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11 May 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 (Insurance) Bill 2009

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

The Committee has the responsibility of considering and dealing with any matters relating to property law and advising 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.

Comments

There are three specific issues on which the Committee wishes to comment:

- The Committee supports proposed Section 103BA on the basis that it is designed to, and appears to, undo the mischief created by the introduction of Clause 63A.
- The Committee strongly opposes proposed Clause S8A which introduces a power to reduce liability based on a failure by a beneficiary to enforce a statutory warranty.
- The Committee supports the proposed omission of Clause 73A of the Regulation which contains an incorrect cross-reference.

The Committee considers that the issues it has raised underline the need for an urgent rewrite of the *Home Building Act 1989 (Act)* and *Home Building Regulation 2004 (Regulation)*, after a comprehensive and meaningful consultation process with all stakeholders.



Amendments in response to *The Owners Strata Plan 57504 v Building Insurers' Guarantee Corporation* [2008] NSWSC 1022 (*SP 57504*).

The Committee notes the uncertainty as to the operation of the Act and Regulation regarding the period within which a home warranty insurance claim can be made highlighted by the decision of Macdougall J on 3 October 2008 in *SP 57504*. The Committee believes the issue is important, and ought to have been clarified in due course, *but only* after measured consideration of the reasoning in, and implications of, the decision.

The initial regulatory response was contained in the *Home Building Amendment (Claims) Regulation 2008* which was gazetted, and commenced on, 19 December 2008. The amending Regulation inserted clause 63A into 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 Committee opposed the introduction of clause 63A on the basis that:

- the Regulation misinterpreted the effect of the decision of Macdougall J in *SP 57504*;
- the amendment unduly shifted the balance in the operation of home warranty insurance provisions in favour of the insurer and away from the consumer beneficiary of the policy;
- the amendment was drafted and implemented with excessive haste, given the existence of many other concerns regarding the operation of the Act which the Committee considered were of a higher priority than an attempt to rectify a

(perceived) problem with the provisions governing the time within which an insurance claim can be made; and

- any attempt to address the issue raised in SP 57504 ought to form part of a re-write of the Act as a whole, rather than a discrete amendment.

Some commentators on Regulation 63A have described it as "ill-considered". The Committee agrees with that assessment.

The Committee supports proposed section 1038A on the basis that this amendment:

- is designed to, and appears to, undo the mischief created by the introduction of clause 63A;
- more accurately reflects the reasoning of Macdougall J in SP 57504; and
- strikes an appropriate balance between the interests of insurers and consumer beneficiaries of HWI policies regarding the time within which a claim can be made.

The Committee notes the provision has retrospective effect. Given that one purpose of the amendment is to undo the mischief created by the introduction of clause 63A, and that the amendment effectively restores the position outlined in the reasoning in SP 57504, the Committee had no difficulty with this provision operating retrospectively.

The Committee observed that the uncertainty and complexity occasioned by the introduction and repeal of clause 63A (including the necessity for relatively complex savings and transitional provisions - Schedule 4 proposed clauses 83 and 86) could well have been avoided had the initial response to SP 57504 included a comprehensive and meaningful consultation process with all stakeholders.

Reduction of liability for failure to enforce statutory warranty

The Committee strongly opposes the proposed insertion of clause 58A into the Regulation. The Committee considered that a power to reduce liability based on a failure by a beneficiary to enforce a statutory warranty:

- is inappropriate in the context of a consumer protection statute;
- is particularly inappropriate in the context of insurance of last resort; and
- is open to abuse by home warranty insurers.

The failure to take action to enforce legal rights may be occasioned by any number of factors - lack of funds, personal circumstances, ignorance of rights, misrepresentations by builders, and, based on anecdotal evidence of which the Committee is aware, perhaps even misinformation by insurers and regulators. It is noted there is an attempt to address this issue by limiting a reduction in liability or amounts payable to an extent which "fairly" represents the extent of insurer prejudice. The Committee believes the use of so vague a criterion invites uncertainty, disputation and an erosion of the rights of consumers of building services.

The Committee's concerns are heightened by the related Savings and Transitional provision (proposed Sch 4 clause 85), which extends the operation of clause 58A to contracts of insurance entered into before the commencement of the clause. The Committee considers that any proposal involving retrospective legislation should be viewed with considerable caution. Where the proposal involves removal of rights under an existing contract regulated by legislation, there would need to be extraordinary circumstances before the Committee would support the proposal. Where, as is the case here, the proposal would lead to a reduction in the long-standing rights of consumers in their relationship with home warranty insurers, the Committee strongly opposes the proposed amendment.

Proposed omission of clause 73A of the Regulation

Clause 73A of the Regulation presently provides:

73A Temporary exemption from section 93 (3) requirements

(1) A contract of insurance is exempt from a requirement arising under section 93 (3) of the Act that the contract include provision that enables the person on whose behalf work is being done and the person's successors in title to make a claim if the contractor's licence is suspended under section 42A of the Act.

(2) This exemption applies only in respect of a contract of insurance entered into before 1 July 2009.

Section 93 of the Act presently provides:

93 Supply of kit home must be insured

(1) A person must not supply a kit home under a contract unless:

(a) a contract of insurance that complies with this Act is in force in relation to the supply of that kit home in the name of the person who contracted to supply the kit home, and

(b) a certificate of insurance evidencing the contract of insurance, in a form prescribed by the regulations, has been provided to the other party (or one of the other parties) to the contract.

Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units in any other case.

(2) Except as provided by section 94A (1A), a person must not demand or receive a payment under a contract for the supply of a kit home (whether as a deposit or other payment and whether or not the kit home has been supplied) from any other party to the contract unless:

(a) a contract of insurance that complies with this Act is in force in relation to the supply of that kit home in the name of the person who contracted to supply the kit home, and

(b) a certificate of insurance evidencing the contract of insurance, in a form prescribed by the regulations, has been provided to the other party (or one of the other parties) to the contract.

Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units in any other case.

(3) This section does not apply to the supply of a kit home 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 building components involved does not exceed \$5,000.

(4) The regulations may prescribe another amount for the purposes of subsection (3) and an amount so prescribed is to apply in the place of the amount referred to in that subsection.

Clause 73A appears to have an incorrect cross-reference. It seemed to the Committee that the Regulation was intended to relate to section 99. Section 99 relevantly provides:

99 Requirements for insurance for residential building work

(1) A contract of insurance in relation to residential building work required by section 92 must insure:

(a) a person on whose behalf the work is being done against the risk of loss resulting from non-completion of the work because of the insolvency, death or disappearance of the contractor, and

(b) a person on whose behalf the work is being done and the person's successors in title against the risk of being unable, because of the insolvency, death or disappearance of the contractor:

(i) to recover compensation from the contractor for a breach of a statutory warranty in respect of the work, or

(ii) to have the contractor rectify any such breach.

(3) For the purposes of subsection (1), a reference to the insolvency, death or disappearance of a contractor is taken to include a reference to the suspension of the contractor's licence under section 42A. Accordingly, a contract of insurance in relation to residential building work required by section 92 must include provision that enables the person on whose behalf the work is being done and the person's successors in title (the beneficiary) to make a claim if the contractor's licence is suspended under section 42A.

The Committee does not oppose the omission of clause 73A.

Conclusion

The Committee considers the introduction and proposed repeal of clause 63A, and the analysis of clause 73A set out above, highlights the urgent need for a rewrite of the Act and Regulation to at a minimum address existing errors, inconsistencies and ambiguities. The Committee understands that such a rewrite is under consideration by the Office of Fair Trading, and would welcome the opportunity to engage in ongoing consultation.

The Committee believes any rewrite should be of far greater scope, extending to consideration of the fundamental principles of the operation of the Act.

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 toljb@lawsocnsw.asn.au .

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Joseph Catanzariti', with a horizontal line underneath the name.

~ **Joseph Catanzariti**
President

cc: Ms Lyn Baker
Commissioner of Fair Trading