



New South Wales

# Home Building Amendment (Warranties and Insurance) Bill 2010

## Explanatory note

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

## Overview of Bill

Part 2C of the *Home Building Act 1989* (the *Principal Act*) sets out the statutory warranties relating to work and materials that are implied in every contract to do residential building work entered into by the holder of a contractor licence or a person required to hold a contractor licence before entering into a contract (the *contractor*). Under section 18D of the Principal Act, the statutory warranties are extended to successors in title unless a predecessor in title has enforced the warranty in the same respect. Under section 92 of the Principal Act, a contractor must not do residential building work under a contract unless a contract of insurance providing home warranty insurance in compliance with the Principal Act is in force. Section 99 of the Principal Act requires the insurance to cover the risk of the person on whose behalf the work is done being unable to recover from the contractor because of the insolvency, death or disappearance of the contractor and the person or the person's successors in title being unable to recover compensation from such a contractor for a breach of a statutory warranty.

In *Ace Woollahra Pty Ltd v The Owners—Strata Plan 61424 & Anor* [2010] NSWCA 101 (the *Ace Woollahra case*) the Court of Appeal held, in effect, that only a contracting party and any successors in title to that person are entitled to enforce

the statutory warranties under Part 2C of the Principal Act and to obtain compensation under home warranty insurance under the Principal Act.

The object of this Bill is to amend the *Home Building Act 1989* to ensure that, where a contractor enters into a contract for residential building work on land with a party or parties who are not the owners of the land, the owner or owners of the land will be deemed to be persons on whose behalf work is done and will be entitled to the benefit of any statutory warranty. As a consequence, any successors in title will also be able to recover for the breach of statutory warranty. Any contract of insurance is deemed to extend to such an owner and the insurer will, without the need for specific provision in a contract of insurance, be able to pay a claim under a contract of insurance on the basis of this extended operation of the statutory warranties, contracts and insurance policies and will be entitled to recover the amount from the contractor.

The Bill will overcome the effect of the decision in the Ace Woollahra case (though not affecting the actual decision in that case or the rights of the parties involved).

The Bill also includes savings and transitional provisions and makes a related amendment by way of statute law revision.

## 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 the date of assent to the proposed Act.

### **Schedule 1 Amendment of Home Building Act 1989 No 147**

**Schedule 1 [2], [4] and [5]** amend sections 18D, 92C and 99, respectively, of the Principal Act to achieve the object described in the Overview of the Bill.

**Schedule 1 [1] and [3]** make consequential amendments to the Principal Act.

**Schedule 1 [6]** is an amendment by way of statute law revision to clarify the effect of section 101 of the Principal Act in its application to persons doing building work otherwise than under contract.

**Schedule 1 [7]** enables the making of savings and transitional regulations.

**Schedule 1 [8]** contains savings and transitional provisions.

First print



New South Wales

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New South Wales

# **Home Building Amendment (Warranties and Insurance) Bill 2010**

No , 2010

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## **A Bill for**

An Act to amend the *Home Building Act 1989* with respect to entitlements to the benefits of statutory warranties and insurance; and for other purposes.

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**The Legislature of New South Wales enacts:**

**1      Name of Act**

This Act is the *Home Building Amendment (Warranties and Insurance) Act 2010*.

**2      Commencement**

This Act commences on the date of assent to this Act.

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**Schedule 1      Amendment of Home Building Act 1989  
No 147**

**[1]    Section 3 Definitions**

Insert in alphabetical order in section 3 (1):

*non-contracting owner*, in relation to a contract to do residential building work on land, means an individual, partnership or corporation that is the owner of the land but is not a party to the contract and includes any successor in title to the owner.

*owner* of land means the only person who, or each person who jointly or severally, at law or in equity:

- (a) is entitled to the land for an estate of freehold in possession, or
- (b) is entitled to receive, or receives, or if the land were let to a tenant would be entitled to receive, the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise.

**[2]    Section 18D Extension of statutory warranties**

Insert after section 18D (1):

(1A) A person who is a non-contracting owner in relation to a contract to do residential building work on land is entitled (and is taken to have always been entitled) to the same rights as those that a party to the contract has in respect of a statutory warranty.

(1B) Subject to the regulations, a party to a contract has no right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency by a non-contracting owner.

**[3]    Section 18D (2)**

Omit the subsection. Insert instead:

(2) This section does not give a successor in title or non-contracting owner of land any right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency, except as provided by the regulations.

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Schedule 1      Amendment of Home Building Act 1989 No 147

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<b>[4] Section 92C</b>	1
Insert after section 92B:	2
<b>92C Operation of contract of insurance in relation to non-contracting owners</b>	3
(1) If the holder of a contractor licence enters into a contract to do residential building work on land and a contract of insurance that complies with this Act is in force in relation to that work, the benefit of the contract of insurance is taken to extend (and to have always extended) to any non-contracting owner in relation to the land at the time the contract to do residential building work was entered into as if the non-contracting owner were a person on whose behalf the work is done.	5 6 7 8 9 10 11 12
(2) Subsection (1) applies irrespective of whether or not the contract of insurance concerned contains a term to the same effect as that subsection.	13 14 15
<b>[5] Section 99 Requirements for insurance for residential building work</b>	16
Insert after section 99 (2):	17
(2A) A provision of a contract of insurance providing cover for the benefit of a person on whose behalf work is done on land is to be read as providing (and to have always provided) for the same benefit in relation to a non-contracting owner of the land.	18 19 20 21
(2B) Subsection (2A) applies irrespective of whether or not the contract of insurance concerned contains a term to the same effect as that subsection.	22 23 24
<b>[6] Section 101 Requirements for insurance by owner-builders and others</b>	25
Insert at the end of the section:	26
(2) In this section: <i>contractor</i> means a person doing residential building work otherwise than under a contract to whom section 96 applies.	27 28 29
<b>[7] Schedule 4 Savings and transitional provisions</b>	30
Insert at the end of clause 2 (1):  <i>Home Building Amendment (Warranties and Insurance) Act 2010</i>	31 32 33

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[8] **Schedule 4**

Insert at the end of the Schedule:

**Part 18 Provisions consequent on Home Building  
Amendment (Warranties and Insurance)  
Act 2010**

**99 Interpretation**

(1) In this Part:

*amending Act* means the *Home Building Amendment (Warranties and Insurance) Act 2010*.

*interim period* means the period commencing on 17 May 2010 (the date of the decision in the relevant judgment) and ending on the commencement of the amending Act.

*relevant judgment* means the decision of the New South Wales Court of Appeal in *Ace Woollahra Pty Ltd v The Owners—Strata Plan 61424 & Anor* [2010] NSWCA 101.

(2) For the purposes of this Part, proceedings are not *finally determined* if:

(a) any period for bringing an appeal as of right in respect of the proceedings has not expired (ignoring any period that may be available by way of extension of time to appeal), or

(b) any appeal in respect of the proceedings is pending (whether or not an appeal is brought as of right).

**100 Application of Part**

(1) This Part prevails to the extent of any inconsistency with any other provision of this Schedule.

(2) Regulations made under clause 2 of this Schedule may have effect despite any provision of this Part.

**101 Relevant judgment and certain other proceedings unaffected**

The amendments made by the amending Act do not extend to or otherwise affect:

(a) the relevant judgement, or

(b) subject to clause 102 (3), any proceedings before a court or tribunal that are finally determined, or

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Home Building Amendment (Warranties and Insurance) Bill 2010

Schedule 1      Amendment of Home Building Act 1989 No 147

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(c) a decision of an insurer or the Building Insurers' Guarantee Corporation made before the commencement of the amendments that cannot be the subject of an appeal because of clause 65 of the <i>Home Building Regulation 2004</i> .	1 2 3 4 5
<b>102 Statutory warranties</b>	6
(1) Section 18D (as amended by the amending Act) extends to a breach of a statutory warranty in relation to residential building work done on land owned by a non-contracting owner under a contract entered into before the commencement of the amending Act.	7 8 9 10 11
(2) A non-contracting owner in relation to a contract to do residential building work on land who is entitled, on and after the commencement of the amending Act, to the benefit of a statutory warranty in relation to work done on the land may enforce the statutory warranty:	12 13 14 15 16
(a) subject to subclause (3), in proceedings commenced in accordance with Part 2C on or after the commencement of the amending Act, or	17 18 19
(b) in proceedings commenced by the non-contracting owner, but not finally determined, before the commencement of the amending Act to enforce the same statutory warranty.	20 21 22
(3) A non-contracting owner in relation to a contract to do residential building work on land who:	23 24
(a) is entitled to the benefit of a statutory warranty under section 18D in relation to a particular deficiency in work done on the land, and	25 26 27
(b) was found, in proceedings under Part 2C that were finally determined during the interim period, not to be entitled to enforce the same statutory warranty for that particular deficiency solely because the owner was not a party to the contract,	28 29 30 31 32
may enforce the same statutory warranty in proceedings subsequent to the earlier unsuccessful proceedings that are brought within 6 weeks after the commencement of the amending Act.	33 34 35 36
(4) Nothing in this clause authorises or permits a non-contracting owner who was a party in proceedings the subject of the relevant judgment to bring subsequent proceedings under subclause (3).	37 38 39

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**103 Application of amendments to existing insurance policies and claims and proceedings**

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| (1) | Subject to the regulations, the amendments made by the amending Act extend to any:   | 3 |
|     | (a) contract of insurance entered into before the commencement of the amendments (despite any provision of the contract) (an <i>existing contract</i> ), and   | 4 |
|     | (b) proceedings on a claim under an existing contract commenced but not finally determined before the commencement of the amendments.  | 5 |
| (2) | Any payment purporting to be made under Part 6 of this Act to a non-contracting owner under an existing contract or to a beneficiary under an indemnity provided under section 103I (1) before the commencement of the amendments made by the amending Act is taken to have been validly made if it could validly have been made if those amendments were then in force. | 6 |
| (3) | This clause applies only to contracts of insurance entered into on or after 1 May 1997.  | 7 |

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