



THE LAW SOCIETY  
OF NEW SOUTH WALES

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21 September 2009

Mr Graeme Head  
Director General  
Department of Services Technology and Administration  
McKell Building  
2-24 Rawson Place  
SYDNEY NSW 2000

Dear Mr Head,

**Section 92B of the *Home Building Act 1989 (HB Act)***

The Law Society, through its Property Law Committee (Committee) has made a number of previous submissions in relation to the *HB Act*, including considering the recommendations of the Moss Report.

The Society has also welcomed the opportunity granted by the Office of Fair Trading (OFT) to identify matters of concern in relation to the redrafting of the *HB Act*.

While the Committee is aware that the *Act* as a whole is under review as part of a total re-write of the *Act*, its members consider that the implications of the recent Court of Appeal decision in *Suncorp Metway Insurance Ltd v Owners Corporation SP 64487* [2009] NSWCA 223 merit consideration now.

***Suncorp Metway Insurance Ltd v Owners Corporation SP 64487* [2009] NSWCA 223**

This case dealt with the consequences for home warranty insurance if a company undertook building work but the directors of the company held the licence and effected home warranty insurance. At first instance the finding was that the building contract was in fact entered into between the company and its directors, and so the owners corporation was covered. This finding was upheld on appeal. Sackville AJA noted at the conclusion of his judgment:

"83 I draw attention to the possibility that an amendment may be required to the *HB Act* in order to overcome the possible gap in the protection afforded to purchasers who rely on certificates of insurance. This case has been fought on the basis that the Policy did not protect Kent Street's successors in title if the building contract of September 1999 had been entered into between Kent Street and the Company, rather than between Kent Street and Clive and Andrew Head.

84 As this case demonstrates, a purchaser of a defective building from a developer might have considerable difficulty in ascertaining with certainty the identity of the parties to the original building contract, particularly if the contract is not in writing and the developer and the builder are related parties. In such a case, the purchaser may be at risk of having an otherwise sound claim under the insurance policy rejected solely because the building contract was entered into by a party related to the developer but not mentioned in the policy. In the circumstances, the likelihood that the related party contracting to perform the work had contravened the legislation would be cold comfort to the unprotected purchaser”.

The insurance policy commenced in 1999, prior to the insertion of section 92B into the *HB Act*.

## **Section 92 B**

Section 92B was proclaimed to commence in May 2003. It appears designed to address circumstances similar to those discussed in the section of the judgment of Sackville AJA extracted above. It provides:

### **92B Operation of contract of insurance**

- (1) If the holder of a contractor licence enters into a contract to do residential building work and a contract of insurance that complies with this Act is in force in relation to that work (whether or not the name of the contractor identified under section 92A (a) is the same as the name of the contractor in the contract), the contract of insurance is taken to extend to any residential building work under the contract at the address stated in the certificate of insurance.*
- (2) An insurer who pays a claim under a contract of insurance the operation of which has been extended under this section is entitled to recover any money paid from the contractor named in the building contract or the person identified as the contractor under section 92A (a).*

### **Suspension of the operation of s92B**

Section 92B has an interesting history - it was proclaimed to commence in May 2003, but its operation to have been effectively suspended by a "temporary exemption" granted by Regulation for contracts of insurance entered into between 4 July 2003 and (presently) 31 December 2009 (see clause 73 Home Building Regulation 2004 as amended in 2005, 2006, 2007 and 2008 to extend the exemption date).

The Society has expressed its concern about this exemption on a number of occasions.

The Committee would be interested to ascertain from the Department an opinion as to:

- a. Whether the Department or OFT considers the mischief referred to by Sackville AJA is addressed in section 92B.
- b. If so, should the section's operation be no longer suspended?
- c. If not, what other law reform might be indicated?

## Conclusion

Once again, the Law Society welcomes the opportunity to discuss with your Department and the OFT any matters of concern in relation to the redrafting of the *HB Act*. If you wish to discuss this submission, please contact Ms Liza Booth, Executive Member, Property Law Committee on telephone 9926 0202 or by email to [liza.booth@lawsociety.com.au](mailto:liza.booth@lawsociety.com.au).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Joseph Catanzariti', written in a cursive style.

**Joseph Catanzariti**  
President