



## Home Building Amendment Bill 2014

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#### Second Reading

**The Hon. MATTHEW MASON-COX** (Minister for Fair Trading) [3.52 p.m.]: I move:

That this bill be now read a second time.

The introduction of the Home Building Amendment Bill is the culmination of a comprehensive consultation process. The reform process was undertaken to ensure home building laws reflect current practice and remove any unnecessary red tape for industry while providing consumers with appropriate protection. I seek leave to have the second reading speech incorporated in *Hansard*.

#### Leave granted.

It is essential that consumers are adequately protected from the risks associated with such a big investment as building a home or undertaking major renovations.

At the same time, the building and construction industry makes a vital contribution to the New South Wales economy. Access Economics reports that the sector will employ 9.18 per cent of the State's workforce by 2020.

When the Liberals and Nationals Government came into power in 2011, housing starts were at a near 50 year low and the sector was in a fragile state. Later that year the Government responded to the most pressing concerns of homeowners and industry and introduced some urgent amendments to cut red tape, which had been well overdue.

However, further reform was necessary to facilitate a healthy industry and support the NSW 2021 goal to improve housing affordability and availability.

That is why, in 2011, my colleague, the Hon. Anthony Roberts, MP, announced that the Act would be comprehensively reformed.

To ensure that stakeholders were partners in the reform process, issues with the legislation were identified and potential solutions were developed with the assistance and involvement of all stakeholders, but particularly key stakeholders who had the expertise and experience in the industry to assist in the development of viable options for reform.

I would like to thank all stakeholders who have so generously given their time and input to help develop these reforms.

The more than 50 changes contained in the bill will ensure that appropriate levels of consumer protection are maintained and, where appropriate, enhanced. Industry will benefit from cuts to unnecessary red tape and the reforms will support builders to get on with the job of creating the homes that the community needs.

I now turn to the detail of the bill.

#### **Home Building Contracts**

The bill proposes a number of reforms to home building contracts.

Under the current Act, a builder can only request a maximum of 10 per cent for a deposit before work is commenced if the contract price is \$20,000 or less and 5 per cent where the contract price is over \$20,000.

The 5 per cent cap for deposits on work over \$20,000 is not always sufficient to cover the costs of commencing a project. This often places pressure on builders who may incur considerable costs for building materials and equipment before work begins.

Accordingly, the bill increases this cap on deposits from 5 per cent to 10, effectively creating a blanket cap of 10 per cent for all deposits.

The bill also addresses a problem that, while deposits for work are strictly regulated, there is currently no regulation of the payment for work once it commences.

It has been reported, over extensive consultation, that this can result in some homeowners finding that they have paid for work not yet carried out, sometimes by significant amounts.

This may leave these home owners at risk if their builder becomes insolvent or disappears before the work is completed, and home warranty insurance may be insufficient to cover all of their losses.

The bill addresses this situation by requiring contracts over \$20,000 to include a progress payment schedule. It also restricts the kinds of progress payments that can be claimed by a builder to only two types of payment.

The first type are payments specifically linked to the completion of specified stages of work, and the work to be done in each stage must be described in clear and plain language in the contract.

The second type are payments for work performed, or costs already incurred, and each claim for payment would need to be supported by invoices, receipts and other documents to support the claim.

These represent payment methods used in home building contracts which are currently used by those builders who engage in best practice contracting.

Better information will now be given to consumers before a contract is signed, encouraging more informed decision making. Consumers will now be better informed before they sign a contract for this significant investment.

It will also be an offence for builders to request payments which are not one of these "authorised payments".

These reforms will assist home owners and builders in having greater certainty about their rights and obligations under a contract and help reduce disputes.

They will also help shield home owners from the risks of uninsured losses without impeding the ability of builders to maintain an appropriate level of cash flow.

The changes will apply to new residential building contracts entered into after commencement of the legislation.

### ***Statutory Warranties***

The statutory warranties scheme is a core element of the consumer protection framework of the Act. It creates legally enforceable standards for the quality and performance of building work.

Currently, the statutory warranties cover work for six years from completion for structural defects, and two years for all other breaches of the warranties. Consequently, for claims brought after the two-year period, the question of whether a defect is a "structural defect" is critical.

Stakeholders on all sides have expressed concerns over the definition of "structural defect". In fact, 90 per cent of stakeholders who responded to the 2012 issues paper wanted the term better defined.

The main issue was that a significant defect may not be a "structural defect" but could still be a "major defect" and worthy of the six-year warranty period.

Of particular concern was whether water penetration and fire safety non-compliance fell within the two- or six-year warranty periods, as there has been considerable variation in rulings on these matters depending on the severity of the defect.

Reform of the definition of "structural defect" is long overdue. It is necessary to reduce the significant time and money spent by parties on disputes and to ensure more consistent court and tribunal decisions. This will deliver cost savings for home owners, builders and the home warranty insurance fund.

The bill replaces "structural defect" with a new concept of a "major defect" for the six-year statutory warranty period. To provide further certainty, the definition will be moved from the Regulation into the Act.

A two-step test will be introduced to determine whether a problem is a "major defect".

The first step is whether the defect is in a "major element" of the building. Major elements will include structural load bearing elements, but for the first time fire safety systems and waterproofing are also expressly included.

The second step considers how severe the consequences of the defect are to the building, such as where it causes, or is likely to cause a building to be uninhabitable or unusable, the destruction of the building, or the threat of collapse of the building.

The bill provides a regulation-making power to prescribe other major elements or major defects to provide further direction into the future if necessary. In keeping with our transparent and extensive consultation approach, we will continue to monitor and consult with our stakeholders in developing the regulations.

This clearer and more robust definition will help reduce the number of disputes, and also the length and complexity of these disputes. This should help reduce the significant legal costs associated with these types of disputes.

A number of other amendments will further clarify aspects of the statutory warranty scheme.

Owners corporations have expressed concern about the ease with which they can apply the existing definition of completion to trigger the statutory warranties and insurance. This is because they are not parties to the original contract.

To provide owners corporations with greater certainty about their rights, the bill will introduce a new definition of completion of building work for strata schemes. This will be the date an occupation certificate is issued that authorises the occupation and use of the whole of the building.

The new definition will apply only to new contracts entered into after commencement.

The Act is currently silent on whether a homeowner has a duty to mitigate their loss, thereby avoiding situations where minor defects become a much bigger problem over time.

At common law, if a homeowner fails to take reasonable steps to mitigate their loss, this may reduce the size of their claim. Home warranty insurance policies may also include loss mitigation clauses.

This amendment clarifies that a homeowner who suffers loss arising from the breach of a statutory warranty has a duty to mitigate that loss.

This change will not reduce the rights of home owners, but will clarify the obligations they are under.

Homeowners will also be required to make reasonable efforts to notify a builder in writing of an alleged breach of the statutory warranties within six months of the breach becoming apparent. Once again this will not reduce a home owner's rights, but is a matter which a court or tribunal may take into consideration.

The bill broadens the defences available to a builder where a builder has reasonably relied on instructions given by a relevant professional acting for the home owner, and the professional is independent of the builder. It is reasonable for a builder to rely on instructions provided to them by a professional, like an architect or engineer, who is engaged by a home owner. It is unreasonable to require a builder to second-guess the expertise of these agents when they do not have the same level of expertise or qualifications.

This amendment will not apply in respect of contracts entered into before the commencement of the amendment.

### ***Dispute Resolution***

The bill enhances dispute resolution processes in a number of ways.

Fair Trading inspectors can already issue orders to a builder requiring the builder to rectify defective or incomplete work.

These orders are important for quick resolution of disputes.

The new legislation will allow these orders to specify staged dates for different work to be completed.

Builders will now be able to apply to have an order amended where it would not be reasonable for them to meet the timeframes, such as if there were delays in the delivery of materials or delays due to bad weather.

To enhance compliance with orders, penalty notices will be able to be issued for failing to comply.

To further support the timely and cost-effective resolution of disputes, home owners will have a duty to not unreasonably refuse a builder access to a building site to rectify defective work.

This is simply because a builder that is willing to rectify work can be placed in an unfair position if the home owner refuses them access. This is particularly so, where there is an order in place. A failure to allow access can unnecessarily inflate the time, costs and resources required to resolve the dispute.

A builder will not be able to enter land without the owner's consent, particularly where there have been issues where the home owner is concerned about a builder's behaviour. But, if access was unreasonably refused, this would be taken into account by a court or tribunal in determining a building claim. A court or tribunal will also have regard under these reforms, to the principle that the rectification of defective building work by the responsible party is the preferred outcome.

### ***Owner Builders***

The Act currently allows home owners to do building work on their home by obtaining an owner-builder permit from Fair Trading.

The owner-builder provisions are being reformed to help ensure that the permit system is not being used inappropriately for commercial reasons as a means of circumventing the licensing requirements. These reforms will also help manage health and safety risks associated with owner-builder work.

Currently, owner-builders are only permitted to undertake work relating to a single dwelling or a dual occupancy. There

are concerns that some commercially orientated, unlicensed people may be using the permit system in order to undertake dual occupancy work on land with a view to subdividing the land and on-selling it at a profit.

The owner-builder permit system is not intended for such commercial development work.

Owner-builders will not be able to obtain a permit for work on a dual occupancy unless the commissioner is satisfied that special circumstances exist, such as where a family could demonstrate legitimate non-commercial reasons for the work or where refusing the permit could cause family hardship.

### ***Home Warranty Insurance***

Mandatory home warranty insurance is a key consumer protection mechanism in the legislation.

Home warranty insurance is a form of last resort cover for home owners in the event a builder is unable to complete or rectify work due to insolvency, death, disappearance or due to certain licence suspensions.

While owner-builders are currently required to take out home warranty insurance, the bill makes them ineligible to obtain home warranty insurance under the statutory scheme before on-selling their home.

This is to focus home warranty insurance on the licensed building sector, and to make a clear distinction between homes that are built by qualified licensed builders and those built by owner-builders.

To safeguard subsequent purchasers of properties, contracts for the sale of all properties on which work by an owner-builder has been carried out in the last six years will be required to include a consumer warning that the work has been undertaken by an owner-builder and that the owner-builder is not providing statutory insurance.

This reform does not preclude private insurers from entering the market and offering insurance to owner-builders which they can attach to the contract for the benefit of the subsequent purchaser.

In order to combat the use of false insurance certificates, the bill provides for a public register of certificates of insurance to be made available to home owners and potential purchasers of property.

The bill will also clarify a number of the home warranty insurance requirements in the Act, including clarifying the definition of "disappeared" for the purposes of insurance claims, as meaning a licensee or owner-builder "cannot be found in Australia". This responds to a 2011 District Court ruling that interpreted this as meaning "could not be found in New South Wales".

The new definition will not apply to any finalised claims or litigation, or any proceedings commenced or claims made before the commencement of the legislation.

### ***Licensing***

This bill enforces the Act's consumer protection objectives by refining the current system of licensing under the Act to ensure that consumers are contracting with fit and proper people with appropriate knowledge and skills, and to help address risks of phoenixing activity.

Imprisonment for up to 12 months will now be a sentencing option for repeat offenders who engage in unlicensed contracting, seeking work by or on behalf of unlicensed persons and home warranty insurance offences.

Licence eligibility is also being tightened where an applicant for a new licence has had a recent involvement in companies that later became insolvent, and to allow Fair Trading to take account of past consumer complaints, cautions, penalty notices or insurance claims.

Corporate licence holders will be required to notify the commissioner within seven days if they have been placed into external administration.

### ***Clarifying the scope of the Act***

Finally, the bill introduces a number of amendments to enable the Act to be better targeted towards core building works, which will cut red tape for industry.

The Act's requirements will no longer apply to standalone contracts for internal painting, concrete tennis courts, ornamental ponds and water features. Consumers will remain protected by the Australian Consumer Law for these kinds of work.

### ***Conclusion***

The Baird-Stoner Government is committed to reforming the home building legislation to ensure that it takes a balanced approach to regulating the industry by providing appropriate protection for home owners without imposing unnecessary red tape on industry.

In fulfilling this commitment, I am pleased to introduce this bill which I believe strikes the right balance between industry concerns and protecting consumers.

I commend the bill to the House.

