



Submission to the  
**Inquiry into  
construction industry  
insolvency in NSW**

NOVEMBER 2012



**Master  
Builders  
Association**

New South Wales

## **Inquiry into Construction Industry Insolvency in NSW**

### **Master Builders Association of New South Wales**

This submission is made by the Master Builders Association of New South Wales (Master Builders).

Master Builders NSW is the oldest industry association in Australia, having been founded in Sydney in 1873. Master Builders is the only industry body representing the key building construction sectors: residential, commercial, engineering and civil construction.

Master Builders NSW has a robust and active membership which is organised into a divisional structure, encompassing 11 regional areas and a total of 24 divisions. Each active division conducts regular meetings and has an elected President (honorary) and an Executive Committee to represent the interests of their local members to the Associations' Council of Management. This structure provides a truly democratic process in terms of representing the views and forming policy of a diverse group of building and construction industry professionals.

Master Builders currently represents some 8,000 members in NSW.

Master Builders NSW Head Office is located at Forest Lodge, Sydney, with dedicated regional offices in Newcastle, Port Macquarie, Albury, Gosford, Ballina and Ulladulla.

### **Introduction**

Master Builders welcomes the Inquiry into insolvency in the NSW building and construction industry. We recognise that there is no single solution to this complex problem. Indeed, we hold the view that separate responses will be required to align with the two key industry sectors of commercial/industrial and residential.

We concur with the Inquiry's approach as noted in the Discussion and Issues Paper that the recommendations of the inquiry must consider all parties in the contractual chain including the client/ principal and indeed banks and financiers of construction projects.

It also needs to be recognised that it is not uncommon for building firms to take the role of principal contractor and subcontractor, often with such roles running parallel. Likewise, many building firms traverse both the commercial and residential sectors.

Previous inquiries and recommendations have predominately focussed on the commercial, industrial and civil construction sectors with little response to payment issues confronting the residential sector. For example, the *Building and Construction*

*Industry Security of Payments Act 1999* (SOPA) effectively excludes the owner/occupiers and builder relationship in the residential sector.

The Discussion and Issues Paper recognises tendering practises as relevant. While obtaining the lowest price is the goal of particular government bodies, the tender process is often abused as a free opportunity for clients to assess whether their project will indeed fall within budget.

The cost of tendering for industry is substantial and more often a non-recoverable and an unsustainable cost to business in times of low activity and high competition. There is a trend at a Local Government level to engage private procurement firms to undertake the tender process on behalf of local government with the costs of the private procurement firm met by tenderers. The process is simply cost shifting onto contractors, the least positioned to absorb such costs.

As noted by the Inquiry, the problem of payments within the construction industry has been examined on several occasions. We reflect on the 1998 report by the Western Australian Law Reform Commission which inquired into financial protection in the building and construction industry<sup>1</sup>.

The NSW building and construction industry is in a very fragile state due to the end of stimulus programs, an unrelenting period in inactivity and low builder and client confidence. Accordingly, we respectfully submit that recommendations of the Inquiry need to be measured and in context with the current economic state of the NSW building and construction industry.

For the purposes of this Inquiry Master Builders has undertaken extensive consultation with members from each sector of the industry. Further, Master Builders has conducted workshops with both contractors and subcontractors to establish a position reflective of the industry.

This submission will address the measures raised at pages 8 and 9 of the Discussion and Issues Paper.

## **1. The Construction Trust**

In July 1996 a comprehensive analysis of the consequences attached to introducing trust arrangements into Australian construction contracts was undertaken by Price Waterhouse for the then National Public Works Council Inc, as part of proposed means to improve the flow of funds to subcontractors in particular (*please see [www.apcc.gov.au](http://www.apcc.gov.au)*).

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<sup>1</sup> Financial Protection in the Building And Construction Industry  
The Law Reform Commission of Western Australia. Project No. 82.

The conclusion at the time was that the complex commercial and administrative burdens and obligations of trusts would be likely to prevent their implementation on a widespread basis throughout the building and construction industry.

Master Builders held a member's workshop to discuss Construction Trusts on 29 October 2012 and the comments below detail views expressed.

The detailed legal issues and considerations involved with trust law, onerous trustee obligations and a potential additional tax burden (arising from funds which are trust funds invested) were found to potentially negate the workability of trusts within the industry. Concerns were expressed that the use of trust funds will not stop unethical conduct or unscrupulous behaviour. Further, it is impossible to fully legislate against this type of conduct despite the plethora of Government legislation which seems to have this aim, for example, the new Australian Tax Office reporting requirements for the building and construction industry. This issue is compounded by the fact that a trustee has a fiduciary obligation to beneficiaries of the trust, and any dealings with trust monies in a way inconsistent with that obligation would have legal consequences. This obligation may be the only instance where a creditor/debtor transaction would engender fiduciary obligations.

The obligations imposed on a trustee are complex and onerous. A trustee must exercise significant due diligence and care to ensure that all trust requirements are met. The trustee would have specific and discretionary powers. Actions would be governed by the State Trustee Act and the common law. The extent of those obligations would be dependent on the structure of the trust.

Whilst the Inquiry has asked respondents to the Discussion and Issues Paper to provide a modelling of the costs relating to the introduction impact of trust arrangements, that is not possible without detail about how any trust would operate in practice and how the limitations proposed and discussed earlier would be effected.

The criticism articulated by Price Waterhouse about trusts that indicates forcing cash flows through trust arrangements does not recognise the commercial reality of the building industry where projects often run concurrently and cash flows are pooled, not separated on a project-by-project basis, remains cogent. In general the issue is more about management practices and the application of appropriate financial management skills. The use of trusts may only overcome some current problems arising from a pooling of funds as a result of the doctrine of tracing. Their effectiveness will also be dependent upon whether, by following proper administrative and accounting procedures, the funds that have been pooled may be

properly identified. The manner in which individual building contracts are now administered would make this unlikely unless a regime of ledgers was required.

Where monies are mingled with the trustee's general account, or placed in accounts that pool funds from various trusts, they may not become identifiable with a particular project. In this event, tracing particular monies for particular projects would not be possible, or, at least, administratively cumbersome. It could also implicate funds used on projects interstate and the unique NSW laws would founder when there were different State or Territory laws that impinged on the same subject. As set out in the Discussion and Issues paper, most of the law relating to insolvency is federal.

In addition, the Price Waterhouse report said the most effective means of protecting and improving subcontractors' security would be to have separate trust arrangements within the head contract in respect of each subcontractor. Similar trusts would be created under arrangements engaging second tier contractors. This would be an administrative nightmare. The most effective means of implementing a trust mechanism would be to operate each project by one all-encompassing trust arrangement which would cover the trustee and all beneficiaries. Whilst this form of trust arrangement would be less administratively burdensome than other arrangements, the large single pool of funds that would be created would likely increase the risk of inappropriate use of the funds and breaches of trust.

It is clear from the members' workshop that the establishment of a formal trust arrangement imposes legal obligations and costs at a time when industry is vulnerable. Should the Inquiry consider any trust arrangement then the matters raised above need to be taken into consideration.

## **2. An overall contractor licensing system along the lines of the *Queensland Building Services Authority Act 1991*.**

Currently, there is a Council of Australian Governments (COAG) initiative in place which seeks to replace State and Territory based licensing arrangements with a national licensing system. Whilst Master Builders has reservations about the national proposals because of a host of omissions that need to be addressed (e.g. the role of home warranty insurance as a mandated prerequisite to registration), the establishment of any new licensing arrangement would need to be mindful of the conditions set out in the Intergovernmental Agreement for National Licensing System for Specified Occupations, (*copy attached*), particularly 6.9(a).

- **Queensland Building Service Authority**

The key benefit we identify with the Queensland Building Services Authority (BSA) structure is that to a large extent it provides a holistic approach to the administration and regulation of the Queensland building industry. Unlike NSW, where the administration, oversight and regulation of the industry is highly fragmented, resulting in duplication, unnecessary red-tape and cost to industry.

Master Builders strongly supports a holistic and integrated structure for the regulation, administration and oversight of the building and construction industry, whether the vehicle is a Building Services Authority, Building Commission, or Department of Building and Construction. We also see merit in such a body reporting directly to Parliament.

Importantly, the financial requirements and appraisal of licence applicants as applied by the BSA is an integrated process in obtaining a licence unlike in NSW where financial assessment of a licensee is abdicated to the NSW Home Warranty Insurance Fund (HWIF), which is essentially a de facto licensing scheme which can determine the size, value and scope of work a NSW builder can undertake.

*While we support an integrated process, we express strong concern that to apply upfront financial qualification when applying for, or renewing a licence in NSW at a time when the industry is very fragile, could tip the industry into further decline if the level of assessment is marginally onerous. Such requirements would need to be cautiously set to accommodate current industry conditions and implemented over a suitable period of time to allow the industry to adjust.*

We would be also concerned should a situation arise where capital backing is required to obtain or renew a licence, and the current capital requirements set by the HWIF continues to apply in parallel to licensing requirements.

We are aware through Queensland Master Builder Association that at the time the Queensland BSA introduced its financial requirements, many contractors had difficulty satisfying the new requirements.

- **Licensing of Commercial Builders**

NSW is interestingly and uniquely positioned in that it does not licence the commercial construction sector, while all bordering jurisdictions require a wider scope of licensing including the commercial sector.

This has placed NSW at a competitive disadvantage where contractors from bordering jurisdictions can freely tender and undertake commercial projects in NSW, however NSW contractors must satisfy the current licensing requirements of each jurisdiction.

We submit that the National Occupational Licensing Scheme (NOLS) will do little to resolve the situation under the current terms, as the Inter-governmental Agreement

on National Licensing provides that no jurisdiction will be required to adopt a new licence category which does not already exist prior to the application of NOLS.

A key consideration for the introduction of commercial licensing is to identify the key benefits to be delivered by the process. There is little evidence to suggest that commercial construction in NSW is performing any worse than those jurisdictions which licence the sector in respect of the delivery and quality of projects.

The view of the majority of commercial contractors consulted regarding this issue had no real objection to the licensing of the commercial sector as long as it did not impose extra burden on the contractor.

However, from a competition perspective it was noted that the introduction of financial testing with any licensing regime could exclude some contractors from undertaking work which they currently do.

### **3. More thorough checks by principals of the contractors they engage.**

Master Builders supports government pre-qualification systems where the upper threshold is appropriate (noting that at present the National Prequalification Scheme relates to non-residential projects of \$50 million and above). The behaviour of governments in this context beyond such schemes is a matter for their internal procedures. The other mechanisms that are available to those when dealing with other participants in the industry, as mentioned on page 27 of the Discussion and Issues Paper are matters for individual companies.

### **4. More thorough checks by subcontractors of contractors for whom they propose to work.**

For Public Works projects it would appear that subcontractors rely on Government procurement processes to confirm the suitability of the head contractor, and in the ordinary course would not conduct their own inquiry.

Further, we believe that the subcontract sector generally does not make such enquiries, nor does it wish to engage the further expense necessary.

**5. Making retention funds a genuine trust fund in a segregated bank account with two authorised signatories being the contractor and subcontractor.**

Master Builders has no objection to this measure in principal but does have some concerns as to the practicalities of the setting up of individual trust accounts as would be necessary if the subcontractor is a signatory.

A further concern is early on in the construction phase when there is retention under the head contract as well as the subcontracts.

For example, if three subcontractors invoice the head contractor for work done in the amount of \$100,000 each and consequently the head contract claims from the principal an amount of \$330,000 after adding his 10% margin. Both the head contract and the subcontracts contain the usual retention clause of deducting 10% for each claim until 5% of the contract price is reached.

Under the subcontracts the head contractor will place an amount of \$30,000 for the three claims into the subcontract retention trust and pay the three subcontractors a total of \$270,000.

In relation to the head contractor's \$330,000 claim, the principal will place an amount of \$33,000 into the head contract retention trust and pay the head contractor \$297,000.

In this scenario the head contract receives \$297,000 from the principal and pays out \$300,000 to the subcontractors and their retention trust, a shortfall to the head contractor of \$3,000. This continues until half the contract value has been claimed and 5% of the total head contract price has been placed into the head contract retention trust.

Needless to say this will cause considerable financial difficulties for the head contractor. It would make some sense if there was only one retention trust account paid into by the principal and provision that the subcontractors had some entitlement to those monies, although it does present some difficulties in the timing of claims as the subcontractors would claim before the head contractor.

**6. A revision of the benign approach to false statutory declarations emphasising the availability of existing legal remedies to prosecute for breaches of the law.**

Master Builders does not support leniency in the face of the swearing of false declarations by any participant in the building and construction industry. A party



provided with a document of this calibre should be entitled to rely on its truth, as contemplated by the law. Existing legal remedies should be utilised.

## **7. The consideration of amendments to improve the operation of the NSW *Building and Construction Industry Security of Payment Act 1999 (SOPA)*.**

Master Builders is concerned that the nomination of adjudicators and the preparation of claims under SOPA has become commercialised and is open to a practice of “adjudicator shopping”.

The perception in the market place is that there is a bias and an advantage to a claimant with some Adjudication Nominating Authority (ANA). Whether there is any basis for this perception or not, the concern is that not only should justice be done, but it should be seen to be done. An independent registrar with no pecuniary interest in the outcome or number of adjudications could remove the commercial interest and potential conflict of initial concerns of the market place.

Further, there is considerable merit in some control over the appointment and further education of the adjudicators that is not in the hands of the ANAs.

It is Master Builders experience that the SOPA has had a considerable influence in ensuring money flow and payment to subcontractors and builders in the commercial sector. There has been a noticeable decline in adjudication applications to Master Builders as an ANA and it is our view that this is as a result of the SOPA having the effect of encouraging payment, unless a genuine and provable reason for not paying exists.

Master Builders position is that the SOPA should be extended to the residential sector across the board. However, the suggestion of having it apply to either residential building contracts with values above say \$750,000, or for residential claims to an owner above \$100,000 may be effective.

## **8. A comprehensive standing education campaign.**

It appears that little has changed to improve the professionalism of the subcontract sector over the past one and half decades, despite wide recognition of the importance and efficiencies of Australia’s subcontract system. In 1996, ACIL Economics & Policy Pty Ltd undertook a review of the residential sector on behalf of the then, Federal Department of Housing and Regional Development<sup>2</sup>. The Report considered financial management and related security of payments issues. The

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<sup>2</sup> The Residential Subcontract Sector  
Department of Industry Science and Tourism  
ISSN 1039-8147

comments in the report reflect similar comments in the Discussion and Issues Paper of the current Inquiry:

*‘One of the problems in the residential sector is likely to be associated with financial management on the part of subcontractors as well as builders. For example, lack of record keeping, no work-in-progress, no formal approach to debtors and often no formal contracts so when a dispute does arise there is often no paper chain to follow in order to resolve it’.*

*‘In every State, builders (and some contractors) related stories of subcontractors who keep working for builders even though payment may not have been received for some weeks, even months. It is argued that subcontractors put forward the following reasons for this:*

- *“I know the builder is in financial trouble but I thought that if I kept working for him I would help him through and eventually get paid”; and*
- *“If I walk away now I will not get any more work once the builder gets back on his feet.”*

*‘Many in the industry, including some of the more financially astute contractors, see the above a recipe for financial disaster – “how can you save a subbie from himself.”*

There appears to be an entrenched reluctance within the subcontractor sector for business owners to take steps to improve their industry skills and knowledge. This attitude in isolation is worthy of examination. Master Builders is currently conducting a business education campaign targeting the wives and partners of subcontractors in an endeavour to engage with the sector.

This is not to say that many subcontractors don’t seek help. However, it usually when a problem has developed and can be compared to “trying to get insurance when the house is already on fire”, rather than being proactive.

Better management is associated with higher levels of skill and education and government efforts to facilitate the operation of the economy with better levels of education is a vital role and one that needs attention in the current context.

- **Mandatory Professional Development**

Since 2004, licensed builders and swimming pool builders in NSW have been required to satisfy mandatory Continuing Professional Development (CPD) obligations at the time of the renewal of their licence. The requirement initiates mixed comments within industry from those who support the requirement, to those who believe it is a complete waste of time.

Since the inception of mandatory CPD, there appears to have been little interest within NSW Fair Trading to extend CPD to the subcontract sector despite some builders expressing the view that it is warranted and such a mandatory mechanism is needed to get subcontractors to be better informed and educated.

Our observations are that there was reluctance on behalf of NSW Fair Trading to expand CPD to the subcontract sector due to an expectation of a high level resistance from the subcontract sector and overall, the process was simply too difficult.

We share the view that it would be a difficult task due to the fact that the majority of trade contractors acquire their skills on the job, and of particular importance, many had entered the industry due to a dislike of scholastic learning. Consequently, we believe that a proposal of CPD for the subcontract sector visualised a return to the classroom for subcontractors – something from which they sought to escape.

We believe that despite the perceived difficulties, professional development could be introduced to the subcontract sector with a tactful and careful approach and under a different structure than the current scheme.

A CPD scheme provides an opportunity for the Regulator to address particular industry issues through education and training, including improving business and financial skills.

The alternative approach is adopted by the Queensland Building Services Corporation where contractors are required to complete an approved managerial course when applying for a licence.

We note however, any recommendation of the Inquiry to require CPD for trade contractors could be in contradiction to the approach being taken through National Occupational Licensing whereby (in our assessment), a key decision has been made by the COAG National Licensing Steering Committee to remove current requirements for CPD. Furthermore, it has been determined there is to be no business qualification requirement for a contractor's licence. Master Builders does not support this position.

- **Training packages and qualifications**

Formal training qualifications are a fundamental requirement for obtaining a contractor licence with the requirement for acquired skills and experience becoming less relevant. The National Licensing Steering Committee has also determined that skill and experience requirements would be removed from obtaining a national licence.

The fact remains that the majority of trade contractors do not hold formal trade qualifications, with the exception of trades such as plumbing, electrical and to a large extent, carpentry trades. This is becoming problematic for many contractors seeking to be licensed, where having no formal qualification they are either required to

undertake training to obtain the qualification, or alternatively seek work in the commercial sector in which there is no licensing requirements other than for certain specialist trades.

The requirement by the Queensland Building Services Authority for additional managerial or business component to be completed at the time of application for a licence is considered as evidence that there are gaps in national training packages underpinning trade qualifications.

Master Builders supports a comprehensive education and training regime for contractors which encompass financial management and business skills.

## **9. The introduction of prompt payment legislation.**

The inquiry is considering various ways of improving the regularity and speed of progress payments for subcontractors. The main proposal is to consider the introduction of a statutorily imposed maximum payment term for progress payments due to contractors and subcontractors. The law would oust any contrary provision in a building contract.

On face value, the proposal to introduce prompt payment legislation has merit in simply setting a ceiling for the due date for payments.

We submit that if such a recommendation were to be made, then it needs to apply to the entire contractual chain ensuring payments from the client or principal are also bound by the provision.

Legislating a ceiling for prompt payment may be difficult to enforce and therefore simply cosmetic. The ability to impose interest on overdue payments would have little effect and in many instances simply increasing the value of the debt. The Inquiry already has evidence that subcontractors are reluctant to use remedies currently available to them and we foresee a similar outcome in imposing interest on outstanding payments.

Prolonged payments terms are not only problematic in the commercial sector but also occur in the residential sector, especially medium density residential projects involving developers operating under special project vehicles. Furthermore, payment terms between head contractors and subcontractors are rarely established in formal contracts other than for projects undertaken by first and middle tier contractors.

The NSW construction industry does not have the benefit of overarching legislation as is the case with many other jurisdictions. NSW does not have a Building Act, nor a separate Contracts Act unlike the position in Queensland where the Building Services Authority has wide scope of authority over the entire construction industry. Regulation of the NSW industry through licensing and related legislation is essentially confined to the residential sector, other than for specialist trades.

Amending the NSW SOPA (as it currently stands) to establish prompt payment terms would therefore not have full application across the industry due to the SOPA currently excluding owner/ occupiers.

Careful consideration has to be given so that a builder can claim from, and be paid by a principal allowing for the timely payment to subcontractors. Too short a period could leave the builder without cleared funds.

Further, consideration needs to be given to the payment regimes of finance providers.

It should be noted that at a national level Master Builders Australia endorses the Western Australian security of payment legislation. This provides for payment within 50 days.

## **Other Pertinent Matters**

- **Governance in New South Wales Fragmented – need for a Building Commission**

In 2002 an enquiry into the **Quality of Buildings in NSW** (Campbell Report) reported that there were a number of structural problems within the home building process, including the fragmentation of the Regulatory Regime within NSW. The key recommendation of the Campbell Report was for the establishment of a Home Building Compliance Commission<sup>1</sup>, independent of the Department of Fair Trading.

Master Builders supported the recommendation, however sought as a policy position that the establishment of a Building Commission should hold an overarching responsibility for all sectors of the NSW building and construction industry, not just the residential sector.

In response to the Campbell Inquiry's key recommendation, the government established the **Home Building Service**, as an agency within the then Office of Fair Trading. The Home Building Service took responsibility for builder and trade licensing and compliance.

More recently, the **Home Building Service** has taken responsibility for the regulation of specialist trade areas of plumbing, gas and electrical.

<sup>1</sup> Joint Select Committee on the Quality of Buildings. Recommendation 1.

In 2009 the NSW Government established the “super department” within the **Department of Commerce**, which was subsequently renamed the **Department of Services, Technology & Administration (DSTA)** <sup>2</sup>. DSTA had an overarching responsibility for the divisions of:

- NSW Fair Trading
- NSW Procurement
- Government Chief Information Service
- NSW Public Works
- Industrial Relations
- Government Advertising and Strategic Communication, and
- Security of Payment Scheme
- NSW Architects Registration Board

The Government also established the **Building Professionals Board (BPB)** which is responsible for accreditation and compliance of building certifiers, including council certifiers. The BPB is an agency within the **NSW Planning** structure and the portfolio of the Minister for Planning.

The Government also formed the **Construction Co-ordination Committee (CCC)** made up of various NSW Government departmental agencies such as Sydney Water, RailCorp, Corrective Services and industry stakeholders. We understand that this **Committee** meets, however industry is unaware of its work and any recommendations.

In addition, the Government established the **NSW Home Warranty Insurance Fund (HWIF)**, following the withdrawal of private home warranty insurance providers. The HWIF is located within the NSW Self Insurance Corporation, which is part of NSW Treasury. Treasury has also taken responsibility for the **NSW Construction Industry Long Service Leave payments Scheme**.

Further, NSW Planning incorporates the **Building Systems Unit**, responsible for NSW’s contribution to the development and reform of the Building Code of Australia and the **Sustainable Systems Unit**, responsible for the Building Sustainability Index (BASIX)

The departments and agencies mentioned above are not exhaustive and the NSW building and construction industry has a nexus with the following Departments or agencies:

- **Department of Family & Community Service – Housing NSW**
- **Landcom**
- **Environment Protection Authority – Waste Resource & Recovery**
- **Department of Premier And Cabinet – Local Council Division and Office of Environment and Heritage**

<sup>2</sup> It should be noted that DSTA is now known as, NSW Government – Finance and Services.

- ***Department of Trade and Investment, Regional Infrastructure and services – Mine Subsidence Board***
- ***WorkCover***

Master Builders believes the Home Building Services' role and functions are in conflict with NSW Fair Trading's principal charter of consumer protection and consequently the Home Building Service should be consolidated into the BPP. Due to the complexities of the industry, the impact of the industry on the Government's fiscal position, the growing crises in shortage of land supply and housing affordability, we believe the industry requires senior government ministerial responsibility.

The pre-qualification process for contractors tendering on government projects and social housing projects is also open to consolidation, drawing together repetitive, but different qualification requirements such as financial and business elements required for licensing and home warranty insurance eligibility. Currently separate processes exist for contractor pre-qualification for government contracts through NSW Procurement and Housing NSW. It is not unusual for contractors to be pre-qualified with both agencies in order to cover government work. Furthermore, the same contractors will undertake a separate qualification process in order to gain home warranty insurance eligibility for residential work.

There is also a direct connection between builder licensing and home warranty insurance and consequently future harmonisation would reduce duplication and red-tape, which currently results in significant costs to industry.

Master Builders' policy position is for further consolidation of government departments, agencies and their functions. Furthermore, in recognition of the importance of the building and construction industry, a specific ministerial portfolio for the industry needs to be created.

Master Builders advocates that an Independent Building Commission is a deserving response to the industry's contribution to the state economy. This Commission would draw together the current fragmented approach of various departments and government agencies to deliver efficiencies and eliminate current duplication.

- **Home Warranty Insurance**

While licensing in NSW is restricted to residential building work and administered by NSW Fair Trading, the reality is that the licensing process for builders is heavily embossed with the caveat that seriously undermines the relevance of a builders licence. The authority provided by a builder licence to perform residential work exceeding \$20,000 is effectively worthless as it is further subjected to a de facto licensing process imposed by the NSW Home Warranty Insurance Fund (HWIF).

The NSW licensing process requires evidence of appropriate qualifications and evidence of two years' experience, however financial assessment is effectively abdicated to the HWIF for licensees seeking to do work requirement home warranty insurance. The HWIF arbitrarily sets the financial requirements for insurance eligibility, subject to a builders projected turnover, size and value of projects. As previously mentioned, the HWIF can effectively control a builders growth, the size and type and of projects undertaken. While a builders experience is part of the licensing assessment process, the HWIF appears to have little regard for this and seeks its own evidence as to a builders experience to undertake certain projects. Whilst a builder can appeal to the Administrative Decisions Tribunal in regard to decision relating to licensing, there is not such independent appeals process in relation to decision of the HWIF, other than an internal review process.

While a NSW builder is subject to financial appraisal to obtain home warranty insurance, that same builder can be subjected to additional and differing financial requirements in order to be eligible to undertake government projects through NSW Procurement. In addition, if the same builder also seeks to undertake social housing work, they can be subjected to additional appraisal by NSW Housing (NSW Family & Community Services). Furthermore, if government projects are being managed through the tender process by other government authorities such a RailCorp or NSW Health, additional requirements or differing tender processes may apply.

The processes described above regularly subject contractors to a review (HWIF) or renewal of their home warranty insurance eligibility and/or pre-qualification status. The process can incur substantial cost to contractors and are brought to question by contractors at a time when little work is available to offset such costs. There appears to be little regard to limit or contain costs to business at time when the level of activity is at a 50 year low.

In particular, we submit that the eligibility criteria confronting residential builder's needs to be a serious consideration by the Inquiry. The difficulties incurred by established builders in meeting the financial requirements of the scheme is an issue, however for new builders or entrants, the capital requirements pose a significant barrier and will substantially impede the replacement of our aging builder population.

- **Mandatory Insurance Scheme and Insolvency Insurance**

Master Builders does not support mandatory insurance to secure payments for subcontractors.

The disaster of the NSW mandatory Home Warranty Insurance Scheme is sufficient evidence that the mandating of insurance products for the building industry must be considered with the utmost caution.



The availability of insolvency insurance may create a reliance on the insurance product rather than address the underlying issue of improving financial and business practises.

- **Disputes involving retention sums**

Master Builders does not support the proposal for the specialising of the Consumer, Trader and Tenancy Tribunal (CTTT) for dealing with disputes over retention sums. There remains very little industry confidence in the fairness and process of the CTTT and this is evidenced by wide spread criticism contained in submissions to the recent Law & Justice Committee Inquiry into the Consolidation of Tribunals. Furthermore, the jurisdiction would need to be extended beyond its current limitation to only deal with residential matters.

NSW Fair Trading currently provides a dispute mediation process involving experienced inspectors. The process can be triggered by either home owners or contractors, however the process is restricted to matters regarding workmanship. Disputes involving payments are excluded from the process as are disputes between builders and subcontractors. The latter exclusion in our view is narrow, as disputes between builders and subcontractors can manifest in disputes with clients.

We strongly support a process of dispute resolution utilising independent, highly experienced building inspectors. It is critical to independently, and with authority determine the status of alleged defects and isolate those matters which are more to do with payments.

The competency and credibility of the building inspectors or experts needs to be independently established, with their appointment based upon their specific area of expertise. A consolidated approach is needed, possibly through the creation of an office of a Building Dispute Adjudicator.

The position would be responsible to assess, accredit or register building experts to undertake such work, with the cost for their engagement shared by respective parties. The office would also provide training in mediation and conciliation, and CPD to ensure knowledge of changing codes and legislative provisions, which in turn would supplement the cost of establishing the office.

Master Builders has been concerned that full benefit of the process is not being realised due to the exemptions. The inspectors could play a much greater role in the dispute resolution process by identifying matters where the capacity to pay is the primary issue, which is clouded by fabricated defect claims.

We strongly support a process of dispute resolution process utilising independent, highly experienced building inspectors. As previously mentioned, it is critical to independently and with authority determine the status of alleged defects in order to isolate matters which are more to do with payments.