

Passed by both Houses



New South Wales

Home Building Amendment Bill 2011

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2011*



New South Wales

Home Building Amendment Bill 2011

Act No , 2011

An Act to amend the *Home Building Act 1989* to make further provision in respect of home warranty insurance, statutory warranties, developers, building disputes and administrative arrangements; to amend the *Civil Liability Act 2002* in relation to proportionate liability; and for other purposes.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Home Building Amendment Act 2011*.

2 Commencement

- (1) This Act commences on the date of assent to this Act, except as provided by subsection (2).
- (2) Schedule 1 [6]–[11], [13] and [17]–[24] and Schedule 3 [1]–[8] and [11]–[15] commence on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Home Building Act 1989 No 147

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

developer—see section 3A.

[2] Section 3A Application of provisions to developers

Omit “is a developer who does the work” from section 3A (1).

Insert instead “is a developer in relation to that residential building work”.

[3] Section 3A (1A)

Insert after section 3A (1):

- (1A) Residential building work done on land in the circumstances set out in subsection (2) is, for the purpose of determining who is a developer in relation to the work, deemed to have been done on behalf of the owner of the land (in addition to any person on whose behalf the work was actually done).

Note. This makes the owner of the land a developer even if the work is actually done on behalf of another person (for example, on behalf of a party to a joint venture agreement with the owner for the development of the land). The other person on whose behalf the work is actually done is also a developer in relation to the work.

[4] Section 3B

Insert after section 3A:

3B Date of completion of residential building work

- (1) The completion of residential building work occurs on the date that the work is complete within the meaning of the contract under which the work was done.
- (2) If the contract does not provide for when work is complete (or there is no contract), the completion of residential building work occurs on *practical completion* of the work, which is when the work is completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose.
- (3) It is to be presumed (unless an earlier date for practical completion can be established) that practical completion of residential building work occurred on the earliest of whichever of the following dates can be established for the work:

- (a) the date on which the contractor handed over possession of the work to the owner,
 - (b) the date on which the contractor last attended the site to carry out work (other than work to remedy any defect that does not affect practical completion),
 - (c) the date of issue of an occupation certificate under the *Environmental Planning and Assessment Act 1979* that authorises commencement of the use or occupation of the work,
 - (d) (in the case of owner-builder work) the date that is 18 months after the issue of the owner-builder permit for the work.
- (4) If residential building work comprises the construction of 2 or more buildings each of which is reasonably capable of being used and occupied separately, practical completion of the individual buildings can occur at different times (so that practical completion of any one building does not require practical completion of all the buildings).
- (5) This section applies for the purposes of determining when completion of residential building work occurs for the purposes of any provision of this Act, the regulations or a contract of home warranty insurance.

[5] Section 4 Unlicensed contracting

Omit section 4 (4). Insert instead:

- (4) A developer in relation to residential building work must not contract with another person for the other person to do that residential building work on behalf of the developer unless the other person is the holder of a contractor licence authorising the other person to do work of that kind.

Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units in any other case.

[6] Section 6 Application of requirements for contracts

Omit “sections 7, 7A and 7B” wherever occurring in section 6 (2).

Insert instead “sections 7, 7AAA, 7A and 7B”.

[7] Section 7 Form of contracts

Insert before section 7 (1):

- (1A) This section applies to a contract only if the contract price exceeds the prescribed amount or (if the contract price is not

known) the reasonable market cost of the labour and materials involved exceeds the prescribed amount. The *prescribed amount* is the amount prescribed by the regulations for the purposes of this section and is inclusive of GST.

[8] Section 7AAA

Insert after section 7:

7AAA Form of contracts—small jobs

- (1) This section applies to a contract only if the contract is not one to which section 7 applies and the contract price exceeds the prescribed amount or (if the contract price is not known) the reasonable market cost of the labour and materials involved exceeds the prescribed amount. The *prescribed amount* is the amount prescribed by the regulations for the purposes of this section and is inclusive of GST.
- (2) A contract must be in writing and be dated and signed by or on behalf of each of the parties to it.
- (3) A contract must contain:
 - (a) the names of the parties, including the name of the holder of the contractor licence shown on the contractor licence, and
 - (b) the number of the contractor licence, and
 - (c) a description of the work to which the contract relates, and
 - (d) any plans and specifications for the work, and
 - (e) the contract price if known.
- (4) The contract must comply with any requirements prescribed by the regulations for the purposes of a contract to which this section applies.

[9] Section 7AA Consumer information

Insert before section 7AA (1):

- (1A) This section applies only to contracts to which section 7 applies.

[10] Section 7A Offence

Insert “or 7AAA” after “section 7”.

[11] Section 7BA Cooling-off period: person may rescind a contract for residential building work within 5 days without penalty

Insert before section 7BA (1):

- (1A) This section applies to a contract only if the contract price exceeds the prescribed amount or (if the contract price is not known) the reasonable market cost of the labour and materials involved exceeds the prescribed amount. The *prescribed amount* is the amount prescribed by the regulations for the purposes of this section and is inclusive of GST.

[12] Section 18C Warranties as to work by others

Insert at the end of section 18C:

- (2) For the purposes of this section, residential building work done on behalf of a developer is taken to have been done by the developer.

[13] Section 18E Proceedings for breach of warranties

Omit section 18E (1). Insert instead:

- (1) Proceedings for a breach of a statutory warranty must be commenced in accordance with the following provisions:
- (a) proceedings must be commenced before the end of the warranty period for the breach,
 - (b) the warranty period is 6 years for a breach that results in a structural defect (as defined in the regulations) or 2 years in any other case,
 - (c) the warranty period starts on completion of the work to which it relates (but this does not prevent proceedings from being commenced before completion of the work),
 - (d) if the work is not completed, the warranty period starts on:
 - (i) the date the contract is terminated, or
 - (ii) if the contract is not terminated—the date on which work under the contract ceased, or
 - (iii) if the contract is not terminated and work under the contract was not commenced—the date of the contract,
 - (e) if the breach of warranty becomes apparent within the last 6 months of the warranty period, proceedings may be commenced within a further 6 months after the end of the warranty period,

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- (f) a breach of warranty *becomes apparent* when any person entitled to the benefit of the warranty first becomes aware (or ought reasonably to have become aware) of the breach.

[14] Section 48C Notification of building dispute

Insert after section 48C (1):

- (1A) A contractor may notify the Director-General, in such manner as the Director-General may approve, that the contractor has a dispute with a person with respect to residential building work or specialist work done by the contractor, not being a dispute with another contractor. The regulations may impose restrictions on the disputes that can be notified under this subsection.

[15] Section 48D Investigation of dispute

Omit “the complainant and the contractor” from section 48D (2).

Insert instead “the complainant and the person with whom the complainant is in dispute”.

[16] Section 90 Definitions

Omit the definition of *developer* from section 90 (1).

[17] Section 92 Contract work must be insured

Omit section 92 (3). Insert instead:

- (3) This section does not apply if the contract price does not exceed the amount prescribed by the regulations for the purposes of this section or (if the contract price is not known) the reasonable market cost of the labour and materials involved does not exceed that amount.

[18] Section 92 (5)

Omit the subsection.

[19] Section 95 Owner-builder insurance

Omit section 95 (3) (b). Insert instead:

- (b) if the reasonable market cost of the labour and materials involved does not exceed the amount prescribed by the regulations for the purposes of this section, or

[20] Section 95 (5)

Omit the subsection.

[21] Section 96 Insurance in relation to residential building work not carried out under contract

Omit section 96 (3) (e). Insert instead:

- (e) the reasonable market cost of the labour and materials involved does not exceed the amount prescribed by the regulations for the purposes of this section.

[22] Section 96 (4)

Omit the subsection.

[23] Section 102 General requirements for insurance

Omit section 102 (3). Insert instead:

- (3) The contract of insurance must provide for cover of not less than the amount prescribed by the regulations for the purposes of this subsection.

[24] Section 102 (6)

Omit the subsection. Insert instead:

- (6) A contract of insurance may provide that the insurer is not liable for such amount of each claim as is specified in the contract. The amount specified is not to exceed the amount prescribed by the regulations as the maximum excess.

[25] Section 103B Period of cover

Omit “6 years after the completion of the work, or the end of the contract relating to the work, whichever is the later” from section 103B (2) (a).

Insert instead “6 years after completion of the work”.

[26] Section 103B (2) (b)

Omit “2 years after the completion of the work, or the end of the contract relating to the work, whichever is the later”.

Insert instead “2 years after completion of the work”.

[27] Sections 103BA–103BC

Omit section 103BA. Insert instead:

103BA Time limits for policies issued between 1.5.1997 and 30.6.2002

- (1) A contract of home warranty insurance entered into on or after 1 May 1997 and before 1 July 2002 provides insurance cover in

respect of loss only if a claim in respect of the loss is made to the insurer during the period of insurance.

- (2) A loss that becomes apparent in the last 6 months of the period of insurance has an *extended claim period*, which permits a claim in respect of the loss to be made within 6 months after the loss becomes apparent. There is no extended claim period for a loss that arises from non-completion of work.
- (3) For the purposes of this section and section 103BB, a loss *becomes apparent* when a beneficiary under the contract of insurance first becomes aware (or ought reasonably to have become aware) of the loss.
- (4) In this section and sections 103BB and 103BC:
loss means loss indemnified by a contract of home warranty insurance.
period of insurance means the period for which a contract of home warranty insurance provides cover.

103BB Time limits for policies issued from 1.7.2002

- (1) A contract of home warranty insurance entered into on or after 1 July 2002 provides insurance cover in respect of loss only if a claim in respect of the loss is made to the insurer during the period of insurance.
Note. Subsection (1) is the general rule but there are exceptions to this general rule, as provided by this section.
- (2) A loss that becomes apparent in the last 6 months of the period of insurance has an *extended claim period*, which permits a claim in respect of the loss to be made within 6 months after the loss becomes apparent. There is no extended claim period for a loss that arises from non-completion of work.
- (3) When a loss becomes apparent during the period of insurance but a claim cannot be made during that period because an insured event has not occurred, a claim can be made after the period of insurance (as a *delayed claim*) but only if:
 - (a) the loss was properly notified to the insurer during the period of insurance (or within 6 months after the loss became apparent in the case of a loss that became apparent in the last 6 months of the period of insurance), and
 - (b) the beneficiary under the contract of insurance making the claim diligently pursued the enforcement of the statutory warrant concerned after the loss became apparent.

- (4) A delayed claim can also be made when the insured event occurs in the last 6 months of the period of insurance (as if the insured event did not occur until after the period of insurance) subject to compliance with the other requirements of this section for a delayed claim.
- (5) A delayed claim cannot be made for a loss that arises from non-completion of work.
- (6) The regulations can make provision for or with respect to what constitutes or does not constitute diligent pursuit of the enforcement of a statutory warranty for the purposes of this section.
- (7) A loss is *properly notified* to an insurer only if the insurer has been given notice in writing of the loss and the notice provides such information as may be reasonably necessary to put the insurer on notice as to the nature and circumstances of the loss. The regulations can make provision for or with respect to the form and content of such a notice.

103BC 10-year “long stop” limit on claims under existing policies

- (1) Despite any other provision of this Act, a contract of home warranty insurance entered into before 1 July 2010 does not in any circumstances provide insurance cover in respect of loss unless a claim in respect of the loss is made to the insurer within 10 years after the work insured was completed.
Note. Section 3B provides for the date of completion of residential building work.
- (2) This section does not operate to extend any period of insurance.

[28] Section 103F Interpretation

Omit the definition of *developer* from section 103F (1).

[29] Section 121B

Insert after section 121A:

121B Information sharing with Self Insurance Corporation

- (1) A person engaged in the administration of this Act may disclose to the Self Insurance Corporation or a member of staff of the Corporation information obtained in the course of the administration or execution of this Act if the disclosure is for the purpose of assisting the Self Insurance Corporation to exercise its functions under this Act.

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- (2) The Self Insurance Corporation or any member of staff of the Corporation may disclose to a person engaged in the administration of this Act information obtained in connection with the exercise of the functions of the Corporation under this Act if the disclosure is for the purpose of assisting in the administration or execution of this Act.
 - (3) Information may be disclosed under this section by giving access to any record of the information.
 - (4) A reference in this section to the functions of the Self Insurance Corporation under this Act includes the functions of the Corporation under section 8A (Specific functions in relation to home warranty insurance) of the *NSW Self Insurance Corporation Act 2004*.

[30] Schedule 4 Savings and transitional provisions

Insert at the end of clause 2 (1):

Home Building Amendment Act 2011, but only to the extent that it amends this Act

[31] Schedule 4

Insert at the end of the Schedule:

Part 19 Provisions consequent on enactment of Home Building Amendment Act 2011

104 Definition

In this Part:

amending Act means the *Home Building Amendment Act 2011*.

105 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 have effect despite any provision of this Part.

106 Purpose and operation of amendments

The amendments made by the amending Act are made for the purpose of the avoidance of doubt and accordingly (except as otherwise provided by this Part) those amendments extend to:

- (a) residential building work commenced or completed before the commencement of the amendment, and
- (b) a contract of insurance entered into before the commencement of the amendment, and
- (c) a loss or liability that arose before the commencement of the amendment, and
- (d) the notification of a loss before the commencement of the amendment.

107 Legal proceedings not affected

An amendment made by the amending Act does not (despite any other provision of this Part) extend to or otherwise affect any decision of a court or tribunal in proceedings commenced in the court or tribunal before the commencement of the amendment (whether the decision is made before or after that commencement).

108 Thresholds for contract requirements

An amendment made by the amending Act to Part 2 of this Act (or to the *Home Building Regulation 2004*, to the extent that it relates to an amendment to that Part) does not apply in respect of a contract for residential building work entered into before the commencement of the amendment.

109 Proceedings for breach of statutory warranties

The amendment made to section 18E by the amending Act does not apply in respect of a contract for residential building work entered into before the commencement of the amendment.

110 Insurance thresholds

- (1) The amendment made by the amending Act to section 92 (and to clause 70 of the *Home Building Regulation 2004*, to the extent that it relates to the amendment to section 92) does not apply in respect of a contract for residential building work entered into before the commencement of the amendment.
- (2) The amendment made by the amending Act to section 95 (and to clause 70 of the *Home Building Regulation 2004*, to the extent that it relates to the amendment to section 95) does not apply in respect of a contract for the sale of land entered into before the commencement of the amendment.
- (3) The amendment made by the amending Act to section 96 (and to clause 70 of the *Home Building Regulation 2004*, to the extent

that it relates to the amendment to section 96) does not apply to residential building work done before the commencement of the amendment.

111 Minimum insurance cover

An amendment made by the amending Act to section 102 (3) or clause 60 or 69 of the *Home Building Regulation 2004* does not apply in respect of a contract of insurance entered into before the commencement of the amendment.

112 Excess for home warranty insurance claims

The amendments made by the amending Act to substitute section 102 (6) and insert clause 18 of the *Home Building Regulation 2004* do not apply in respect of a contract of insurance entered into before the commencement of the amendments.

113 Pending claims not affected by new time limits

Sections 103BA–103BC (as inserted by the amending Act) do not apply to a loss in respect of which a claim was made under a policy of insurance before the commencement of the section concerned, whether or not the claim was finalised before that commencement.

114 Period of grace for claims where loss already properly notified

- (1) The requirement under section 103BA (as inserted by the amending Act) that a claim in respect of a loss be made during the required claim period is satisfied in the case of a loss for which no claim was made during the required claim period but that was properly notified to the insurer during the required claim period and before the commencement of that section if a claim in respect of the loss is made within 6 months after the commencement of that section.
- (2) The *required claim period* is the period of insurance or the period of 6 months after the loss became apparent in the case of a loss that became apparent in the last 6 months of the period of insurance.
- (3) In this clause, *properly notified* has the same meaning as in section 103BB.

115 Period of grace for proper notification of losses

- (1) The requirement under section 103BB (3) (a) that a loss be *properly notified* to an insurer during the required notification period is satisfied in the case of a loss that was notified (but not

properly notified only because it was not notified in writing) to the insurer during the required notification period and before the commencement of that section if the loss is properly notified to the insurer within 6 months after the commencement of that section.

- (2) The *required notification period* is the period of insurance or the period of 6 months after the loss became apparent in the case of a loss that became apparent in the last 6 months of the period of insurance.

116 Time limits on claims in insurance contracts

A provision included in an insurance contract for the purpose of giving effect to clause 63 (3) of the *Home Building Regulation 2004* is taken to be modified to the extent necessary to give effect to clause 63 (3) of that Regulation as amended by the amending Act.

117 Limitations on beneficiaries under contract of insurance

The amendment made by the amending Act to clause 55 of the *Home Building Regulation 2004* does not apply in respect of a contract of insurance entered into before the commencement of the amendment.

118 Proportionate liability

This Part does not apply to the amendments made by the amending Act to the *Civil Liability Act 2002*.

Note. Schedule 1 to the *Civil Liability Act 2002* provides transitional arrangements for amendments to that Act.

Schedule 2 Amendment of Civil Liability Act 2002 No 22

[1] Section 34 Application of Part

Insert after section 34 (3):

- (3A) This Part does not apply to a claim in an action for damages arising from a breach of statutory warranty under Part 2C of the *Home Building Act 1989* and brought by a person having the benefit of the statutory warranty.

[2] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1 (1):

Home Building Amendment Act 2011, but only to the extent that it amends this Act

[3] Schedule 1

Insert at the end of the Schedule:

Part 13 Provision consequent on enactment of Home Building Amendment Act 2011

41 Operation of proportionate liability amendment

The amendment of section 34 by the *Home Building Amendment Act 2011* extends to civil liability arising before the commencement of the amendment but not so as to affect proceedings commenced before the commencement of the amendment (whether or not the proceedings were finally determined before the commencement of the amendment).

Schedule 3 Amendment of Home Building Regulation 2004

[1] Clause 11A

Insert before clause 12:

11A Thresholds for contract requirements

- (1) The prescribed amount for the purposes of section 7 (Form of contracts) of the Act is \$5,000.
- (2) The prescribed amount for the purposes of section 7AAA (Form of contracts—small jobs) of the Act is \$1,000.
- (3) The prescribed amount for the purposes of section 7BA (Cooling-off period: person may rescind a contract for residential building work within 5 days without penalty) of the Act is \$20,000.

[2] Clause 13 Requirements for contracts for residential building work

Insert “to which section 7 of the Act applies” after “A contract” in clause 13 (1).

[3] Clause 15 Exemptions from contract requirements for holders of contractor licences

Omit clause 15 (d).

[4] Clause 17 Exemptions relating to cooling-off periods in contracts

Omit clause 17 (c).

[5] Clause 18

Insert after clause 17:

18 Maximum insurance excess

The maximum excess for the purposes of section 102 (6) of the Act is \$250.

[6] Clause 55 Beneficiaries

Insert after clause 55 (2) (d):

- (e) a body corporate that is related, within the meaning of section 50 of the *Corporations Act 2001* of the Commonwealth, to any corporate person referred to in paragraph (a), (b) or (c),

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- (f) a body corporate that is a related party, within the meaning of section 228 of the *Corporations Act 2001* of the Commonwealth, of any corporate person referred to in paragraph (a), (b) or (c).

[7] Clause 60 Minimum insurance cover

Omit clause 60 (1). Insert instead:

- (1) For the purposes of section 102 (3) of the Act, the amount prescribed is \$340,000 in relation to each dwelling to which the insurance relates, subject to clause 69 (Requirements for insurance for residential flat buildings).

[8] Clause 60 (2) and (3)

Omit the subclauses.

[9] Clause 61 Period of cover

Omit the clause.

[10] Clause 63 Time limits for notice of loss or damage

Omit clause 63 (3). Insert instead:

- (3) If a beneficiary gives notice of a loss (the *notified loss*) to the insurer, the beneficiary is taken for the purposes of a provision included in an insurance contract pursuant to this clause to have given notice of every loss (a *related loss*) that was caused by the same defect as caused the notified loss, whether or not the claim in respect of the notified loss has been settled.
- (4) The giving of notice of or the making of a claim for the notified loss does not constitute the giving of notice of or the making of a claim for any related loss for the purposes of sections 103BA–103BC of the Act, and those sections are not affected by this clause or any provision included in an insurance contract pursuant to this clause.

[11] Clause 69 Requirements for insurance for residential flat buildings

Omit “\$200,000” from clause 69 (2) wherever occurring.

Insert instead “\$340,000”.

[12] Clause 69 (1) and (2)

Omit “\$12,000” wherever occurring. Insert instead “\$20,000”.

[13] Clause 70

Omit the clause. Insert instead:

70 Insurance thresholds

The amount of \$20,000 (inclusive of GST) is prescribed for the purposes of sections 92, 95 and 96 of the Act.

[14] Clause 71 Meaning of “structural defect”

Omit “section 103B (2)”. Insert instead “sections 18E (1) (b) and 103B (2)”.

[15] Schedule 3 Additional contract provisions

Omit “The contractor must provide the owner with a certificate of home warranty insurance (for work over \$12,000) before commencement of work and before demanding or receiving any payment.”.

Insert instead “The contractor must provide the owner with a certificate of home warranty insurance (for work over \$20,000) before commencement of work and before demanding or receiving any payment. Your contractor may be able to organise optional home warranty insurance for work up to \$20,000, and you can discuss this with your contractor.”.