



Australian Institute of Building Submission to the *Review of the New South Wales Home Building Act 1989*

Introduction

The Australian Institute of Building (AIB) welcomes the opportunity to respond to the *Review of the New South Wales Home Building Act 1989*. The AIB is keen to see more efficient and thorough building legislation, and welcomes this review.

Vision

The vision of the AIB in regards to this review is to ensure that:

- The building sector in NSW is improved through higher educational standards;
- The building industry is a viable and growing sector for the benefit of the state, consumers and builders; and
- Builders and consumers are informed, educated and provided with adequate legislative protection and support, to reduce building disputes.

Key Issue 1 – Home Building Contracts

1. What aspects of the regulation of home building contracts could be improved and why?

Although it is noted that this is a broad issue, the contract must cover all aspects of home renovation, extension, maintenance as well as service alterations and new building works.

Therefore, to capture all aspects it would be an advantage to incorporate an annexure document to suit the specific nature of the proposed works, if deemed necessary.

2. Should the threshold for large contracts be raised from \$5,000 to \$20,000?

AIB supports this initiative.

3. Will further regulation of progress payments provide greater clarity and certainty in home building contracts?

Regardless of contract size, clear terms of payment need to be defined. These contract sum break-downs should include periodic progress assessments and milestones if applicable. Examples and guides could be inserted in the various forms of contract available.

On the issue of deposits, this is only relevant to small home building contracts. For small home building, deposits are necessary to assist in 'cash-flowing' the project. However, the security of these deposits is an issue which needs consideration by the NSW Department of Fair Trading. To obtain a builders' licence, there are far greater financial guarantees required in other states, such as Queensland and Western Australia. It is anticipated that these requirements will be aligned in the national licensing review.

Unpinned deposits should not be permitted, and builders should have the capacity to cash-flow early works. Where required for specific larger procurement items, these can be handled by similar terms to commercial contracts, provision of security, insurance, and transfer of title of ownership.

4. What items, if any, should be included in a termination clause?

Termination clauses need to be fair for both parties, and exercisable under similar terms to Australian Standards contracts. AIB advocates that the following items should be included in termination clauses:

- Failure to perform in a timely manner.
- Failure to pay on time.
- Frustration due to approval process affecting the flow of work and therefore extending the project delivery.
- No access.
- No Authority approval, providing it is outside off the Licence Holders control.
- Bad workmanship.
- Unsafe work practice.

The termination clauses on most recognised industry contracts including the Master Builders Association, Australian Institute of Architects, and NSW Fair Trading are all worthy of being viewed to get further detail on the above recommended items.

5. If cost-plus contracts are to be regulated, in what situations should they be allowed and what controls should apply?

Cost plus contracts must be guided by some form or original budget estimates and clear mechanisms to exceed, as a means of monitoring. A combination of Queensland and Victorian terms would improve the NSW controls and should be and be on an "open book basis" to prove the costs associated.

Cost-plus contracts should ideally be used for works that cannot be fully understood without opening up the works, and then it may only be portions of the works subjected to cost-plus.

A better and alternate system to cost-plus is to use the provisional sum with rates, if possible.

Key issue 2 – Statutory Warranties

6. Should the definition of “completion” include a specific definition for subsequent purchasers?

Completion should always be clearly defined, and certified under the terms of the building contract either by the principal or if disputed, by an independent third party.

This date should then be clearly identified in subsequent sales contracts. Further, with the exception of home owners, and first owners, in the case of new strata developments, the warranties should only be applicable to ‘structural defects’.

In the case of Owner Builders, where by definition ‘completion’ will always be loosely defined, the fact that building works were completed by Owner Builders should always be identified on subsequent sales contracts.

7. Is it necessary to clarify that the principal contractor is ultimately responsible for the statutory warranties to the home owner?

Statutory should only apply to one subsequent owner. There should be clear guidelines around obtaining warranties from both the main contractor and the specialist subcontractors where applicable, and both of these should be executed in the form of standard written undertakings.

In the case of domestic construction, often there are substantial principal supplied components or nominated sub-contractors, and these need to be clearly identified and the Regulator needs to take into account that these warranties are not the responsibility of the principal contractor.

8. Do you think maintenance schedules should be required for strata schemes and why?

AIB strongly supports that maintenance schedules should be required for strata schemes. Maintenance schedules should also be required for all owners. Furthermore, there should be regulated obligations under the building contract to provide detailed maintenance guidelines at completion, and these should be coupled with generic guidelines under the Strata Schemes Act.

9. Should home owners’ obligations relating to maintenance be further clarified in the legislation? Why?

AIB believes that there is often lack of understanding of maintenance obligations by homeowners. There is also a critical miscomprehension regarding the requirement of inspections and maintenance. The equivalent is buying a new car, and then expecting never to service it.

In the case of a dispute, owners should be required to provide a certificate of adequate maintenance issued by an approved inspector. This would verify that none of the claimed items are maintenance items, and an approved maintenance regime has been followed by the owners.

It would also assist if Fair Trading were to develop a recognised generic maintenance schedule which could be adapted and included with required handover/warranty documents at the time of completion.

10. Should “structural defect” and other terms be further defined in the Act? If so, which ones and what would be the definition?

AIB believes that the definition of structural defect as defined in clause 71, and included in appendix B, is adequate.

11. In what ways could the statutory warranties be improved (if at all)?

Statutory warranties need to take into account the growing practice of importation of cheaper, unregulated and sometimes inferior products such as:

- Stone – natural and reconstituted
- Tiles
- Taps, and bathroom pc’s
- Engineered flooring and floor coverings
- Steel
- Glass & windows
- Balustrading
- Other metalwork including stainless steel
- Joinery

Often in domestic construction these are client supplied items, either provided to the principal contractor or pre-ordered supply novated. AIB believes that the Act does not adequately provide for allocation of responsibility in these circumstances.

Further the Act needs to adequately deal with the responsibilities of the design consultants engaged by the principal, and the instructions of the principal in relation to product selections and adherence to design consultant detailing.

The test is that they must be fit for purpose and warrant performance and provide maintenance schedules.

12. Are the statutory warranty defences currently contained in the legislation adequate?

AIB has no comment on this question at this point in time.

Key issue 3 – Dispute Resolution

13. Should home-owners be required to allow licensees back on site to rectify defects? In what circumstances would this be inappropriate?

Where reasonable access is denied, the homeowner should then forfeit their rights. Reasonable access should be defined to within a certain period, three months for example, and during reasonable periods of the day, and normal working hours. Similar provisions to those that exist in Queensland are recommended. The only exceptions should be where access is inappropriate due to civil proceedings, or where the attendance by the builder would result in threatening circumstances for either party.

14. Are Complaint Inspection Advices useful in the dispute resolution process?

AIB believes that Complaint Inspection Advices are useful in the dispute resolution process, and should be maintained. They should, however, be linked to appropriate time-frames for rectifications.

15. Should a penalty notice offence be created for non-compliance with a Rectification Order?

AIB supports this proposal.

16. Which option, if any, do you support for disputes over \$500,000 and why? Do you have any other suggestions?

AIB agrees with the statement in the discussion document that “the culture of litigation is deeply entrenched in NSW, in particular within the strata sector”. The majority of disputes escalate too quickly to costly court cases, and usually due to a breakdown in communication.

All disputes should be referred to an industry professional, as accredited or recognised by Department of Fair Trading.

17. What are your thoughts about alternative dispute resolution?

AIB supports the adoption of a model similar to that in Queensland, specifically the introduction of a building disputes adjudicator. These adjudicators should have formal building training (and not just legal training) to AQF Level 8 or who are registered on the National Building Professionals Register, as per the Construction Training Package’s requirements for Trainers and Assessors of those acquiring the qualifications necessary for a Building Contractor’s Licence. These adjudicators should have jurisdiction for claims capped at levels significantly higher than \$500,000. Furthermore, adjudicator claims should not be capped.

18. Can the current dispute resolution processes be improved? How?

AIB believes that the current dispute can be improved - see comments above. Also, the current dispute resolution processes need to be expanded to an industry forum to provide a new model.

Key Issue 4 – Owner Builders

19. Do you think that owner-builders should be required to take out home warranty insurance at the beginning of the project? Should sub-contractors be required to take out home warranty insurance when working for owner-builders?

AIB believes that where an owner builder fails to take out home warranty (HOW) insurance at the commencement of a project, then they should forfeit their rights not just to HOW insurance, but also to the Owner Builder Permit which is subject to the works.

If owner builders are to be permitted then they should adopt all the same obligations as principal

contractors.

Better regulation of specialist subcontractors with specialist licensing, which may be relied upon by principal contractors and home-owners alike, should be encouraged. Where properly contracted, this would permit Fair Trading to gain the assistance of specialist contractors in a dispute.

20. Should the Queensland provisions, or a variation of those provisions, be adopted in NSW? Why?

To further curb the proliferation of owner-builders, the Queensland model of notification on the property title is supported, that the property has been subject to owner-builder work.

21. Should the threshold for obtaining an owner-builder permit be increased? If so, to what value and why?

The threshold for obtaining an owner-builder permit should not be increased.

Home Owners' permits should only be issued for the construction of a single dwelling, limited to a maximum value of construction not exceeding \$500,000, and should be linked to HOW insurance not transferring to subsequent owners for 'other than structural' defects.

22. Do you have any objection to recognising a leasehold arrangement as a prescribed interest in the land?

This is acceptable subject to previously discussed restrictions on eligibility for HOW those being:

- Limited project value;
- Must be obtained prior to commencement; and
- Not transferrable for 'other than structural' defects.

23. Can you see any problems with raising the threshold for the owner-builder permit course in line with the current home warranty insurance threshold? If so, what problems arise and how can they be addressed?

AIB is of the view that the threshold should remain as is, and under control.

24. Do you think a penalty should be introduced for owner-builders who commence work prior to obtaining a permit? If so, what penalty do you think is appropriate?

Penalties are appropriate, but AIB does not have an opinion as to the quantum penalties. However, those penalised must be excluded from being eligible to acquiring any further Owner Builder Permits.

25. Will obtaining an owner-builder permit in all the owners' names close the current loophole? Do you have any other suggestions?

Owner builder permits must be issued in **all** the owners' names, and therefore restrict the loophole

where the 'owner' with no asset to support the insurance scheme becomes the nominated owner builder, with often the purpose of on-selling and then not being financially able to support the Home Warrantee obligations.

The current system allows different owners to acquire Owner Builders' Permits for the same residence.

26. Do you think that owner-builders should not be able to build dual occupancies? Why?

Owner-builder permits should be limited to single occupancy dwellings, because at least one of the dual occupancies is by definition not the place of residence of the owner-builder.

Owner-builders are purely trying to engage in a commercial activity without the responsibilities imposed by the Home Building Act on licence holders.

Key Issue 5 – Disciplinary Provisions

27. Do you agree with the possible proposals to help prevent phoenix company activity in the building industry? Is there anything else that can be done, bearing in mind NSW Fair Trading's jurisdiction?

The culture of phoenix company activity amongst builders has followed in line with that of greater concern, the phoenix activity of developers.

Primarily for taxation purposes, the majority of developments are undertaken by \$2 companies specifically established for the one off development and quickly terminated once the last of the residences is on-sold. However, this practice has the added result of the developer not being available to respond to claims under the Home Building Act.

AIB advocates fairer regulation of developers' responsibilities, assisting in swinging the balance of fairness to both the developers, subsequent home owners and builders.

This aspect of the review is fundamentally linked to the licensing regime in NSW, and the adaption of more stringent regulations such as those in both Queensland and Western Australia, which would assist in kerbing phoenix activities.

28. Should NSW Fair Trading building inspectors be able to issue Penalty Infringement Notices for non-compliance with a Rectification Order?

AIB believes that NSW Fair Trading building inspectors should be able to issue Penalty Infringement Notices for non-compliance with a Rectification Order.

However, these need to be balanced, and owners' actions, sometimes improper, need to be taken into account. A typical example in domestic construction is an owner fabricating defects and/or delays to deliberately withhold payment owed. Further, those notices should only be imposed by individuals with AQF Level 8 qualifications in building (as opposed to engineering and architecture), or those who are registered on the National Building Professionals Register (as per the Construction Training

Package's requirements for Trainers and Assessors of those acquiring a Building Contractor's Licence).

Do you think that this will improve compliance with the legislation and Rectification Orders?

AIB believes that this will improve compliance with the legislation and Rectification Orders.

29. Do you think that qualified supervisors should be limited in the number of projects that they can oversee? If so, how many projects would be appropriate?

Qualified supervisors should be limited in the number of projects that they can oversee. However, this may make a commercial builder's license unmanageable, unless a regime of commercial builders is implemented to nominate additional supervisors based on the number of projects being undertaken at any particular time. This will assist in raising builders' professionalism and supervision standards by increasing the number of qualified supervisor ratios.

Senior builders managers/directors should be required to have qualifications similar to those qualifying with such standards as chartered builder as defined by the Australian Institute of Building or who are registered on the National Building Professionals Register (as per the Construction Training Package's requirements for Trainers and Assessors of those acquiring the qualifications necessary for a Building Contractor's Licence).

30. Do you think that the current disciplinary provisions provide an effective deterrent from errant conduct?

AIB is of the view that the current disciplinary provisions do provide an effective deterrent from errant conduct. However, there is a need to better monitor owner builder licenses and phoenix builder activity under the licensing regime.

Key issue 6 – home warranty insurance

31. How does the NSW home warranty insurance scheme compare with other jurisdictions? What model do you think would work best and why?

The scheme has improved since the resumption of administration by the state government. It has returned some stability to the sector following the period of privatisation. However, the three-level threshold model is in need of improvement.

32. Should new rectification work of a significant value be covered by a further certificate of insurance? Why?

AIB takes the position that new rectification work of a significant value does not need to be covered by a mandated further certificate of insurance.

33. Is there a need for a searchable public register of home warranty insurance policies?

AIB has no objection to a searchable public register of home warranty insurance policies.

34. Does the current 20% cap for incomplete work provide enough consumer protection? Should the cap be increased to 40%? Why?

AIB supports raising the cap to 40%, because 20% has proved inadequate to provide sufficient consumer protection.

35. Do you think the scheme should be renamed? Do you have any suggestions for such a name?

AIB believes the scheme should be renamed, the current title raises expectations which by definition which cannot be fulfilled. This in turn results in the public holding the industry, its participants and the Regulator in poor regard.

The title should reflect the fact that HOW is the insurance of last resort, and was never designed to replace those insurances required by contract or of good practice.

36. Should the current exemption from home warranty insurance requirements for the construction of multi-storey buildings be retained? Why?

The current exemption from home warranty insurance requirements for the construction of multi-storey buildings should be retained. It should also be reconsidered based on overall project value, i.e. similar value, number of dwellings and complexity of the project that can be built horizontally.

37. Does the high rise exemption require further clarification? If so, what would you clarify?

Further clarification is needed and the high rise exemption should be based on the project value or number of dwellings, rather than number of storeys.

It is inconsistent to require a four-dwelling project built over four storeys (i.e. one each level) to not require HOW, whilst a four-dwelling project built over two storeys (i.e. two on each level) does require HOW.

38. Is the current definition of “storey” in the Act sufficiently clear? Should any changes be made?

Each floor should be regarded as a storey, including basement levels.

39. Do you think that section 92B should be repealed? Why?

Section 92B needs to be clearer in its intent (i.e. proposed outcomes), and needs further clarification.

40. What are your thoughts on the current eligibility criteria? Can the process be made easier, keeping in mind the level of risk taken on by the insurer and the possible ramifications on the cost of premiums?

Appears to be inequitable considering the ease of owner builders obtaining HOW certificates compared with the stringent criteria imposed on licensed builders.

Considering the significant eligibility criteria the Principal of last resort is unworkable.

41. Does the definition of “disappeared” for the purposes of lodging a claim need to be clarified? Do you agree with the proposal put forward in this paper?

AIB supports the proposal.

42. What are your thoughts around home owners being able to purchase top-up cover? Is this necessary?

AIB believes that HOW insurance should be prorated against the construction valuation of each dwelling.

Further Information

For further information, please contact the AIB Chief Executive Officer or Policy & Advocacy Manager on (02) 6247 7433 or ceo@aib.or.au or policy@aib.org.au

Appendix 1

About the AIB

Founded in 1951, the AIB is the peak body for building and construction professionals, acknowledged for its ability to bring individuals together who share a common interest in improving the standing of the building profession and their career within Australia and overseas.

The AIB is incorporated by Royal Charter and is the pre-eminent professional body for building professionals in Australia and the Asia-Pacific region.

Recognised as the accrediting body for building and construction degrees at educational institutions, the AIB has a long and proud history of supporting and servicing the building profession. For more than sixty years, the Institute has worked with the building and construction industry, government, universities and allied stakeholders to promote the building profession, support the development of university courses in building and construction whilst promoting the use of innovative building techniques and a best-practice regulatory environment.

AIB is proud of its role in promoting the exchange of information amongst individuals and accomplishes this through publications including the *Construct* magazine and the Australasian Journal of Construction Economics & Building (AJCEB).

The AIB also has an extensive continuing professional development program in Australia and overseas and facilitates the annual AIB Professional Excellence in Building Awards Program.

For further information please go to www.aib.org.au