



New South Wales

# Home Building Amendment Bill 2014

## Explanatory note

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

## Overview of Bill

The object of this Bill is to amend the *Home Building Act 1989*, in connection with the statutory review of that Act, to deal with the following matters:

- (a) penalties for unlicensed work—by increasing the maximum penalty for a second or subsequent offence by an unlicensed individual who does, or offers to do, residential building work or specialist work, or a licensee or developer who hires unlicensed persons (including imprisonment as a sentencing option),
- (b) contracts to do residential building work or specialist work—including by extending the matters for which contracts must provide, regulating progress payments and increasing the cap on deposits,
- (c) contracts to supply kit homes—including by extending the matters for which contracts must provide and increasing the cap on deposits,
- (d) statutory warranties implied into contracts—including by requiring work to be done with due care and skill (rather than in a proper and workmanlike manner, as at present), clarifying the responsibilities of subcontractors for breaches of the warranties, imposing duties on consumers to mitigate loss and notify defects, clarifying the test of which home building defects require a greater warranty period and providing a defence for builders who rely on the instructions of a professional acting for the consumer,
- (e) contractor licences, supervisor certificates and tradesperson certificates—including by broadening the grounds on which a person is disqualified from holding a licence or certificate, providing for consistent consideration for all licensing and certification

decisions and consolidating licensing and certification provisions currently spread across the Act and regulations,

- (f) notification of insolvency, winding up or deregistration of licence holders—by requiring the holders of contractor licences to notify their insolvency, winding up or deregistration and making a breach of that obligation an executive liability offence,
- (g) owner-building—including by requiring special circumstances before an owner-builder permit can authorise work that relates to dual occupancy, requiring all owner-builder applicants to undertake safety training or other training, prohibiting joint owners of property upon which owner-builder works are being carried out from carrying out owner-building work on other properties within 5 years, broadening the grounds on which a person is disqualified from holding an owner-builder permit and consolidating permit provisions currently spread across the Act and regulations,
- (h) resolution of building disputes—including by making further provision for the issue of rectification orders (which are used to resolve disputes), by allowing for orders to set out stages for rectification work, by clarifying that they can require the payment of money by a consumer only when the money is due under a home building contract, by making it a breach of a licence to fail to comply with a rectification order and requiring a court or tribunal, when determining a building claim, to have regard to the principle that rectification of the defective work by the responsible party is the preferred option,
- (i) disciplinary proceedings—including by changing the meaning of improper conduct, and the grounds for disciplinary action, to cover work done otherwise than with due care and skill (rather than otherwise than in a good and workmanlike manner, as at present),
- (j) home warranty insurance—including by clarifying when a contractor is taken to have disappeared, requiring residential building work done under a contract to be insured in the name under which the person contracted to do the work, providing that a contract of insurance extends to the rectification of the original residential building work, preventing owner-builders from obtaining home warranty insurance, providing an increased maximum penalty for a second or subsequent offence by an individual of uninsured contracting to do residential building work or specialist work or seeking that work by or for an uninsured person, improving access to insurance in cases of insolvency and renaming home warranty insurance as insurance under the Home Building Compensation Fund,
- (k) other minor, consequential or ancillary matters—including by moving definitions, and exclusions from certain definitions, from the regulations to the Act and dealing with savings and transitional matters.

## 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.

## Schedule 1      Amendment of Home Building Act 1989 No 147

### Preliminary and interpretation

**Schedule 1** amends Part 1 of the Act (dealing with interpretation and other preliminary matters) as follows:

- (a) by moving definitions in the Act to a Schedule and by moving from the regulations to the Act provisions about matters or work that are included or excluded from the definitions of *dwelling* and *residential building work*,
- (b) by providing that, for the purposes of the Act and regulations and a contract of insurance under the Act, the date of completion of a new building in a strata scheme occurs on the

- issue of an occupation certificate for the building or on the occurrence of some other event that is prescribed by the regulations,
- (c) by making it clear that the application of the Act to specialist work is not limited to specialist work that is residential building work and extends to commercial, industrial and other specialist work that is not residential building work,
  - (d) by excluding from the definition of *residential building work*, and thus from the operation of the Act's requirements about contracts and licensing:
    - (i) work comprising the construction of concrete tennis courts (and the like), ornamental ponds and water features and other structural ornamentation, if the work is undertaken as a stand-alone project, and
    - (ii) internal paintwork, if undertaken as a stand-alone project, and
    - (iii) off-site work to fabricate a manufactured home,
  - (e) by making consequential amendments.

**Contracting to do residential building work or specialist work**

**Schedule 1** amends Part 2 of the Act (dealing with the regulation of residential building work and specialist work) as follows:

- (a) by increasing the maximum penalty (and to include the option of imprisonment as a penalty) for a second or subsequent offence committed by an individual against provisions that prohibit unlicensed contracting and seeking work by or for an unlicensed person,
- (b) by including in the Act provisions currently in the regulations that provide for the terms that must be included in contracts and that create exceptions to requirements as to the form and content of contracts, cooling-off periods for contracts and the duty to provide copies of contracts,
- (c) by requiring contracts to do residential building work to include details of any progress payments payable under the contract and a statement about how the contract can be terminated,
- (d) by extending an existing offence about compliance with contract requirements to cover non-compliance with requirements of the regulations as to the terms and other matter that must or must not be included in contracts,
- (e) by providing that the maximum deposit for residential building work is 10% of the contract price, regardless of the contract price (up from 5% when the contract price is more than \$20,000),
- (f) by imposing restrictions on the progress payments that can be required under a contract to do residential building work with a value more than a prescribed amount (currently \$20,000),
- (g) by inserting notes as aids to interpretation of provisions relating to exemptions.

**Contracts to supply kit homes**

**Schedule 1** amends Part 2A of the Act (dealing with the regulation of the supply of kit homes) as follows:

- (a) by transferring from the regulations to the Act the terms that a contract for the supply of a kit home must include,
- (b) by extending an existing offence about compliance with contract requirements to cover non-compliance with requirements of the regulations as to the terms and other matter that must or must not be included in contracts,
- (c) by providing that the maximum amount of a deposit for the supply of a kit home is 10% of the contract price (up from 5% where the contract price is \$20,000 or less).

### **Statutory warranties**

**Schedule 1** amends Part 2C of the Act (dealing with statutory warranties) to clarify the rights and obligations of licensees and consumers under the statutory warranties (which imply minimum standards of work into a contract to do residential building work), as follows:

- (a) by providing for a warranty to be implied into every contract to do residential building work that the work will be done with due care and skill (rather than in a proper and workmanlike manner, as at present), so as to modernise the Act's terminology and make it more consistent with the *Australian Consumer Law (NSW)*,
- (b) by providing that, although the principal contractor is primarily responsible to the consumer for a breach of a statutory warranty (even when the breach relates to work undertaken by a subcontractor) subcontractors are also responsible for statutory warranties,
- (c) by setting out the duties of a person who has the benefit of a statutory warranty (a *consumer*), as follows:
  - (i) by imposing a duty on the consumer to mitigate loss arising from a breach of the warranty,
  - (ii) by introducing a defect notification period, requiring the consumer to notify the licensee of a defect in the residential building work within 6 months of when the consumer became aware or ought reasonably to have become aware of the defect,
  - (iii) by requiring consumers to allow the licensee reasonable access to the site, so that the licensee can rectify the work,
  - (iv) by allowing a court or tribunal to take any failure to mitigate loss or give notice of a defect into account in proceedings concerning a breach of statutory warranty and by providing that a court or tribunal must take into account any failure to comply with the duty to allow reasonable access,
- (d) by changing the kind of defect that attracts a 6-year statutory warranty period from *structural defect* (as defined in the regulations) to a *major defect* in a major element of the building,
- (e) by providing for a defence in proceedings for a breach of a statutory warranty for licensed builders who rely on the instructions of a professional acting for the person for whom the work was contracted (and who is independent of the builder).

### **Contractor licences, supervisor certificates, tradesperson certificates and owner-builder permits**

**Schedule 1** amends Part 3 of the Act (dealing with the issue, cancellation and suspension of contractor licences, supervisor certificates, tradesperson certificates and owner-builder permits) as follows:

- (a) by transferring from the regulations to the Act provisions dealing with the grounds on which a person is disqualified from applying for or holding a contractor licence, supervisor certificate and tradesperson certificate and amending those provisions as follows:
  - (i) by providing that a provision that currently prevents a licence or certificate from being issued to a person who is or was a director or a person involved in the management of a corporation that is under external administration at the time of making the decision extends to disqualify those with such involvement in corporations that have already been wound up,
  - (ii) by amending the exemptions from the grounds on which a licence or certificate can be refused relating to an applicant who is or was a director or concerned in the management of an externally-administered body corporate, to provide for a members' voluntary winding up only to be exempt and for any other voluntary winding up (such as by creditors) to be a ground to refuse a licence or a certificate,
  - (iii) by preventing the issue of a licence or certificate to a person involved in a home building entity that has been the subject of an unreasonably large number of

- complaints, cautions, penalty notices or home warranty insurance claims under the Act, the *Australian Consumer Law (NSW)* or other relevant legislation,
- (iv) by making the fit and proper person test mandatory, so that an application must be refused if it is considered that the applicant, or a close associate of the applicant who exercises a significant influence over the applicant or the operation and management of the applicant's business, would not be a fit and proper person to hold an authority (whereas this is currently merely an optional consideration),
  - (b) by providing for consistent considerations for all licensing and certification decisions (that is, for their issue, renewal, restoration and cancellation), including by requiring the cancellation of a contractor licence if an application for a licence by the person would be required to be refused and making similar provision relating to renewal,
  - (c) by requiring cancelled contractor licences, supervisor certificates and tradesperson certificates, or statements about them, to be lodged with the head of the government agency that administers the Act (the *Chief Executive*) rather than at an office of that agency, and also requiring such lodgment when licences or certificates are suspended because of failure to insure or the appointment of a controller or administrator,
  - (d) by requiring the holder of a contractor licence to notify certain events or circumstances (including insolvency, winding up or deregistration), which would allow reliance on an existing power to suspend the licence if there was a risk to the public that the licensee would be unable to complete building contracts,
  - (e) by providing that an offence involving failure to notify issues relating to the solvency and registration of the holder of a contractor licence is an executive liability offence, for which a director of the corporation or an individual who is involved in the management of the corporation, and who is in a position to influence the conduct of the corporation in relation to the commission of the offence, may be liable,
  - (f) by specifying the matters that must be considered before a provisional supervisor certificate can be issued,
  - (g) by broadening the definition of *owner-builder work* to include residential building work on a secondary dwelling on land,
  - (h) by providing that an owner-builder permit must not authorise its holder to do residential building work that relates to a dual occupancy unless there are special circumstances,
  - (i) by requiring all applicants for owner-builder permits to undertake education or training, or hold qualifications, required by the Chief Executive or the regulations (which are intended to include a requirement to obtain a construction induction card (a "white card") under the *Work Health and Safety Act 2011*),
  - (j) by extending the 5-year limitation that currently applies to the holder of an owner-builder permit carrying out owner-builder work on other properties, so that the limitation applies to all persons with a registered interest in land upon which owner-builder work was undertaken, rather than just the person to whom the owner-builder permit was issued,
  - (k) by setting out in a Schedule to the Act some of the conditions of authorities presently in the regulations,
  - (l) by requiring cancelled authorities or statements about them to be lodged with the Chief Executive rather than at an office of the relevant government agency.

#### **Resolving building disputes**

**Schedule 1** amends Part 3A of the Act (relating to the current powers of inspectors to make rectification orders after completing an investigation of a building dispute) as follows:

- (a) by making it clear that a condition of a rectification order requiring the payment of money by the complainant under a building claim relates only to money payable under the contract,
- (b) by allowing for staged rectification orders, so that a rectification order may set out stages for compliance with the requirements of the order,

- (c) by providing that a rectification order may be amended by a further order,
- (d) by making it a condition of every contractor licence that the contractor must comply with the requirements of a rectification order (which will make a builder's non-compliance with a rectification order grounds for the taking of disciplinary action),
- (e) by requiring a court or tribunal, when determining a building claim involving an allegation of defective residential building work or specialist work, to have regard to the principle that rectification of the defective work by the responsible party is the preferred option,
- (f) by providing that the Tribunal can make an order to resolve a building dispute even if it is not the order that the applicant asked for.

#### **Disciplinary proceedings**

**Schedule 1** amends Part 4 of the Act (relating to provisions about improper conduct and disciplinary proceeding) as follows:

- (a) by changing one of the grounds for a finding of improper conduct by or for disciplinary action against a licence or certificate holder so that references to work having to be done in a good and workmanlike manner will become references to work having to be done with due care and skill (for consistency with changes to the statutory warranty changes as to standard of work),
- (b) by requiring the return of an authority that is suspended, varied or cancelled as a result of disciplinary proceedings to the Chief Executive rather than at an office of the relevant government agency.

#### **Insurance**

**Schedule 1** amends Part 6 of the Act (relating to insurance of residential building work), as follows:

- (a) by clarifying that a reference to the disappearance of a contractor, supplier or owner-builder is a reference to disappearance from Australia,
- (b) by requiring that residential building work done under a contract must be insured in the name under which the person contracted to do the work (rather than in the name of the person who contracted to do the work),
- (c) by providing an increased maximum penalty for a second or subsequent offence by an individual of uninsured contracting for residential building work or specialist work,
- (d) by providing that a contract of insurance in relation to residential building work done by a person (whether or not under contract) extends to any residential building work done by the same person by way of rectification of the same original work (and thus that a separate contract of insurance is not required in relation to the rectification work),
- (e) by omitting a provision that provides that if the holder of a contractor licence enters into a contract to do residential building work and a contract of insurance is in force in relation to the work, the contract of insurance is taken to extend to any residential building work under the contract at the address stated in the certificate of insurance,
- (f) by making it clear that the requirement for contract work to be insured extends to residential building work that is owner-builder work when the work is done under a contract between the person who contracts to do the work and the owner-builder,
- (g) by removing the current requirement for an owner-builder to take out home warranty insurance for owner-builder work and preventing home warranty insurance from being taken out by an owner-builder in future (without affecting the current requirement that work done by a contractor to an owner-builder must have home warranty insurance),
- (h) by requiring contracts for the sale of land on which owner-builder work has been carried out to contain a consumer warning stating that work done under an owner-builder permit is not required to be insured under the Act unless done by a contractor to the owner-builder,

- (i) by imposing obligations on sellers of houses and units used for commercial purposes (which are excluded from the definition of *dwelling* in the Act) to include a warning in a contract for the sale of the relevant land that the property does not have the protection of the Act,
- (j) by improving access to home warranty insurance in cases of insolvency to ensure that consumers can make claims for work done by a partnership where one member is insolvent and the licence has been cancelled,
- (k) by clarifying the meaning of *building claim order* in a provision providing that a contract of insurance in relation to residential building work must include provision that deems the suspension of a contractor's licence to constitute the insolvency of the contractor for the purposes of the application of the policy to any loss that is the subject of a building claim order made against the contractor that remains unsatisfied, so that an insurance policy must cover loss that is the subject of an outstanding order by a court or the Tribunal in relation to a building claim,
- (l) by providing for the keeping of a register of insurance particulars that can be accessed by beneficiaries or potential purchasers of property (including details of the builder, the site and any successful claims on the insurance and the amount of those claims),
- (m) by providing for the period of cover of an insurance contract to be referable to the occurrence of a major defect (as defined in the statutory warranty provisions of the Act) in residential building work, rather than a structural defect, after completion of work,
- (n) by renaming home warranty insurance as insurance under the Home Building Compensation Fund,
- (o) by renaming the Home Warranty Insurance Scheme Board as the Home Building Compensation Fund Board,
- (p) by providing that a claim for non-completion of work can be made as a delayed claim to allow beneficiaries to continue to pursue a contractor for breach of statutory warranties that involve a claim for defective work as well as a non-completion claim beyond 12 months after the work ceased.

#### **Miscellaneous matters**

**Schedule 1** also makes amendments dealing with miscellaneous matters, as follows:

- (a) by including an executive liability provision in the Act for directors and persons involved in the management of a corporation that commits the offence of failing to notify the occurrence of an insolvency event that provides grounds for the cancellation of a licence,
- (b) by extending a provision about the limitation of personal liability that currently applies to the Chief Executive so that it also applies to members of the Home Building Compensation Fund Board and the Home Building Advisory Council,
- (c) by clarifying the obligation of the Chief Executive to keep a register of particulars of licences, certificates and owner-builder permits and other matters,
- (d) by providing for service of notices and documents under the Act by email and fax,
- (e) by updating references to the government agency that administers the Act and the head of that agency and by requiring lodgment of certain documents with the Chief Executive rather than at an office of that agency,
- (f) by providing for the making of savings and transitional regulations,
- (g) by inserting savings and transitional provisions,
- (h) by renumbering existing Schedules about the membership of the Home Building Compensation Fund Board and the Home Building Advisory Council.

## **Schedule 2      Amendment of NSW Self Insurance Corporation Act 2004 No 106**

**Schedule 2** amends the *NSW Self Insurance Corporation Act 2004* as a consequence of the change of terminology from “home warranty insurance” to “insurance under the Home Building Compensation Fund”.

## **Schedule 3      Repeals**

**Schedule 3** repeals Acts that contain only uncommenced provisions that amend the *Home Building Act 1989*.