Agreement in Principle

Ms VIRGINIA JUDGE (Strathfield—Minister for Fair Trading, Minister for the Arts) [6.18 p.m.]: I move:

That this bill be now agreed to in principle.

The Government is today introducing the Home Building Amendment (Warranties and Insurance) Bill 2010. The bill is being introduced urgently to overcome the effect of a recent Court of Appeal decision in the case of *Ace Woollahra v The Owners – Strata Plan 61424 & Building Insurers' Guarantee Corporation*. That decision has created considerable uncertainty in relation to the statutory warranty and home warranty insurance schemes and has cast significant doubt on whether the schemes protect all homeowners as intended. The bill will amend the Home Building Act to clarify the entitlements of homeowners to statutory warranties and home warranty insurance where loss is suffered due to defective residential building work.

The bill will change the Act to protect homeowners who have building work done, as well as subsequent purchasers of homes and apartments in circumstances where it now appears that no benefits are available. The Home Building Act provides two forms of protection against defective residential building work to homeowners who engage builders to carry out building work and those who buy a home from such persons. First, it gives homeowners a statutory warranty against defective building work undertaken by the builder. These warranties are implied in contracts to carry out residential building work. The homeowner can pursue legal action against the builder for the work required to fix the defect. Secondly, the Act is intended to allow the homeowner to claim under insurance for rectification of the work or monetary compensation.

These benefits were always intended to be available to the person who owned the land on which the building work was done, as usually that person would suffer any relevant loss. As it was expected that only the landowner would be the person entering into the contract with the builder, the Act did not specify or identify the person contracting with the builder. The intended beneficiary of the schemes was merely referred to as the person obtaining the benefit of the statutory warranties or, for insurance, the person on whose behalf the work was done. These benefits also extend to any person who is a subsequent purchaser or successor in title for a period of up to a possible maximum of seven years.

So in these cases the homeowner and any subsequent purchaser will get the benefits of the Act. However, in some instances, a contract with a builder might be entered into by a person who is not in fact the landowner. For example, a husband might enter into a contract with a builder to undertake residential building work on land owned not by him but by his wife. Similarly, a company that owns land might be developing it into a residential complex, but the contract to do the building work or to have the work done by a builder is entered into by a subsidiary of the company.

It was always thought that the benefits of the Act would flow to a landowner even if someone else was the contracting party. It was also thought that any successors in title would similarly be protected. Insurers, builders and others accepted that this was the way the Act was intended to work, and dealt with claims accordingly. However, on 17 May 2010 the Court of Appeal took a different view. The court held that only the person who actually contracts with the builder and that person's successors in title are entitled to the benefits of the statutory warranties and insurance. This means that if a person who enters into a building contract is not the landowner, subsequent purchasers of the land will not get the benefit of the statutory warranties or of the insurance.

In the case before the Court of Appeal, a landowner was involved in a form of joint venture arrangement with another party to develop a strata scheme residential living complex. The other party, not the landowner, entered into the contract with the builder. Subsequently, the owners' corporation of the strata scheme and the unit holders acquired interest in the land from the landowner. The court held that, as the original landowner did not enter into the contract with the builder, the owners' corporation and the unit holders should not have received the benefits of the statutory warranties and insurance under the Act. The owners' corporation and the unit owners were not left out of pocket. The costs of rectifying the building defects had already been met by the Building Insurers Guarantee Corporation. The issue came to court when the guarantee corporation sought to recover the rectification costs from the builder. This situation could easily arise again when a builder enters into a building contract with a party other than the landowner.

There is also a concern that developers might structure their projects to take advantage of the decision. This was not how the scheme was intended to operate. Indeed, in another Court of Appeal decision, in 2005, the court said that the phrase, "a person on whose behalf the work is being done and the person's successors in title":

> point to the person for whom the work is done being a person who has title, or an estate or interest in the land on which the work is done.

The uncertainty that the recent decision has created needs to be addressed. For this reason, the Government is

introducing the bill and is seeking to secure its passage urgently. The ramifications of this decision are significant as the decision may cause many statutory warranty and insurance claims to be rejected. The court decision precludes from the scheme any owner or successor in title where the person who contracted with the builder was not the owner of the land. This will occur because the statutory schemes were based on an assumption that, in any building contract, the person who contracted with the builder would always be the same person who owned the land.

Alternatively, the Act by implication provided that the landowner always was the beneficiary regardless of who entered into the contract. In addition, given that this assumption might now not be correct, a claimant, including a subsequent purchaser, could be required to produce evidence establishing the direct connection with the contracting party in order to prove an entitlement. In a large number of cases, the successor in title, particularly owners' corporations and lot owners, will not be able to obtain the evidence tracing a connection back to the contracting party. This could be because there was no written building contract created at the time or because the contract is unavailable due to the document being disposed of or the builder or developer going into liquidation.

Further, there is an assumption that the contracts would always be in writing and available many years later to subsequent owners of the land. This, of course, is highly unlikely. Without the contract, the claimant cannot identify the contracting party and thus cannot trace the necessary ownership connection. As a result, legal actions commenced or insurance claims lodged will be unsuccessful and the benefits intended to be available to consumers will be lost.

To protect future intended beneficiaries, the proposed amendments to the Act will restore the intended benefits by providing that a legal action or insurance claim cannot be defeated due to the contracting party not being the owner of the land at the time the contract is entered into. Specifically, the bill will insert into the Home Building Act amendments to the statutory warranty and insurance provisions to the effect that a landowner who was not a party to the contract will still be covered by the schemes. The amendments will provide that a person who is a non-contracting owner in relation to a contract to do residential building work is entitled to the same rights as a party to the contract has in respect of a statutory warranty or insurance.

The bill defines a "non-contracting owner" as a person who is the owner of the land but is not a party to the building contract, and includes any successor in title to the landowner. An additional provision will ensure that both a contracting party and a non-contracting owner will not each be able to recover for a particular defect. A claim by one should preclude a later claim by the other, to avoid a builder or insurer having to pay twice for the loss suffered in relation to the one defect. The amendments will also recognise the right of insurers to recover from builders in circumstances where a claim was paid notwithstanding the fact that the landowner was not a party to the residential building contract.

The transitional provisions in the bill will ensure that these amendments will be available to benefit homeowners regardless of when the residential building work was done under the statutory warranty scheme. That is, the proposed amendments will apply retroactively to all building contracts made and insurance policies issued since 1 May 1997, when the schemes were introduced. Such an action should not be taken lightly; however, the Government believes it is indeed justified. Claims have always been paid, and insurance premiums calculated, on the basis that the scheme was intended to benefit the landowner regardless of whether that was the person who entered into the contract with the builder. More importantly, subsequent purchasers of land, particularly in strata developments, should not be caught out because an unorthodox or unusual contracting arrangement was used by a developer.

Although the scheme changed from a first resort insurance scheme to a last resort insurance scheme in July 2002, the landowner will now be entitled to the benefits provided by the Act as in force at the time the contract was entered into. This legislation is urgent. While an attempt could be made to address the issue in the next session, many decisions will have been made by insurers by then, and possibly by courts and tribunals. Insurers, courts and tribunals will essentially be obliged to act on the basis of the Court of Appeal decision as it stands today. It will be extremely difficult to undo or reverse the effects of these decisions in several months time.

Indeed, the department already expects insurers to deny claims involving circumstances similar to those that arose in the Ace Woollahra case on the basis of legal advice on how the Act now operates in light of the court decision. More worryingly, for the same reason it is expected that insurers will now require claimants to obtain and provide a copy of the relevant building contract to prove that the original landowner was a party to the building contract. Unfortunately, these approaches are justified as an insurer will not be able to recover from the builder or developer if a claim is paid where the landowner was not a party to the contract or where the claimant was not able to produce evidence to identify the relevant party to the contract.

The passage of this bill is essential to ensure that the Home Building Act operates as it was always intended to. It will benefit homeowners and deliver to them the benefits of warranties and insurance provided for by the current Act. Without this bill, many homeowners, particularly those in strata developments, could find they have no recourse against a developer or builder. The Government must act in this situation to protect the rights of all those persons who are making probably the largest purchase of their lives and who, through no fault of their

own, find themselves facing substantial loss and inconvenience by the emergence of defective building work. I commend the bill to the House.