

Passed by both Houses



New South Wales

Home Building Amendment (Insurance) Bill 2009

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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, , 2009*



New South Wales

Home Building Amendment (Insurance) Bill 2009

Act No , 2009

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

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 (Insurance) Act 2009*.

2 Commencement

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

Schedule 1 Amendment of Home Building Act 1989 No 147

[1] Section 99 Requirements for insurance for residential building work

Omit section 99 (3)–(5). Insert instead:

- (3) A contract of insurance in relation to residential building work required by section 92 must include provision that deems the suspension of a contractor's licence under section 42A to constitute the insolvency of the contractor for the purposes of the application of the policy to any loss that is the subject of a building claim order made against the contractor that remains unsatisfied.
- (4) The following provisions apply to a claim under a contract of insurance that arises because of the operation of subsection (3) in connection with a building claim order:
 - (a) the claim is limited to a loss that would have been covered by the contract in the event of the contractor's insolvency,
 - (b) the amount of the claim need not be the same as the amount of the building claim order (and in particular is not limited by the amount of the building claim order),
 - (c) the building claim order does not limit any right of a beneficiary to appeal against a decision of the insurer in respect of a claim under the contract (and any such right of appeal may be exercised as if the building claim order had not been made),
 - (d) the building claim order does not limit any right of recovery of the insurer against the contractor in respect of the loss to which the claim relates (whether that right arises pursuant to any rights of the beneficiary to which the insurer is subrogated, or otherwise).
- (5) For the purposes of the operation of a provision of a contract of insurance referred to in subsection (3), a contractor's licence that would have been suspended under section 42A were it not for the fact that the licence expired, or was surrendered or cancelled, before the suspension took effect is taken to have been suspended under that section.
- (6) In this section:
building claim order has the same meaning as in section 42A.

[2] Section 102 General requirements for insurance

Insert after section 102 (3):

- (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] Section 103BA

Insert after section 103B:

103BA Limitations on policy coverage—claims made and notified policy

- (1) A contract of insurance provides insurance cover in respect of loss only if:
- (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
 - (b) in any other case:
 - (i) the loss becomes apparent and is notified to the insurer within the period of insurance, or
 - (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.
- (2) A loss *becomes apparent* when a beneficiary under the contract first becomes aware (or ought reasonably have become aware) of the loss.
- (3) In this section:
loss means loss indemnified by a contract of insurance.
period of insurance means the period for which a contract of insurance provides cover.

[4] Section 103C Regulations

Omit section 103C (2) (a). Insert instead:

- (a) limitations on and reductions in liability,

[5] Schedule 4 Savings and transitional provisions

Insert at the end of clause 2 (1):

Home Building Amendment (Insurance) Act 2009

[6] Schedule 4, clause 79 (3)

Omit the subclause.

[7] Schedule 4, Part 15

Insert after Part 14:

Part 15 Provisions consequent on Home Building Amendment (Insurance) Act 2009

80 Definitions

In this Part:

amending Act means the *Home Building Amendment (Insurance) Act 2009*.

contract of insurance means a contract of insurance entered into for the purposes of Part 6 of this Act.

81 Insurance claims arising from suspension of contractor's licence

- (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.
- (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).

82 Minimum amount of cover

- (1) Section 102 (3A) extends to:
 - (a) a contract of insurance entered into before the commencement of that subsection (despite any provision of the policy), and
 - (b) a claim under any such contract of insurance, and
 - (c) proceedings on such a claim (including proceedings commenced but not finally determined before the commencement of that subsection).
- (2) Despite subclause (1), section 102 (3A) does not extend to or otherwise affect:
 - (a) a claim that was paid in full before the commencement of that subsection, or

- (b) any agreement made before the commencement of that subsection to settle a claim, or
 - (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 *Home Building Regulation 2004*, or
 - (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
 - (e) any final determination of legal proceedings made by a court or tribunal before the commencement of that subsection.
- (3) This clause applies only to contracts of insurance entered into on or after 1 May 1997.

83 Application of amendments to existing insurance policies

- (1) Section 103BA (Limitations on policy coverage—claims made and notified policy) extends to:
- (a) a contract of insurance entered into before the commencement of that section (despite any provision of the contract), and
 - (b) a claim under any such contract of insurance, and
 - (c) proceedings on such a claim (including proceedings commenced but not finally determined before the commencement of that section).
- (2) Despite subclause (1), section 103BA does not extend to or otherwise affect:
- (a) a claim that was paid in full before the commencement of that section, or
 - (b) any agreement made before the commencement of that section to settle a claim, or
 - (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 *Home Building Regulation 2004*, or
 - (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

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- (e) any final determination of legal proceedings made by a court or tribunal before the commencement of that section.
 - (3) This clause applies only to contracts of insurance entered into on or after 1 May 1997.

84 Proceedings finally determined

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 it is an appeal brought as of right).

85 Reduction of liability for failure to enforce statutory warranty

Clause 58A of the *Home Building Regulation 2004* (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.

86 Repeal of clause 63A of Regulation—period of grace for notifying loss

- (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.
- (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.
- (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.
- (4) If an insurer has refused a claim on the basis of clause 63A of the Regulation:
 - (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

- (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).
- (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):
 - (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
 - (b) does not prevent the insurer from proceeding to accept and assess the refused claim as a claim now properly made.
- (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.
- (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.
- (8) In this clause:
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).

Note. Section 103BA extends to existing contracts of insurance.

the Regulation means the *Home Building Regulation 2004*.

Schedule 2 Amendment of Home Building Regulation 2004

[1] Clause 25 General requirements for obtaining certain authorities under Act

Insert after clause 25 (1) (a) (ii):

- (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
- (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
- (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

[2] Clause 25 (3)

Omit the subclause. Insert instead:

- (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:
 - (a) has complied with the order of the court or Tribunal after the period required by the court or Tribunal, and
 - (b) has a reasonable excuse for the failure to comply with the order within that period.

[3] Clause 39A General requirements for renewal or restoration of authorities

Insert after clause 39A (1) (e):

- (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
- (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

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

- (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] Clause 39A (4)

Omit the subclause. Insert instead:

- (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:
- (a) has complied with the order of the court or Tribunal after the period required by the court or Tribunal, and
 - (b) has a reasonable excuse for the failure to comply with the order within that period.

[5] Clause 58A

Insert after clause 58:

58A Reduction of liability for failure to enforce statutory warranty

- (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.
- (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.

[6] Clause 63A Period within which insurance claim must be made

Omit the clause.

[7] Clause 73A Temporary exemption from section 93 (3) requirements

Omit the clause.