



# Submission

## Reform of the *Home Building Act 1989*

To:

The Hon. Anthony Roberts MP  
Minister for Fair Trading  
Level 36 Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

## ***Introduction***

This Real Estate Institute of New South Wales (**REINSW** or the **Institute**) submission is in response to the Reform of the Home Building Act 1989 Issues Paper (**Issues Paper**) published by NSW Fair Trading.

The REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. The REINSW seeks to promote the interest of members and the property sector on property related issues, and in doing so the REINSW has a substantial role in the formation of regulatory policy in New South Wales.

The REINSW appreciates the opportunity to lodge this submission and welcomes discussion of the issues raised by this submission with the Minister and/or policy officers from NSW Fair Trading.

The Institute does not have the technical expertise to comment on all issues in the Issues Paper and accordingly this submission will focus on the areas of statutory warranties and home warranty insurance.

The REINSW supports an approach to statutory warranties whereby consumer protection is optimised and the obligations of the providers and suppliers of building services are clear and easy to understand so as to ensure ease of compliance and reduce the scope for disputes to arise.

The Institute is of the view that the home warranty insurance scheme should be reviewed so that it becomes a scheme of 'first resort' for consumers rather than a scheme of 'last resort' as it currently is. The quantum of the coverage should also be reviewed to ensure that any caps set are at a level which adequately protects consumers.

The exemption from home warranty insurance for multistorey buildings should be removed and builders and developers of strata schemes should be required to deliver the building contract and all associated documentation to the owners' corporation at the first annual general meeting.

## ***Statutory Warranties***

*Q. Should the definition of "completion" include a specific definition for subsequent purchasers?*

The Institute's view is that the definition of "completion" should not have a specific or separate definition for subsequent purchasers as this would unnecessarily complicate the scheme and confuse consumers. It is submitted that there should be one definition of "completion" based on objective industry-accepted principles and criteria as to when work under a contract is considered to be completed.

The issue of the occupation certificate may be an appropriate measure as to when work is considered completed. If this is adopted, then it should apply to both the original homeowner and subsequent purchasers as a single point in time when the work is considered completed.

The Institute opposes the suggestion that vendors be required to disclose the relevant details in the contract at the time of sale as this would place additional burdens on vendors, who in most instances are not in a position to provide the information – this will only create more uncertainty in an already strained property market.

However, in the case of a developer of a strata building, the REINSW supports an approach whereby the developer is required to hand over the building contract and all documentation and certificates in connection with the development to the owners corporation at the earlier of the first meeting or the expiration of the initial period.

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

The Institute supports such a clarification and a clarification of the responsibilities of subcontractors.

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

The REINSW opposes requiring owners corporations to establish and comply with maintenance schedules.

Owners corporations already have an obligation pursuant to section 62(1) of the *Strata Schemes Management Act 1996 (SSMA)* to properly maintain the common property and keep it in a state of good and serviceable repair. Owners corporations also have an obligation pursuant to section 75A of the SSMA to prepare a 10-year plan of anticipated sinking fund expenditure.

The Institute is of the view that owners corporations already have in place legal obligations for repairing and maintaining the common property and the introduction of maintenance schedules would only serve to steer the attention away from the obligations of builders and developers to provide a sound building free of defects and allow builders to avoid their obligations based on an argument that the owners corporation has not complied with a maintenance schedule. The onus of rectifying defects should be on the builder, not the consumer.

*Q. Should home owners' obligations relating to maintenance be further clarified by legislation? Why?*

The REINSW is of the view that extreme caution should be exercised in any attempt to codify the obligations of owners relating to maintenance. As noted above, the onus should not be placed on consumers to rectify defects. Further consultation would be required to develop the appropriate wording.

*Q. Should "structural defect" and other terms be further defined in the Act?*

The Institute is of the view that the distinction between 'structural' and 'non-structural' defects is problematic and should be abolished. It creates the potential for dispute and for home owners to be refused relief on the basis of this arbitrary and artificial distinction.

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

As the statutory warranties are a means of providing protection to consumers, it may be appropriate for the statutory warranties under the Act to parallel the consumer guarantees in the Australian Consumer Law (ACL) (being Schedule 2 of the *Competition and Consumer Act 2012 (Cth)*). Any matters not covered by the consumer guarantees in the ACL but covered by the existing statutory warranties can be provided for in addition.

### ***Home Warranty Insurance***

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

The REINSW is not in a position to comment on this question as it does not have expertise regarding the schemes operating in other jurisdictions.

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

The Institute does not believe a further certificate of insurance should be necessary as the original cover should extend to the rectification work as well as the original work.

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

The REINSW would support the establishment of a searchable public register as it would make it easier for consumers to verify the existence of an insurance policy. This would benefit subsequent owners as well as the original owner.

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

The REINSW is of the view that the cap should be set at a level which adequately protects consumers, however is unable to comment on the quantum.

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

The Institute agrees that there is uncertainty amongst home owners as to the nature and scope of the home warranty insurance scheme. Consumers frequently believe that it is a 'first resort' scheme rather than a 'last resort' scheme. The REINSW supports the scheme being renamed to more appropriately reflect its true nature.

If the intention of the scheme is to truly protect consumers, then consideration should be given to the restructure of the scheme so that it becomes a 'first resort' scheme for consumers with the insurer taking on the task of pursuing the builder.

*Q. Should the current exemption from home warranty insurance requirements for the construction of multistorey buildings be retained? Why?*

The REINSW opposes the exemption from home warranty insurance for multistorey buildings and submits that it should be repealed. The ultimate owners of the homes in such buildings are consumers just like those in smaller buildings and should be afforded the same consumer protections.

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

As noted above, the REINSW is of the view that the exemption should be removed altogether.

*Q. Is the current definition of "storey" in the Act sufficiently clear? Should any changes be made?*

The REINSW agrees that the definition of 'storey' (should the exemption for multistorey buildings be retained) should be clarified and that a stand-alone definition should be inserted in the Act. Further consultation should be undertaken to come up with a suitable definition and consideration should be given to matters such as the differing methodology of surveyors when describing storeys on a plan, the fact that homes and car parking can be located on the same storey and the fact that many developments include commercial and residential uses.

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

The Institute believes that section 92B should be retained as it provides protection to home owners where the insurance coverage might otherwise fail on a technicality of a discrepancy in the description of the contractor on the contract of insurance and the building contract.

*Q. 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?*

The REINSW acknowledges that the risk to the insurer needs to be balanced against the need to keep premiums low. The eligibility criteria should be kept at a level where the scheme is accessible to builders and consumer protection is not reduced.

*Q. 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?*

The REINSW supports a definition of 'disappeared' to mean that, after reasonable enquiries have been made, the licensee cannot be found in Australia. Home owners should not be put to expense in trying to locate a licensee.

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

The Institute supports the concept of home owners being able to purchase top-up cover, so long as the onus for taking out the basic level of coverage remains on the licensee.

## ***Vendor Obligations on Sale***

Sections 95, 96 and 96A of the Act contain certain obligation on the vendor in respect of a contract for the sale of land on which home building work has been carried out.

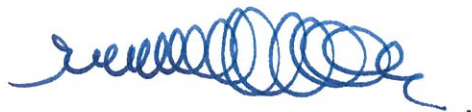
- Section 95(2A) requires an owner-builder vendor to include a 'conspicuous note' in the contract for sale that there was an owner-builder permit issued and that the work was required to be insured. It is submitted that this obligation should be repealed as it does not do anything to enhance consumer protection over and above the requirement in section 95(2) to attach the certificate of home warranty insurance to the contract for sale.
- There appears to be a drafting anomaly in section 95(4), in that the reference should be to a breach of the obligation to attach the home warranty insurance certificate (subsection (2)), which would be consistent with the equivalent provisions in the subsequent sections 96 and 96A.
- The purchaser can render a contract void due to the vendor's failure to attach the home warranty certificate (sections 95(4), 96(3A) and 96A(3)). It is submitted that the right to 'void' should be replaced with a right to 'rescind'. This terminology would be consistent with the language of the conveyancing legislation. Also, the sections should prescribe the method by which the purchaser's right is to be exercised – e.g. "by notice in writing served by the purchaser on the vendor in any manner permitted under the contract for sale or section 170 of the *Conveyancing Act 1919*".

The REINSW appreciates the opportunity to comment on the reform of the Home Building Act and would welcome the opportunity to discuss it further.

August 2012



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