



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM:LJB
Direct Line: 9926 0202

19 March 2010

Re-write of the Home Building Act 1989
Fair Trading Policy
Dept of Services, Technology & Administration
PO Box 972
Parramatta NSW 2124

Dear Sir/Madam,

Re-write of the Home Building Act 1989

The Law Society appreciates the opportunity to be involved in the consultation process for the re-write of the Home Building Act.

The Society, through its Property Law Committee (Committee) has advocated major reform of the Act for many years.

The Committee applauds the decision of the Government to re-write the Act in accordance with the recommendation of the Moss Review "to consolidate the various amendments to the Act that have occurred over the years and to make it simpler and easier to understand for consumers and industry." The current Act has been amended so frequently that the complex structure of the Act is itself affecting the clarity and accessibility of the legislation.

Some specific issues have been addressed by the Committee in the table attached to this letter.

The Committee's general comments appear below:

Background

The Law Society has made numerous submissions about the operation of the Act since at least the time of the introduction of the privatised insurance regime in 1997 (Building Services Corporation Legislation Amendment Act 1996). Some of these submissions were prompted by the announcement of various inquiries into the operation of the Act; others were in response to legislative change; still others in response to Court decisions.

One topic raised in earlier submissions is the "temporary exemption" from section 92B currently in clause 73 of the Regulation – the Committee has expressed concerns about that clause, and those concerns are still valid. The Committee does not propose to revisit all of those issues again in this submission, but believes the re-write provides a welcome opportunity to revisit those issues as part of a holistic approach to what has consistently proved to be a difficult legislative framework.

Further simplification

The re-write of the Act should also provide an opportunity to review the Home Building Regulation 2004 (which is in any event due for staged repeal and re-enactment on 1 September 2010 under the Subordinate Legislation Act) with a view to relocating a number of the long-standing key provisions of the Regulation into the Act. For example, many of the prescriptions for the purposes of the definitions in the Act currently contained in Part 2 of the 2004 Regulation are well-settled, and it would assist clarity if such provisions were within the Act itself (it is suggested that clauses 5, 6, 9, 10 and 11 in particular could usefully be relocated).

In the interest of statute law simplification, the uncommenced provisions of the *Home Building Legislation Amendment Act 2001* and the *Building Legislation Amendment (Quality of Construction) Act 2002* should be repealed.

Major structural changes

The Government's announcement on 8 November 2009 of major structural changes to the home warranty insurance (HWI) scheme will, as mentioned at paragraph 1.2 of the Consultation Paper, necessitate separate public consultation. The Committee believes such consultation should include consideration of the fundamental issue of the scope of coverage afforded by the HWI scheme in the interests of better protecting consumers which is listed at on page 14 of the Consultation Paper as the primary objective of the Act. The Committee urges that the "existing consumer benefits under the current arrangements" should be not only maintained but enhanced.

The Committee noted the observations at page 14 of the Paper that "home warranty insurance is designed as a safety net where a licensed contractor does not honour their fundamental responsibilities to consumers – that is, the builder is unable to begin or complete a building contract or return and rectify defective work". The Committee believes that this statement, reflecting the policy decision underpinning the move in 2002 (*Home Building Amendment (Insurance) Act 2002*) to insurance of last resort where the consumer is claiming a breach of statutory warranty has created significant difficulties for consumers relating to what many consumers would regard as a "fundamental responsibility" of the builder. It is timely in considering major structural reforms to revisit this issue.

The Committee further urges that action be taken to re-instate HWI coverage for multi-storey buildings. The Committee is aware of several leading court cases involving strata title properties, and believes that consumers who own residential lots in multi-storey buildings are in need of at least the same level of protection from HWI insurance as owners of free-standing cottages.

Further consultation

Given the scope of the amendments foreshadowed in the Consultation Paper, it would be appropriate for consultation to proceed by way of the release of an Exposure Draft Bill (and if the Regulation is to be repealed and re-enacted at the same time, a Draft Regulation) after Fair Trading NSW has had the opportunity to consider the responses to the Consultation Paper.

The Committee is concerned that a projected commencement date of 1 July 2010 would not allow sufficient time for meaningful consultation. Given the timeframe for review of the 2004 Regulation under the Subordinate Legislation Act, adopting a target commencement date of 1 September 2010 for any amendments to the Act would be preferable to commencement on 1 July next.

The Committee appreciates that many of these matters will require further discussion and input and welcomes very much the opportunity to be closely involved in the process to ensure a better outcome for all stakeholders.

Once again, thank you for the opportunity to provide these comments.

Yours faithfully,



Mary Macken
President

Attachment - Specific Issues

No	Page	Para	Topic	Comments
1	4	2.1.1	Including a statement of objectives	Supported.
2	4	2.1.2	Consolidating key definitions	<p>Supported. The Committee makes two further suggestions:</p> <p>The Consultation Paper suggests that the word "develop" be defined. The Act currently defines a "developer"; the Committee believes that defining the noun rather than the verb is more appropriate</p> <p>The Committee would add to the list of defined terms "a person who does building work otherwise than under a contract"</p>
3	4	2.1.3	Clarifying responsibility for statutory warranty obligations	Supported.
4	4-5	2.2	Other options for change	<p>Most of the bulleted matters are supported, except:</p> <p>First bullet point: The Committee believes the definition of "residential building work" is clearer if it stands alone and is linked to the type of work undertaken rather than having to refer to the scope of a licence or certificate. There would be benefit however in clarifying the scope of work authorised by each type of licence and certificate.</p> <p>Sixth and seventh bullet points: Disclosure when a property is sold and situations where a purchaser can void a contract for purchase should be clarified (particularly given the drafting inconsistencies within the current sections 95, 96 and 96A, which the Law Society has raised in previous submissions on the Act). The Committee would extend the restatement and clarification beyond owner-builders, to developers and persons who do building work otherwise than under a contract.</p>
5	6	3.1.1	Increase the monetary threshold for certain contractual requirements	<p>The Committee supports an increase in the monetary threshold from \$1,000, but believes that increasing the threshold to \$12,000 would unduly reduce consumer protection. Significant work on residential property could be undertaken for a contract price of less than \$12,000 (anecdotal evidence suggests that such work could include renovation of a bathroom or a kitchen, or construction of a rear deck or a balcony). The</p>

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				Committee believes an appropriate compromise balancing the need for a proper level of consumer protection and the reduction of red tape would be if the threshold were raised to \$5,000.
6	7	3.1.2	Streamlining the assessment criteria for licence applications and renewals	Not opposed.
7	7	3.2	Other options for change	<p>First and fourth bullet points: Not opposed.</p> <p>Second bullet point: Opposed for the same reasons as set out in the comments on 3.1.1 above.</p> <p>Third bullet point: While the Committee broadly supports the proposal, the Committee notes that clarification would be needed about what obligations such an owner-builder had when selling the property.</p>
8	8-10	4	Strengthening disciplinary and enforcement powers	None of the recommendations are opposed.
9	11-12	5.1.1 to 5.1.3	Providing greater certainty and transparency for both consumers and licensed contractors – key options for change	Supported.
10	12	5.1.4	Clarifying the point at which the statutory warranty period commences	<p>Strongly supported. The uncertainty associated with calculating the duration of the statutory warranty period (including, for example, determining whether a sale is affected by ss 95, 96 or 96A of the Act) is the cause of considerable difficulty.</p> <p>The Committee notes that cl 61 of the current Regulation determines (for the purposes of calculating the period of cover of an insurance policy) when work is taken to be complete. The Committee could see no reason why that approach should not be applied to the calculation of statutory warranty periods.</p>
11	12-13	5.1.5	Aligning periods of cover under statutory warranties and home warranty insurance	<p>The Committee favours an aligning of the periods of cover. In the interests of consumer protection, the Committee would prefer the 6 year period to be extended rather than the 7 year period shortened.</p> <p>While on the subject of periods of cover, the Committee suggests that the difficult and artificial distinction between structural and non-structural defects be</p>

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				abolished, and a single coverage period adopted.
12	13	5.2	Other options for change	<p>First and second bullet points: Supported.</p> <p>Third bullet point: The Committee strongly opposes this proposal. Currently, some but not all vendors of residential properties have disclosure obligations under the Act. In particular, successors in title have no disclosure obligations. To require (all) those selling residential properties to disclose previous enforcement would create difficulties for vendors in obtaining particulars of the identity of relevant insurers, and whether there have been any claims by predecessors in title (as noted in the report itself, a history of previous claims is something of which a purchaser is unlikely to be aware – the same would apply to many vendors).</p>
13	14	6	Clarifying and modernising home warranty insurance arrangements	<p>The Committee noted the announcement of major structural reforms to the home warranty insurance scheme. The Committee noted in particular that “the process for initiating the Government’s involvement in the scheme will take place parallel to the process of re-writing the Home Building Act”. Presumably that process will require further legislation. The Committee urges that the legislative framework underpinning this major structural reform be made available well in advance of its commencement.</p> <p>The Committee reiterates its comments earlier in this submission urging that modification of the HWI arrangements extend to reinstating HWI as insurance of first resort for breach of statutory warranty and reintroducing the requirement for HWI to be effected where the building work involves a multi-storey building.</p>
14	15	6.1.2	Preventing home warranty insurance claims by “related” parties	<p>The Committee notes that the issue of who is a related party featured in the Court of Appeal decision of <i>Allianz v Waterbrook</i> [2009] NSWCA 224 (“<i>Waterbrook</i>”). The Committee agrees the issue should be revisited in the light of the decision. The Committee would not however give unqualified support to amending the current definition, as much would depend on the proposed wording of any amended definition. Any revised definition should have regard not only to definitions in existing legislation but to the consumer protection objective of the Act (a matter the subject of considerable analysis in the judgment of Ipp JA in <i>Waterbrook</i>).</p>
15	15	6.1.3	Preventing claims relating to defects reasonably visible	<p>The Committee noted that this issue also arose in <i>Waterbrook</i>. The Committee notes that this exclusion was in the original HWI scheme as introduced in 1972,</p>

No	Page	Para	Topic	Comments
			at the time of purchase	but had understood that the exclusion had been removed during the life of that scheme. The Committee believes that in the interests of consumer protection the exclusion should not be reintroduced into the Act, and draws support for this view from the reasoning of Ipp JA in <i>Waterbrook</i> .
16	16	6.1.4	Improving access to home warranty insurance in cases of insolvency	Supported.
17	16-17	6.2	Other options for change	<p>First bullet point: The Committee has no objection to clarification of current cl 74, but repeats its view that residential multi-storey buildings should again be covered by HWI.</p> <p>Fourth bullet point: This proposal is strongly opposed. The bullet point speaks of "clarifying" the position about section 97 applications being made prior to the commencement of work. This is not the Committee's understanding of the scope of section 97. Indeed, the section has greatest utility where, for example, an owner-builder who had no intention to sell at the time of undertaking the work finds, perhaps through hardship or changed circumstances, that it is necessary to sell within the time contemplated by s 95, and cannot obtain HWI from an insurer. Anecdotal evidence suggests that NSW Fair Trading has considered section 97 applications in those circumstances. That course is entirely appropriate, and to the extent that the Consultation Paper implies applications cannot be made after work has commenced the Act should be amended to remove all doubt.</p> <p>Fifth bullet point: The Committee welcomes clarification of the position of homeowners and successors in title under section 92.</p> <p>Seventh and eighth bullet points: Supported, with the additional comment about reinstatement of multi-storey HWI reiterated.</p> <p>Thirteenth bullet point: Supported provided there is no change to the current position that HWI is not mandatory for an owner-builder (specifically, HWI is not required where an owner-builder does not sell within the period referred to in s95(3)(a)).</p>
18	19	7	Minor and administrative	Supported. As to the fourth bullet point, the Committee agreed that the use of the term "successor in title" in the Act is not clear (that proposition is supported by the use

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			changes	of the hyphenated description in the Discussion Paper). However the Committee is not persuaded that the term "warranty beneficiary" enhances clarity.
19	-			One point which appears not to have been canvassed in the Consultation Paper. The Committee has long held the view that there is no logical justification for the markedly different obligations on sale imposed on an owner-builder under section 95 when compared with the obligations imposed under sections 96 and 96A. In particular, the Committee believes the "conspicuous note" serves no useful purpose, especially since a complying owner-builder will attach evidence of insurance in any event. It would be preferable for an affected owner-builder to provide the brochure referred to in sections 96 and 96A.