HOME BUILDING AMENDMENT BILL 2008

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Second Reading

The Hon. PENNY SHARPE (Parliamentary Secretary) [5.18 p.m.], on behalf of the Hon. Ian Macdonald: I move:

That this bill be now read a second time.

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

Leave not granted.

I am pleased to introduce the Home Building Amendment Bill 2008, which includes a number of important enhancements to the home warranty insurance scheme under the Home Building Act 1989. As members know, residential building is one of the most expensive purchases consumers undertake. The Home Building Act requires that builders contracting residential building work worth more than $12,500 must take out home warranty insurance. Home warranty insurance indemnifies a homeowner against loss and damage arising from insolvency, disappearance or death of a contractor. Insurance cover is provided for non-completion of work and for breach of statutory warranty. This form of insurance often is referred to as last-resort cover and acts as a safety net in the event of the most dire of circumstances where there is no longer a contractor in place to build, complete or repair the contracted work.

A homeowner who has a problem with their home can currently access a comprehensive dispute resolution process involving inspections and mediation by Fair Trading or, if mediation fails, they can lodge a claim with the Consumer, Trader and Tenancy Tribunal. Claims also can be lodged directly with a court. The tribunal can order the contractor to undertake work or pay compensation, which is known as a money order. If the contractor fails to comply with a money order the homeowner must take legal action to enforce the order or have the contractor made insolvent.

Fair Trading's research has indicated that a significant number of consumers who have orders made in their favour are not having them enforced. In the five years to 2007 there were 564 money orders issued by the tribunal that were complied with by the required date. Some 160 of those orders related to contracts with 132 contractors and were of sufficient value that a home warranty insurance contract was required. Thus they are not able to receive the relief that has been provided by the tribunal or lodge a home warranty insurance claim. An insurance claim cannot be paid until the contractor is declared insolvent or extensive inquiries show the contractor has disappeared or has died. The proposal will provide consumers with the remedies to which they are entitled.

Currently a licence cannot be issued or renewed if the applicant has not satisfied any order of the Consumer Trader and Tenancy Tribunal within the period specified by the tribunal. However, licences under the Home Building Act can be issued for up to a period of three years. Taking of disciplinary action could be a lengthy process and covers only non-compliance with a tribunal's order. Non-compliance with a court order is not grounds for disciplinary action. There needs to be a faster process to provide consumers with the remedies to which they are entitled.

The proposed legislation, under proposed section 42A, will suspend a home building licence 28 days after the date on which the amount of money was due to be paid under the tribunal's order. I note that while tribunal orders tend to include a time frame for performance, court orders for money generally become payable once they are made. Regarding orders to do things, the District Court does not generally have the power to make such orders; but when the Supreme Court makes orders there is no general practice as to whether time limits are imposed. Accordingly, it is proposed that the director general will determine a reasonable period for payment in published guidelines if no period is specified in the order. This is necessary to make the principle applying to tribunal orders equally applicable to court orders.

If an order is obtained staying the operation of the decision pending an appeal against the decision the suspension would take effect when the decision of the court or the tribunal is confirmed on appeal, and the contractor will not be able to continue in business until they comply with the order. Fair Trading will have the capacity to defer operation of this suspension if necessary—for example, if agreed arrangements are in place for payment. Publicly available guidelines will be developed to ensure that this discretion is used appropriately. Under existing section 48S of the Home Building Act 1989 the Consumer, Trader and Tenancy Tribunal must

currently inform the director general of any order it makes when determining a building claim. This information must be provided as soon as is practicable after making the order, and must include information about the time limit for compliance.

Currently no mechanism exists for Fair Trading to be informed of court orders involving building claims. The bill therefore proposes that a licence holder must notify the director general in writing within seven days of the amount of money to be paid and the name of the person to whom the money is to be paid. There is a penalty of 40 penalty units for a corporation, and 20 penalty units in any other case, for failing to notify the director general. A party to the proceedings may also choose to notify the director general of the making of the order and the terms of the order, thereby providing an extra means of notification. In addition, the loophole whereby disciplinary action cannot currently be taken against a licensee for failure to comply with a court order is being closed by the bill.

The legislation will also reduce the time involved in determining a home warranty insurance claim. The legislation will provide consumers with the ability to make a home warranty insurance claim as soon as a contractor has their home building licence suspended for non-compliance with a money order. On suspension of a licence for non-compliance with an order, insurers will be required to provide an insurance contract that allows a claim to be made by a person on whose behalf the work is being done and that person's successors in title as though the contractor has died, disappeared or become insolvent. However, the insurer is not liable to pay the amount that is the subject of the order of the tribunal or a court.

I should point out that the risk being insured does not change from the current situation. In other words, it is the risk of loss from non-completion of the work and from not being able to recover compensation for breach of statutory warranty or not being able to have the breaches rectified. The suspension of the licence of a builder for failure to comply with an order gives relief to the claimant only and not every other client of the builder. Under the proposed section 99 (4) the insurer is required to accept liability for the claim only where the tribunal or a court has ordered the contractor to pay the beneficiary an amount of money, and the contractor has failed to comply with the order. Should the builder have other work in progress, those consumers would have to have a money order made in their favour by the tribunal or a court, and the builder would have to fail to comply with that order before the insurer is required to accept liability for a claim.
Existing section 47A of the Home Building Act provides that the director general may appoint a person to coordinate or supervise work when the licence of a builder is suspended or cancelled. If the insurer pays the claim the insurer can recover money from the contractor in a court in the amount paid by the insurer under the claim. If the contractor complies with the tribunal or court order or completes the residential building work after the claim has been paid the insurer will be able to recover from the beneficiary the amount paid to the beneficiary under the order. This will exclude any amount paid under the order that does not relate to a matter for which the insurer is liable under the contract of insurance.

Taken as a whole, the proposed provisions will facilitate more timely access to home warranty insurance and will create an incentive for building contractors to act appropriately when ordered to pay compensation to homeowners. I note that the Government's bill is consistent with recommendation 18 of the inquiry into the operation of the Home Building Service, which was conducted by the Legislative Council's General Purpose Standing Committee No. 2 in 2007. The recommendation was as follows:

> That the New South Wales Government adopt the recommendation of the Home Warranty Insurance Scheme Board to introduce an additional trigger to enable consumers to access insurance without having to pursue a builder's bankruptcy or insolvency.

Apart from the proposals relating to an additional trigger for making a claim on a home warranty insurance policy, the bill includes a provision which clarifies an amendment included under the Home Building Amendment (Statutory Warranties) Act 2006. On 2 August 2006 the Court of Appeal made a ruling in the case *Honeywood as executrix of the estate of the late Neville Honeywood v. Munnings & Anor [2006] New South Wales CA 215* which affected statutory warranties under the Home Building Act 1989. The decision held that the statutory warranty provides only one opportunity for action. A party is barred from bringing a second action for different losses arising from the same breach of contract even when the party was unaware of the losses when the original proceedings were bought.

This Court of Appeal ruling had the potential to prevent homeowners from taking action for structural defects that arise after the completion of legal proceedings for less serious matters than may have been addressed at an earlier date. The ruling also had the potential to prevent insurers from obtaining recovery from builders. The Home Building Amendment (Statutory Warranties) Act 2006 was passed by Parliament and commenced operating in November 2006 to address the Court of Appeal ruling and to confirm that the statutory warranties are not extinguished by prior legal proceedings. The amendment Act inserted provisions in part 2C of the Home Building Act 1989 to the effect that enforcing a statutory warranty in proceedings does not prevent the person enforcing the same warranty in relation to other deficiencies that the person did not know about, and could not reasonably be expected to have known about, at the conclusion of the earlier proceedings. The amendments were applied retrospectively to ensure that no person was prevented from taking action in the period between the Court of Appeal ruling and the passage of the legislation.

An issue that subsequently has arisen is whether the amendments were limited to legal proceedings and would not overcome the Court of Appeal ruling in circumstances in which statutory warranties had been enforced by means of an out-of-court settlement. At present there is a possibility that a court could interpret the 2006 amendments in section 18 (2), which refer to enforcement in proceedings, as not applying to enforcement by accord and satisfaction—for example, out-of-court settlements. Minor amendments therefore are being made to clarify the legislation so that it is clear that a homeowner is able to pursue proceedings for a breach of the same statutory warranty in relation to a different deficiency, even if they resolved a previous breach of statutory warranty through legal proceedings or by accord and satisfaction. The proposed amendments also will flow through to private insurers and the Building Insurers' Guarantee Corporation in recovery proceedings to enforce statutory warranties of persons insured by them. I commend the bill to the House.