

[Act 2001 No 51]



New South Wales

Home Building Legislation Amendment Bill 2001

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Home Building Act 1989* in relation to the following matters:

- (a) the regulation of the residential building industry and certain specialist work (including the provision of building consultancy services),
- (b) the resolution of building claims, including disputes between holders of authorities and the people with whom they contract and the jurisdiction of the Fair Trading Tribunal with respect to building claims,
- (c) the disciplining of holders of authorities,
- (d) the insurance of residential building work and of the supply of kit homes.

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

The Bill also:

- (a) amends the *Fair Trading Tribunal Act 1998* in relation to the general jurisdiction of the Fair Trading Tribunal (that is, not just in relation to building claims), and
- (b) omits uncommenced amendments made by the *Regulatory Reduction Act 1996* that would otherwise remove some of the regulatory controls that apply to refrigeration work or air-conditioning work.

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 a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Home Building Act 1989* set out in Schedules 1–9.

Clause 4 is a formal provision giving effect to the amendments to the *Fair Trading Tribunal Act 1998* set out in Schedule 10.

Clause 5 repeals uncommenced amendments made to the *Home Building Act 1989* (*the Act*) by the *Regulatory Reduction Act 1996*. Those amendments remove references to “refrigeration work or air-conditioning work” from the definition of *specialist work* in the Act. The effect of the uncommenced amendments is to remove the need for people to have a contractor licence to do refrigeration and air-conditioning work. As a result of the repeal of those uncommenced amendments, refrigeration and air-conditioning work will continue to be regulated.

Schedule 1 Amendments relating to regulation of residential building work, specialist work and the supply of kit homes

Regulation of roof plumbing

At present, roof plumbing comes within the definition of *specialist work* in the Act. As a result, all roof plumbing, including residential roof plumbing and commercial and industrial work, requires a contractor licence under the Act.

Schedule 1 [1] and [2] provide for the licensing of roof plumbing to be restricted to contractors who undertake only residential building work.

Schedule 1 [3] makes a consequential amendment.

Photo licences

Schedule 1 [4] provides for applicants for the issue of a contractor licence to be photographed.

Schedule 1 [10] makes similar provision for applicants for certificates.

Categories of work

Schedule 1 [5] provides for contractor licences to specify the category or categories of residential building work or specialist work that the holder of the contractor licence is authorised to do. That category must be one prescribed by the regulations.

Schedule 1 [11] makes similar provision in relation to supervisor certificates and registration certificates.

Cancellation of contractor licences

At present, a contractor licence is automatically cancelled if one of the circumstances set out in section 22 of the Act occurs.

Schedule 1 [6] provides instead for the Director-General of the Department of Fair Trading (the *Director-General*) to serve a notice on the holder of a contractor licence setting out the reasons for the cancellation, and for the cancellation to take effect on the date specified in the notice. The amendment also adds to the list of circumstances in which a contractor licence may be cancelled, namely if the holder of the contractor licence becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit or is made the subject of a winding up order.

Suspension of contractor licences on appointment of controller or administrator

Schedule 1 [7] provides for the contractor licence of a corporation to be suspended if a controller or administrator of the corporation is appointed under the *Corporations Law*.

Schedule 1 [15] provides for the review by the Administrative Decisions Tribunal of a decision of the Director-General to suspend a contractor licence for that reason.

Warning notices

Schedule 1 [8] adds to the list of examples of circumstances to which a public warning notice may relate a person's repeated failure to comply with orders of the Fair Trading Tribunal.

Schedule 1 [9] removes the need for the Director-General to give 48 hours' notice of the issue of a warning notice if there is an immediate risk to the public.

Owner-builder permits

Schedule 1 [12] requires that an applicant for an owner-builder permit to satisfy certain educational requirements.

Renewal of contractor licences

Schedule 1 [13] provides that the Director-General may reject an application for the renewal or restoration of a contractor licence if the applicant is (or has in the last 5 years been) bankrupt, is or has been a director or person concerned in the management of a company that is the subject of a winding up order or for which a controller or administrator has been appointed, if there are any unsatisfied Fair Trading Tribunal orders against the applicant or if the Director-General considers that there have been an unreasonable number of complaints, cautions, penalty notices or insurance claims against the applicant.

Continuing professional development

Schedule 1 [13] provides that the Director-General may reject an application for renewal or restoration of an authority if the Director-General is not satisfied that, in the year before the authority is renewed or restored, the applicant has undertaken or completed the course or courses of further education, or other training, specified by the Director-General for at least as many hours as are required by the Director-General.

Completion of work in progress if an authority is suspended, cancelled or surrendered

Schedule 1 [14] provides for the Director-General to appoint a person to co-ordinate or supervise any unfinished work under a contract made by a person whose authority has been suspended, cancelled or surrendered.

Register of particulars of the holders of authorities

Schedule 1 [16] makes it clear that regulations prescribing the particulars of a holder of a contractor licence, a supervisor certificate, a registration certificate, building consultancy licence or a permit that must be included on the Department of Fair Trading's public register may include the results of any disciplinary action under Part 4 of the Act or of any prosecutions against the holder (including any penalty notices issued to the holder), any instance of non-compliance with a Tribunal order and certain matters relating to the insurance history of the holder.

Schedule 2 Amendments relating to contracts

Schedule 2 [1] substitutes a definition.

Schedule 2 [3] requires contracts for residential building work to include a statement informing the owner of the building of the right to rescind the contract during the cooling-off period.

Schedule 2 [4] requires information about contracts for residential building work, the resolution of disputes under contracts and the resolution of disputes relating to insurance to be provided to consumers.

Schedule 2 [5] provides for contracts for residential building work to be subject to a cooling-off period of 5 clear business days after the consumer is given a copy of the contract, unless the consumer has received legal advice about the contract and the cooling-off period. However, if the contract does not include a notice informing the building owner of the right to rescind the contract, the amendment provides for the building owner to rescind within 7 days after becoming aware that the contract should have contained such a notice.

Schedule 2 [6] provides for the Governor to make regulations for or with respect to the clauses or matters that must be included in a contract to do residential building work or specialist work and the matters that cannot be included in such a contract.

Schedule 2 [8] requires contracts for the supply of kit homes to include a statement regarding the cooling-off period.

Schedule 2 [9] requires information about contracts to supply kit homes and the resolution of disputes under contracts, and the resolution of disputes relating to insurance, to be provided to consumers.

Schedule 2 [10] provides for contracts for the supply of kit homes to be subject to a cooling-off period of 5 clear business days after the consumer is given a copy of the contract, unless the consumer has received legal advice about the contract and the cooling-off period. However, if the contract does not include a notice regarding the right to rescind the contract, the amendment provides for the person to rescind within 7 days after becoming aware that the contract should have contained such a notice.

Schedule 2 [11] provides for the Governor to make regulations for or with respect to the clauses or matters that can be included in a contract for the supply of a kit home and the matters that cannot be included in such a contract.

Schedule 2 [2] and **[7]** make consequential amendments.

Schedule 3 Amendments relating to building consultancy work

Schedule 3 provides for the regulation of persons who do building consultancy work, which is defined to mean inspecting dwellings and reporting on their condition, the conduct of inspections and the furnishing of reports in respect of specialist work or doing any other work prescribed by the regulations. The new provisions provide for licensing and impose requirements on contracts for building consultancy work in a similar way to the manner in which residential building work and specialist work are regulated under the Act.

Schedule 3 [5] inserts a new Part 2D that contains the following provisions:

Proposed section 18H provides that a contract to do building consultancy work can be lawfully entered into only by or on behalf of the holder of a licence under the proposed Part.

Proposed section 18I prohibits advertising for any building consultancy work by, or otherwise seeking any such work for, an unlicensed individual, partnership or corporation.

Proposed section 18J specifies the procedural requirements (contained in proposed sections 18K–18R) that apply to a contract under which the holder of a building consultancy licence undertakes to do any building consultancy work.

Proposed section 18K requires that contracts relating to building consultancy work entered into by the holder of a licence are not enforceable if they are not in writing and signed by the parties to them or do not sufficiently describe the work the subject of the contract.

Explanatory note

Proposed section 18L requires information about a contract to do building consultancy work, and the resolution of disputes under the contract or relating to insurance, to be provided to consumers.

Proposed section 18M provides for the Governor to make regulations for or with respect to the clauses or matters that must be included in a contract to do building consultancy work and the clauses or matters that cannot be included in such a contract.

Proposed section 18N makes it an offence to contract to do building consultancy work unless the requirements of proposed section 18K of the Act are complied with in relation to the contract.

Proposed section 18O requires the holder of a building consultancy licence to give a copy of a contract to do building consultancy work to the other party to the contract within 5 clear business days after entering into the contract.

Proposed section 18P provides that a provision of a contract to do building consultancy work, or any other agreement, that requires a dispute under the contract to be referred to arbitration is void.

Proposed section 18Q clarifies that a contract to do building consultancy work does not give the holder of a building consultancy licence or any other person a legal or equitable estate or interest in any land, except in specified circumstances.

Proposed section 18R provides that a contract to do building consultancy work that is not in writing or that does not have a sufficient description of the work to which it relates is not enforceable by the holder of the building consultancy licence against any other party to the contract.

Proposed section 18S declares that other rights or remedies that a person (other than the person who contracts to do building consultancy work) may have apart from the Act, as amended, are not affected by Division 1 of the proposed Part.

Proposed section 18T requires individuals who do building consultancy work to be holders, or employees of the holders, of licences.

Proposed section 18U imposes a duty on licensees to ensure that work they contract to do is done by appropriately qualified persons.

Proposed section 18V prohibits persons from falsely representing that they hold licences under the Act.

Schedule 3 [7] inserts proposed Division 3A of Part 3 which includes the following provisions:

Proposed section 32A sets out how applications for building consultancy licences are to be made.

Explanatory note

Proposed section 32B requires the Director-General to issue a licence or reject the application and imposes grounds on which an application must be rejected, including that the licence holder will not be insured under an approved policy of professional indemnity insurance.

Proposed section 32C states the authority that is conferred by a building consultancy licence. Any such authority is subject to the conditions of the licence.

Proposed section 32D sets out the circumstances in which a building consultancy licence may be cancelled.

Proposed section 32E provides for the suspension of a building consultancy licence if there is no approved policy of professional indemnity insurance in force in relation to the holder of the licence.

Proposed section 32F authorises the publication of notices warning people of particular risks involved in dealing with specified holders of building consultancy licences.

Proposed section 32G provides for the approval of professional indemnity insurance relating to building consultancy work.

Schedule 3 [10] requires an application for renewal or restoration of a building consultancy licence to be accompanied by documentation showing the licence holder is insured under an approved policy of professional indemnity insurance.

Schedule 3 [11] provides for an application for renewal or restoration of a building consultancy licence to be rejected if the licence holder is not insured under an approved policy of professional indemnity insurance.

Schedule 3 [12] exempts holders of building consultancy licences who also have certain other professional qualifications from the need to undertake continuing professional development as required by the Act. Those professionals are exempt only if they are insured under an approved policy of professional indemnity insurance.

Schedule 3 [29] provides for the making of regulations relating to insurance for building consultancy work.

Schedule 3 [1]–[4], [6], [8], [9], [13]–[28] and [30] make consequential amendments. These amendments extend provisions applying to other licences under the Act to building consultancy licences.

Schedule 4 Amendments relating to resolution of building disputes and building claims

Section 89B of the Act gives the Fair Trading Tribunal jurisdiction to hear building claims, which are disputes relating to residential building work or specialist work (plumbing other than roof plumbing, gasfitting or air-conditioning and refrigeration work). The dispute may be between a consumer and a contractor, between a head contractor and a subcontractor or between a claimant and an insurer under the home warranty insurance scheme.

Schedule 4 [1] inserts a new Part 3A dealing with the resolution of building disputes and building claims.

The following steps apply to all disputes whether or not an insurable event has arisen:

- (a) consumers will be able to contact the Fair Trading Tribunal and the relevant building dispute will then be assessed for the purpose of determining whether the matter is appropriate for assessment by an independent expert,
- (b) if the dispute cannot be resolved through informal discussions between the independent expert, the consumer and the builder or insurer, a building claim should be lodged with the Fair Trading Tribunal,
- (c) following the hearing the Tribunal will be able to make orders binding on all the parties to the proceedings.

Proposed Part 3A contains the following provisions:

Proposed section 48A defines certain terms, including *building claim* and *building goods or services*.

Proposed section 48B provides for the regulations to exclude disputes from the application of the proposed Division that deals with preliminary methods of dealing with a dispute.

Proposed section 48C provides for any person to notify the Fair Trading Tribunal of any dispute that the person has in relation to building goods or services.

Proposed section 48D provides for the Tribunal to attempt to resolve the building dispute, including by appointing an independent expert to evaluate the situation.

Proposed section 48E provides for other parties to participate in the assessment of a building dispute.

Proposed section 48F provides for the costs of assessment by an independent expert to be borne by the Tribunal, unless the regulations otherwise provide.

Explanatory note

Proposed section 48G requires any agreement reached on a building dispute to be put in writing, signed and filed with the Tribunal.

Proposed section 48H provides for the continued enforceability of certain agreements or arrangements.

Proposed section 48I provides for the making of an application for the determination of a building claim.

Proposed section 48J provides that an application cannot be dealt with unless the preliminary building dispute procedure has been followed.

Proposed section 48K provides that the Fair Trading Tribunal has jurisdiction to hear and make orders in respect of building claims involving no more than \$500,000 or any other amount that is prescribed by the regulations. (A building claim involving more than \$500,000 would be dealt with by the District Court. If a claim involved more than \$750,000 it would be dealt with by the Supreme Court.)

Proposed section 48L gives the Fair Trading Tribunal primary responsibility for the hearing of building claims for amounts of up to \$500,000 (or any other prescribed amount). If a person starts proceedings in relation to a building claim in a court and those proceedings could otherwise be heard by the Tribunal, those proceedings may be transferred to the Tribunal unless the parties consent to have them remain with the court. (At present, building claims may be heard by a court or by the Fair Trading Tribunal. If a matter is commenced in a court, the Tribunal has no jurisdiction. If a matter has been commenced in the Tribunal, a court has no jurisdiction. The transfer of matters between the Tribunal and a court may occur only if the parties agree or if the Tribunal or court so directs. See sections 22 and 23 of the *Fair Trading Tribunal Act 1998*.) Under the amended provisions, the Fair Trading Tribunal will be able to make an order in relation to a building claim for the payment of money despite the fact that the applicant has sought an order for a party to do work.

Proposed section 48M provides that an action that relates to the refusal of an insurance claim that exceeds \$500,000 is to be heard by a court of competent jurisdiction.

Proposed section 48N provides that the Tribunal may have regard to any expert's report when determining a building claim.

Proposed section 48O sets out the powers of the Tribunal in determining a building claim.

Proposed section 48P provides for the adjournment of proceedings before the Tribunal where an insurable event arises.

Proposed section 48Q provides for the joining of persons as parties to proceedings before the Tribunal on a building claim.

Proposed section 48R provides that an order made under the proposed Part must include a warning regarding non-compliance.

Proposed section 48S provides for the Director-General to be informed of any orders made under the proposed Part.

Proposed section 48T provides for the Director-General to be informed of compliance with an order and makes it an offence to give false information concerning compliance with an order.

Proposed section 48U provides that if the Director-General is not informed that an order has been complied with it will be taken to have not been complied with (for the purposes of the public notification provisions).

Other amendments

Schedule 4 [2]–[4] make consequential amendments.

Schedule 4 [5]–[7] omit redundant references to abolished tribunals.

Schedule 5 Amendments relating to disciplinary proceedings

At present, Part 4 of the Act deals with dispute resolution and disciplinary proceedings. A complaint may be made to the Director-General about the holder of a contractor licence or of a supervisor or registration certificate (or a former holder of such a contractor licence or certificate) on one of the grounds listed in section 55 of the Act. The Director-General may investigate any residential building work or specialist work, any kit home or any holder of a contractor licence or of a supervisor or registration certificate even if the Director-General has not received a complaint. Disciplinary action for improper conduct is initiated by the Director-General serving a notice to show cause on the holder of the relevant authority. The allegations contained in the notice are heard before the Fair Trading Tribunal. A range of determinations may be made by the Tribunal, including imposing a monetary penalty, imposing a condition on an authority and suspension or cancellation of an authority. The decision of the Tribunal is final although there is a limited right of appeal to the Supreme Court on a point of law.

As a result of the amendments made by Schedule 5, Part 4 of the Act will apply only to disciplinary proceedings and not to dispute resolution.

Schedule 5 [8] amends Part 4 of the Act so as to provide for disciplinary action to be the responsibility of the Director-General, with inquiries being held in the manner that the Director-General thinks fit. Provision remains for members of the public to make a complaint. Under the amended provisions, the Director-General may conduct an inquiry or may invite the holder of an authority to show cause as to why the Director-General should not take any disciplinary action. A person has at least 14 days to respond by making oral or written submissions and is entitled to adduce evidence with respect to the matters in the notice. The Director-General may, after conducting an inquiry, take certain disciplinary action, including issuing a reprimand, requiring compliance with a specified requirement, suspending or cancelling an authority, imposing conditions on an authority and disqualifying the person from holding an authority or being involved in the management of the business.

Schedule 5 [9] provides for the Administrative Decisions Tribunal to review a decision or determination made by the Director-General to impose a penalty or cancel or suspend an authority as well as any decision under Part 4 prescribed by the regulations.

Schedule 5 [3], [4] and [5] are consequential on those amendments that provide for the Director-General, rather than the Fair Trading Tribunal, to take disciplinary action.

Schedule 5 [1], [2], [6] and [7] are consequential on the amendments discussed above.

Schedule 6 Amendments relating to insurance

Clarification of the obligation to be insured

Section 92 of the Act provides that a person must not do residential building work under a contract unless a contract of insurance that complies with the Act is in force in relation to the work.

Schedule 6 [1] and [8] clarify that the contract of insurance must be in the name of the person who contracts to do the work (and not, for instance, in the name of a company with which the person is involved).

Schedule 6 [5] and [10] make the same amendment in relation to contracts for the supply of a kit home.

Schedule 6 [4] and [7] require licensees to provide certain information to insurers and extend the operation of a contract of insurance to any residential building work or the supply of any kit home, at the address stated in a certificate of insurance, whether or not the contractor named in the contract is also the person named in the contract of insurance.

Insurance threshold

At present, the requirement that all residential building work done under a contract must be insured does not apply if the contract price does not exceed \$5,000 or (if the contract price is not known) the reasonable market cost of the labour and materials involved does not exceed \$5,000. At present, if the contract amount is less than \$5,000 and the owner is supplying materials or some work bringing the total project cost to over \$5,000, insurance is not required.

Schedule 6 [3] creates an obligation to insure residential building work where the reasonable market cost of the labour and materials involved exceeds \$5,000, whether or not part of the work or materials is to be provided by the other party to the contract.

Uninsured work or supply of kit home

Schedule 6 [9] enables a court to allow a contractor who has failed to take out insurance to recover money for residential building work done where it is just and equitable to do so.

Schedule 6 [11] makes a similar amendment in relation to a contract for the supply of a kit home.

Schedule 6 [2] and [6] make consequential amendments.

Owner-builder permits

Schedule 6 [12] provides for certain details about an owner-builder permit issued in relation to land to be disclosed when land is sold.

Schedule 6 [13] provides that a contract for sale of land is voidable if that requirement is not met.

Consumer information about insurance

Schedule 6 [14] requires information explaining the operation of a contract of insurance to be provided in relation to residential building work not carried out under contract.

Schedule 6 [16] requires such information to be provided by a developer.

Contracts for sale of land voidable where required insurance not taken out

Schedule 6 [15] provides for the purchaser of a dwelling from a speculative builder to be able to rescind the contract for the sale of land if the required insurance is not taken out.

Schedule 6 [17] makes a similar amendment in relation to a sale by a developer of land on which residential building work has been done, or is to be done, on the developer's behalf.

Claim forms

Schedule 6 [18] provides for the Director-General to approve insurance claim forms and provides that a claim under a contract of insurance may be made in such a form.

Approval of insurance and insurers

Section 103A of the Act provides for the Minister to approve a kind of insurance or an insurer for the purposes of Part 6 of the Act. That approval may be unconditional or subject to conditions.

Schedule 6 [19] provides for the making of an application for approval of an insurer, provides for the imposition of conditions on any such approval and makes it a condition of an approval that an insurer keep certain records.

Schedule 6 [20] provides for the suspension or revocation of the approval of an insurer or insurance.

Schedule 6 [20] also inserts a new section that requires insurers to provide information about claims and other matters to the Director-General on request, and provides for such information to be provided to other insurers.

Period of cover

Schedule 6 [21] provides for the Minister to approve a reduction in the period for which insurance cover must be provided (from the standard 7 years to a shorter period) to the extent to which the insurance cover applies to loss in relation to specified work or materials.

Insurance cover commences when certificate given

Schedule 6 [22] provides that the insurer is not entitled either to refuse to pay a claim under the contract or to cancel the contract on the ground that the contract was entered into before the period of insurance commenced if a certificate evidencing insurance has been given or the insurer has otherwise accepted cover.

Schedule 7 Miscellaneous amendments

Schedule 7 [1] constitutes the Home Building Administration Fund and provides that such part of all licence fees under the Act as is determined by the Minister are to be paid into the Fund.

Schedule 7 [2] and **[3]** abolish the Education and Research Fund.

Schedule 7 [4]–[7] update references to Acts.

Schedule 7 [8] removes the requirement that a person must have “persistently” contravened a requirement of the Act before a Supreme Court injunction may be issued.

Schedule 7 [9] provides for proceedings for offences to be instituted within 3 years after the commission of the offence.

Schedule 7 [10] provides for the making of regulations concerning the keeping of public registers.

Schedule 8 Amendments relating to penalties

Schedule 8 doubles the maximum monetary penalty for all offences under the Act, including offences involving unlicensed contracting, not using the correct form of contract, taking excessive deposits and the carrying out of work by unqualified persons.

Schedule 8 [31] doubles the maximum penalty that can be imposed under the regulations.

Schedule 9 Amendments inserting savings and transitional provisions

Schedule 9 [1] provides for the making of savings and transitional regulations.

Schedule 9 [2] puts beyond doubt that building work may continue or be sold, or that a kit home may be supplied, despite the fact that the required contract of insurance was issued by HIH Casualty and General Insurance Limited or FAI General Insurance Company Limited. The amendment also inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 10 Amendment of Fair Trading Tribunal Act 1998

Schedule 10 amends the *Fair Trading Tribunal Act 1998* in relation to all proceedings heard by the Fair Trading Tribunal, not just building claims.

Schedule 10 [1] provides for any costs payable to an assessor who assists the Fair Trading Tribunal in determining proceedings to be borne by the Tribunal, unless the regulations provide for them to be paid by the parties to the proceedings.

Schedule 10 [2] provides for the enforcement of certain orders of the Fair Trading Tribunal, by providing for the Tribunal to allow a person in whose favour an order is made to renew proceedings if the order is not complied with. As a result, if the Fair Trading Tribunal makes an order requiring a person to do certain work and that work is not done, the order can be enforced as if it were an order for the payment of money without the need for a new application and a new order to be made.

Schedule 10 [3]–[5] insert savings and transitional provisions and provide for the making of savings and transitional regulations.