



Review of the Home Building Act 1989

Position Paper
September 2013



Next steps

The NSW Government anticipates that a Bill implementing many of the reforms contained in this Paper will be introduced into Parliament later in 2013. The remainder of the reforms are likely to be implemented through a remake of the *Home Building Regulation 2004*. It is expected that the whole package of reforms will then commence together in 2014.

More information about the progress of the review will be made available from time to time on NSW Fair Trading's website at www.fairtrading.nsw.gov.au.

NSW Civil and Administrative Tribunal

In late 2013, the *Consumer, Trader and Tenancy Tribunal Act 2001* and the Consumer Trader and Tenancy Regulation 2009 will be repealed consequent on the abolition of that Tribunal and the establishment of the Civil and Administrative Tribunal. The majority of the functions of the Consumer, Trader and Tenancy Tribunal will be transferred to the new Civil and Administrative Tribunal.

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September 2013

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Minister's Foreword



The *Home Building Act 1989* protects homeowners from the risks associated with building or renovating a home, which, for most people, is the biggest investment they will ever make. At the same time, the residential building industry makes an important contribution to the NSW economy.

It is therefore crucially important that the principal piece of legislation regulating home building in NSW provides an appropriate level of homeowner protection without impeding industry growth and investment through needless red tape and regulation.

The NSW Liberals & Nationals Government is committed to improving the home building legislation to achieve this outcome.

In 2011, I announced a comprehensive review of the home building legislation to ensure that the law in this area takes a balanced approach that provides appropriate protection for homeowners while also cutting paperwork for the industry

I am pleased to present this Position Paper which sets out the NSW Government's key proposals for reforms to the *Home Building Act 1989*. The reforms have been informed by an extensive consultation process involving broad stakeholder input.

This balanced package of reforms is designed to benefit homeowners and industry alike. Although the proposals set out in this Position Paper are many and varied, they share a common purpose – to ensure that the home building legislation provides a suitable level of homeowner protection without imposing unnecessary regulation.

I thank you for your involvement in this important reform process.

Anthony Roberts MP
Minister for Fair Trading

Chapter 1: Introduction

Executive Summary

This Position Paper presents the NSW Government's key proposed reforms to the *Home Building Act 1989* (the Act).

The Act is the principal piece of legislation regulating the home building industry in NSW. It provides homeowners with a level of protection from the risks associated with building or renovating a home, which represents a substantial investment for most homeowners.

The home building industry makes a significant contribution to the NSW economy and accounts for a considerable proportion of the state's workforce. The housing industry is improving after a significant period of decline. Housing completions were 35 per cent higher in the 2012-2013 financial year compared to 2011-2012. However, housing demand continues to be on the rise.

It is therefore crucial that the Act provides an appropriate level of homeowner protection without imposing unnecessary red tape and regulation that may impede industry growth and investment.

In 2011, following the introduction of urgent amendments to the Act to help stimulate the industry, the NSW Liberals and Nationals Government committed to a broad and comprehensive review of the home building legislation.

The package of reform proposals set out in this Position Paper reflects the findings of that review. The proposals have been informed by an extensive consultation process, including broad public input on the 2012 Issues Paper, *Reform of the Home Building Act*, and subsequent targeted consultation on the more complex aspects of the Act.

The proposed reforms cover various aspects of the home building legislation – dispute resolution, statutory warranties, home building contracts, owner-builders, home warranty insurance, licensing and the scope of the legislation.

The reforms share an overarching objective – to ensure that the home building legislation provides an appropriate level of homeowner protection without imposing unnecessary red tape and regulation that may impede home building activity and investment in NSW.

More specifically, the proposed reforms are directed at –

- ensuring the level of regulation of home building contracts is commensurate with the associated risks;
- providing greater clarity about the rights and obligations that flow from the statutory warranty provisions and change the focus of what constitutes a defect requiring a greater warranty period;
- encouraging the timely and efficient resolution of home building disputes;
- ensuring that owner-builder permits are not used to circumvent licensing requirements and manage the health and safety risks associated with owner-builder work;
- ensuring the home warranty insurance scheme operates equitably and focuses on its core business;
- helping to keep phoenix companies and other poor performing builders out of the industry; and
- ensuring the Act does not go beyond what is reasonably required to provide homeowners with an adequate level of protection against the associated risks.

This Position Paper outlines how the NSW Government intends to address the broad range of issues identified during the comprehensive review of the Act and provides an opportunity for the public to understand the reforms before they are introduced into Parliament. It sets out the complete package of proposed reforms.

Background to the Review

1.1 Background

Building or renovating a home generally represents one of the most significant investments a person will make and, for the majority of people, it is a process that will occur only once or twice in a lifetime. Consequently, homeowners often find that they have little knowledge and experience about the process and how to reduce the inherent risks.

It is therefore important that the home building industry is appropriately regulated to provide protections for homeowners while at the same time allowing for competition in the marketplace and minimising red tape for industry.

The Home Building Act is the primary piece of legislation regulating the home building industry in NSW. It does this through a licensing regime with rules of conduct, minimum standards and dispute resolution mechanisms. It also establishes a statutory warranties scheme and the home warranty insurance scheme, which protects homeowners where a builder dies, disappears, becomes insolvent or fails to comply with a compensation order made by a court or the Consumer, Trader and Tenancy Tribunal (CTTT).

1.2 State of the sector and the need for reform

The building and construction industry makes an important contribution to the NSW economy and accounts for a significant proportion of the State's total workforce. The housing industry is improving after a significant period of decline. Housing completions were 35 per cent higher in the 2012-2013 financial year compared to 2011-2012. However, housing demand continues to be on the rise.

Reform of the Act is necessary to ensure the industry is able to continue to contribute to the NSW economy and meet rising demands for housing.

As an interim measure, the NSW Government introduced amendments to the Act in 2011 to address some urgent issues and to cut red tape and stimulate building activity. At the same time, the NSW Government committed to undertake a broad review of the Act to properly address the full range of issues and concerns raised by industry, homeowners and other stakeholders.

1.3 Summary of the review process

The development of the package of proposed reforms was informed by extensive public consultation and additional targeted consultation with a range of stakeholders.

In July 2012, NSW Fair Trading publicly released the *Reform of the Home Building Act 1989* Issues Paper to facilitate comment on the six key areas of regulation considered in need of reform; that is, home building contracts, statutory warranties, dispute resolution, owner-builders, disciplinary provisions and home warranty insurance.

In response, 133 written submissions were received as well as 502 responses to the online questionnaire from a wide range of stakeholders including: individual builders and other

tradespeople; building societies; individual homeowners; peak building and development organisations; trade unions and homeowner advocates.

In addition to the public submissions, key stakeholders participated in roundtable discussions and ad hoc working groups to discuss the more complex aspects of the proposed reforms. An inter-agency reference group, comprising representatives from the Department of Premier and Cabinet, the Building Professionals Board, the Inquiry into Insolvency in the Construction Industry, the Better Regulation Office, NSW Self Insurance Corporation, the Department of Planning and Infrastructure, and the CTTT was also convened to consider the proposed reforms in the context of other NSW Government priorities and initiatives. This consultation process provided an effective basis for identifying key issues with the regulation of home building work and formulating options for reform.

The review of the Home Building Act has been undertaken at a time where there has been a focus on insolvency in the building and construction industry, particularly its impact on small business. In August 2012, the Government established the *Independent Inquiry into Construction Industry Insolvency*, headed by Bruce Collins SC, to consider the cause and impact of insolvency and to provide options to better safeguard the interests of small business. The Government's response to the recommendations can be viewed at: <http://www.finance.nsw.gov.au/updates/independent-inquiry-construction-industry-insolvency-response>

This review is working closely with the Collins review in the development of these reform proposals. This includes consultation with key stakeholders where the respective reforms might have an impact on the same sector of the industry.

1.4 Summary of key proposals

A summary of all of the proposed reforms is provided in the following table. The remainder of the Position Paper provides a more detailed analysis of the most significant proposed reforms.

Some of the proposals will likely have a greater immediate benefit to homeowners than to industry, while others will likely have a greater immediate benefit to industry, while some have an equal benefit to both. However, even those reforms that will have the most appreciable benefit for one stakeholder group may also have an indirect benefit to the other group, which will assist the sector as a whole. For example, reforms that reduce compliance costs for builders are likely to lead to lower home building costs for consumers.

Overall, it is anticipated that this package of proposed reforms will deliver a net benefit to homeowners and industry stakeholders alike.

Summary of the proposed reforms

Home Building Contracts
Increase the cap on deposits for work over \$20,000 from 5 to 10 per cent.
Require contracts over \$20,000 in value, but not regulated by the <i>Building and Construction Industry Security of Payment Act 1999</i> , to contain progress payment schedules and require that at any point in time, payments to the builder cannot exceed the value of the work carried out by more than 20 per cent of the contract sum (including variations).
Require contracts valued at over \$20,000 to contain a termination clause.
Increase the 'general works' contract threshold from \$5,000 to \$20,000 and require contracts valued at less than \$20,000 to comply with the 'small works' contract requirement.
Statutory Warranties
Clarify the test of what home building defects require a greater warranty period (i.e. 'major defects'), broaden the current focus from purely structural to other major building components and require that the consequence of the defect be severe.
Clarify the responsibilities for statutory warranties of principal contractors and subcontractors.
Clarify homeowners' obligation to mitigate loss.
Allow a builder to limit liability for loss caused by a breach of the statutory warranties to the extent that the builder was acting on instructions from a professional engaged solely by the homeowner.
Align the terminology used in the statutory warranties with the Australian Consumer Law.
Dispute Resolution
Introduce an expert determination model which will enable the technical issues about home building defects in dispute to be quickly, cost-effectively and conclusively established at the beginning of any litigation.
Require homeowners to give builders reasonable access to a property for rectification work.
Require homeowners to notify of defects within six months of becoming aware of the defect.
Introduce an offence for a builder who breaches a rectification order and allow for penalty notices to be given for such breaches.
Allow a rectification order issued by a NSW Fair Trading Inspector to set out staged requirements.
Clarify that a NSW Fair Trading Inspector may make an order about payment of funds in a rectification order if the payments are required under the contract.
Provide that the primary focus of dispute resolution in home building matters should be an order for rectification.
Owner-builders
Prohibit owner-builder work on dual occupancies where the land is capable of being sub-divided and on-sold, except under exceptional circumstances.
Require all owner-builder applicants to prove that they have undergone the existing basic work health and safety training as a pre-requisite to applying for a permit.
Increase the threshold for when owner-builders are required to undertake an owner-builder course from \$12,000 to \$20,000 to match the threshold for when home warranty insurance is required.
Expand the five year limitation period on an owner-builder obtaining a permit for another property to include joint owners.

Home Warranty Insurance
Establish a public register of home warranty insurance certificates.
Allow non-completion claims to be made as 'delayed' claims.
Prohibit owner-builders from obtaining home warranty insurance and increase disclosure requirements at the time of sale for owner-builder properties during the warranty period.
Exempt cabinetry work from the home warranty insurance requirements when undertaken as a genuine stand-alone project.
Rename the home warranty insurance scheme to better reflect its purpose and how it operates.
Clarify that rectification work done under an original contract by the original builder does not require a separate insurance policy.
Continue the high rise exemption from the home warranty insurance requirements.
Align definitions of 'storey' and 'rise in storeys' with the National Construction Code.
Clarify that for the purposes of home warranty insurance, 'disappeared', means 'cannot be found in Australia'.
Allow liquidators, receivers and administrators to apply for an exemption from the home warranty insurance requirements on behalf of eligible applicants.
Establish disclosure requirements where buildings that are exempt from protections under the Act are sold for residential use.
Permit a home warranty insurance claim to be made if a partnership licence has been cancelled because of bankruptcy.
Allow new home warranty insurance policies to limit liability to work required to be covered by home warranty insurance and work considered to be residential building work under the Act.
Limit non-completion claims to the allowable deposit where no residential building work has commenced.
Repeal section 92B and establish an offence for contracting as an entity that is not the entity insured under a home warranty insurance policy.
Clarify that giving a builder written notice of a defect or commencing litigation is 'diligent pursuit of the enforcement of a statutory warranty' for the purpose of eligibility to make a 'delayed claim'.
Licensing Provisions
Provide for a consistent set of matters to be considered for licensing decisions throughout the life of the licence (including past behaviour and involvement in insolvent entities).
Introduce a positive notification requirement on authority holders for certain insolvency matters.
Provide for imprisonment as a sentencing option for second or subsequent convictions for unlicensed building work and not having home warranty insurance in place.
Streamline licensing requirements and consolidate into the Act.
Scope of the Act
Exclude concrete tennis courts, ornamental ponds, water features and other structural ornamentation, and internal paintwork from the requirements of the Act if undertaken as a stand-alone project.
Provide that residential building work does not include the off-site fabrication of a manufactured home but does include on-site work.
Replace the specific exemptions from the home warranty insurance requirements in relation to works done for Government with a qualified, blanket exemption.

Machinery Amendments

Clarify that the exception to the 'external administration' ground which would otherwise require the Director-General to refuse to issue an authority applies only where the body corporate has been voluntarily wound up by its members, not by its creditors.

Provide for consistency between the exceptions to the grounds which would otherwise require the Director-General to refuse to issue, renew or restore an authority.

Amend supervision requirements for apprentices and trainees to align with relevant legislation.

Include licensing categories for water, plumbing and fire protection systems in the body of the Regulation.

Amend the definition of 'structural landscaping' to maintain consistency with the NSW Housing Code.

Clarify that a 'building claim order' is an order made by the court or the Tribunal to pay an amount of money in respect of a building claim.

Chapter 2: Home Building Contracts

The Act currently sets out requirements for the content and form of certain residential building contracts, including terms which must be incorporated and information which must be provided. These requirements are directed at providing a level playing field for homeowners and builders, helping to remove causes of disputes and provide clarity for both parties in the event of a dispute.

Responses to the 2012 Issues Paper and targeted consultation highlighted a number of issues where the level of regulation of home building contracts either falls short of, or exceeds, the associated risks.

The key objective of the proposed reforms set out in this part is to ensure that the level of regulation of home building contracts is commensurate with the associated risks.

2.1 Increase the cap on deposits, cap progress payments and require a schedule of progress payments

When homeowners make payments in advance of the actual progress of building work, there are inherent risks. For example, a builder may become insolvent before the work is completed. If the homeowner has paid in excess of what is covered by home warranty insurance, then they may not be able to recover that money. On the other hand, for builders, deposits and progress payments are a vital source of cash flow during the life of the contract.

The Act currently imposes a cap on the value of deposits for home building work –

- if the contract price is \$20,000 or less, a homeowner cannot be asked to pay more than a 10 per cent deposit;
- if the contract is more than \$20,000, a homeowner cannot be asked to pay more than a five per cent deposit.

In addition, although there are caps on deposits, there are no restrictions on the value of progress payments. There have been instances where some builders get around the cap on advance deposits by ‘front loading’ contracts with progress payment requirements. This is problematic because home warranty insurance claims for incomplete work are limited to 20 per cent of the contract price. Homeowners who make progress payments which exceed the value of the work completed by more than 20% of the contract price may be unable to recover their money if the builder dies, disappears or becomes insolvent before the work is completed.

Presently, there is no requirement to include a progress payment schedule in a home building contract although most industry pro-forma contracts and the NSW Fair Trading home building contracts contain them.

Policy position:

Increase the cap on deposits for work over \$20,000 from five per cent to 10 per cent, in effect creating a blanket cap of 10 per cent for all deposits regardless of the work value.

Require contracts over \$20,000 to include a schedule of progress payments which must be agreed to by both the homeowner and builder. The amount and timing of the payments would be a matter for the parties to negotiate. The requirements would not apply to contracts regulated by the *Building and Construction Industry Security of Payment Act 1999*.

Require that, at any point in time, progress payments to a builder cannot exceed the value of the work carried out by more than 20% of the contract price including variations (until final payment, at which point the builder can claim any balance remaining under the contract,

subject to any other arrangements between the parties such as retention funds). This would not include unfixed materials (e.g. bricks that have been delivered to the site but not laid) and would align with the 20 per cent claim limit for incomplete work under the home warranty insurance.

Collectively, these reforms would help shield homeowners from the risks associated with advance payments while at the same time enabling builders to maintain an appropriate level of cash flow during the life of the contract.

2.2 Require contracts over \$20,000 to include a termination clause

Currently there is no requirement for home building contracts to contain a termination clause. A termination clause is good business practice as it provides guidance on the circumstances in which a contract can be terminated and the processes to be followed to terminate the contract. The proposal is not to prescribe a statutory requirement for what must be in a termination clause, or the possible grounds for termination; rather it would be a requirement that a clause be included in the contract which includes the grounds for termination and the processes (including notices) that must be followed.

Policy position:

Require contracts over \$20,000 in value to contain a termination clause setting out the circumstances in which a contract can be terminated and the processes to be followed to terminate the contract (including notice requirements and periods).

2.3 Increase the 'general works' contract threshold

Under the current Act, home building work valued between \$1,000 and \$5,000 requires a written 'small works' contract which contains basic information, while work valued at more than \$5,000 has more extensive contract requirements.

It can be argued that, for works valued at less than \$20,000, the costs of complying with the more extensive contract requirements are disproportionate to the risks to homeowners. The 2012 Issues Paper raised this as a possible area of reform and while homeowners and homeowner representatives were supportive of requiring as much documentation as possible, the level of documentation necessary for a \$5001 project was far greater than the commensurate level of consumer risk. In addition, as \$20,000 is the threshold over which home warranty insurance is required, it is appropriate that the more enhanced contract requirements apply to this work.

Policy position:

Increase the threshold for when the general contract requirements apply from over \$5,000 to over \$20,000.

Chapter 3: Statutory Warranties

The Act provides that a number of terms, known as statutory warranties, are automatically included in contracts for residential building work. Statutory warranties create legally enforceable standards for the quality and performance of residential building work.

During consultation, a number of aspects of the statutory warranty scheme were identified as being in need of clarification.

The key policy objectives of the proposed reforms set out in this part are to provide greater clarity about the rights and obligations that flow from the statutory warranty provisions and to change the focus of what constitutes a defect requiring a greater warranty period.

3.1 Improve the definition of 'structural defect'

Under the Act, a breach of the statutory warranties for contracts entered into after 1 February 2012 can be enforced for up to two years after the completion of the work and for up to six years if there is a 'structural defect'. Consequently, for defective building claims brought after the two year period, the question of whether or not the defect is a 'structural defect' is critical. Non-structural defects are defined by default as anything else that is not covered by the structural defect definition. The term 'defect' is not currently defined under the Act.

The definition of 'structural defect' contained in the Regulation is a source of disputes due to a lack of clarity about its application. Responses to the 2012 Issues Paper highlighted concerns across diverse stakeholder groups about this issue.

The current definition contains a number of 'tests' which are designed to only include certain problems with the *structural* elements of the building. The application of these tests to defects of the same 'type', but of varying gravity, has resulted in inconsistent decisions in the CTTT and courts. Of particular concern is the lack of clarity over issues such as water penetration and fire safety non-compliance.

Policy position:

Replace the term 'structural defect' with 'major defect' and insert a two-step test to determine whether a problem with building work was a major defect-

1. The first step would focus on whether the defect was in a major element of the building. 'Major element' would include a structural element, but also other major elements of a building such as fire safety systems and water proofing.
2. The second step would focus on how severely the defect impacted the building's safety, use and performance.
3. In addition, the term 'defect' would be defined to mean a building failure due to a breach of a statutory warranty.

The two year warranty period will apply to those defects not covered by the 'major defect' definition. A clearer and more robust definition would help remove a source of disputes. It would also allow industry to properly assess their level of liability, provide homeowners with guidance as to when to enforce a warranty and help to ensure more consistent court and CTTT decisions.

3.2 Clarify responsibilities of contractors and subcontractors for statutory warranties

The 2012 Issues Paper noted uncertainty in the building industry about the liability of sub-contractors for statutory warranties. The dispute resolution mechanisms in the Act are predicated on homeowners not having to pursue sub-contractors for breaches of the statutory warranties. However, the Act also clearly states that all contracts to do residential building work contain these implied warranties. This includes sub-contracts. Accordingly, while the principal contractor is responsible to the homeowner for any breaches of the statutory warranties, sub-contractors must also perform warrantable work.

Policy position:

Clarify that while sub-contractors are responsible for complying with the statutory warranties, it is the principal contractor who is primarily responsible to the homeowner for all breaches of the statutory warranties.

3.3 Clarify homeowners' obligations to mitigate loss

At common law, where a plaintiff suffers loss due to a breach of contract, a failure on their part to take reasonable steps to mitigate the loss can reduce the amount they may be entitled to recover. This ensures that the overall costs of remedying a breach are minimised.

Although this principle already applies to home building contracts at common law, it has been suggested that it should be clarified in the Act to ensure homeowners are aware of their common law responsibilities.

Policy position:

Clarify that homeowners have an obligation to take reasonable steps to mitigate loss arising from a breach of the statutory warranties.

3.4 Clarify the liability of a licensee when acting under the advice of owner's professionals

Currently, if a builder breaches the statutory warranties and that breach results in a loss for the homeowner, the builder is liable for 100 per cent of that loss, even if some or all of the loss is the result of instructions of an architect, engineer or other professional engaged by the homeowner.

The Act provides a defence to a breach of a statutory warranty where a defect arises from instructions given by the homeowner which were contrary to the builder's written advice. There are concerns however, that it would be unreasonable to require a builder to "second-guess" the instructions given to them by a professional, if the builder does not have the same level of expertise or qualifications.

While a builder remains liable for any breach of the statutory warranties, they should be able to limit any part of a loss resulting from that breach which is due to following instructions of the owner's professional advisers. The professional, however, would have to be wholly engaged by the owner and not be a professional referred or suggested by, or associated with, the licensee.

Policy position:

Allow a licensee to limit liability for a loss arising from a breach of the statutory warranty to the extent that the loss arises from a reasonable reliance on instructions provided by a professional engaged by the homeowner.

Chapter 4: Dispute Resolution

It is in the interests of both homeowners and builders that home building disputes are resolved in a timely and efficient manner and ideally before the matter is escalated to the CTTT or the courts.

Responses to the 2012 Issues Paper highlighted that this was a major area of concern for all stakeholder groups and more could be done to encourage resolution of home building disputes, particularly for more costly or complex matters.

Accordingly, the key objective of the proposed reforms set out in this part is to reduce the overall time and cost of resolving disputes by encouraging the timely and efficient resolution of home building disputes without making changes to areas that are working well, or adding another layer of bureaucracy.

4.1 Establish an expert determination process

Currently, when disputes about defective building work proceed to litigation, a significant amount of time is spent by the CTTT or the courts considering whether a problem with building work is in fact a “defect”. Disputes about defects almost invariably involve consideration of technical matters and for this reason it is common for parties to engage multiple expert witnesses to give evidence in support of their arguments. This significantly increases the time and costs of resolving a dispute.

There are a number of options currently available to the CTTT and the courts to deal with complex technical issues, such as conclaving, ‘hot-tubbing’ and the appointment of shared single experts. However, often these processes are not successfully implemented early enough in the proceedings. This delay can be caused by continuous applications for adjournments, the pleading of incomplete or ambit claims and issues with cost recovery. As such, the technical issues remain unresolved until later in the proceedings, by which time significant costs have already been incurred.

Policy position:

Introduce, as a pilot, an expert determination model to enable the technical issues about home building defects in dispute to be quickly, cost-effectively and conclusively established at the beginning of the dispute resolution process. NSW Fair Trading will develop a suitable model in consultation with the Department of Attorney General and Justice.

4.2 Give builders access to a property to rectify defective works

Currently, the Act does not require a homeowner to give a builder reasonable access to a building site to rectify defective works under the statutory warranties scheme.

The most cost-efficient and time-efficient way for home building disputes to be resolved is where the original builder is allowed to return to the building site and satisfactorily rectify the work. However, in some instances, a homeowner may unreasonably refuse to allow the original builder access to the site, even if the builder is willing to rectify the work. There will of course be situations where it would not be possible or appropriate to require the homeowner to give the builder access to the site (eg where it is proven that the builder has been threatening or intimidating towards the home owner).

Policy position:

Require a homeowner to give a builder reasonable access to a property to perform works required under an order for rectification given by a Fair Trading Inspector, the CTTT or a court. A list of the circumstances in which it may be reasonable for a consumer to refuse access may be expressly provided. If a homeowner refused to give reasonable access, the CTTT or a court could nullify any work orders and prevent the homeowner from applying for a money order or taking further steps in the dispute.

4.3 Establish a defect notification period

One reason cited by industry for prolonged building disputes is that builders are not always notified of defective work in a timely manner. Currently, the Act does not require a homeowner to notify of a defect within a reasonable time. This can lead to protracted disputes where the builder argues that a defect would have been easier, quicker and more cost effective to fix had notification been made earlier.

It is important to note that a homeowner can and will continue to be able to pursue a breach of the statutory warranties within the warranty period.

Policy position:

Require a homeowner to notify a builder of a defect within six months of when the homeowner became aware, or ought to have reasonably become aware, of the defect. A failure to notify would not bar a homeowner from pursuing a breach of the warranties. However, if the dispute was escalated, the CTTT or a court could take into consideration whether the loss arose or was made worse by a failure to notify within the six month period.

4.4 Offence for non-compliance with a rectification order

Currently, although contravention of a rectification order issued by a Fair Trading inspector constitutes 'misconduct' and is grounds for disciplinary sanction, it is not an offence. In contrast, Queensland and Western Australia impose significant penalties for non-compliance with similar orders.

Policy position:

Establish an offence for a licensee who breaches a rectification order issued by a Fair Trading Inspector and allow a penalty notice to be given for such offences. This may help resolve disputes more quickly by providing a greater incentive for builders to comply with rectification orders.

Chapter 5: Owner-builders

In broad terms, the owner-builder permit scheme is intended to allow homeowners to build, extend, or do work on their own home, with the exception of specialist work like plumbing and electrical work, without needing a licence under the Act.

Although legitimate owner-builders are not in the business of building, there are concerns that the owner-builder permit scheme is being exploited by commercially oriented operators as a way of sidestepping the licensing requirements. There are also concerns that health and safety risks associated with owner-builder work are not appropriately managed. These concerns were highlighted in submissions made to the 2012 Issues Paper.

The key objectives of the proposed reforms set out in this part are to ensure that owner-builder permits are not used to circumvent the licensing requirements and ensure that health and safety risks associated with owner-builder work are properly managed.

5.1 Prohibit owner-builder work on sub-dividable dual occupancies

Currently, the Act enables homeowners to obtain an owner-builder permit to undertake work on their own home which may be a single dwelling or a dual occupancy.

An owner-builder may have legitimate non-commercial reasons to do work on a dual occupancy, for example, to build a 'granny flat' to accommodate a family member. However, there are concerns that some commercially-oriented unlicensed speculative operators may use an owner-builder permit to undertake dual occupancy work with a view to subdividing the land and selling it at a profit. Working under an owner-builder permit gives these operators a competitive advantage over licensed builders as they do not have to obtain the requisite qualifications or comply with the licensing regime.

Policy position:

Prohibit owner-builder work on dual occupancies where the land is capable of being subdivided and on-sold. An exemption could be obtained from the Director-General exceptional circumstances e.g. where the prohibition would cause unreasonable family hardship.

5.2 Require WorkCover training for owner-builders and raise the threshold for undertaking an owner-builder course

A key principle underpinning the owner-builder provisions is that homeowners should have the right to work on their own home as long as it does not pose a safety risk to themselves or others.

Currently, where the value of building work proposed under an owner-builder permit exceeds \$12,000, the applicant must first complete an owner-builder course. The \$12,000 threshold is now out of line with the home warranty insurance threshold which was increased to \$20,000 in 2011. It is recognised that the time and cost required to complete the course is disproportionate to the risks associated with works under \$20,000.

In addition, the *Work Health and Safety Regulation 2011* currently requires anyone carrying out construction work to first obtain a construction induction card (a 'White Card') which, in essence, is proof of having completed basic work health and safety training.

While it is a requirement of the Work Health and Safety legislation, the Home Building Act does not require a White Card as a prerequisite to obtaining an owner-builder permit. In

practice, training providers require a White Card as a prerequisite to enrolment in an owner-builder course. Consequently, applicants for an owner-builder permit for works over \$12,000 (the threshold amount for the owner-builder course) will already hold a White Card.

However, there is nothing preventing an applicant for an owner-builder permit for works less than the owner-builder course threshold from obtaining an owner-builder permit and unwittingly carrying out construction work without holding a White Card. This could cause significant on-site safety risks and place the permit holder in breach of the *Work Health and Safety Regulation 2011*. In addition, if a White Card was required for all owner-builder work, then concerns about raising the value of building work threshold for when the owner-builder course was required would be addressed.

Policy position:

Require proof of a valid White Card as a prerequisite to obtaining an owner-builder permit and raise the threshold for when an owner-builder course must be undertaken from \$12,000 to \$20,000 to align it with the home warranty insurance threshold.

Chapter 6: Home Warranty Insurance

Mandatory home warranty insurance is a key feature of the regulation of home building in NSW and in all other Australian jurisdictions except Tasmania. In essence, the Home Warranty Insurance Scheme is intended to provide a safety net for homeowners. It provides funds as a last resort where a builder is unable to complete the contracted work or rectify defective work because of their death, disappearance or insolvency.

Although responses to the 2012 Issues Paper affirmed public support for maintaining mandatory home warranty insurance, many stakeholders were of the view that more could be done to increase the efficiency of the scheme.

The key objective of the proposed reforms set out in this part is to help ensure the home warranty insurance scheme operates equitably and focuses on its core business.

6.1 Establish a public register of insurance certificates

The home warranty insurance scheme does not provide a homeowner with cover if their certificate of insurance is invalid, even if they are the victim of fraudulent behaviour. There is currently no easy way to check the validity of a certificate. Disclosure is an important consumer protection mechanism and having a public register of home warranty insurance certificates issued since 1 July 2010 would provide homeowners and potential purchasers with that necessary disclosure.

Policy position:

Establish a public register of home warranty insurance certificates that can be accessed by beneficiaries or potential purchasers of property. The register would include details of the builder, the works covered and any successful claims.

6.2 Allow non-completion claims to be made as 'delayed claims'

The Act provides for circumstances where a home warranty insurance claim can be made after the period of insurance has expired. This is known as a delayed claim. Currently, the Act does not allow a delayed claim to be made for loss that arises due to the non-completion of work, such as a lost deposit or progress payment.

Non-completion claims were excluded from the delayed claim provision when it was inserted in 2011 because it was considered that if work had not been completed, then it was generally because the builder had died, disappeared or become insolvent and these events would occur soon after the work ceased.

However, this has not always turned out to be the case – in practice, many beneficiaries find they are still pursuing a builder (who is alive, solvent and has not disappeared) for incomplete work well beyond 12 months after the work ceased.

Policy position:

Allow a delayed claim to be made for a loss arising from the non-completion of work in circumstances where the homeowner had been diligently pursuing the builder and had properly notified the claim within the insured period.

6.3 Prohibit owner-builders from obtaining home warranty insurance

The 2012 Issues Paper discussed the current situation where builders who carry out work for owner-builders are required to provide the owner-builder with home warranty insurance if the value of that work exceeds \$20,000. In addition, if an owner-builder wishes to sell the property within six years of the work's completion ('completion' for an owner-builder is deemed to be 18 months after the owner-builder permit was issued), they need to obtain a further home warranty insurance certificate for all the works combined.

These requirements give rise to duplicated insurance coverage. In addition, requiring owner-builders to obtain home warranty insurance when selling their property blurs the distinction between properties where work has been performed by an owner-builder and properties where work has been performed by a licensed builder and could act as an inducement for owner-builders to be more commercially orientated.

Although the Act currently seeks to draw a distinction between licensed builders and owner-builders by requiring owner-builders who sell their property to disclose that owner-builder work has been undertaken, it does not also apply to the subsequent purchaser of the owner-builder property.

Policy position:

Prohibit owner-builders from obtaining home warranty insurance. To ensure potential purchasers are aware that owner-builder work has been undertaken on a property, contracts for sale of owner-built properties will be required to contain a conspicuous note stating the date the owner-builder permit was issued and any other necessary information. This would draw a sharper distinction for prospective purchasers between work undertaken by an owner-builder and work undertaken by a licensed, qualified builder. To minimise compliance costs, the current register of owner-builder permits maintained by NSW Fair Trading would be made available for online inspection, free of charge.

6.4 Additional home warranty insurance requirement exemptions

The home warranty insurance scheme already exempts certain works from its operation. One of the issues posed during consultation on the 2012 Issues Paper was whether it would be appropriate to provide any further exemptions from the operation of the scheme where consumers are protected by general consumer protection legislation such as the Australian Consumer Law. Submissions to the Issues Paper identified built-in furniture and cabinetry work (including kitchen cabinetry work) as a sector of the home building industry that is not 'core' residential building work and therefore does not require the added protections afforded under the Act.

Policy position:

Exempt built-in furniture and cabinetry (including kitchen cabinetry) from the home warranty insurance requirements when that work is done as a standalone contract, but not when done as part of other residential building work where the combined work requires a home warranty insurance certificate. This would reduce red tape and regulation and help focus the home warranty insurance scheme on its core business. Critically, these works would still be covered by the licensing requirements and statutory warranties.

6.5 Rename the Home Warranty Insurance Scheme

There is some uncertainty among homeowners as to the nature of the home warranty insurance scheme. A common misconception is that the scheme operates much like car insurance or home insurance. However, the scheme is not an “insurance” scheme in the commonly understood sense. In fact, the scheme is a financial safety net when all other avenues have been exhausted and the builder is no longer around to fix the problems because they have died, disappeared, become insolvent or had their licence suspended because of non-compliance with a money order from a court or the CTTT.

It has been suggested that the current name of the scheme may contribute to this misunderstanding, particularly through its use of the word ‘insurance’. Independent reviews of the scheme, like the 2008 review by the Senate Standing Committee on Economics, have recommended that the name be changed to remove this misconception, even though it would make no material difference to the operation of the scheme.

Policy position:

Rename the home warranty insurance scheme to better reflect its purpose and how it operates. The final name will be chosen with input from stakeholders.

6.6 Clarify that original insurance covers rectification work

Concerns have been raised by homeowner advocates that the Act is not clear about whether further insurance cover should be taken out when rectification work is undertaken by the original licensee under the original contract.

Policy position:

Clarify that rectification work done under an original contract by the original builder for no additional payment does not require a separate home warranty insurance policy. The original home warranty insurance policy will continue to cover that work. A new policy is only required if it is new work not included in the original contract or the work is undertaken under a new contract by a new builder.

6.7 Continue the high-rise home warranty insurance exemption

Currently, the construction of residential buildings more than three storeys in height is exempted from the home warranty insurance requirements. A corresponding exemption exists in all other Australian jurisdictions with mandatory home warranty insurance.

The exemption was introduced following a 2003 NSW Home Warranty Insurance Inquiry which found that private insurers were unwilling to underwrite high-rise developments due to the risks associated with these projects.

Although many respondents to the 2012 Issues Paper advocated for the removal of the exemption, others maintained that it should be continued.

A key rationale for the exemption is that the risks involved in high-rise works are materially different to those of individuals who are building a home. Developments of this nature are undertaken between larger, established developers and builders, and generally involve the use of commercial contractual arrangements, such as retention funds for defects.

Removing the high-rise exemption would be likely to place considerable upward pressure on home warranty insurance premiums, which in turn would have a significant impact on home building costs for consumers.

It is also likely that if the exemption was removed, applicants for home warranty insurance for high-rise development would need to meet very strict criteria to be eligible for cover. This would reduce the number of builders that are able to tender for high-rise developments and could reduce competition in the industry. This proposal does not preclude the exemption issue from being re-considered in the future. The NSW Government is currently pursuing reforms to strata and community title laws and will be releasing a position paper outlining its reform proposals in the coming weeks.

Policy position:

Continue with the high-rise exemption from the home warranty insurance requirements at this stage.

6.8 Clarify the definition of ‘storey’ and ‘rise in storeys’

The current home warranty insurance exemption is based on the proposed building having a rise in storeys of more than three and containing two or more dwellings.

The existing definition was derived from the Building Code of Australia, but is slightly different. This results in confusion about its application. As a result, the clarity of the definition of ‘storey’ has been questioned in recent litigation and court decisions.

Policy position:

Align the definitions of ‘storey’ and ‘rise in storeys’ with those contained in the National Construction Code.

6.9 Clarify definition of ‘disappeared’

One of the triggers for access to the home warranty insurance scheme is when the builder or owner-builder has disappeared.

In a recent decision, the term ‘disappeared’ was considered in this context and found that it meant ‘cannot be found in NSW’. Given the nature of state borders, there is concern that this interpretation sets too low a threshold for triggering a home warranty insurance claim.

Policy position:

Clarify that for the purposes of home warranty insurance, ‘disappeared’ means ‘cannot be found in Australia’.

6.10 Allow liquidators, receivers and administrators to apply for exemptions from insurance requirements.

Currently, a builder, developer and an owner-builder can apply for an exemption from the requirement to attach a certificate of home warranty insurance to the residential building contract or the contract for sale of a property under exceptional circumstances. Such an exemption is only granted if the vendor clearly indicates to the purchaser that there is no home warranty insurance available on the property.

However, the legislation is unclear about whether an administrator, liquidator or receiver can apply for an exemption on behalf of the builder developer or owner-builder when they need to sell a dwelling as part of the winding up process. While they can perform all the functions of the owner, they are not the owner.

Policy position:

Clarify that an administrator, liquidator or receiver can make an application for an exemption for the home warranty insurance requirements on behalf of a client who would ordinarily be able to request an exemption in their own right.

6.11 Establish disclosure requirements for sale of exempt commercial properties

Where a property is designed, constructed or adapted for commercial use as a tourist, holiday or overnight accommodation, it is currently appropriately exempted from the requirements of the Act.

There have been instances where homeowners have bought dwellings for residential use which were exempted from the application of the Act because they were built as commercial holiday accommodation. Whilst it is appropriate to exempt commercial work from the Act, there is a danger for purchasers if they buy a commercial unit for use as a residence, unaware that it does not have the protections of the Act.

Policy position:

Require vendors of property designed and constructed as commercial premises but sold as residences within six years of completion to disclose in the contract for sale that the property is not afforded the protections of the Act.

6.12 Provide access to home warranty insurance in cases of partnership insolvency

Under the current scheme, a home warranty insurance claim can be made when a builder has died, disappeared, become insolvent or had their licence suspended because of non-compliance with a money order from a court or the CTTT. These facts can be readily established for individuals or companies, however it is not as straightforward in the case of partnerships.

There have been instances where a home warranty insurance claim has been denied because while the qualified member of the partnership, or the person who did the work, has become insolvent, a non-qualified member remains solvent. However, as soon as one member of the partnership becomes insolvent, the operation of the Act requires NSW Fair Trading to cancel the licence. Therefore, in order to make a claim, a beneficiary would have to force the remaining members into insolvency. Meanwhile, rectification of the works is impossible because the licence has been cancelled.

Policy position:

Clarify that a home warranty insurance claim can be made based on the insolvency trigger if a partnership licence has been cancelled because of the insolvency of a partner in the partnership.

6.13 Additional limitation of liability in insurance contracts

The Home Building Regulation sets out the limitations on liability that may be included in a policy of home warranty insurance.

Currently, there is nothing enabling a policy to limit liability to work that constitutes residential building work under the Act and for which home warranty insurance is required. This means that home warranty insurance may be payable in circumstances where a policy has been unnecessarily or incorrectly issued for work that is not residential building work or does not require home warranty insurance.

Policy position:

Allow new contracts of insurance to be limited to work considered to be residential building work and/or work that is required to be covered by a certificate of home warranty insurance regardless of whether a valid home warranty insurance certificate has been issued.

6.14 Limit non-completion claims to allowable deposit if work has not commenced

Clause 52(2) of the Regulation provides that work is taken not to be completed, even though it has not commenced. The intent of this clause is to ensure that if a beneficiary has made a legal deposit, then a non-completion claim can still be made (even where work has not commenced) to recoup the deposit. The intention of the clause is *not* to allow a claim to be made for the full 20% non-completion of work where the only payment that has been made is the legal deposit and no work has been done.

It is therefore proposed that amendments be made to provide that a claim for loss of legal deposit resulting from non-completion of the work because of the insolvency, death or disappearance of the contractor can be made even where work has not commenced but the liability is limited to the value of the legal deposit only.

Policy position:

Provide that a non-completion claim can only be made for loss of a legal deposit if no work has commenced and provide a definition for the 'commencement' of residential building work.

Chapter 7: Licensing Provisions

The system of licensing builders and tradespeople under the Act protects homeowners by ensuring that the person they contract has appropriate qualifications and experience and is a fit and proper person.

There are concerns, however, that the licensing provisions do not go far enough to help keep phoenix companies and other poor performing builders out of the industry. These concerns were re-iterated by stakeholders in submissions to the 2012 Issues Paper.

7.1 Broaden grounds for refusing an authority

The Home Building Regulation prevents an authority from being issued to a person who, in the previous three years, was a director of, or a person concerned in the management of, a *body corporate under external administration*. It is unclear whether this provision applies only to companies that are under external administration at the time of the application, or whether it also applies to companies that *were* under external administration in the previous three years but are no longer under external administration at the time of the application, e.g. because they have already been wound up.

A continued trend of homeowner complaints, cautions, penalty notices or home warranty insurance claims made against a builder is often indicative that they are failing to provide services to an acceptable standard.

Currently, where a body corporate applies for an authority, the Home Building Regulation requires the Director-General to be satisfied that none of these grounds exist in relation to the body corporate and any of its directors. However, the Act does not require consideration of whether the directors of the body corporate have previously been involved in managing another home building entity that itself was subject to one or more of these grounds.

The conduct matters that may be considered under the Act and the Regulation also vary inconsistently between what may be considered at the time of application for a licence, at the time of renewal, or during the term of a licence. For consistency, all matters should be able to be considered at all times.

Policy position:

Provide for consistent considerations for licensing decisions (including past behaviour and involvement in insolvent entities) –

- Clarify that the 'external administration' ground for refusing an authority includes circumstances where the body corporate was under external administration in the previous three years and has now been wound up;
- Extend the grounds for refusing an authority to include circumstances where the applicant, or a relevant person, was a director, or a person concerned in the management of another home building entity that itself has been the subject of an unreasonably large number of complaints, cautions, penalty notices or home warranty insurance claims.

7.2 Establish notification requirements for certain insolvency matters

The Act currently enables the Director-General to cancel or suspend a contractor's licence in certain circumstances, including where the holder of the licence becomes bankrupt, is placed under external administration or is wound up.

There is currently no mechanism that facilitates the disclosure of this information during the term of a licence. Instead, the information is provided only when the builder applies to renew their licence, which is generally once every three years. Providing this information at three year intervals may be too late to prevent phoenix companies and other poor performing builders from causing further detriment to homeowners.

Policy position:

Require a licence holder to notify the Director-General in writing within seven days of being placed under external administration, becoming bankrupt or being wound up.

7.3 Introduce custodial sentencing options for serial offenders

Currently, offences against the Act, even more serious offences such as unlicensed home building work and the use of forged home warranty insurance certificates, are punishable only by financial penalties.

Although the maximum penalties for these offences are relatively high, the imposition of a monetary penalty may be of little consequence, as in many cases the offender may be insolvent. In the past, monetary penalties have not deterred serial offenders from continuing to perform unlicensed work.

Policy position:

Provide for imprisonment as a sentencing option for second and subsequent convictions for serious offences against the Act, including unlicensed trading and non-compliance with the home warranty insurance requirements. The prospect of imprisonment will do more to keep serial offenders out of the industry. This approach would be modelled on the *Motor Dealers Act 1974* which provides for imprisonment as a sentencing option for repeat convictions of selected offences.

Chapter 8: Scope of the Act

Broadly speaking, the requirements under the Act apply to residential building work and certain specialist work. There are concerns that the scope of work captured by the Act goes beyond what is considered 'core' residential building work.

The objective of the proposed reforms set out in this part is to ensure the Act does not go beyond what is reasonably required to provide homeowners with an adequate level of protection against the associated risks.

8.1 Additional exemptions for non-core building works

The Home Building Regulation prescribes types of buildings which in effect trigger the licensing, statutory warranty and home warranty insurance requirements under the Act.

These include concrete tennis courts, ornamental ponds and water features, and other structural ornamentation. Industry stakeholders have raised concerns that the compliance and administrative cost to builders associated with these licensing requirements is disproportionate with the corresponding level of homeowner risk.

In addition, the Regulation prescribes types of building works which do not trigger requirements under the Act. Currently, internal decorative paintwork is not included on this list, even though it is not considered 'core' residential building work.

Policy position:

Exclude the construction of concrete tennis courts, ornamental ponds and water features and other structural ornamentation, and internal decorative paintwork from the requirements of the Act. The exclusion would not apply when done as part of other works that triggered the requirements under the Act. Excluding these works would reduce red tape and regulation and help focus the Act on core residential building work. At the same time, the protections under the Australian Consumer Law would continue to apply.

8.2 Clarify exemption for 'manufactured homes'

A manufactured home is a type of pre-fabricated home that is fabricated in a factory. The house is transported in one or more major sections to the building site, where it is erected on footings and connected to services. These types of manufactured homes are designed to be able to be moved from one position to another, but may be used as long term dwellings, such as in residential parks.

It has been argued that because a manufactured home is fabricated off-site in a controlled environment, it is a *product* rather than the result of 'building work'.

Policy position:

Clarify that the Act does not apply to the off-site fabrication of a manufactured home, however modular, kit homes or other pre-fabricated homes would continue to be caught by the requirements of the Act. The protections of the Australian Consumer Law, including the consumer guarantees, would continue to apply to manufactured homes. The residential building work involved in erecting the home on-site, any specialist work done during fabrication and connection to services will continue to be covered by the requirements of the Act.

8.3 Repeal section 92B

Section 92B was introduced to allow homeowners to make a claim on home warranty insurance covered work in circumstances where a builder obtained insurance in his or her name but entered into a home building contract in a name of a different but related entity, such as a family company. The provision has been temporarily exempted from operating each year since it was introduced in 2003 due to concerns that it could enable insurance obtained by one entity to cover residential building work performed by another, completely separate entity. Exploitation of this loophole could significantly increase the liability of insurers.

The policy intent of the provision remained valid but it was not possible to draft it in a way which could completely ensure that there were no unintended consequences. In particular, it could not be guaranteed that insurers would be required to pay out claims for an entity which they had no knowledge of and had not had the opportunity of considering their eligibility.

In addition, while the provision potentially provided additional consumer protection, it did not discourage or address the problems of a licensee entering into a contract in the name of a different entity to the entity that was insured.

Policy position:

Repeal section 92B and instead prohibit a builder from entering into a contract as an entity that is not the entity insured under the home warranty insurance scheme.

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