

HOME BUILDING CONTRACTS AMENDMENT BILL 2002

EXPLANATORY MEMORANDUM

- Clause 1 provides that the proposed Act may be cited as the *Home Building Contracts Amendment Act 2002*.
- Clause 2 sets out the commencement date.
- Clause 3 identifies that the provisions of the proposed Act are to the *Home Building Contracts Act 1991*.
- Clause 4 **Long title amended**
amends the long title to refer to mutuals and approved funds providing cover for home indemnity.
- Clause 5 **Section 3 amended**
defines a building licence by reference to section 374 of the *Local Government (Miscellaneous Provisions) Act 1960*.
- Clause 6 **Section 9 amended**
Section 9(1)(a) refers to “a building licence under Part XV of the *Local Government (Miscellaneous Provisions) Act 1960*”. Given that section 3 of the Act, as amended by Clause 5, defines a building licence, there is no longer any need for this reference.
- Clause 7 **Section 14 amended**
Part 3A is the part of the Act that deals with Home Indemnity Insurance (HII). This means that HII will be required for cost plus contracts. Cost plus contracts are contracts that allow the builder to recover costs such as materials and labour, subject to certain conditions, other than the primary cost entered into with the contract. There has been some confusion about whether HII is required for cost plus contracts. This will clarify the situation.
- Clause 8 **Heading to Part 3A amended**
This clause amends the heading to more accurately reflect the proposed amended content of Part 3A.

Clause 9

Section 25A amended

This clause inserts definitions in the appropriate alphabetical positions.

- (1) Seven new definitions are provided to enable a more accurate interpretation and understanding of the proposed amendments to the Act and are listed below.

“approved fund” means a fund that is approved under section 25GB;

“building contract” means –

- (a) a residential building work contract; or
- (b) a cost plus contract between a builder and another person for the performance by the builder of residential building work but does not include a contract for the performance by a builder of residential building work for another builder who is in turn obliged to perform the work under another contract;

“corresponding cover” –

- (a) in relation to residential building work performed by a builder, means the cover referred to in section 25DA; and
- (b) in relation to residential building work performed by an owner-builder, means the cover referred to in section 25GA;

“developer” means a person for whom residential building work is performed under a building contract in relation to 4 or more dwellings;

“rescind”, in relation to a contract, means to avoid the contract as from its beginning;

“sale contract”, in respect of residential building work performed by a builder or owner-builder, means a contract to sell or otherwise dispose of –

- (a) a dwelling constructed by the builder or the owner-builder;
or
- (b) the land on which the building is constructed;

“settlement” means the time at which the obligations under a sale contract are completed to the extent that the purchaser under the contract is entitled to be registered as the proprietor of the dwelling or land.

- (2) amends the definition of an owner builder to provide greater accuracy.
- (3) is a punctuation change from a full stop to a semi colon, because it is no longer the last definition listed.

Clause 10

Section 25B amended

As section 3 (as amended by Clause 5 of the Bill) defines a building licence, there is no longer any need to refer to "part XV of the *Local Government (Miscellaneous Provisions) Act 1960*". Accordingly this reference is deleted.

Clause 11

Section 25C amended

(1)(a) requires a builder to have HII when performing residential building work; or

(1)(b) requires a builder to have corresponding cover by an approved fund when performing residential building work.

This amendment effectively allows for the entry of mutuals and other approved funds into the HII market because it allows builders to obtain insurance or corresponding cover. Corresponding cover is the term used to describe the cover a mutual or other approved fund provides which puts the person for whom the building work is done and their successors in title in the same position as if a policy of insurance were in place.

(2) provides that the certificate which must be given by the builder to the owner show that either insurance or corresponding cover has been taken out by the builder. Currently, the Act only makes provision for a certificate of insurance to be provided.

(3)(a) means that during the period of a suspension order, the builder does not have to obtain insurance or corresponding cover, or give the owner a certificate as evidence of the cover.

(3)(b)(i) and (ii) mean that if at the end of a period of suspension the builder is still performing the residential building work, and it is pursuant to a building licence issued before or during the suspension period, then the builder does not have to obtain insurance or corresponding cover, or give the owner a certificate evidencing such cover.

(4) means builders are not allowed to cancel their existing policies just because a suspension period has been called.

Clause 12

Section 25D amended

removes the requirement for mandatory HII cover when work is being carried out for developers, for loss of deposit up to \$13,000 and loss arising from non-completion of the residential building work by the builder.

This means a builder, who is employed by a developer, is not required to insure that developer against a loss of a deposit and loss resulting from non-completion of the building work. The Act still requires builders employed by developers to have a policy of home indemnity in force for residential building work, in relation to defective workmanship, before performing the work. These policies will insure the developer and the developer's successors in title, against the risk of being unable to take advantage of or enforce a remedy ordered under section 12A of the *Builders' Registration Act 1939* (in relation to poor workmanship) by reason of the death, disappearance or insolvency of the builder. This is expected to make the insurance less expensive and more readily available.

Clause 13

Section 25DA inserted

25DA Corresponding cover by an approved fund - builders

- (1) Corresponding cover is the term used to describe the cover a mutual or other approved fund provides, which puts the person for whom the building work is done and their successors in title in the same position as if a policy of insurance were in place.
- (2) For the purposes of subsection (1) this allows any element of discretion to be disregarded.

This effectively allows for the introduction of mutuals and approved funds into the HII market because they are able to provide corresponding cover instead of insurance.

Clause 14

Section 25F replaced

25F Restriction on sale by owner-builder

- (1)(a) and (b) require an owner-builder, in the event that they wish to sell within 7 years of the issue of the building licence, to obtain HII or corresponding cover and to provide a certificate to the purchaser. Currently, the Act only provides for the obtaining of insurance.

It also provides for a penalty of \$10,000 for failure to comply.

- (2) means the owner builder does not have to obtain insurance or corresponding cover if they enter into a sale contract during the period of a suspension order.

Clause 15

Section 25GA inserted

25GA Corresponding cover by an approved fund – owner builders

- (1) Corresponding cover is the term used to describe the cover a mutual or other approved fund provides which puts the person for whom the building work is done and their successors in title in the same position as if a policy of insurance were in place.
- (2) For the purposes of subsection (1) any discretion is to be disregarded.

As with Clause 13, but for owner builders, this effectively allows for the introduction of mutuals and approved funds into the HII market because they are able to provide corresponding cover instead of insurance.

Clause 16

Part 3A Division 3A inserted

Division 3A – Approved funds

25GB Minister's approval of a fund

- (1) This empowers the Minister to approve a fund.
- (2) This provides for the following essential conditions of a fund before it will receive approval:
 - (a) that it is a mutual or similar to a mutual fund;
 - (b) that the Minister approves the rules of the fund;
 - (c) that each person responsible for the management of the fund is approved by the Minister;
 - (d) that the Minister is satisfied that there is adequate provision for excess of losses for the fund; and
 - (e) that any insurer providing excess of loss cover is authorised under the *Insurance Act 1973 (Cwth)* and is approved by the Minister.

This provides approval conditions to ensure the Minister is satisfied that adequate safeguards are in place for potential claims exposure and consumer protection.

- (3) The Minister may also take into account –
 - (a) the independence of the persons involved in, or responsible for, the management, provision for excess of losses and auditing of the fund;
 - (b) matters that do not necessarily relate to the particular fund but which relate to the building or insurance industries generally, and
 - (c) any other relevant matter.

This provides for the Minister to be as fully informed as is possible when making an approval decision and to be able to take all relevant matters into consideration.

- (4) The Minister may impose conditions on the approval and vary those conditions at any time.

25GC Changes in arrangements for an approved fund

This requires the Minister's written consent to any changes that occur to a fund in relation to the following conditions of approval for a fund:

- (a) that it is a mutual or similar to a mutual fund;
- (b) that the Minister approves the rules of the fund; and
- (c) that each person responsible for the management of the fund is approved by the Minister.

25GD Revocation of a Ministers approval of a fund

This empowers the Minister to revoke approval of a fund if:

- (a) there has been a change to the matters outlined above in 25GC without the approval of the Minister;
- (b) the Minister is no longer satisfied that adequate insurance or other provision for excess losses of the fund are in place; or
- (c) an approved insurer is no longer providing excess of loss cover.

Clause 17

Division 5 – Provisions about non-application of sections 25C(1) and (2) and 25F(1)

This proposed amendment deals with the suspension period and the subsequent notice requirements for builders 25C(1) and owner builders 25F(1).

25I Minister may make orders specifying periods

- (1) This allows the Minister to suspend the requirement for builders to obtain HII or corresponding cover for up to a period of six months. This means that if home indemnity insurance or corresponding cover is not available in the market, then the Minister may suspend this requirement in order to facilitate ongoing stability in the residential building industry. 25C(3) and 25F(2) respectively provide that builders and owner-builders are not required to have HII during a suspension period.

- (2) This allows the Minister to make no more than four suspension orders. This is to allow for sufficient time to address the circumstances that have arisen leading to the lack of availability of home indemnity insurance or corresponding cover in the market. 25C(3) and 25F(2) respectively provide that builders and owner-builders are not required to have HII during a suspension period.

25J Notice requirement – builders

- (1) Specified period. This refers to the proposed section 25I, which concerns the suspension period that can be ordered by the Minister for the purposes of the proposed section 25C(3), that relieves the builder from the obligation of taking out HII or corresponding cover during a suspension period, or, after the end of a suspension period and under a building licence issued before or during the suspension period.
- (2) This means that during a suspension period, the builder, when entering into a contract, has to give a prescribed notice to the other party advising that there is no HII or corresponding cover.

Penalty \$10,000

- (3) This means that where a building licence is issued before or during a suspension period, and a builder enters into a contract after the suspension period, the builder must still give a prescribed notice to the other party advising that there is no HII or corresponding cover.

Penalty \$10,000

- (4) This means that just because a builder does not provide a notice to the other party to the contract, this does not invalidate the contract.
- (5) (a) and (b) If a builder enters into a contract and a suspension order commences before the building licence is issued, the builder must give the other party to the contract a prescribed notice advising that there is no HII or corresponding cover. This is because at the time of entering the contract the other party could have assumed that HII was in place. The prescribed notice will provide advice that this is now not the case.

Penalty \$10,000

- (6) If the party to whom the notice is given pursuant to subsection (5) is not a developer they may rescind the contract. At the time of entering the contract the consumer could have assumed that HII was in place. This gives the consumer a choice as to whether they wish to proceed with building their home without the protection of HII or corresponding cover. The developer is not given the option to rescind as it is considered that contracting builders to construct residences is within the scope of their normal course of business. As such, developers accept a higher degree of risk than consumers.
- (7) If the party wishes to rescind they need to do it before: one month after having been given the prescribed notice; or before settlement; or practical completion of the home; whichever is the earliest. This gives the consumer a reasonable amount of time to choose whether they wish to proceed with building or purchasing their home without the protection of HII or corresponding cover but limits that timeframe so as to provide some certainty for builders. Settlement or practical completion is included in this provision in case either falls before a month.

25K Notice requirements – owner –builders

- (1) Specified period. This refers to the proposed section 25I, which concerns the suspension period that can be ordered by the Minister for the purposes of the proposed section 25F(2), that relieves the owner builder from the obligation of taking out HII or corresponding cover during a suspension period.
- (2) This means when an owner builder enters into a sale contract during a suspension period, they must give a prescribed notice to the purchaser advising that there is no HII or corresponding cover. This is because at the time of entering the contract the other party could have assumed that HII was in place. The prescribed notice will provide advice that this is now not the case.

Penalty \$10,000

- (3) This means that just because an owner builder does not provide a notice to the other party to the contract, this does not invalidate the contract.

25L Giving a copy of a notice to a subsequent purchaser

This clause refers to the proposed section 25J, which concerns notice requirements for builders.

- (1) If a developer is given a prescribed notice stating there is no home indemnity insurance or corresponding cover, then before entering into a sale contract, the developer must give a copy of the notice to the other party, the purchaser, if settlement is likely to occur within six years of practical completion. This means that consumers purchasing from developers will be provided with advice, before entering into a sale contract, that there is no HII for the residence.

The definition of developer is a person for whom residential building work is performed under a building contract in relation to 4 or more dwellings. The definition is based on that used in New South Wales and was proposed by the key stakeholder forum. It can sometimes be the case that ordinary consumers build duplexes or triplexes and this definition still entitles them to coverage. This definition also requires no research to be undertaken by Local Councils before issuing a building licence.

Penalty \$10,000

- (2) This means that just because a developer does not provide a notice to the other party to the contract, this does not invalidate the contract.

Clause 18

- (1) (a) Section 32(2) concerns the regulations. This amends the regulations to include corresponding cover where it is appropriate and relates to clauses 13, 14 and 15.
- (d) Currently regulations can be made that exempt any person or builder or any specified class of person or builder from the requirements of Part 3A. This amends the provision so that the exemption may be unconditional or subject to certain conditions. This makes it consistent with section 32(2)(a).
- (3) This means that regulations may provide that contravention is an offence and a penalty of up to \$5,000 may be imposed. The Act currently does not specifically allow for offences to be created for the failure to comply with conditions attached to a regulation. This provision will be useful in ensuring compliance with regulations that require certain actions, such as the provision of disclosure notices.

Clause 19

Section 33 says that application of any provision of the existing Act can not be retrospective. This amendment ensures the notices required in the proposed Act during a suspension period are excluded from being captured by the retrospective provision in section 33. This protects the intention and integrity of those notices.

Clause 20

This is to change each occurrence of “shall” to “must” to be consistent with the proposed Act and in accordance with Parliamentary Counsel policy.

Clause 21

The proposed Act will affect section 374AAA of the *Local Government (Miscellaneous Provisions) Act 1960*, which relates to the requirement for home indemnity insurance to be held before Local Government issue a building licence. This consequential amendment ensures that corresponding cover is included as an option in that section, unless it is not required.