

[Act 1996 No 122]



New South Wales

Building Services Corporation Legislation Amendment Bill 1996

Explanatory note

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

Overview of Bill

The objects of this Bill are to amend the *Building Services Corporation Act 1989*, the *Consumer Claims Tribunals Act 1987* and the *Contracts Review Act 1980* to require builders, developers and owner-builders to insure residential work privately, to remove the Building Services Corporation's (the BSC) functions relating to building disputes, to confer additional power in building matters on the Commercial Tribunal and building disputes tribunals, and to establish statutory warranties for residential building work and minimum requirements for building contracts. The Bill also dissolves the Building Services Corporation, confers its functions on the Director-General of the Department of Fair Trading and the Fair Trading Administration Corporation and renames the *Building Services Corporation Act 1989* as the *Home Building Act 1989*. The Bill also consequentially amends various other Acts.

* Amended in committee—see table at end of volume.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides that the proposed Act will commence on a day or days to be proclaimed.

Clause 3 is a formal provision that gives effect to Schedules 1–5, which amend the *Building Services Corporation Act 1989*.

Clause 4 is a formal provision that gives effect to Schedule 6, which amends the *Consumer Claims Tribunals Act 1987*.

Clause 5 is a formal provision that gives effect to Schedule 7, which contains amendments to the *Contracts Review Act 1980* and other Acts.

Schedule 1 Amendments to BSC Act relating to work and contracts

Schedule 1 [1] inserts definitions of *business day*, *contract price*, *owner-builder* and *statutory warranty*. These definitions are used in new provisions relating to contracts, warranties and insurance.

Schedule 1 [2] specifies the circumstances in which the proposed amendments apply to developers.

Schedule 1 [3] inserts new sections establishing requirements for contracts for residential building work or specialist work.

Proposed section 6 applies the requirements to that work but excludes them in certain emergency situations.

Proposed section 7 requires the contracts to be written, to contain the parties' names and licence details, the plans and specifications, the contract price (if known) and applicable statutory warranties and to comply with any requirements of the regulations.

Proposed section 7A makes it an offence to contract to do such work unless the contract requirements in proposed section 7 are complied with (maximum penalty 20 penalty units).

Proposed section 7B requires the licence holder to give the other party a signed copy of the contract not more than 5 clear business days after entering into the contract (maximum penalty 20 penalty units).

Proposed section 7C makes void clauses in contracts or other agreements that require mandatory arbitration of disputes.

Proposed section 7D specifies the circumstances in which a licence holder or other person has a caveatable interest in the land by virtue of the contract.

Schedule 1 [4] inserts proposed section 10 which provides that a contract that does not have a sufficient description of the work or is not in writing is not enforceable by a licence holder who is party to it. It also removes the right of a licence holder who enters such a contract, or a person who contracts to do work under a contract that contravenes other contractual requirements, to claim damages or to take action in respect of a breach of contract. The person will still be liable for breaches of the contract.

Schedule 1 [5] inserts new sections establishing requirements for contracts for supplying kit homes.

Proposed section 16C applies the requirements to that supply.

Proposed section 16D requires the contracts to be written, to contain the parties' names and licence details, the plans and specifications and the contract price (if known) and to comply with any requirements of the regulations.

Proposed section 16DA makes it an offence to contract to supply a kit home unless the contract requirements in proposed section 16D are complied with (maximum penalty 20 penalty units).

Proposed section 16DB requires the licence holder to give the other party a signed copy of the contract not more than 5 clear business days after entering into the contract (maximum penalty 20 penalty units).

Proposed section 16DC makes void clauses in contracts that require mandatory arbitration of disputes.

Proposed section 16DD specifies the circumstances in which a licence holder or other person has a caveatable interest in the land by virtue of the contract.

Schedule 1 [6] inserts proposed section 16G which provides that a contract that does not have a sufficient description of the kit home to be supplied or is not in writing is not enforceable by a licence holder who is party to it. It also removes the right of a licence holder who enters such a contract, or a person who contracts to supply a kit home under a contract that contravenes other contractual requirements, to claim damages or to take action in respect of a breach of contract. The person will still be liable for breaches of the contract.

Schedule 1 [7] inserts proposed Part 2C. (Statutory warranties).

Proposed section 18A applies the Part to residential building work done or to be done under a contract made on or after the commencement of the section.

Proposed section 18B sets out the warranties by a licence holder, or a person required to hold a licence, in a contract to do residential building work. The warranties are:

- that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications in the contract
- that the materials supplied by the builder will be good and suitable for the purpose, and new unless otherwise stated in the contract
- that the work will comply with the law
- that the work will be done with due diligence and within time
- that the work will result in a dwelling that is reasonably fit for occupation as a dwelling
- that the work and materials will be reasonably fit for the specified purpose or result if the purpose is made known.

Proposed section 18C extends the statutory warranties to immediate successors in title to owner-builders, developers and licence holders when they sell land on which residential building work has been done.

Proposed section 18D extends the statutory warranties to successors in title unless a predecessor in title has enforced the warranty in the same respect.

Proposed section 18E permits proceedings for a breach of statutory warranty to be commenced for up to 7 years after completion of the work or, if the work is not completed, the completion date or the date of the contract (if there is no completion date).

Proposed section 18F provides a defence to a breach of statutory warranty if the defendant shows that the relevant deficiencies arose from the instructions of the person for whom the work was done after contrary written advice by the defendant or person who did the work.

Proposed section 18G prohibits contracting out of statutory warranties.

Schedule 2 Amendments to BSC Act relating to licensing

Schedule 2 [1] omits the financial grounds on which the BSC could previously reject an application for a licence or renewal of a licence.

Schedule 2 [2] omits provisions that automatically cancelled a licence on financial grounds.

Schedule 2 [3] omits references to warnings about financial matters from the examples of the kinds of warnings that may be given by the BSC about licence holders.

Schedule 2 [4] makes an amendment consequential on the amendment made by Schedule 2 [1].

Schedule 2 [5] makes an amendment consequential on the amendment made by Schedule 2 [6].

Schedule 2 [6] removes the power to require financial information from applicants for licences.

Schedule 3 Amendments to BSC Act relating to disputes

Schedule 3 [1] makes an amendment consequential on the repeal of provisions relating to rectification orders.

Schedule 3 [2] amends definitions contained in Part 4 as a consequence of the amendment made by Schedule 3 [10].

Schedule 3 [3] makes an amendment consequential on the repeal of provisions relating to rectification orders.

Schedule 3 [4]–[6] revise the definition of *improper conduct* (for which action can be taken against a licence holder's licence) to include breaches of statutory warranties and make other consequential amendments as a result of the repeal of the provisions relating to rectification orders and other amendments.

Schedule 3 [7] revises the definition of *improper conduct* (for which action can be taken against a supervisor's licence) to include breaches of statutory warranties.

Schedule 3 [8] revises the grounds on which complaints can be made against licence holders. The new grounds include grounds related to breaches of statutory warranties but do not include matters related to the financial circumstances of licence holders.

Schedule 3 [9] makes an amendment consequential on the amendment made by Schedule 3 [10].

Schedule 3 [10] inserts new provisions relating to complaints. As a consequence of the introduction of new private insurance arrangements, there will no longer be rectification orders as to work. The Director-General of the Department of Fair Trading (the *Director-General*) will be able to advise the parties and to take action to bring them to a settlement. However, the function lost will, by virtue of the transitional provisions inserted by Schedule 5, continue in relation to existing work and contracts.

Proposed section 58 enables the Director-General to determine whether to take action about a complaint and to advise the parties and attempt to bring them to a settlement.

Proposed section 59 protects an insurer who makes a complaint from liability for loss caused by the complaint.

Schedule 3 [11] makes an amendment consequential on the amendment made by Schedule 3 [10].

Schedule 3 [12] makes an amendment consequential on the amendment made by Schedule 3 [15].

Schedule 3 [13] inserts definitions of *authority, building claim* and *building disputes tribunal*.

Schedule 3 [14] removes the right to appeal to the Commercial Tribunal against a decision on an insurance claim in the existing scheme (the transitional provisions will continue the right for those currently insured under that scheme).

Schedule 3 [15] inserts proposed sections 89A–89D which confer jurisdiction on the Commercial Tribunal relating to certain building claims.

Proposed section 89A confers on the Tribunal jurisdiction over building claims outside the monetary jurisdiction of building disputes tribunals under the *Consumer Claims Tribunals Act 1987*. These will include disputes relating to insurance claims under private insurance required under the proposed Part 6.

Proposed section 89B gives the Tribunal power to take any action that a building disputes tribunal may take in deciding a building claim.

Proposed section 89C sets out a procedure for deciding which court is to decide an issue in a building claim where proceedings are taken in the Tribunal and another court.

Proposed section 89D confers on the Tribunal jurisdiction under the *Contracts Review Act 1980* to make orders about unjust contracts for certain residential building work or specialist work or about provisions in such contracts. Under that Act the Tribunal may re-open contracts and take other action in relation to contracts.

Schedule 4 Amendments to BSC Act relating to insurance

Schedule 4 [1] provides that a licence is automatically cancelled if the holder is convicted more than once in any period of 12 months of an offence under proposed Part 6. A licence will also be automatically cancelled if the holder fails to maintain insurance as required under the BSC Act.

Schedule 4 [2] makes it clear that the failure of a licence holder to obtain insurance in relation to residential building work or the supply of a kit home is a sufficient ground for suspension of the licence by the District Court.

Schedule 4 [3] inserts proposed Part 6.

Proposed section 90 contains definitions for the purposes of the proposed Part.

Proposed section 91 applies the proposed Part to residential building work done or to be done and kit homes supplied or to be supplied under contracts made on or after the commencement of the proposed section.

Proposed section 92 makes it an offence for a person to contract to do residential building work unless a contract of insurance is in force (maximum penalty 100 penalty units). It is also an offence to contract to do such work without attaching a certificate of insurance to the contract (maximum penalty 100 penalty units). The offences will not apply if the contract price, or the value of the labour and materials, is not more than \$5,000.

Proposed section 93 makes it an offence for a person to contract to supply, or supply, a kit home unless a contract of insurance is in force (maximum penalty 100 penalty units). It is also an offence to contract to supply a kit home without attaching a certificate of insurance to the contract (maximum penalty 100 penalty units). The offences will not apply if the contract price, or the value of the labour and building components, is not more than \$5,000.

Proposed section 94 removes the right of a person who enters into a contract without complying with proposed section 92 or 93 to enforce the contract or to recover money in respect of work done under the contract under any other right of action (including a quantum meruit action).

Proposed section 95 makes it an offence for an owner-builder to contract to sell land on which the owner-builder is to do or has done owner-builder work unless a contract of insurance is in force (maximum penalty 100 penalty units). It is also an offence to contract to sell the land without attaching a certificate of insurance to the contract (maximum penalty 100 penalty units). The offences will not apply if the sale occurs more than 7 years after the work is completed or the value of the work is not more than \$5,000. The contract for the sale will be voidable at the purchaser's option if the owner-builder does not obtain the insurance.

Proposed section 96 makes it an offence for a person who does residential building work otherwise than under a contract or a developer to do residential building work unless a contract of insurance is in force (maximum penalty 100 penalty units). It is also an offence to sell the land without attaching a certificate of insurance to the contract (maximum penalty 100 penalty units). The offences will not apply if the sale occurs more than 7 years after the work is completed or the value of the work is not more than \$5,000 or to owner-builders and other persons who do their own work.

Proposed section 97 enables the Director-General to exempt a person from the insurance requirements of proposed section 95 or 96 in exceptional circumstances or circumstances of hardship.

Proposed section 98 makes it clear that an employee of an owner-builder, a developer, a licence holder or other person required to be insured is not required to obtain insurance.

Proposed section 99 sets out the matters an insurance contract for residential building work by a licence holder must insure. They include the risk of loss from non-completion of the work because of the insolvency, death or absence of the contractor and the risk of loss arising from breach of statutory warranty.

Proposed section 100 sets out the matters an insurance contract for the supply of a kit home must insure. They include the risk of loss from non-supply because the supplier dies or is insolvent or cannot be found and the risk of loss from the use of unsuitable materials and components or faulty design of the kit home.

Proposed section 101 sets out the matters an insurance contract for residential building work by an owner-builder, a developer or a person who does work otherwise than under a contract must insure. This will be the risk of loss arising from breach of statutory warranty.

Proposed section 102 sets out the general requirements for insurance contracts. The contract must be of a kind approved by the Minister, be provided by an insurer approved by the Minister, provide cover of not less than \$200,000 and must comply with the requirements of the regulations. An excess of \$500 is permitted.

Proposed section 103 enables regulations to be made establishing requirements for professional indemnity insurance and other similar forms of insurance. Matters about which regulations may be made include the provision of automatic run-off cover and the duration of cover.

Proposed section 103A enables the Minister to approve a kind of insurance or an insurer subject to conditions and to revoke or vary an approval.

Proposed section 103B requires an insurance contract to provide cover for non-completion for not less than 12 months after work ceases or a kit home is supplied. Cover for other risks must be provided for not less than 7 years after completion.

Proposed section 103C enables the Governor to make regulations about insurance requirements.

Proposed section 103D makes a provision of an agreement that purports to restrict or remove the rights of a person under the proposed Part void.

Proposed section 103E exempts the New South Wales Land and Housing Corporation from the proposed Part.

Schedule 4 [4] makes a consequential amendment.

Schedule 5 Other amendments to BSC Act

Schedule 5 [2] renames the Act the *Home Building Act 1989*.

Schedule 5 [1], [3]–[21], [24]–[42] and [44] amend the Act as a result of the abolition of the Building Services corporation. The functions of the Corporation and its General Manager are to be exercised by the Director-General.

Schedule 5 [22] inserts proposed sections 105–113.

Proposed section 105 defines *assets* and *liabilities*.

Proposed section 106 confers functions on the Director-General related to the objectives of the Act. These were formerly exercised by the Building Services Corporation.

Proposed section 107 constitutes the Fair Trading Administration Corporation (the *Administration Corporation*).

Proposed section 108 provides that the Administration Corporation's affairs are to be managed and controlled by the Minister.

Proposed section 109 sets out the Administration Corporation's functions, including the carrying on of business related to assets held by it.

Proposed section 110 transfers the assets, rights and liabilities of the Building Services Corporation to the Administration Corporation.

Proposed section 111 provides for the keeping and use of the Administration Corporation's seal.

Proposed section 112 establishes the Home Building Trust Account.

Proposed section 113 establishes the Fair Trading Administration Corporation General Account.

Schedule 5 [23] establishes the Home Building Education and Research Fund.

Schedule 5 [43] enables savings and transitional regulations to be made as a result of the proposed Act.

Schedule 5 [45] inserts proposed Part 4 of Schedule 4. The proposed Part contains savings and transitional provisions consequent on the enactment of the proposed Act. These provisions include:

- (a) the continued application of the current contracts provisions to existing contracts, and
- (b) the continued application of financial provisions relating to licences in the case of current licence applications, and
- (c) the continued application to previous conduct, subsequent conduct relating to existing work and contracts, and existing disputes of current provisions related to disputes settling, complaints, disciplinary action, jurisdiction of building disputes tribunals and the Commercial Tribunal and appeals, and
- (d) the continued operation of statutory insurance schemes, but only in relation to work currently insured, or currently required to be insured under those schemes, and
- (e) matters resulting from the dissolution of the Building Services Corporation, the transfer of its assets and the subsequent renaming of the Act.

Schedule 6 Amendment of Consumer Claims Tribunals Act 1987

Schedule 6 [1] and **[2]** make amendments consequential on the amendment made by Schedule 6 **[3]**.

Schedule 6 [3] provides that the time limit for jurisdiction in a building claim related to a contract of insurance is 10 years or less after completion of the residential building work.

Schedule 6 [4]-[6] and **[13]** make amendments consequential on the dissolution of the Building Services Corporation.

Schedule 6 [7] makes an amendment consequential on the repeal of provisions relating to rectification orders.

Schedule 6 [8] inserts definitions of *residential building work* and *specialist work* for the purposes of Part 3A.

Schedule 6 [9] makes it clear that a claim or appeal against a decision under a contract of insurance required to be entered into under the *Building Services Corporation Act 1989* (to be renamed the *Home Building Act 1989*) may be dealt with by a building disputes tribunal.

Schedule 6 [10] makes an amendment consequential on the repeal of provisions relating to rectification orders.

Schedule 6 [11] and **[12]** remove provisions as to the referral of building claims to the BSC for dispute resolution.

Schedule 6 [14] confers jurisdiction on building disputes tribunals to require payment of money for application towards payment for building work the subject of a claim.

Schedule 6 [15] confers additional powers on building disputes tribunals in claims relating to building insurance.

Schedule 6 [16] confers jurisdiction under the Contracts Review Act 1980 on building disputes tribunals in relation to contracts for residential building work or specialist work. A tribunal may adjust contractual provisions and rights under this jurisdiction.

Schedule 6 [17] enables regulations to be made about procedure when the jurisdiction conferred by Schedule 6 [16] is exercised.

Schedule 7 Amendment of other Acts

Contracts Review Act 1980 No 16

The Schedule amends the definition of *Court* to include the Commercial Tribunal and building disputes tribunals under the *Consumer Claims Tribunals Act 1987* when those bodies are exercising their jurisdiction under the *Home Building Act 1989*.

Local Government Act 1993 No 30

The Schedule removes the requirement for proof of insurance under the *Building Services Corporation Act 1989* before a council can release approved plans and specifications for building work and replaces it with a requirement for proof of the insurance required under proposed Part 6 of that Act (as renamed).

Strata Titles Act 1973 No 68

The Schedule makes an amendment consequential on the repeal of provisions relating to rectification orders.

Strata Titles (Leasehold) Act 1986 No 219

The Schedule makes an amendment consequential on the repeal of provisions relating to rectification orders.

In addition, the following Acts are amended to replace or remove references to the Building Services Corporation and to replace references to the *Building Services Corporation Act 1989*:

Dangerous Goods Act 1975 No 68

First State Superannuation Act 1992 No 100

Gas Act 1986 No 213

Home Purchase Assistance Authority Act 1993 No 15

Hunter Water Board (Corporatisation) Act 1991 No 53

Land Tax Management Act 1956 No 26

Liquefied Petroleum Gas Act 1961 No 3

Public Authorities Superannuation Act 1985 No 41

Public Finance and Audit Act 1983 No 152

Search Warrants Act 1985 No 37

State Authorities Non-contributory Superannuation Act 1987 No 212

State Authorities Superannuation Act 1987 No 211

Superannuation Act 1916 No 28

Water Board (Corporatisation) Act 1994 No 88

Water Supply Authorities Act 1987 No 140