the assignment of any rights that the beneficiary may have against a developer or any other person in respect of the matter.

Amendments to Home Building Regulation 1997

Schedule 3.2 [1] and [2] are consequential on the amendment made by Schedule 3.1 [2].



New South Wales

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New South Wales

Home Building Amendment (Insurance) Bill 2002

No. , 2002

A Bill for

An Act to amend the *Home Building Act 1989* and the *Home Building Regulation 1997* to make further provision with respect to insurance for residential building work, owner-builder work and the supply of kit homes; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Home Building Amendment (Insurance) Act 2002</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5 6
3 Amendment of Home Building Act 1989 No 147	7
The <i>Home Building Act 1989</i> is amended as set out in Schedules 1 and 3.1.	8 9
4 Amendment of Home Building Regulation 1997	10
The <i>Home Building Regulation 1997</i> is amended as set out in Schedules 2 and 3.2.	11 12
5 Amendment of Home Building Legislation Amendment Act 2001 No 51	13
The <i>Home Building Legislation Amendment Act 2001</i> is amended by omitting from Schedule 6 [20] proposed section 103A (3) and (4) of the <i>Home Building Act 1989</i> .	14 15 16

Schedule 1	Amendments to Home Building Act 1989	1
	relating to insurance	2
	(Section 3)	3
[1]	Section 90 Definitions	4
	Insert at the end of section 90:	5
	(2) A reference in this Part to the disappearance of a contractor,	6
	supplier or owner-builder includes a reference to the fact that,	7
	after due search and inquiry, the contractor, supplier or	8
	owner-builder cannot be found.	9
[2]	Sections 95 (2A) and (3), 96 (3) (d) and 96A (4)	10
	Omit “7 years” wherever occurring. Insert instead “6 years”.	11
[3]	Section 99 Requirements for insurance for residential building work	12
	Omit “insolvency or death of the contractor or because of the fact that,	13
	after due search and inquiry, the contractor cannot be found” from	14
	section 99 (1) (a).	15
	Insert instead “insolvency, death or disappearance of the contractor”.	16
[4]	Section 99 (1) (b)	17
	Omit the paragraph. Insert instead:	18
	(b) a person on whose behalf the work is being done and	19
	the person’s successors in title against the risk of being	20
	unable, because of the insolvency, death or	21
	disappearance of the contractor:	22
	(i) to recover compensation from the contractor for	23
	a breach of a statutory warranty in respect of the	24
	work, or	25
	(ii) to have the contractor rectify any such breach.	26

[5] Section 100 Requirements for insurance for kit homes	1
Omit “insolvency or death of the supplier or because of the fact that, after due search and inquiry, the supplier cannot be found” from section 100 (a).	2
Insert instead “insolvency, death or disappearance of the supplier”.	3
	4
[6] Section 100 (b)	5
Omit the paragraph. Insert instead:	6
(b) a person to whom the kit home is supplied and the person’s successors in title against the risk of being unable, because of the insolvency, death or disappearance of the supplier, to recover compensation from the supplier for any of the following events or to have the supplier rectify any of the following events:	7
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	12
(i) the materials and components used in the kit home not being good or suitable for the purpose for which they were used,	13
	14
	15
(ii) the design of the kit home being faulty.	16
[7] Section 101	17
Omit the section. Insert instead:	18
101 Requirements for insurance by owner-builders and others	19
A contract of insurance in relation to owner-builder work or residential building work required by section 95 or 96 must insure a purchaser of the land on which the work is done and the purchaser’s successors in title against the risk of being unable, because of the insolvency, death or disappearance of the owner-builder or contractor concerned:	20
	21
	22
	23
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	25
(a) to recover compensation from the owner-builder or contractor for a breach of a statutory warranty in respect of the work, or	26
	27
	28
(b) to have the owner-builder or contractor rectify any such breach.	29
	30

[8] Section 102A	1
Insert after section 102:	2
102A Approval of alternative home building indemnity schemes or arrangements	3 4
(1) This Part does not apply to or in respect of any residential building work or owner-builder work or the supply of a kit home if the work or supply is, for the time being, covered by a home building indemnity scheme, or other similar arrangement, approved by the Minister by notice published in the Gazette.	5 6 7 8 9 10
(2) The notice is to set out the terms of any such scheme or arrangement.	11 12
(3) The approval by the Minister of a scheme or arrangement under this section is subject to:	13 14
(a) any conditions that may be prescribed by the regulations, and	15 16
(b) any conditions (not inconsistent with the regulations) that may be imposed by the Minister.	17 18
(4) An approval under this section may be varied or revoked by the Minister at any time by further notice published in the Gazette.	19 20
(5) The regulations may make provision for or with respect to any scheme or arrangement approved by the Minister under this section.	21 22 23
(6) Without limiting subsection (5), the regulations may make provision for or with respect to:	24 25
(a) the functions of the Guarantee Corporation (within the meaning of Part 6A) in relation to the administration of any such scheme or arrangement, and	26 27 28
(b) the payment of contributions into the Building Insurers' Guarantee Fund in connection with any such scheme or arrangement administered by the Guarantee Corporation.	29 30 31 32

[9] Section 103B Period of cover	1
Omit section 103B (2). Insert instead:	2
(2) A contract of insurance must provide insurance cover for other loss insured in accordance with this Act for a period of not less than:	3
(a) in the case of loss arising from a structural defect within the meaning of the regulations—6 years after the completion of the work or the supply of the kit home, or the end of the contract relating to the work or supply, whichever is the later, or	4
(b) in the case of loss arising otherwise than from any such structural defect—2 years after the completion of the work or the supply of the kit home, or the end of the contract relating to the work or supply, whichever is the later.	5
[10] Section 103B (2B)	6
Insert after section 103B (2A):	7
(2B) Subsection (2) is subject to any variation specified in the regulations as to the period for which insurance cover must be provided.	8
[11] Section 103P Building Insurers' Guarantee Fund	9
Insert after section 103P (2) (d):	10
(e) any contributions or other amounts required by the regulations to be paid into the Fund in connection with any scheme or arrangement approved by the Minister under section 102A that is being administered by the Guarantee Corporation.	11
[12] Section 103P (3) (b)	12
Insert "or in connection with any scheme or arrangement approved by the Minister under section 102A that is being administered by the Guarantee Corporation" after "Part".	13

[13] Section 103P (3) (e)	1
Insert after section 103P (3) (d):	2
(e) money required by the regulations to be paid from the Fund in connection with any scheme or arrangement approved by the Minister under section 102A that is being administered by the Guarantee Corporation.	3 4 5 6
[14] Section 103S Functions of Guarantee Corporation	7
Insert after section 103S (1):	8
(1A) Without limiting subsection (1) (c), the regulations may make provision for or with respect to the functions of the Guarantee Corporation in relation to any home building insurance or reinsurance arrangements that are entered into by the State.	9 10 11 12
[15] Schedule 4 Savings and transitional provisions	13
Insert at the end of clause 2 (1):	14
<i>Home Building Amendment (Insurance) Act 2002</i>	15
[16] Schedule 4, Part 10	16
Insert after clause 67:	17
Part 10 Provisions consequent on enactment of Home Building Amendment (Insurance) Act 2002	18 19 20
68 Application of amendments	21
Subject to the regulations, an amendment to a provision of this Act that is made by the <i>Home Building Amendment (Insurance) Act 2002</i> does not apply to an insurance contract that is in force at the time the amendment commences.	22 23 24 25

Schedule 2	Amendments to Home Building Regulation 1997 relating to insurance	1
		2
	(Section 4)	3
[1]	Clause 39 Definitions	4
	Insert after clause 39 (2):	5
	(3) A reference in this Part to the disappearance of a contractor, supplier or owner-builder includes a reference to the fact that, after due search and inquiry, the contractor, supplier or owner-builder cannot be found.	6 7 8 9
[2]	Clause 43 Losses indemnified	10
	Omit “insolvency or death of the contractor or because, after due search and inquiry, the contractor cannot be found” from clause 43 (1) (a).	11 12
	Insert instead “insolvency, death or disappearance of the contractor”.	13
[3]	Clause 43 (1) (b)	14
	Omit the paragraph. Insert instead:	15
	(b) loss or damage arising from a breach of a statutory warranty, being loss or damage in respect of which the beneficiaries cannot recover compensation from the contractor or have the contractor rectify because of the insolvency, death or disappearance of the contractor.	16 17 18 19 20
[4]	Clause 43 (2) (a)	21
	Omit “insolvency or death of the supplier or because, after due search and inquiry, the supplier cannot be found”.	22 23
	Insert instead “insolvency, death or disappearance of the supplier”.	24
[5]	Clause 43 (2) (b)	25
	Omit the paragraph. Insert instead:	26
	(b) loss or damage resulting from any of the following events, but only if the beneficiaries cannot, because of the insolvency, death or disappearance of the supplier,	27 28 29

recover compensation from the supplier for the loss or damage or have the supplier rectify the loss or damage:	1
(i) the materials and components used in the kit home not being good or suitable for the purpose for which they were used,	2
(ii) the design of the kit home being faulty.	3
[6] Clause 43 (3)	4
Insert “, being loss or damage in respect of which a beneficiary cannot recover compensation from the contractor or supplier concerned, or have the contractor or supplier rectify, because of the insolvency, death or disappearance of the contractor or supplier” after “for the following loss or damage”.	5
[7] Clause 43 (3) (e)	6
Insert at the end of clause 43 (3) (d):	7
, or	8
(e) any legal or other reasonable costs incurred by a beneficiary in seeking to recover compensation from the contractor or supplier for the loss or damage or in taking action to rectify the loss or damage.	9
[8] Clause 45 Limitations on liability and cover	10
Insert after clause 45 (i):	11
(j) the contract may limit liability resulting from non-completion of building work to an amount that is 20% of the contract price (including any agreed variation to the contract price) for the work.	12
[9] Clause 57AA General requirements for insurance	13
Omit “\$5,000” wherever occurring. Insert instead “\$12,000”.	14

[10] Clause 57AC	1
Insert after clause 57AB:	2
57AC Meaning of “structural defect”	3
(1) For the purposes of section 103B (2) of the Act, <i>structural defect</i> means any defect in a structural element of a building that is attributable to defective design, defective or faulty workmanship or defective materials (or any combination of these) and that:	4
(a) results in, or is likely to result in, the building or any part of the building being required by or under any law to be closed or prohibited from being used, or	5
(b) prevents, or is likely to prevent, the continued practical use of the building or any part of the building, or	6
(c) results in, or is likely to result in:	7
(i) the destruction of the building or any part of the building, or	8
(ii) physical damage to the building or any part of the building, or	9
(d) results in, or is likely to result in, a threat of imminent collapse that may reasonably be considered to cause destruction of the building or physical damage to the building or any part of the building.	10
(2) In subclause (1):	11
<i>structural element</i> of a building means:	12
(a) any internal or external load-bearing component of the building that is essential to the stability of the building or any part of it, including things such as foundations, floors, walls, roofs, columns and beams, and	13
(b) any component (including weatherproofing) that forms part of the external walls or roof of the building.	14
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[11] Clause 57BA	1
Insert after clause 57B:	2
57BA Transitional provision—application of certain amendments	3
The amendments made to clauses 43, 45 and 57AA by the <i>Home Building Amendment (Insurance) Act 2002</i> do not apply to an insurance contract that is in force at the time of commencement of the amendments.	4 5 6 7

Schedule 3 Other miscellaneous amendments	1
(Sections 3 and 4)	2
3.1 Home Building Act 1989 No 147	3
[1] Section 48A Definitions	4
Omit “action for reversal of” from section 48A (2) (a).	5
Insert instead “appeal against”.	6
[2] Section 48I Application for determination of a building claim	7
Omit “, in accordance with the regulations, and on payment of the prescribed fee,”.	8
	9
[3] Section 103M Assignment of rights	10
Insert after section 103M (3):	11
(4) A reference in this section to the assignment of a beneficiary’s rights includes a reference to the assignment of any rights that the beneficiary may have, in respect of the matter covered by the indemnity, against a developer or any other person.	12
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3.2 Home Building Regulation 1997	16
[1] Clause 57G Application for determination of building claim	17
Omit the clause.	18
[2] Clause 57H Fee for application for determination of building claim	19
Omit the clause.	20