

[Act 2000 No 56]



New South Wales

Home Building Amendment Bill 2000

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*:

- (a) to make it clear that a person who does residential building work on behalf of a developer referred to in section 3A of the Act (the *developer*) is the person required to take out insurance under Part 6 of the Act and not the developer, and
 - (b) to provide that the obligation of any such developer in respect of insurance under that Part is limited to not entering into a contract for the sale of the land on which the work has been done, or is to be done, on the developer's behalf unless a certificate of insurance evidencing certain insurance required under the Part is attached to the contract, and
 - (c) to provide that a provision of an insurance contract required under section 92 of the Act that excludes any such developer or other person prescribed by the regulations from making claims under that contract is permissible under the Act, and
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- (d) to validate such exclusionary provisions relating to certain developers contained in insurance contracts made on and after 1 May 1997, and
- (e) to make it clear that the regulations may specify which persons are not required to be beneficiaries under a contract of insurance required to be entered into under Part 6 of the Act.

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 (except Schedule 1 [5]–[9]) on a day or days to be appointed by proclamation. It also provides that Schedule 1 [5]–[9] (and so much of proposed section 3 as relates to those items) are taken to have commenced on the day on which the Bill for the proposed Act was first introduced into Parliament, whether or not the Act was enacted in the form of the Bill as introduced.

Clause 3 is a formal provision giving effect to the amendments to the *Home Building Act 1989* set out in Schedule 1.

Schedule 1 Amendments

Schedule 1 [1] amends section 90 of the Act to insert a definition of *developer* in relation to residential building work for the purposes of Part 6 of the Act. A developer is an individual, partnership or corporation (other than a company referred to in section 3A (3) of the Act) on whose behalf the residential building work is done in the circumstances set out in section 3A (2) of the Act.

Section 3A (1) of the Act provides that, for the purposes of the Act, an individual, a partnership or a corporation on whose behalf residential building work is done in the circumstances set out in section 3A (2) is a developer who does the work. The circumstances are:

- the residential building work is done in connection with an existing or proposed dwelling in a building or residential development where 4 or more of the existing or proposed dwellings are or will be owned by the individual, partnership or corporation, or
- the residential building work is done in connection with an existing or proposed retirement village or accommodation specially designed for the disabled where all of the residential units are or will be owned by the individual, partnership or corporation.

Section 3A (3) of the Act provides that a company that owns a building under a company title scheme is not a developer for the purposes of the Act.

Schedule 1 [2] makes an amendment to section 96 (1) in the nature of statute law revision by clarifying the maximum penalty for an offence under that subsection.

Schedule 1 [3] omits section 96 (2A). At present, section 96 (2A) makes it an offence for a developer who does residential building work on land to enter a contract for the sale of the land without attaching a certificate evidencing the existence of insurance required under Part 6 of the Act for the work. The obligations of developers under existing section 96 (2A) will be re-enacted as section 96A (to be inserted by Schedule 1 [4] to the proposed Act).

Schedule 1 [4] inserts a new section 96A in the Act. The new section makes it an offence for a developer to enter into a contract for the sale of the land on which residential building work has been done, or is to be done, on the developer's behalf unless a certificate of insurance evidencing that the person who did or does the work for the developer was insured under section 92 of the Act is attached to the contract. It also makes it clear that references in Part 6 of the Act to a person who does residential building work extend to persons who do the work of behalf of developers, but not to developers.

Schedule 1 [5] amends section 99 of the Act to make it clear that a contract of insurance required under section 92 of the Act does not need to insure the developer on whose behalf the residential building work is done or any other person belonging to a class of person prescribed by the regulations for the purposes of that section.

At present, section 99 requires such contracts of insurance to insure "a person on whose behalf the work is done" against certain risks. The amendment overcomes the decision of the NSW Supreme Court in *HIH v Jones* [2000] NSWSC 359, where it was held that the expression covered a developer referred to in section 3A of the Act on whose behalf work was done. The result in that case was that a provision of a contract of insurance taken out in accordance with section 92 excluding a developer from making claims under the contract was declared to be void by operation of section 103D of the Act. Section 103D provides that a provision of a contract or other agreement that purports to restrict or remove the rights of a person under Part 6 is void.

Schedule 1 [6] and **[7]** amend section 103C of the Act to make it clear that the regulations may, despite the provisions of Part 6 of the Act, specify the beneficiaries who must be insured, or persons who are not required to be insured, under a contract of insurance required to be entered into under Part 6.

Schedule 1 [8] amends clause 2 of Schedule 4 to the Act to enable regulations to be made containing provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [9] inserts a new Part 7 in Schedule 4 to the Act containing provisions of a savings and transitional nature consequent on the enactment of the proposed Act. In particular, the new Part validates certain provisions in contracts of insurance made in accordance with section 92 of the Act made on or after 1 May 1997 that exclude a developer on whose behalf residential building work was being done from being able to make a claim under the contract.

The Part also validates clause 42 of the *Home Building Regulation 1997* to the extent of any invalidity consequent on the amendment made to section 103C of the Act. Clause 42 specifies who are, and who are not, required to be insured as beneficiaries for the purposes of a contract of insurance required under Part 6 of the Act.