



New South Wales

Home Building Amendment (Compensation Reform) Bill 2017

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* (the *principal Act*) and other legislation as follows:

- (a) to enable insurance against loss arising from non-completion of residential building work or breach of statutory warranties for residential building work in cases where the builder dies, disappears or becomes insolvent (*home building insurance*) to be provided by private insurers as well as the NSW Self Insurance Corporation (*SICorp*),
- (b) to enable home building insurance (where there is a building contract) to be provided by one insurance contract, or 2 insurance contracts relating to losses incurred as a result of acts before and after completion of residential building work,
- (c) to confer on the State Insurance Regulatory Authority (the *Authority*) regulatory functions relating to home building insurance and private insurers who provide the insurance, including the power to establish mandatory guidelines about insurance premiums and other matters and the power to reject proposed insurance premiums,
- (d) to prohibit claims made 10 years or more after the work insured was completed,
- (e) to establish the Home Building Operational Fund (for payment of the Authority's administrative costs in relation to the principal Act) and the Home Building Insurers Guarantee Fund (for payment of indemnities in the event of a private insurer becoming insolvent), and to require contributions to be made to those Funds by licensed insurers,
- (f) to establish an indemnity scheme for claims relating to licensed insurers who become insolvent,

- (g) to enable losses to be covered by alternative indemnity products instead of contracts of insurance, if the products are approved by the Authority,
- (h) to provide for the licensing of insurers and providers of alternative indemnity products by the Authority for the purpose of providing home building insurance or alternative indemnity product cover and for supervision measures for licensed insurers and providers,
- (i) to extend the government sector agencies who may share information obtained in the course of the administration or execution of the principal Act,
- (j) to enable regulations to be made providing for the exemption of builders who carry out residential building work for the Crown or State owned corporations from home building insurance requirements,
- (k) to abolish the Fair Trading Administration Corporation,
- (l) to make other minor related amendments and to enact savings, transitional and other provisions as a consequence of the proposed Act,
- (m) to make consequential amendments to other Acts and regulations.

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

Home building insurance

Schedule 1 [1], [2], [5], [10], [16], [35] and [44] update references to the Home Building Compensation Fund (which is the Fund established for the purposes of home building insurance provided by SICorp) so that they refer instead to insurance under Part 6 of the principal Act, as a result of the amendments made by the proposed Act to allow private insurers to provide home building insurance in addition to SICorp.

Schedule 1 [3] requires contracts for residential building work or specialist work to specify the cost of the required home building insurance or alternative indemnity product cover.

Schedule 1 [21] enables home building insurance (that is required when there is a contract for residential building work) to be provided in the form of 2 separate contracts (currently all insurance must be in one contract that covers all the risks required to be insured). One contract (a *construction period insurance contract*) must cover a person for whom work is done and the person's successors in title against the risk of loss arising from non-completion of work, and breaches of statutory warranty, where the contractor becomes insolvent, dies or disappears before completing the work. The other contract (a *warranty period insurance contract*) must cover a person for whom work is done and the person's successors in title against the risk of loss arising from a breach of statutory warranty where the contractor becomes insolvent, dies or disappears. The warranty period insurance contract is not required to, but may, cover a breach of statutory warranty in a case of non-completion. An insurer may provide both contracts or only one of the contracts and a person obtaining insurance may enter into the contracts with different insurers. The provisions allowing insurance to be obtained under 2 contracts do not limit the ability to obtain, or provide, home building insurance in one contract.

Schedule 1 [23] confers on the Authority, instead of the Secretary of the Department of Finance, Services and Innovation (the *Secretary*), the function of approving forms for giving notice of a home building insurance claim.

Schedule 1 [24] confers on the Authority, instead of the Minister administering the principal Act, the function of approving the kind of insurance that is to be home building insurance.

Schedule 1 [25] enables licensed insurers to provide home building insurance, in addition to SICorp. **Schedule 1 [26]** makes a consequential amendment.

Schedule 1 [27] enables a contract for home building insurance to contain additional matters, not inconsistent with the principal Act or regulations under that Act.

Schedule 1 [28] makes it clear that a contract for home building insurance may cover loss arising in additional circumstances and additional risks and loss.

Schedule 1 [33] specifies the period of 12 months after the cessation of the work the subject of cover as the period of cover under a construction period insurance contract for loss or damage arising from a breach of a statutory warranty applicable to residential building work.

Schedule 1 [32] makes a consequential amendment.

Schedule 1 [34] enables the Authority, instead of the Minister administering the principal Act, to approve shorter periods of cover for specified insurance contracts or classes of insurance contracts.

Schedule 1 [37] provides that the 6-month extension for making claims where a loss becomes apparent during the last 6 months of a period of insurance does not extend to a loss arising from non-completion or a breach of warranty that is covered by a construction period insurance contract. **Schedule 1 [36]** makes a consequential amendment.

Schedule 1 [38] extends the prohibition on making claims under a home building insurance contract 10 years or more after the insured work was completed to all home building insurance contracts. Currently, the restriction applies only to insurance contracts entered into before 1 July 2010.

Schedule 1 [39] provides that a home building insurance contract does not provide cover for a breach of a statutory warranty if a claim has already been made and paid by the same or a different insurer or provider of an alternative indemnity product for the breach. The proposed amendment also makes it clear that a mortgagee in possession is not entitled to the benefit of a home building insurance contract.

Schedule 1 [41] enables regulations to be made about when claims may be made that may be inconsistent with other provisions in the same Part of the principal Act.

Schedule 1 [42] enables regulations to be made about the circumstances that constitute the cessation of work for the purposes of the insurance provisions of the principal Act.

Schedule 1 [43] exempts residential building work for the Crown or a State owned corporation from the requirements to obtain home building insurance. If the work is done under contract, the exemption will not apply unless the contract specifies that the exemption is being relied on. The regulations may prescribe conditions for an exemption and also circumstances in which the exemption will not apply. The regulations may also provide for a consumer warning to be attached to the contract for the sale of land on which work is carried out by an exempted person.

Regulation of insurers

Schedule 1 [17] and [18] confer on the Authority, instead of the Secretary, the function of approving the form of brochures about the effect of a home building insurance contract and related matters.

Schedule 1 [19] confers on the Authority, instead of the Secretary, the function of granting exemptions from the requirements contained in Part 6 of the principal Act. That Part sets out the scheme for, and related requirements for, home building insurance.

Schedule 1 [29] replaces the requirement for SICorp to keep a register of particulars of insurance certificates and claims and other matters with a requirement for the Authority to keep such a register for all home building insurance and alternative indemnity product cover. **Schedule 1 [31]** makes a consequential amendment.

Schedule 1 [30] enables a licensed insurer or licensed provider of an indemnity product to disclose particulars to the Authority for the purposes of the register despite the *Privacy and Personal Information Protection Act 1998*.

Schedule 1 [40] inserts provisions providing for the regulation of premiums for home building insurance. The Authority will be able to make Insurance Guidelines for the determination of premiums, including as to the manner in which premiums are to be determined and requiring

licensed insurers to provide information about the determination of premiums. Insurers are to file proposed premiums with the Authority in accordance with the Guidelines, as required by the Authority or at their own initiative. A proposed premium can be charged from the end of the rejection period for the premium if it is not rejected by the Authority. The Authority may reject a premium if it forms the opinion, after considering actuarial advice and other relevant financial information, that it is excessive or inadequate or the premium does not conform to the Insurance Guidelines. An insurer may request the Authority to reconsider a rejection and the matter may also be determined by an arbitrator if the rejection is not withdrawn within 4 weeks of the request for reconsideration.

Schedule 1 [45] makes it an offence for an insurance intermediary or an insurer to advertise or otherwise represent insurance as home building insurance if that insurance does not meet the requirements of the principal Act.

Schedule 1 [46] enables the Authority to issue Insurance Guidelines about appropriate market practices or claims handling procedures (or both), prudential standards and contracts of insurance. The proposed amendment also sets out the consultation procedures for the Guidelines and requires Guidelines to be published on the NSW legislation website. Regulations may be made with respect to the issue of the Guidelines and also about any matter about which a guideline may be made (in such a case the regulations will prevail to the extent of any inconsistency).

Schedule 1 [14] makes a consequential amendment.

Schedule 1 [46] also establishes the Home Building Operational Fund which is to be used for the administrative costs of the Authority relating to the principal Act. Licensed insurers will be required to pay contributions to that Fund as determined by the Authority for periods determined by the Authority.

Indemnity scheme for licensed insurers

Schedule 1 [47] inserts definitions relating to the application of indemnity provisions to insolvent licensed insurers.

Schedule 1 [48]–[51] and [53]–[59] apply the provisions of the current scheme for the State indemnity given to claimants covered by insolvent insurers to claimants under insurance contracts issued by licensed insurers who become insolvent and are declared, by order of the Minister administering the principal Act, to be insolvent insurers. The claims will be made to, and administered by, the Authority and the Authority will be assigned the rights of a beneficiary under an insurance contract if a payment is made to the beneficiary. The Authority will be able to enter into agreements with the liquidator of an insolvent insurer and to intervene in proceedings in relevant matters. The amendments also contain consequential amendments. **Schedule 1 [80] and [7]** make consequential amendments.

Schedule 1 [52] establishes the Home Building Insurers Guarantee Fund, to be administered by the Authority, which is to be the Fund from which indemnity payments relating to contracts of insurance provided by insolvent licensed insurers will be paid. Licensed insurers will be required to pay annual contributions to that Fund as determined by the Authority. The existing Building Insurers' Guarantee Fund will be restricted to payments relating to insolvent insurers who provided home building insurance before 1 July 2010.

Schedule 1 [86] closes the Building Insurers' Guarantee Fund to new claims, or revived claims, relating to insurers who provided home building insurance before 2010.

Alternative indemnity products and providers

Schedule 1 [60] inserts proposed Part 6B into the principal Act, which provides for cover for breaches of statutory warranties or non-completion, in the event of the insolvency, death or disappearance of the builder, to be provided by means of alternative indemnity products rather than insurance contracts. Alternative indemnity products include fidelity fund schemes, specialised insurance arrangements and other insurance products or arrangements to be prescribed by regulations. The products must be approved by the Authority and proposed Part 6C requires the providers to be licensed. Proposed Part 6B applies relevant provisions relating to contracts of insurance to alternative indemnity products and provides for regulation-making powers to be used

to provide for other matters, including periods of cover, limits on claims, actuarial or auditing requirements for providers and contributions by providers to the Home Building Operational Fund. The indemnity scheme for insolvent insurers is also to be applied to providers with power to make regulations with respect to specific matters peculiar to providers. Insurance Guidelines may be made by the Authority with respect to requirements for approval of alternative indemnity products, determination of premiums or charges, market practices, claims handling procedures and prudential standards.

Schedule 1 [15] inserts a note relating to alternative indemnity products.

Licensing of insurers and providers of alternative indemnity products

Schedule 1 [61] inserts proposed Part 6C into the principal Act, which provides for the licensing of private insurers to provide home building insurance and of providers of alternative indemnity products to provide cover under those products. Division 1 of the proposed Part makes it an offence to provide home building insurance unless the insurer is a licensed insurer or cover by means of an alternative indemnity product unless the provider is a licensed provider. SICorp is taken to be a licensed insurer for the purposes of the principal Act but is not required to hold a licence. The Division provides for applications for a licence to be made to the Authority and sets out matters to be considered in determining an application. A licence may be conditional or unconditional and new conditions imposed or changes to conditions by the Authority require the approval of the Board of the Authority. A licence may be assigned with the consent of the Authority and the assignor. The Authority may suspend the licence of a licence holder that contravenes its licence, the principal Act or the regulations or in other specified circumstances relating to failures to comply with Commonwealth insurance requirements, defaults in payments, insolvency or winding up proceedings. A civil penalty (of up to \$110,000) may be imposed on a licence holder for a breach of the principal Act or the regulations, but only after the Authority has referred the matter to a special committee. A licence may be cancelled by the Authority for any reason, including for reasons that relate to the insurance scheme under Part 6 (including cover under proposed Part 6B) of the principal Act generally. The Authority may assign the insurance contracts of an insurer if the insurer's licence is cancelled or otherwise ceases to be in force, or the Authority is satisfied that it is necessary to do so to ensure compliance with licence conditions. The Authority is required to keep records relating to licences and may publish information about licence holders, including pricing, profitability and comparative performance information. There will be a right to seek a review of licensing decisions (including disciplinary decisions relating to licensed insurers) from the Civil and Administrative Tribunal.

Division 2 of the proposed Part contains provisions relating to supervision of licence holders, including a requirement for holders to submit business plans for their business at the request of the Authority. The Division requires re-insurance arrangements and approvals to be notified to the Authority, enables the Authority to require information about investment of relevant funds from licence holders and also requires licence holders to keep accounting and other business or financial records as prescribed by the regulations or required by the Authority. Licence holders will be required to lodge quarterly returns with the Authority as to their business and financial position. The Authority may appoint persons to audit and inspect the accounting and other records relating to the business and financial position of a licence holder and to report on whether the home building insurance business is being carried on effectively, economically and efficiently. The Authority may also require a licence holder or a former licence holder to disclose specified financial information about the holder or a related body corporate, as well as information about claims and contracts of insurance. The Authority may report to the Minister on compliance by licence holders, licence conditions and complaints and other matters. Any such report may be published or laid before Parliament. The Supreme Court may, on the application of the Authority, make orders protecting the interests of insured persons under home building insurance contracts or contracts or arrangements for alternative indemnity product cover, if the insurer or provider cannot or has not met liabilities under them or has acted or may act in a manner prejudicial to the interests of insured persons. A licence holder or former licence holder will be required to notify certain defaults and changes in issued capital, or any bidder's statement or target's statement, to the Authority. Only the Authority will be able to take proceedings against a licence holder for

failure to comply with the terms of a licence or the principal Act or regulations. **Schedule 1 [5]** makes a consequential amendment.

Schedule 1 [6]–[9] extend provisions relating to insurers in relation to building claims to providers of alternative indemnity products.

Abolition of Fair Trading Administration Corporation

Schedule 1 [63] repeals provisions that constitute the Fair Trading Administration Corporation and establish the Fair Trading Administration Corporation General Account. **Schedule 1 [4], [62] and [84]** make consequential amendments.

Miscellaneous amendments

Schedule 1 [11] and [13] create a new preliminary Division in Part 6 of the principal Act and move interpretative and application provisions to that Division.

Schedule 1 [12] updates a Division heading.

Schedule 1 [20] inserts a new Division heading in Part 6 of the principal Act.

Schedule 1 [22] makes a statute law revision amendment.

Schedule 1 [64] enables the Authority to certify that it is in the public interest that information obtained from an insurer or provider of an alternative indemnity product about the business or commercial operations of the insurer or provider, under the insurance, alternative indemnity product cover and licensing provisions of the principal Act, be divulged to particular persons.

Schedule 1 [66] authorises information obtained from an insurer or provider about the business or commercial operations of the insurer or provider to be divulged to the Minister or the Authority.

Schedule 1 [67] excludes the publication by the Authority of profitability, compliance, claims and contracts information about licensed insurers or providers of alternative indemnity products, that is published under the licensing provisions of the principal Act, from the general prohibition on disclosure of information about the business or commercial operations of the insurer or provider.

Schedule 1 [68] extends the operation of the prohibition on disclosure of information about the business or commercial operations of an insurer to providers of alternative indemnity products and to information obtained under or in connection with the administration of the Parts of the principal Act relating to the insolvent insurers indemnity scheme and the licensing of insurers and providers. **Schedule 1 [65]** makes a consequential amendment.

Schedule 1 [69] extends the bodies to or by whom information obtained by a person engaged in the administration of the principal Act may be disclosed to include the Authority (and its staff), a licensed insurer or provider (and its staff) and a government sector agency prescribed by the regulations. A disclosure may be made only for the purpose of assisting in the exercise of functions under the principal Act or for assisting in the administration or execution of that Act. The Authority may also disclose information obtained under the principal Act to a government sector agency prescribed by the regulations to assist that agency in the administration or execution of another Act.

Schedule 1 [70] makes it clear that personal information or health information may be disclosed to or by those bodies for the purposes of assisting in the exercise of their functions under the principal Act or in the administration or execution of the principal Act.

Schedule 1 [72] enables the Authority to require a licence holder, former licence holder, insurance broker or commission agent to disclose to the Authority data relating to contracts of insurance, alternative indemnity product cover, claims and other related matters.

Schedule 1 [73] provides for the manner in which documents may be served on the Authority, or a claims administrator under the insolvent insurers indemnity scheme, for the purposes of the principal Act or the regulations.

Schedule 1 [74] enables the Authority, or a claims administrator under the insolvent insurers indemnity scheme, to make an order for substituted service of a document.

Schedule 1 [75] and [76] enable the Authority to authorise a person to enter any land, building, vehicle or vessel and to carry out an examination or inspection of any structure or work for the

purpose of ensuring compliance with the principal Act and regulations or any other purpose related to the Authority's functions.

Schedule 1 [77]–[79] enable the Authority to appoint a person as an authorised person for the purposes of exercising compliance powers in relation to licensing and other matters, including power to require the provision of information, and to require the person to appear before the authorised person to provide information.

Schedule 1 [80] confers on a person authorised by the Authority power to require a person who has control over the carrying out of residential building work or specialist building work on a site to provide the name and residential address of each person who has contracted to do the work or any part of the work.

Schedule 1 [81] enables certificates signed by an employee of the Authority prescribed by the regulations that certify specified matters as to home building insurance or alternative indemnity product cover or licences to be admissible in evidence in any proceedings and to be prima facie evidence of the matters stated in them.

Schedule 1 [83] enables the Authority to issue a penalty notice or to appoint authorised officers to issue penalty notices for offences under the principal Act.

Schedule 1 [84] and [85] omit and include defined terms as a consequence of amendments made by the proposed Act relating to home building insurance.

Schedule 1 [86] inserts savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other legislation

Schedules 2.1, 2.2, 2.4 and 2.5 omit references to the Fair Trading Administration Corporation, which is to be abolished by the proposed Act, from various Acts and regulations.

Schedule 2.3 amends the *NSW Self Insurance Corporation Act 2004* as follows:

- (a) to update references and omit a note as a result of the amendments to the principal Act (**Schedule 2.3 [2]–[7], [15], [16] and [18]**),
- (b) to make it clear that SICorp may enter into arrangements with insurance brokers and to extend to any such broker the same controls and exception from personal liability that applies to insurance agents who enter into arrangements with SICorp (**Schedule 2.3 [8]–[10]**) and to make consequential amendments (**Schedule 2.3 [11]–[14]**),
- (c) to omit a provision that exempts SICorp from having to comply with certain competition law requirements in relation to contracts with insurance agents and builders (**Schedule 2.3 [15]**),
- (d) to remove a requirement that a premium charged by SICorp for home building insurance be approved by the Authority, as a consequence of the inclusion of the new provisions relating to approval of premiums that are to be inserted by Schedule 1 to the proposed Act (**Schedule 2.3 [17]**),
- (e) to enable regulations to be made with respect to records to be kept by, the confidentiality obligations of, the ownership, custody and control of records of, and the conduct of, insurance brokers who enter into arrangements with SICorp (**Schedule 2.3 [19]–[23]**) and to make a consequential amendment (**Schedule 2.3 [1]**).

Schedule 2.6 amends the *State Insurance and Care Governance Act 2015* as follows:

- (a) to add skills and experience relevant to matters arising under the *Home Building Act 1989* to the qualifications for members of the Board of the Authority who are appointed by the Minister,
- (b) to include in the principal objectives of the Authority the objective of promoting the efficiency and viability of the home building insurance scheme established under that Act and other related objectives,

- (c) to include in the functions of the Authority any functions conferred by or under that Act and other functions relating to collecting and analysing information about home building insurance and alternative indemnity product cover and encouraging and promoting sound prudential practices by home building insurers and providers of alternative indemnity products.

Schedule 2.7 amends the *Strata Schemes Management Act 2015* to update a reference to the Home Building Compensation Fund and to make a consequential amendment.