

[Act 2001 No 41]



New South Wales

Insurance (Policyholders Protection) Legislation Amendment Bill 2001

Explanatory note

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

Overview of Bill

The objects of this Bill are:

- (a) to amend the *Insurance Protection Tax Act 2001* to require the tax paid into the Policyholders Protection Fund under that Act to be applied to meet claims under home building and third-party motor accident insurance policies of declared insolvent insurers, and
 - (b) to amend the *Home Building Act 1989* to make provision for the payment of claims under home building insurance policies of declared insolvent insurers, and
 - (c) to make consequential and other amendments to the *Motor Accidents Compensation Act 1999* in connection with third-party motor accident insurance policies.
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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 30 June 2001.

Clause 3 is a formal provision giving effect to the amendments to the *Insurance Protection Tax Act 2001* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Home Building Act 1989* set out in Schedule 2.

Clause 5 is a formal provision giving effect to the amendments to the *Motor Accidents Compensation Act 1999* set out in Schedule 3.

Clause 6 is a formal provision giving effect to the amendments to the Act and instrument set out in Schedule 4.

Schedule 1 Amendment of Insurance Protection Tax Act 2001

Schedule 1 [2] inserts a new Part (Part 3A, sections 16–16H) into the *Insurance Protection Tax Act 2001*.

Proposed section 16 defines certain words and expressions used in the proposed Part.

Proposed section 16A empowers the Treasurer, if satisfied that a liquidator or provisional liquidator has been appointed in respect of an insurer, or that an insurer has been dissolved, to declare, by order published in the Gazette, that the insurer is a declared insolvent insurer for the purposes of the proposed Part. The proposed section also deems certain insurance companies in the HIH group of companies to have been declared as declared insolvent insurers on 15 March 2001 (the date on which a provisional liquidator was appointed in respect of those companies).

Proposed section 16B establishes the Policyholders Protection Fund as an account in the Special Deposits Account in the Treasury and provides for the circumstances in which money is to be paid into and from the Fund.

Proposed section 16C provides for a standing appropriation out of the Consolidated Fund into the Policyholders Protection Fund of all amounts paid as tax under the *Insurance Protection Tax Act 2001*.

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Proposed sections 16D and 16E provide that the Policyholders Protection Fund must be applied to meet expenditure required to be made out of the proposed Building Insurers' Guarantee Fund and the Nominal Defendant's Fund in connection with insurance policies issued by declared insolvent insurers.

All payments made from the Policyholders Protection Fund under those proposed sections are to be made in the amounts, on the conditions and at the times determined by the Treasurer.

Proposed section 16F provides that if any money in the Building Insurers' Guarantee Fund is not needed for further payments, the money is to be paid from that Fund into the Policyholders Protection Fund.

Proposed section 16G provides for the reimbursement to the Policyholders Protection Fund from the Nominal Defendant's Fund if the Nominal Defendant recovers any moneys:

- (a) from re-insurers of insurance entered into, or issued, by declared insolvent insurers, or
- (b) otherwise in connection with the winding up of a declared insolvent insurer.

Money may only be paid into the Policyholders Protection Fund under these proposed sections if the Treasurer determines that it is not needed for payments in connection with the declared insolvent insurers.

Proposed section 16H provides that moneys advanced to the Policyholders Protection Fund from the Consolidated Fund may be repaid to the Consolidated Fund if the Treasurer determines that the money is not needed for payments to the proposed Building Insurers' Guarantee Fund or the Nominal Defendant's Fund in accordance with this proposed Part.

Schedule 1 [1] inserts a definition of *Policyholders Protection Fund* into section 3 of the *Insurance Protection Tax Act 2001* as a consequential amendment.

Schedule 2 Amendment of Home Building Act 1989

Schedule 2 [1] inserts proposed Part 6A (proposed sections 103F–103ZB) into the *Home Building Act 1989* to deal with matters relating to insolvent insurers.

Proposed section 103F defines certain words and expressions used in the proposed Part and deals with the interpretation of the proposed Part.

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Proposed section 103G empowers the Minister, if satisfied that a liquidator or provisional liquidator has been appointed in respect of an insurer, or that an insurer has been dissolved, to declare with the approval of the Treasurer, that the insurer is an insolvent insurer for the purposes of the proposed Part. Declared insolvent insurers under the *Insurance Protection Tax Act 2001* are also insolvent insurers for the purposes of the proposed Part.

Proposed section 103H is a transitional provision that provides that payments made by the State in respect of insolvent insurer's policies, assignments given by persons to whom such payments were made and other related actions taken after 15 March 2001 but before the commencement of this proposed Part are taken to have been made, given or taken under this Part.

Proposed section 103I provides that the State must indemnify every person who was entitled to recover an amount under a compulsory contract of insurance entered into under Part 6 of the *Home Building Act 1989* by an insolvent insurer, to the extent of the amount that the person was entitled to recover under that policy. The proposed section also provides for exceptions to the indemnity. Among others, builders, developers and persons covered by other contracts of insurance are excluded from this State indemnity. Persons entitled to a State indemnity are referred to in proposed Part 6A as **beneficiaries**.

Proposed section 103J provides that the indemnity provided by the State under Division 2 of this proposed Part may only be enforced by a claim made to, and proceedings taken against, the Building Insurers' Guarantee Corporation.

Proposed sections 103K and 103L provide for the method of making claims to the Building Insurers' Guarantee Corporation and provide that payments under the indemnity are to be made from the Building Insurers' Guarantee Fund.

Proposed section 103M provides for the assignment of beneficiaries' rights in respect of the matter covered by the indemnity to the Building Insurers' Guarantee Corporation. The Building Insurers' Guarantee Corporation may enforce the rights assigned under the proposed section on behalf of the State. For example, the Building Insurers' Guarantee Corporation may seek to prove a debt in the winding up of an insolvent insurer.

Proposed section 103N provides that if a claim is made by a beneficiary under the State indemnity in respect of incomplete or defective residential building work or the non-supply of a kit home or supply of a defective kit home, the Building Insurers' Guarantee Corporation may give reasonable directions to the builder concerned in respect of:

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- (a) the completion of the building work or the rectification of the defective building work, or the supply of the kit home or the replacement of the defective kit home, or
- (b) the payment by the builder to the Building Insurers' Guarantee Fund of any amount in respect of the completion of the building work or the rectification of the defective building work, or the supply of the kit home or the replacement of the defective kit home.

If a claim is made by a beneficiary under the State indemnity, the Building Insurers' Guarantee Corporation may direct the builder concerned to pay to the Building Insurers' Guarantee Fund any amount paid out of the Fund on that claim.

The Building Insurers' Guarantee Corporation may only give a direction under the proposed section to the same extent that an insolvent insurer (if it was not insolvent) would have been able to require that work or supply, or require a payment to the insurer by the builder, under the insolvent insurer's policy. A builder who fails to comply with a direction under this proposed section is guilty of improper conduct.

Proposed section 103O provides that the State indemnity continues despite the insolvent insurer being dissolved.

Proposed section 103P establishes the Building Insurers' Guarantee Fund as a fund belonging to the Building Insurers' Guarantee Corporation and provides for payments into and from that Fund.

Proposed sections 103Q, 103R and 103S provide for the establishment, constitution and functions of the Building Insurers' Guarantee Corporation. The Building Insurers' Guarantee Corporation is to be a statutory body representing the Crown, its affairs are to be managed and controlled by the Minister for Fair Trading and its functions include dealing with and finalising claims for State indemnity and holding and managing, on behalf of the State, the Building Insurers' Guarantee Fund. Under proposed section 103T the financial reports of the Building Insurers' Guarantee Corporation may be combined with the reports of the Department of Fair Trading.

Proposed section 103U empowers the Building Insurers' Guarantee Corporation to enter into agreements or arrangements on behalf of the State with, and the State accept any assignment from, any liquidator of an insolvent insurer or any other person for the purpose of the settling of any claim in respect of which an assignment was made under proposed section 103M or for any other purpose relating to an indemnity under the proposed Part.

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Proposed section 103V enables the Building Insurers' Guarantee Corporation (where it has made a payment out of the Building Insurers' Guarantee Fund in respect of a claim or judgment under the proposed Part) to recover amounts due to the insolvent insurer concerned under any contract or arrangement for re-insurance or co-insurance.

Proposed section 103W requires the liquidator of an insolvent insurer to forward claims relating to any contracts of insurance entered into by the insolvent insurer to the Building Insurers' Guarantee Corporation.

Proposed sections 103X and 103Y require liquidators of insolvent insurers and other persons in possession of documents relating to insolvent insurers' policies, whenever requested to do so by the Building Insurers' Guarantee Corporation, to supply to the Guarantee Corporation all documents and information in the liquidator's possession relating to contracts of insurance entered into by the insolvent insurer and all claims or judgments made in respect of those contracts and to allow those documents to be inspected by a person authorised by the Minister for Fair Trading.

Proposed section 103Z enables the Building Insurers' Guarantee Corporation to take, and intervene in, legal proceedings relating to insolvent insurers and contracts of insurance entered into by insolvent insurers.

Proposed section 103ZA provides that the Fair Trading Tribunal has the same jurisdiction in relation to claims for a State indemnity as it has in relation to claims under compulsory building contracts of insurance. The proposed section also enables the Governor to make regulations for or with respect to the application of any of the provisions of the *Home Building Act 1989* in relation to the dealing with or finalising of claims, the satisfying of judgments or the resolving of disputes regarding claims.

Proposed section 103ZB enables the Building Insurers' Guarantee Corporation (where it has made a payment out of the Building Insurers' Guarantee Fund in respect of a claim for a State indemnity) to recover amounts due to the insolvent insurer concerned under any guarantee or indemnity given by a builder or other person.

Schedule 2 [2] amends clause 2 (1) of Schedule 4 to the *Home Building Act 1989* to enable regulations of a savings or transitional nature consequent on the enactment of this Bill to be made.

Schedule 2 [3] puts beyond doubt that building work may continue or be sold, or that a kit home may be supplied, despite the fact that the required certificate of insurance was issued by or through HIH Casualty and General Insurance Limited or FAI General Insurance Company Limited, so long as the certificate was

provided on or before 20 June 2001 (the date this Bill was introduced into Parliament) or, in the case of owner-builder insurance, 15 March 2001 (the date the insurance companies were placed in provisional liquidation).

Schedule 3 Amendment of Motor Accidents Compensation Act 1999

Schedule 3 [1] and [2] amend section 40 of the *Motor Accidents Compensation Act 1999* to provide that money may:

- (a) be paid into the Nominal Defendant's Fund from the Policyholders Protection Fund in accordance with proposed section 16E of the *Insurance Protection Tax Act 2001*, and
- (b) be paid from the Nominal Defendant's Fund into the Policyholders Protection Fund in accordance with section 16G of the *Insurance Protection Tax Act 2001*.

Schedule 3 [3] and [7] make amendments to provide that a ***declared insolvent insurer*** under the *Insurance Protection Tax Act 2001* is also an insolvent insurer for the purposes of Part 7.3 of the *Motor Accidents Compensation Act 1999* (that deals with insolvent third-party policy insurers).

Schedule 3 [4] amends section 184 of the *Motor Accidents Compensation Act 1999* to provide that references to liquidator in Part 7.3 of that Act includes a provisional liquidator.

Schedule 3 [5] amends section 184 of the *Motor Accidents Compensation Act 1999*:

- (a) to make it clear that the provisions of Part 7.3 of that Act (dealing with insolvent insurers) apply to third-party policies issued by insurers under the *Motor Accidents Act 1988* before the third-party insurance provisions of that Act were repealed by the *Motor Accidents Compensation Act 1999*, and
- (b) to provide that Part 7.3 of that Act has effect despite any provisions of the *Corporations (New South Wales) Act 1990* or the *Corporations Law*.

Schedule [6] amends section 185 of the *Motor Accidents Compensation Act 1999* to provide that the Special Minister of State (the Minister responsible for that Act) must obtain the approval of the Treasurer before declaring that an insurer is an insolvent insurer for the purposes of Part 7.3 of that Act.

Schedule 4 Consequential amendment of other Acts and instruments

Schedule 4.1 and **4.2** amend the *Public Finance and Audit Act 1983* and the *Public Authorities (Financial Arrangements) Regulation 2000* respectively to provide that those pieces of legislation regarding the reporting requirements and investment powers of public authorities will apply to the Building Insurers' Guarantee Corporation that is to be established under proposed Part 6A of the *Home Building Act 1989* (as inserted by Schedule 2 to this Bill).