

HOME WARRANTY INSURANCE REFORMS BECOME LAW

Christopher Wong
Senior Associate
Minter Ellison

As foreshadowed in Christopher Wong's article in the March edition of the *ACLN* ('More Reforms on Home Warranty Insurance: The Saga Continues', page 42), the further reforms to the home warranty insurance scheme in NSW highlighted in the article have been passed by the Parliament on 9 May 2002 via the *Home Building Amendment (Insurance) Act 2002* ('the Act').

KEY DIFFERENCES FROM PROPOSED REFORMS

While the Act has adopted most of the proposed reforms, the NSW government has decided not to proceed with that relating to the removal of compulsory insurance for high rise buildings (contrast this with the Victorian position). Although this preserves the current protection afforded to consumers, this protection is whittled down by the reform that allows home owners to make a claim only 'in the last resort' ie. where the builder is insolvent, dead or has otherwise disappeared.

A new reform which was not previously canvassed is the introduction of a 20% cap on the value of the residential building contract for any claim relating to non-completion only (not defective work) of the works.

This reform attempts to bring NSW in line with the position in Victoria.

STRUCTURAL DEFECTS

As discussed in my previous article, the current 7 year period of cover will be reduced to 2 years for non-structural defects and 6 years for structural defects.

'Structural defect' is defined in a new section 57AC to the *Home Building Act 1989* ('HBA') as any defect in a structural element of a building attributable defective design, defective or faulty workmanship or defective materials that results in, or is likely to result in:

- any part of the building being closed or prohibited from being used;
- the prevention of the continued use of the building;
- the destruction of or physical damage to the building;
- the threat of imminent collapse that may reasonably be considered to cause destruction of or physical damage to the building.

'Structural element' is defined as any internal or external load-bearing component of the building that is essential to the stability of the building eg. foundations, floors, walls, roofs, columns, beams and any component (including waterproofing) that forms part of the external walls or roof of the building.

The definition of 'structural defects' is wider than that contained in the previous home building legislation, the *Building Services Corporation Act 1989*, and does not exclude defective design undertaken by persons other than the builder.

COMMENCEMENT AND CONSEQUENCES

A media release dated 14 May 2002 from the Department of Fair Trading indicates that the reforms are expected to commence by latest 1 July 2002. Assuming that this is the actual date, any insurance policies issued on or after this date will be subject to the reforms.

An immediate consequence of this may be that home owners will be pushing builders to obtain insurance policies before 1 July 2002 in order to enjoy the wider protection under the current scheme. Conversely, builders may try to resist obtaining insurance before this date to take advantage of the more limited liability under the new scheme. Also, insurance companies may control the policy date so that policies are issued later rather than sooner.

Given that timing is crucial element, at a deeper level, this raises the following interesting questions:

(a) if residential building work commenced before 1 July 2002 but the insurance policy was issued only after that date, it is conceivable that the wider protection under the existing scheme should apply to work carried out up to 30 June 2002, and the more restricted protection under the new scheme should apply to work carried out from 1 July 2002;

(b) if so, problems may arise in attributing the cause of a particular defect to work pre-1 July 2002 and post. If the cause of a defect is found to be due to work carried out both pre, on and post 1 July 2002, difficulties may arise in the attribution of quantum;

(c) quite apart from a builder's ability to take out retrospective insurance cover under section 94(3) of the HBA, in practice, insurers may simply refuse to provide cover for the work carried out pre-1 July 2002.

If so, and if a home owner suffers damage arising from defective work carried out pre-1 July 2002, the home owner may have to sue the builder to recover such losses on the basis of the builder's failure to take out insurance before performing any work (breach of section 92 HBA);

(d) further, if insurers deliberately delay in issuing policies pre-1 July 2002, either in concert with a builder or on their own, a home owner who would otherwise have enjoyed the wider protection of the scheme pre-1 July 2002 may have a potential claim against the insurer and/or the builder (as the case may be) for remedies in tort or under the *Trade Practices Act*.

CONCLUSION

The consequences of the reforms highlighted above acutely illustrate the state of flux which the home warranty insurance scheme is in. Like the persistent whine of a broken record, each new legislative amendment creates new problems. It remains to be seen what action will be taken to address these problems as and when they arise, and whether yet another round of amending legislation will find its way to the embattled Parliament table.

The consequences of the reforms highlighted above acutely illustrate the state of flux which the home warranty insurance scheme is in. Like the persistent whine of a broken record, each new legislative amendment creates new problems.