

## **APPENDIX 3**

### **Summary of Australian building regulation and home warranty insurance schemes**

From submission 44, Insurance Council of Australia, April 2008

#### **Introduction**

A form of home builders warranty insurance is compulsory in every State and Territory in Australia and, in general, provides for compensation for loss or damage arising from a contractor's failure to complete home building work or to meet certain standards of workmanship in performing such work.

Various Acts in the States and Territories govern the way in which this insurance is administered and underwritten. In most States, the insurance is a prerequisite for the commencement of work. With the exception of Queensland and the Northern Territory, home warranty insurance schemes are privately underwritten by insurers approved under the relevant legislation.

This paper gives a general outline of operation of the various schemes in relation to home building work done by a contractor on behalf of another person. It should be noted that the relevant legislation in the different jurisdictions may also set out particular provisions in relation to developers, owner-builders and kit home suppliers.

#### **New South Wales**

The home warranty insurance scheme in NSW is privately underwritten.

The Office of Fair Trading (OFT) Home Building Services division is the authority responsible for administering the scheme in accordance with the *Home Building Act 1989* (HBA).

The objectives of the HBA focus on the need to ensure that residential building work meets acceptable standards and that consumers are protected or have avenues of recourse when builders fail to meet or complete their obligations.

Essentially, the role of the OFT includes evaluation and approval of licences for builders and maintenance of a register of specified information; and approval of insurers and insurance conditions.

The majority of disputes between owners and builders or other contractors are dealt with initially by the OFT. Disputes unable to be resolved through the initial dispute resolution process, and appeals in relation to residential building insurance, are dealt

with by the Home Building Division of the Consumer Tenancy and Trader Tribunal (see Part 3A of HBA).

Residential building work is essentially considered to be the building or alteration of dwellings which, as defined in the HBA, include a detached or semi-detached house, transportable house, terrace or town house, duplex, villa-home, strata or company title home unit or residential flat, and extends to include swimming pools and other structures related to the dwelling. Highrise developments over 3 storeys are exempt (with effect from 31/12/2003).

To obtain a licence authorising the holder to contract to do residential building work, applicants need to show the OFT that they have the fitness, ability and capacity to carry out the contracts for which the licence is required. Applicants must also satisfy the OFT that they have complied or are able to comply with any insurance requirements of the HBA in relation to the work (section 20 of HBA). The OFT must cancel licences under certain circumstances (section 22 of HBA) and may suspend licences if the holder has not or cannot comply with the insurance requirements (section 22A of HBA).

Section 18B of the HBA provides that various warranties by the licence holder or person required to hold a licence before entering into a contract are implied in every contract to do residential building work. These warranties include:

- that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- that all materials supplied by the holder will be good and suitable for the purpose;
- that the work will be done with due diligence and within the time frame stipulated in the contract.

Proceedings for a breach of warranty must be commenced within seven years from completion of the work, or if the work is not completed, the due date for completion or the date of the contract (section 18E of HBA). The warranties extend to immediate successors in title (section 180 of HBA).

### ***Insurance***

Section 92 of the HBA provides that a person must not do residential building work under a contract where the contract price exceeds \$12,000 unless a contract of insurance is in force in relation to the work, and a certificate of insurance evidencing the contract of insurance has been provided to the other party to the contract.

If a contract of insurance is not in force, the contractor may not be entitled to damages in the event of breach by another party to the contract but remains liable for damages for any breach committed by the contractor (section 94 of HBA).

To protect home owners section 99 of the HBA requires that the contract of insurance taken out by the builder or tradesperson must insure the person on whose behalf the work is being done against the risk of loss:

- resulting from non-completion of the work due to insolvency, death or disappearance of the contractor; and
- arising from a breach of a statutory warranty in respect of the work (which extends to the person's successors in title).

The contract of insurance must be of a kind approved by the Minister and be provided by an insurer approved by the Minister. The contract must provide for cover of not less than \$300,000 in relation to each dwelling to which the insurance relates (section 102 of HBA).<sup>1</sup>

A contract of insurance must provide cover for loss arising from non-completion of the work for a period of not less than 12 months after failure to commence, or cessation of the relevant work. In relation to other loss insured, cover must be provided for a period of not less than six years for structural defects from the earlier of completion or the termination of contract, or two years for non structural defects from the earlier of completion or termination of contracts.

### ***Insurers***

Section 103A of the HBA provides that the Minister may approve a kind of insurance, or an insurer for the purposes of the Act. An approval may be subject to conditions, and the Minister may, by written notice to an insurer, revoke or vary an approval.

Five insurers are currently approved -with one providing insurance for owner builders only.

If a liquidator or provisional liquidator has been appointed in respect of an insurer, or an insurer has been dissolved, the insurer may be declared insolvent by the Minister (section 103G of HBA). Subject to certain provisions, section 103I of the HBA provides that the State will indemnify any person who would have been covered by an insolvent insurer's policy.

## **Victoria**

The builders warranty insurance scheme in Victoria is privately underwritten.

The operation of the scheme is governed by the *Domestic Building Contracts Act 1995* (DBC) and the *Building Act 1993* (BA). Overall supervision of the BA is

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1 Increased from \$200,000 in March 2007 as per schedule 1 of the *Home Building Amendment (Minimum Insurance Cover) Regulation 2007* (NSW) which amended the *Home Building Regulation 2004* (NSW).

assigned to the Building Commission (BC). The Building Practitioners Board (BPB) is responsible for the administration of the registration system and oversight of the conduct of registered building practitioners.

The Victorian Civil and Administrative Tribunal resolves domestic building disputes and disputes relating to insurance claims concerning domestic building work.

The objects of the DBC under section 4 are:

- to provide for the maintenance of proper standards in the carrying out of domestic building work in a way that is fair to both builders and building owners;
- to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness; and
- to enable building owners to have access to insurance if domestic building work under a major domestic building contract is incomplete or defective.

The DBC applies to the erection or alteration of a home and any associated work such as driveways and swimming pools (section 5). Subject to qualifications, a home means any residential premises and includes any part of commercial or industrial premises that are used as residential premises (section 3(1)).

Section 29 of the DBC provides that a builder must not enter into a major domestic building contract unless registered under the BA (see section 169 of BA). Major domestic building contract means a contract for which the price for the work is more than \$12,000 or any higher amount fixed by regulation (clause 6, Domestic Building Insurance Ministerial Order (No. S 98 Friday 23 May 2003)).

If the applicant for registration is required under Part 9 of the BA to be covered by insurance, the applicant must include proof of such insurance with the application. The BPB must register an applicant if satisfied that, among other things, the applicant has satisfied the requirements of section 169 of the BA, and that he or she holds an appropriate qualification and is of good character (section 170 of BA).

A building contract must not be entered into unless it contains all relevant details, including details of registration, implied warranties and insurance required under the BA (section 31 of DBC).

Under section 8 of the DBC, the builder warrants that, in general, work and materials will meet certain standards of workmanship and fitness for purpose and other legislative requirements and that work will be carried out with reasonable care and skill and within certain timeframes. The warranties transfer to successors in title (section 9 of DBC) for a period of 10 years after completion of the home (section 134 BA).

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## ***Insurance***

Section 135 of the BA provides that the Minister may by order published in the Gazette require building practitioners to be covered by insurance. It is an offence for a building practitioner to carry out work unless covered by the required insurance (section 136 of BA). Such required insurance may cover losses resulting from:

- breaches of warranties implied into the major domestic building contract for that work under the DBC;
- defective work; and
- non-completion of the domestic building work (section 137A).

Under clause 35 of the Domestic Building Insurance Ministerial Order, insurers' liability is a minimum of \$200,000 per dwelling.

## ***Insurers***

Five insurers are currently underwriting this class of insurance in Victoria.

## **South Australia**

The building indemnity insurance scheme is privately underwritten.

The Commissioner for Consumer Affairs is responsible for administering the scheme, in accordance with the *Building Work Contractors Act 1995* (BWCA). The scheme is designed not only to give consumers protection but also to ensure high standards of accountability in the building industry.

All builders and tradespeople are required to be licensed by the Commissioner of Consumer Affairs (section 6 of BWCA) and must possess the standards of qualification and experience set out in the Regulations, including sufficient business knowledge and experience and financial resources for the purpose of properly carrying on their business.

Licensed builders are required (section 12 of BWCA) to ensure that their work is properly supervised by a Registered Building Supervisor (section 15 of BWCA).

For domestic building work, a "house" means a building intended for occupation as a place of residence but does not include such things as hotels, motels and the like. Domestic building work includes associated work such as swimming pools.

Under section 32 of the BWCA, certain warranties are implied on the part of the builder in every domestic building work contract. These warranties include that the work will be performed in a proper manner to accepted trade standards, that materials will be good and proper, and that the work will be performed with reasonable diligence. Proceedings for a breach of warranty must be commenced within five years after completion of the work.

## ***Insurance***

Section 34 of the BWCA requires that prior to commencing building work builders must take out insurance, and (in relation to domestic building work) provide the owner with evidence of Building Indemnity Insurance. A policy of building indemnity insurance is necessary where the building work costs over \$12,000 and requires council approval.

The policy of insurance complies with the Act:

- if it insures each person who may become entitled to the benefit of a statutory warranty against the risk of being unable to take the benefit of the warranty because of the insolvency, death or disappearance of the builder; and
- in the case of work being performed on behalf of someone, it insures that person against the risk of loss resulting from non-completion of the work because of the insolvency, death or disappearance of the builder (section 35 of BWCA).

The Regulations under the BWCA require a minimum cover of \$80,000.

## ***Insurers***

Four insurers are currently underwriting this class of insurance in South Australia.

## **Western Australia**

The home indemnity insurance scheme (HII) is privately underwritten.

The Consumer Protection Division of the Department of Consumer and Employment Protection is responsible for administering the home indemnity insurance scheme in accordance with the *Home Building Contracts Act 1991* (HBCA).

The Builders Registration Board (BRB) is established under the *Builders' Registration Act 1939* (BRA) and is responsible for the administration of, and compliance with the BRA.

Home building work is defined in the HBCA to include the construction or alteration of a dwelling or multi-unit grouped homes or high-rise developments including associated work such as landscaping and swimming pools.

Under section 4 of the BRA, builders must be registered with the BRB, which compiles and keeps a register containing the names, addresses, qualifications, and other prescribed particulars of persons who are admitted to the register. It has the power to cancel or suspend registration or take proceedings for offences against the BRA (section 8). The BRB will need to be satisfied with the skill and experience of applicants and may require evidence of material and financial resources (section 10 of BRA).

Under section 12A of the BRA, the Disputes Tribunal (see section 26 of BRA) has the power to order a builder to remedy any faulty or unsatisfactory building work within specified time frames or order payment of suitable compensation to the owner. Complaints must be made within six years of completion of the dwelling.

### ***Insurance***

The HII provisions were incorporated into the HBCA in 1996 to protect home owners against financial loss.

Under the regulations, all residential building work exceeding a value of \$12,000 including new dwellings, extensions and alterations and associated work such as swimming pools must be covered.

The HBCA (section 25C) requires that builders must obtain a HII policy before performing residential building work.

Section 25D of the HBCA provides that a policy of insurance for residential building work performed on behalf of another person under a residential building work contract complies if it insures that person and the person's successors in title against:

- the risk of loss of deposit; and
- the risk of loss from non-completion by reason of insolvency, death or disappearance of the builder.

In the case of such work to be performed by a builder on behalf of another person, whether or not under a residential building work contract, a policy of insurance complies if it insures that person and the person's successors in title against the risk of being unable to take advantage of an entitlement to, or to enforce or recover under, a remedy under section 12A of the *Builders' Registration Act 1939* because of the insolvency, death or disappearance of the builder.

A policy of insurance must also provide that claims may be made under it at any time before the expiration of 6 years from the day of completion (section 25D of HBCA).

A minimum cover of \$100,000 applies or the cost of the building work if less than this amount (section 25D of HBCA).

### ***Insurers***

Five insurers are currently providing home indemnity insurance in Western Australia.

### **Tasmania**

Housing Indemnity Insurance in Tasmania is privately underwritten.<sup>2</sup>

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2 The following information reflect the law in Tasmania as at 18 April 2008.

The Department of Justice and Industrial Relations is responsible for administering the scheme in accordance with the *Housing Indemnity Act 1992* (HIA) and its Regulations.

Under section 3 of the HIA, a residential building means a building intended primarily for occupation as a place of residence but excludes buildings comprising three or more separate dwellings situated directly one above the other, or residential flats. Building work includes the erection or alteration of a residential building and additions thereto.

The HIA does not apply to building work that is valued at less than \$12,000 or such other amount as prescribed by the regulations (section 5).

For building work covered by the HIA, certain warranties are implied in a building work contract, namely:

- that the work will be carried out in a skilled and proper manner in accordance with the plans and specifications agreed to by the parties;
- all materials supplied by the builder will be good and suitable for the purpose and unless specified in the contract will be new;
- work will be performed in accordance with requirements of this or any other Act;
- where the contract does not stipulate a period for completion, that the work will be performed with reasonable diligence (section 7 of HIA); and
- building work will be reasonably fit for the purpose expressed by owner.

Proceedings for a breach of a statutory warranty must be commenced within 6 years after completion of the work (section 9 of HIA). The warranties also extend to successors in title (section 8 of HIA).

### ***Insurance***

A builder must not perform building work unless a complying insurance policy is in force in relation to the work, and in the case of work to be performed under a building work contract the owner has been furnished with a certificate as evidence of the insurance policy (section 11 of HIA).

Section 12 of the HIA provides that a policy in relation to building work complies with the Act if:

- the policy insures each person who is entitled to the benefit of a statutory warranty in respect of the building work against the risk of being unable to enforce or recover under the statutory warranty because of the insolvency, death or disappearance of the builder;
- where the work is performed on behalf of some other person, the policy insures that person against the risk of loss resulting from non-completion because of the insolvency, death or disappearance of the builder;



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- the policy provides that it will remain in force for a period of six years after the date of completion of the relevant work;
  - the policy provides for the prescribed insurance cover or the cost of the building work, whichever is the less;
  - the policy is in a form that has been approved in writing by the Minister and is granted by an insurer so approved; and
  - the policy complies with any other requirements prescribed by the regulations.

The prescribed insurance cover is defined to mean cover of at least \$200,000 or such other prescribed amount (section 3 of HIA).

### ***Insurers***

Insurers issuing policies must be approved by the Minister (section 20B of HIA).

Currently four insurers are issuing Housing Indemnity Insurance policies.

### **Queensland**

Under the Queensland *Building Services Authority Act 1997* (QBSA), the Building Services Authority (BSA) is the provider of home warranty insurance under a statutory insurance scheme.

The objects of the Act are:

- to regulate the building industry to ensure the maintenance of proper standards in the industry and to achieve a reasonable balance between the interests of building contractors and consumers;
- to provide remedies for defective building work;
- to provide for the efficient resolution of building disputes; and
- to provide support, education and advice for those who undertake building work and consumers.

The QBSA requires building contractors to be registered in order to carry out professional building services. The QBSA (section 31) restricts registration to persons considered fit and proper for the purpose, having certain qualifications and or professional experience and a minimum financial standing as determined by the Board of the BSA. The BSA handles all licensing matters and is responsible for ensuring all licensees continue to meet the required standards.

The General Manager of the BSA is also responsible for assessing and approving the payment of insurance claims as well as advising consumers on insurance claims (section 18 of QBSA).

For domestic building work above \$3,300, the *Domestic Building Contracts Act 2000* stipulates that the builder warrants that: the work will be carried out diligently; in an

appropriate and skilful way; materials will be suitable for the purpose and work will be in accordance with the contract and any relevant laws. The warranties transfer to successive owners of the building (section 49). A proceeding for a breach of a warranty must be started within 6 years and 6 months after the work is finished, or if the work is not finished, the stated completion date or period (section 51).

### ***Insurance***

Under section 68 of the QBSA, a building contractor must, before commencing residential construction work pay to the QBSA the appropriate insurance premium for the work in accordance with the regulations.

The Insurance Scheme insures the construction of a House, Duplex, Townhouse, Villa unit, any residential unit (provided it is not a multiple dwelling of more than 3 storeys) and residential outbuildings.

Under the Queensland Services Board Policy (Edition 5 - parts 1-3), the BSA will pay for loss for:

- non-completion due to contract termination resulting from licence suspension or cancellation, death or legal incapacity of the contractor or insolvency;
- defective construction; and
- subsidence or settlement of the insured work.

Payment for loss arising from non-completion will only be made if the insured has properly terminated the contract with the contractor within two years from the date of payment of the insurance premium or the date of entering into the contract, whichever is the earlier.

Payment for loss arising from major defective work will be made if the defect first becomes evident within six years and six months after date of payment of premium, or the date of the contract, whichever is the earlier (see Parts 1 and 2 of the Queensland Services Board Policy).

The maximum liability for each residence is the replacement value of the insured work or \$400,000 whichever is the lesser. Cover also includes alternative accommodation, removal and storage costs up to \$5,000 (Part 4 of the Queensland Services Board Policy).

Insurance claims are made to the QBSA and any disputes over decisions can be referred to the Queensland Building Tribunal (section 86 of QBSA).

### **Northern Territory**

A limited form building warranty insurance protection is mandatory in the Northern Territory. It is underwritten by the Northern Territory Insurance Office (a statutory authority).

The Government's role in building control is undertaken by the Building Advisory Services Branch of the Department of Lands, Planning and Environment. The general functions of the Branch are to:

- provide an advisory service to industry, government and the public;
- maintain a central Building Records System;
- develop and implement Regulations and policies;
- provide administrative and technical support to statutory bodies.; and
- monitor, audit and enforce the requirements of the *Building Act 1993* in the Northern Territory

The *Building Act 1993* (BA) and its Regulations provide the framework for the control and standards for building. The Act provides for the establishing of technical standards for buildings, the registration of building practitioners and certifiers, the regulation of building matters, the granting of building and occupancy permits and the establishing of a building appeals process, and for related purposes.

The Building Practitioners Board is established under the Act to maintain acceptable building standards and to ensure practitioners are suitably qualified. Building Practitioners are registered by the Board if they meet the qualification standards (section 24 of BA). Building and occupancy permits are issued by private sector Building Certifiers who are authorised by the Board.

Regulations establish standards and requirements for buildings and the carrying out of building work which include standards for performance and materials or methods of construction.

### ***Insurance***

An owner or his agent can apply to a building certifier for a building permit but, under section 61 of the BA, work cannot commence unless:

- the person holds a type or class of approved policy of insurance against failure to carry out the building work due to negligence or reasons beyond his or her reasonable control; and
- the building work, when complete, is covered by an approved policy of insurance against non-compliance with the Regulations.

Insurance is supported by the Home Building Certification Fund, which is managed by the Territory Insurance Office (TIO).

The TIO policy does not include cover, for example, for non-completion due to insolvency, poor workmanship or lack of due diligence, defects etc. unless there is a breach of the Regulations.

NB: The Building Act was amended late 2004 to provide for stricter licensing requirements (implementation 2005) and compulsory, privately underwritten home

warranty insurance. The provisions relating to private underwriting were originally intended to be implemented in 2006. To date these provisions have not been activated and the commencement of these provisions is now expected to be early-mid 2008, subject to competitive insurance products being available in the Territory.<sup>3</sup> Insurance scope and limits will be similar to NSW.

## **Australian Capital Territory**

The residential building insurance scheme in the ACT is privately underwritten.

The Department of Urban Services is the statutory authority responsible for regulating the home building industry and the scheme in accordance with the *Building Act 2004* (BA). The BA provides for the appointment of a Building Controller whose responsibilities include:

- supervision of the Act and its Regulations;
- registration and maintenance of builder licences;
- approval of building permits.

The objectives of the BA focus on the need to ensure that residential building work meets acceptable standards and that consumers are protected or have avenues of recourse when builders fail to meet or complete their obligations.

The BA (section 88(2)) incorporates statutory warranties on the builder of a residential building that, in general, require that the work will be carried out in a proper and workmanlike manner, in accordance with the plans and any requirements, that the materials will be good and proper and that the work will be completed with reasonable diligence.

The warranties expire at the end of five years from the date of the certificate of occupancy (section 88 of BA and refer Regulations).

Each of the owner's successors in title succeeds to the rights of the owner in respect of the statutory warranties (section 88(3) of BA).

### ***Insurance***

Approval for residential building work valued at more than \$12,000 will only be granted if the Building Controller (or an appointed Certifier) is satisfied that the required insurance, in approved format, is in place.

Section 90 of the BA provides that an insurance policy in respect of residential building work complies if, among other things:

- it is issued by an authorised insurer;

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3 NT Government, *Residential Building Reform*, September 2007, p.9

- it provides for a total amount of insurance cover of the prescribed amount, or an amount equal to the cost of the work, whichever is less;
- it insures the owner and successors in title for a specific period;
- it insures the owner and successors in title against the risk of being unable to enforce or recover under the contract because of the insolvency, disappearance or death of the builder;
- it insures the owner and successors in title against the risk of loss resulting from a breach of a statutory warranty;
- it insures the owner and the successors in title against the risk of loss resulting from the builder's negligence or from subsidence of the land;
- it provides that a claim may only be made within the prescribed period after the claimant becomes aware of the existence of the grounds of the claim; and
- the form of the policy has been approved in writing by the building controller.

Under the regulations, the minimum cover per dwelling is \$85,000.

### ***Insurers***

An 'authorised insurer' is defined in the BA to mean a body corporate that has been granted authority to carry on insurance business under the *Insurance Act 1973* (Cth) (section 12).

If an insurer ceases to be in the business of issuing residential building insurance policies, or if the insurer's authority to carry on insurance business is cancelled under the *Insurance Act 1973* (Cth), the insurer must notify the building controller within 7 days of either event occurring (section 95 (1) of BA).

Insurers are required to provide annual claims statistics to the construction occupations registrar (section 95(4) of BA).

Currently five insurers are providing home building warranty insurance in the ACT.