



Our Ref JC:LB1290129
Email: ljb@lawsocnsw.asn.au
Direct Line: 9926 0202

16 March 2009

Ms Virginia Judge, MP
Minister for Fair Trading
Level 36 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Home Building Amendment (Claims) Regulation 2008

I am writing to you at the request of the Law Society's Property Law Committee (Committee).

The Committee has responsibility to consider and deal with any matters relating to property law and to advise the Council of the Law Society on all issues relevant to that area of practice. The members of the Committee are senior property law practitioners and experts. Many of them advise clients, both builders and homeowners, of their rights and obligations under the home warranty insurance (HWI) scheme.

Regulation

The Committee notes the gazettal (and commencement) on 19 December 2008 of the *Home Building Amendment (Claims) Regulation 2008* (Regulation) which inserted a new clause 63A in the principal Regulation as follows:

- 63A *Period within which insurance claims must be made*
- (1) *A claim under a contract of insurance must be made no later than 6 months after the beneficiary first becomes aware, or ought reasonably to have become aware, of the fact or circumstance under which the claim arises or no later than 6 months after the end of the period of cover, whichever is the earlier.*
 - (2) *Despite subclause (1), if the claim is a claim for loss arising from non-completion of work, the claim must be made:*
 - (a) *in the case of a claim arising from a failure to commence the work no later than 12 months after the contract date or the date provided in the contract for commencement of work, whichever is the later, or*



- (b) *in any other case – no later than 12 months after the date work ceased.*
- (3) *A claim cannot be made later than is permitted by this clause.*
- (4) *This clause applies only to a claim made after the commencement of this clause and extends to a claim made after that commencement in respect of a loss arising before that commencement.*
- (5) *In this clause*
period of cover *means the period for which the contract of insurance provides insurance cover as required by section 103B of the Act.*

The new clause is plainly an attempt to overcome the decision of McDougall J in *SP 57504 v Building Insurers' Guarantee Corporation* [2008] NSWSC 1022. Its drafting and gazettal is inconsistent with the circulation of a Better Regulation Statement (BRS) which:

- foreshadowed that the preferred option for (any necessary) law reform would be by “a staged series of **legislative** amendments” (BRS section 6 – emphasis added) and
- indicated that any amendment to the *Home Building Regulation 2004* would occur as part of the ongoing process of reviewing legislation under the *Subordinate Legislation Act 1989* rather than as a response to the decision of McDougall J (BRS section 7).

The gazettal of the Regulation also raises doubts about the Government’s commitment to consultation beyond what the BRS itself concedes was limited consultation prior to the release of the BRS. It could also be seen as a means of pre-empting any discussion of the implications of a proposed change to the operation of the HWI scheme.

Changes

It is the Committee’s view the recently commenced clause 63A goes far beyond what is required to achieve clarity in the legislation in light of the decision in *SP 57504*.

Objective of Government Action

It is stated in the BRS that the Government’s objective:

“is to clarify the legislation establishing the privately underwritten Home Warranty Insurance Scheme and to confirm that – since the introduction of the private scheme in 1997 – a claim for insurance has needed to be made during the period of insurance cover required under section 103B of the *Home Building Act 1989*”¹. It further states that the proposal for legislation to clarify the previously understood time periods for making a claim, by retrospective amendment, “will not disadvantage the vast majority of home owners – but will ensure that the current understanding about the scope of the Home Warranty Insurance scheme is maintained”.².

Effect of the amendments

The recently commenced clause 63A of the *Regulation* does not achieve the Government’s stated purpose of maintaining the current understanding about the scope of the HWI scheme. It effectively severs the previously understood relationship between

¹ BRS Page 3

² BRS Page 4

the period of insurance and the time available to make an insurance claim. The “previously understood” period for making a claim for insurance was during the period of insurance cover required under section 103B of the *Home Building Act 1989*. The Committee considers that it should be a fundamental feature of the HWI scheme that a claim can be made within the period of statutory cover.

Clause 63A now limits claims to a period of six months after the beneficiary first becomes aware, or ought reasonably to have become aware, of the fact or circumstance under which the claim arises. This is irrespective of the amount of insurance cover period remaining.

It is difficult to see how this proposal “will not disadvantage the vast majority of home owners – but will ensure that the current understanding about the scope of the Home Warranty Insurance Scheme is maintained” (BRS, page 4).

The Committee has had the opportunity to read the submission forwarded to you by the Institute of Strata Title Management. It shares many of the concerns expressed in that submission and endorses the comments on the impact of the changes for homeowners particularly given the “insurance of last resort” status of insurance under the HWI scheme.

Preferred Option for Legislative Amendment

While the Committee notes that some commentators are of the view that the decision in *SP57504* does not go as far as suggested in the BRS, given the uncertainty highlighted by that case and the commentary on it, the Committee supports legislative amendment to clarify that any claim for breach of statutory warranty must be lodged no later than seven years and six months after completion of the work.

Retrospectivity

The Committee strongly opposes any proposal for retrospectivity and considers that:

- a retrospective removal of the rights of an insured is entirely inconsistent with the objective of consumer protection which has been the key feature of the Home Building Act and its predecessor statutes for over 35 years;
- the financial consequences outlined in the BRS if there were no retrospective amendment are overstated ;
- a prospective “closing off” of the claims notification period provides adequate protection for those insurers still in the market;
- retrospectivity could impact adversely on any claimants with proceedings pending relying on *SP57504*, and for that matter on that owners corporation itself.

Going forward

The Committee is sufficiently concerned about the circumstances of the making of this Regulation that it believes it would be appropriate for the *Regulation* to be disallowed pursuant to section 41 of the *Interpretation Act 1987* pending a far-ranging and considered consultation process. Such a process should occur over a time-frame of

more than 11 weeks (the time between the handing down of the decision of McDougall J and the gazettal of the amending *Regulation*).

If you wish to discuss the matters raised in this submission, please contact Ms Liza Booth, Executive Member of the Property Law Committee, on (02) 9926 0202 or by email to ljb@lawsocnsw.asn.au.

Yours sincerely,

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

Joseph Catanzariti
President

cc: Ms Lyn Baker
Commissioner of Fair Trading