



New South Wales

# Home Building Amendment (Insurance) Bill 2009

## Explanatory note

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

## Overview of Bill

The object of this Bill is to make the following amendments to the *Home Building Act 1989* and the *Home Building Regulation 2004*:

- (a) the Act is amended to provide that a home warranty insurance policy only covers a loss that becomes apparent and is notified to the insurer within the period of insurance (or is notified within 6 months after the loss becomes apparent in the case of a loss that becomes apparent in the last 6 months of the period of insurance),
- (b) the Act is amended to clarify the operation of provisions that enable a claim to be made under a home warranty insurance policy when a contractor's licence is suspended for failure to comply with a court or Tribunal order to pay money on a building claim,
- (c) the Act is amended to make it clear that when home warranty insurance policies are expressed to provide the minimum cover required under the Act, the amount of cover provided is the minimum applicable when the policy is issued,

- (d) the Act is amended to enact consequential savings and transitional provisions, including provisions that extend the amendments referred to in paragraphs (a) and (c) to insurance policies issued before the commencement of those amendments,
- (e) the Regulation is amended to extend the grounds for refusing to issue, renew or restore an authority under the Act to include failure to satisfy certain judgments and orders relating to building claims or claims by insurers in relation to home warranty insurance,
- (f) the Regulation is amended to permit home warranty insurance policies to include a provision allowing the insurer to reduce its liability for any failure by the insured to enforce a statutory warranty, to the extent that the failure has prejudiced the insurer,
- (g) the Regulation is amended to repeal provisions that will be redundant as a result of the proposed amendments to the Act,
- (h) minor or consequential amendments.

## 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 [1]** makes it clear that a recent extension of the home warranty insurance policy (enabling a claim to be made when a contractor fails to pay money required to be paid by a building claim order) operates on the same basis as if the contractor had become insolvent, which is an existing ground of liability under such a policy. **Schedule 1 [6]** makes a consequential amendment.

**Schedule 1 [2]** provides that when a home warranty insurance policy provides that the amount of cover is the minimum amount required under the Act it means that the amount of cover is that minimum amount as at the time the policy is issued. A transitional provision (**Schedule 1 [7]**) extends this amendment to existing policies.

**Schedule 1 [3]** limits the claims covered by a home warranty insurance policy to make it clear that such a policy only covers a loss that becomes apparent and is notified to the insurer within the period of insurance or (if the loss becomes apparent during the last 6 months of the period of insurance and does not arise from non-completion of work) is notified within 6 months after becoming apparent. A transitional provision (**Schedule 1 [7]**) extends this amendment to existing policies.

**Schedule 1 [4]** clarifies an existing regulation-making power that authorises limitations on liability under a home warranty insurance policy to include reductions in liability.

**Schedule 1 [5]** inserts a savings and transitional regulation-making power.

**Schedule 1 [7]** inserts savings and transitional provisions consequent on the other amendments that the Bill makes to the Act and the Regulation.

## **Schedule 2      Amendment of Home Building Regulation 2004**

**Schedule 2 [1]–[4]** extend provisions of the Regulation that provided the grounds on which the issue, renewal or restoration of a licence and other authority under the Act must be refused to include the following grounds:

- (a) being a debtor under an unsatisfied judgment for payment of money in relation to a building claim or to an insurer in relation to a home warranty insurance claim,
- (b) being a director in the last 3 years of a corporation that is a debtor as referred to in paragraph (a),
- (c) being subject to an unsatisfied order of a court on a building claim.

**Schedule 2 [5]** permits a home warranty insurance policy to include a provision allowing the insurer to reduce its liability because of a failure by the beneficiary to take action to enforce a statutory warranty from the breach of which the insured loss arises, but only to the extent of an amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of the failure. A transitional provision (**Schedule 1 [7]**) extends this amendment to existing policies.

**Schedule 2 [6]** omits a provision that will be redundant. The provision was an interim measure introduced in December 2008 to limit the making of a claim under a home warranty insurance policy in essentially the same way as the amendment to be made by **Schedule 1 [3]**. A transitional provision (**Schedule 1 [7]**) provides a period of grace for the notification of a loss in a case in which the redundant provision prevented a claim from being made.

**Schedule 2 [7]** omits a provision that will be redundant as a result of the amendment to be made by **Schedule 1 [1]**.



First print



New South Wales

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New South Wales

# Home Building Amendment (Insurance) Bill 2009

No. , 2009

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## A Bill for

An Act to amend the *Home Building Act 1989* and the *Home Building Regulation 2004* to make further provision for home warranty insurance.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Home Building Amendment (Insurance) Act 2009</i> .	3
<b>2 Commencement</b>	4
This Act commences on the date of assent to this Act.	5



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<b>[2] Section 102 General requirements for insurance</b>	1
Insert after section 102 (3):	2
(3A) A provision of a contract of insurance to the effect that the amount of cover provided by the contract is the minimum amount provided for from time to time by this Act or the regulations is to be read as providing that the amount of cover provided is the minimum amount provided for by this Act or the regulations at the time the contract is entered into.	3 4 5 6 7 8
<b>[3] Section 103BA</b>	9
Insert after section 103B:	10
<b>103BA Limitations on policy coverage—claims made and notified policy</b>	11
(1) A contract of insurance provides insurance cover in respect of loss only if:	12 13
(a) in the case of cover for loss arising from non-completion of work—the loss becomes apparent and is notified to the insurer within the period of insurance, or	14 15 16
(b) in any other case:	17
(i) the loss becomes apparent and is notified to the insurer within the period of insurance, or	18 19
(ii) the loss becomes apparent during the last 6 months of the period of insurance and is notified to the insurer within 6 months after the loss becomes apparent.	20 21 22 23
(2) A loss <i>becomes apparent</i> when a beneficiary under the contract first becomes aware (or ought reasonably have become aware) of the loss.	24 25 26
(3) In this section:	27
<i>loss</i> means loss indemnified by a contract of insurance.	28
<i>period of insurance</i> means the period for which a contract of insurance provides cover.	29 30
<b>[4] Section 103C Regulations</b>	31
Omit section 103C (2) (a). Insert instead:	32
(a) limitations on and reductions in liability,	33
<b>[5] Schedule 4 Savings and transitional provisions</b>	34
Insert at the end of clause 2 (1):	35
<i>Home Building Amendment (Insurance) Act 2009</i>	36

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<b>[6] Schedule 4, clause 79 (3)</b>	1
Omit the subclause.	2
<b>[7] Schedule 4, Part 15</b>	3
Insert after Part 14:	4
<b>Part 15 Provisions consequent on Home Building Amendment (Insurance) Act 2009</b>	5 6
<b>80 Definitions</b>	7
In this Part:	8
<i>amending Act</i> means the <i>Home Building Amendment (Insurance) Act 2009</i> .	9 10
<i>contract of insurance</i> means a contract of insurance entered into for the purposes of Part 6 of this Act.	11 12
<b>81 Insurance claims arising from suspension of contractor's licence</b>	13
(1) Section 99 (3)–(6) (as inserted by the amending Act) apply only to a contract of insurance entered into on or after the commencement of those provisions.	14 15 16
(2) An insurance contract that is entered into on or after the commencement of those provisions using any existing stock of insurance contract forms is deemed to include the provision required to be included by section 99 (3) (as inserted by the amending Act).	17 18 19 20 21
<b>82 Minimum amount of cover</b>	22
(1) Section 102 (3A) extends to:	23
(a) a contract of insurance entered into before the commencement of that subsection (despite any provision of the policy), and	24 25 26
(b) a claim under any such contract of insurance, and	27
(c) proceedings on such a claim (including proceedings commenced but not finally determined before the commencement of that subsection).	28 29 30
(2) Despite subclause (1), section 102 (3A) does not extend to or otherwise affect:	31 32
(a) a claim that was paid in full before the commencement of that subsection, or	33 34

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(b)	any agreement made before the commencement of that subsection to settle a claim, or	1 2
(c)	a decision of an insurer made before the commencement of that subsection that cannot be the subject of appeal because of clause 65 of the <i>Home Building Regulation 2004</i> , or	3 4 5
(d)	the amount that a person is entitled to recover under a contract of insurance where that amount was paid before the commencement of that subsection under the indemnity provided by Division 2 (Insurance claims indemnified by State) of Part 6A of this Act, or	6 7 8 9 10
(e)	any final determination of legal proceedings made by a court or tribunal before the commencement of that subsection.	11 12 13
(3)	This clause applies only to contracts of insurance entered into on or after 1 May 1997.	14 15
<b>83</b>	<b>Application of amendments to existing insurance policies</b>	16
(1)	Section 103BA (Limitations on policy coverage—claims made and notified policy) extends to:	17 18
(a)	a contract of insurance entered into before the commencement of that section (despite any provision of the contract), and	19 20 21
(b)	a claim under any such contract of insurance, and	22
(c)	proceedings on such a claim (including proceedings commenced but not finally determined before the commencement of that section).	23 24 25
(2)	Despite subclause (1), section 103BA does not extend to or otherwise affect:	26 27
(a)	a claim that was paid in full before the commencement of that section, or	28 29
(b)	any agreement made before the commencement of that section to settle a claim, or	30 31
(c)	a decision of an insurer made before the commencement of that section that cannot be the subject of appeal because of clause 65 of the <i>Home Building Regulation 2004</i> , or	32 33 34
(d)	the amount that a person is entitled to recover under a contract of insurance where that amount was paid before the commencement of that section under the indemnity provided by Division 2 (Insurance claims indemnified by State) of Part 6A of this Act, or	35 36 37 38 39

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(e) any final determination of legal proceedings made by a court or tribunal before the commencement of that section.	1 2
(3) This clause applies only to contracts of insurance entered into on or after 1 May 1997.	3 4
<b>84 Proceedings finally determined</b>	5
For the purposes of this Part, proceedings are not <i>finally determined</i> if:	6 7
(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	8 9 10
(b) any appeal in respect of the proceedings is pending (whether or not it is an appeal brought as of right).	11 12
<b>85 Reduction of liability for failure to enforce statutory warranty</b>	13
Clause 58A of the <i>Home Building Regulation 2004</i> (as inserted by the amending Act) extends to a contract of insurance entered into before the commencement of that clause, and for that purpose every contract of insurance entered into before that commencement is taken to include provision as referred to in that clause.	14 15 16 17 18 19
<b>86 Repeal of clause 63A of Regulation—period of grace for notifying loss</b>	20 21
(1) If clause 63A of the Regulation prevented a claim for loss from being made during any part of the loss notification period for the loss, there is to be a period of grace for notifying the loss.	22 23 24
(2) The period of grace starts on the repeal of clause 63A of the Regulation and continues for a period that is equal in length to that part of the loss notification period for which clause 63A of the Regulation prevented the claim from being made.	25 26 27 28
(3) A loss notified to an insurer during the period of grace is deemed to have been notified during the loss notification period for the loss.	29 30 31
(4) If an insurer has refused a claim on the basis of clause 63A of the Regulation:	32 33
(a) the insurer must notify the claimant of any period of grace for notifying the loss to which the claim relates that results from the operation of this clause, and	34 35 36

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- (b) the period of grace for notifying the loss concerned starts (despite subclause (2)) when the claimant receives the insurer's notification under paragraph (a) and continues for the period provided for by subclause (2). 1  
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- (5) The refusal of a claim for loss on the basis of clause 63A of the Regulation (being a claim that would have been validly made had clause 63A of the Regulation not been made): 5  
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7
- (a) does not prevent the claimant from resubmitting the claim or submitting the claim as a new claim (without the need to appeal against the decision to refuse the claim), and 8  
9  
10
- (b) does not prevent the insurer from proceeding to accept and assess the refused claim as a claim now properly made. 11  
12
- (6) An insurer is not entitled to refuse or reduce liability on a claim for loss on the grounds of a failure to notify the loss during the loss notification period if the loss is notified during the period of grace. 13  
14  
15  
16
- (7) The period of grace provided by this clause does not apply in a case in which the loss notification period ended before the commencement of clause 63A of the Regulation. 17  
18  
19
- (8) In this clause: 20  
**loss notification period** for a loss means the period within which loss must be notified to the insurer under a contract of insurance in order for the loss to be covered by the contract of insurance (as provided by section 103BA). 21  
22  
23  
24  
**Note.** Section 103BA extends to existing contracts of insurance. 25  
**the Regulation** means the *Home Building Regulation 2004*. 26

<b>Schedule 2</b>	<b>Amendment of Home Building Regulation 2004</b>	1
		2
<b>[1] Clause 25</b>	<b>General requirements for obtaining certain authorities under Act</b>	3
		4
	Insert after clause 25 (1) (a) (ii):	5
	(iii) is not a debtor under a judgment for money that has not been satisfied where the judgment is for the payment of money in relation to a building claim under Part 3A of the Act or the payment of money to an insurer in relation to a claim relating to home warranty insurance (within the meaning of Part 6 of the Act), and	6
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	(iv) is not (and has not been within the period of 3 years before the date of the application) a director of a corporation that is a debtor under a judgment for money as referred to in subparagraph (iii), and	12
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	(v) is not subject to any order of a court in relation to a building claim under Part 3A of the Act that has not been satisfied within the period required for satisfaction of the order, and	16
		17
		18
		19
<b>[2] Clause 25 (3)</b>		20
	Omit the subclause. Insert instead:	21
	(3) Subclause (1) (a) (v) or (vi) does not prevent the Director-General from issuing an authority if the Director-General is satisfied that the person:	22
		23
		24
	(a) has complied with the order of the court or Tribunal after the period required by the court or Tribunal, and	25
		26
	(b) has a reasonable excuse for the failure to comply with the order within that period.	27
		28
<b>[3] Clause 39A</b>	<b>General requirements for renewal or restoration of authorities</b>	29
		30
	Insert after clause 39A (1) (e):	31
	(e1) is not subject to any order of a court in relation to a building claim under Part 3A of the Act that has not been satisfied within the period required for satisfaction of the order, and	32
		33
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	(e2) is not a debtor under a judgment for money that has not been satisfied where the judgment is for the payment of money in relation to a building claim under Part 3A of the	36
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	Act or the payment of money to an insurer in relation to a claim pursuant to home warranty insurance (within the meaning of Part 6 of the Act), and	1 2 3
	(e3) is not (and has not been within the period of 3 years before the date of the application) a director of a corporation that is a debtor under a judgment for money as referred to in paragraph (e2), and	4 5 6 7
<b>[4]</b>	<b>Clause 39A (4)</b>	8
	Omit the subclause. Insert instead:	9
	(4) Subclause (1) (e) or (e1) does not prevent the Director-General from renewing or restoring an authority if the Director-General is satisfied that the person:	10 11 12
	(a) has complied with the order of the court or Tribunal after the period required by the court or Tribunal, and	13 14
	(b) has a reasonable excuse for the failure to comply with the order within that period.	15 16
<b>[5]</b>	<b>Clause 58A</b>	17
	Insert after clause 58:	18
	<b>58A Reduction of liability for failure to enforce statutory warranty</b>	19
	(1) An insurance contract may contain a provision to the effect that the insurer may reduce its liability under the contract or reduce any amount otherwise payable in respect of a claim because of a failure by the beneficiary to take action to enforce a statutory warranty from the breach of which the insured loss arises, but only to the extent of an amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of the failure.	20 21 22 23 24 25 26 27
	(2) A provision included in an insurance contract under this clause does not limit the operation of any provision included in the insurance contract to the effect of a provision required to be included by clause 63.	28 29 30 31
<b>[6]</b>	<b>Clause 63A Period within which insurance claim must be made</b>	32
	Omit the clause.	33

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<b>[7] Clause 73A Temporary exemption from section 93 (3) requirements</b>	1
Omit the clause.	2