



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:JDgl785175

17 October 2013

Home Building Act Review
Fair Trading Policy
PO BOX 972
PARRAMATTA NSW 2124

By email: policy@services.nsw.gov.au

Dear Sir/ Madam,

Review of the Home Building Act 1989 – Position Paper

The Law Society acknowledges and appreciates the exhaustive consultation process to date that NSW Fair Trading has embarked upon during the review of the *Home Building Act 1989* ("Act"). The Society's Property Law Committee ("PLC"), Dispute Resolution Committee ("DRC") and Business Law Committee ("BLC") (together referred to as "the Committees") have considered the *Review of the Home Building Act 1989 Position Paper* ("Position Paper") issued by NSW Fair Trading in September 2013.

There are a number of policy positions identified in the Position Paper that the PLC supports, such as the introduction of a public register of home warranty insurance certificates and the clarification that the original insurance covers rectification work.

The DRC also endorses the approach taken to Dispute Resolution outlined on pages 14 and 15 of the Position Paper. The PLC and the DRC are pleased to see that homeowners will be required to give builders reasonable access to a property for rectification work and that the home warranty insurance scheme is likely to be renamed to better reflect its purpose.

The PLC and BLC are disappointed that it appears that a more comprehensive rewrite of the Act is not being undertaken, so as to improve the clarity, operation and accessibility of the legislation. However the proposed reforms appear to achieve many of the objectives set out at page four of the Position Paper.

The Committees would prefer to postpone any detailed comment until a draft Bill becomes available. There are several significant matters though that the PLC thought timely to bring to your attention.

1. Ascertaining date of completion under s 3B of the Act

NSW Fair Trading's Issues Paper in respect of the Act suggested that a builder or developer of a strata building be required to provide details of the building contract to the first meeting of the owners corporation to assist with ascertaining the critical date of completion. The PLC suggested in response that the obligation should be upon the

developer to provide those documents, as it is better placed to supply all relevant documentation. The PLC considered the possibility that the documents might be provided to an independent party such as NSW Fair Trading, as a pre-condition to registration of a strata plan, and that the documents could be collected by an owners corporation after its inaugural general meeting. The PLC noted that the developer's existing obligation to supply certain documents to the owners corporation under Schedule 2, clause 4(1)(a) of the *Strata Schemes Management Act 1996*, could be extended to include the building contract itself (including all plans and documents the subject of the contract).

This issue has not been raised further in the Position Paper. As NSW Fair Trading is also well advanced in its current strata reform agenda, the PLC considered it was timely to reiterate its suggested amendment to strata legislation to assist the better working of the Act.

2. Scope of “residential building work”

The PLC notes that paragraphs 8.1 and 8.2 of the Position Paper focus on the scope of the Act with reference to what constitutes residential building work. The PLC suggests further clarification is also required as to whether non-habitable parts of common property in a strata scheme would fall within the definition of residential building work, and whether an owners corporation (not being a natural person) is capable of occupying a residence. The PLC notes this issue was considered by the Court of Appeal in *Advance Earthmovers Pty Ltd v Fubew Pty Ltd* [2009] NSWCA 337.

3. Proposal to repeal s 92B

The PLC does not support the repeal of s 92B of the Act. In the PLC's view the section should be retained and the exemption from operation, originally granted in July 2003, should be removed. The rationale for the introduction of the section in 2001 is plain from the second reading speech of then Minister Watkins (LA Hansard, 31 May 2001):

Firstly, some consumers have suffered difficulties as a result of the activities of a licensed contractor who was licensed in his or her own right as an individual and who was also a director of a company which was licensed. The difficulties arose because the contract for the building work was in the name of the company whereas the certificate of insurance was issued in the individual builder's name. In some cases where this has occurred the insurer declined cover on the basis that it had not issued insurance to the company. The most infamous of these instances related to a former builder, Gary Cohen. He left a trail of consumers in his wake after setting his contracts up in this way. I am pleased to say, by the way, that last year Fair Trading was successful in having Mr Cohen banned for 10 years.

To address this issue it is proposed that the Act be amended to require the contractor to inform the insurer of the identity of the parties to the contract, the address of the premises where the work is to be done and such other matters as may be prescribed. If the insurer issues a certificate of insurance covering the work the consumer will be covered whether or not the contractor's name shown in the building contract is different to that shown in the certificate of insurance. If a claim is paid the insurer will be entitled to recover from the contractor shown in the building contract or the person nominated to the insurer as the builder.

The PLC believes that the policy objective of preventing an insurer denying liability on a technical point where the identity of the insured party did not exactly coincide with the party who entered into the building contract, is as important today as it was in 2001.

4. Continue the high-rise home warranty insurance exemption

Paragraph 6.7 of the Position Paper details the intention to continue the high-rise exemption from home warranty insurance at this stage. The PLC regards a detailed examination of the reintroduction of high rise home warranty insurance as a matter of priority for the reasons expressed in earlier submissions, including that the increasing percentage of people who reside in multistorey developments should be provided with the same level of consumer protection granted to people living in low-rise and freestanding single residences. The PLC appreciates the likely impact on insurance premiums of removing the exemption, but believes the consumer benefit of reinstating home warranty insurance protection for high-rise residential buildings would be substantial. The PLC looks forward to a detailed consideration of this issue in the near future.

5. Prohibit owner-builders from obtaining insurance

This policy position outlined in paragraph 6.3 of the Position Paper proposes that a “conspicuous note” stating the date the owner-builder permit was issued and any other necessary information, be included in the contract for sale of an owner-built property. The PLC suggests that in order to provide greater certainty this note should be a prescribed form in the Regulations to facilitate ease of compliance.

6. Establish disclosure requirements for sale of exempt commercial properties

Where a property is designed, constructed or adapted for commercial use as tourist, holiday or overnight accommodation it is exempted from the Act. If such a property is subsequently sold as a residence, it is proposed at paragraph 6.11 that there be disclosure in the contract for sale that the property is not afforded the protections of the Act. It is unclear precisely how the disclosure is to take place. Further guidance must be given and in the PLC’s view this should not be by way of a “conspicuous note”.

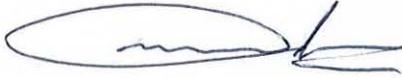
7. Further detail required

The PLC notes that further detail is not provided in the Position Paper on a number of the proposals outlined in the summary of the proposed reforms. For example, no detail is provided regarding the proposal at the foot of page eight to replace the specific exemptions from the home warranty insurance requirements in relation to work done for Government with a qualified, blanket exemption. The PLC is unable to make any meaningful comment on this and other proposals not adequately detailed in the Position Paper.

The Committees welcome the opportunity to consider the Government’s proposed policy positions in advance of legislation being introduced. The Committees would welcome the further opportunity to review the draft Bill prior to its introduction to the Parliament. Due to the technical nature of many parts of the Act, the whole of the Bill would need to be reviewed to enable useful and reliable comments to be made on the proposed amendments.

Please direct any questions in respect of this letter to Gabrielle Lea, Policy Lawyer,
Property Law Committee on telephone (02) 9926 0375 or via email:
gabrielle.lea@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, consisting of a large, loopy initial 'J' followed by several horizontal strokes and a final vertical stroke.

John Dobson
President