Home Building

Proposed Reforms to the Home Building Act 1989 (NSW)

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1 INTRODUCTION

In New South Wales, the main legislation regulating the home building industry is the *Home Building Act 1989 (NSW)* ('the Act'), which was previously known as the *Building Services Corporation Act 1989 (NSW)* prior to 1 May 1997.[1] The principal aim of the Act is to protect an owner or purchaser of residential property from defective or shoddy work, or the non-completion of work by builders, trades persons and suppliers of kit homes. The primary responsibility for regulating such consumer protection lies with the Department of Fair Trading ('DFT'). The DFT's functions include administering the Act and the *Home Building Regulation 1997* ('the Regulation'). The Fair Trading Tribunal ('the Tribunal'), which is established under the Fair Trading Tribunal Act 1998, hears disputes relating to residential building work.

The mechanisms under the Act and used by the DFT to protect consumers include:

(a) implementing the home warranty insurance scheme;
(b) implementing the builder licensing scheme and related disciplinary process;
(c) managing the resolution of disputes; and
(d) providing consumer advice, education and information.

In recent times, concerns raised by home owners, consumer advocates, industry associations, builders, insurers, members of parliament and other interested groups have resulted in exhortations for reform of the Act. Consequently, a media release entitled 'Home Building: Proposed Reforms to Consumer Protection and Dispute Resolution' was issued by the Minister for Fair Trading ('the Minister') in November 2000.[1] This paper seeks to examine the proposed reforms detailed in the media release and provide what is hoped will be constructive comments on the reforms where appropriate.

2. OBJECTIVES

The primary objective of the reforms is to further enhance and significantly improve the level of protection for consumers by:

(a) making the insurance scheme fairer and more accountable;
(b) tightening the licensing system;
(c) speeding up the disciplinary process;
(d) establishing an early intervention dispute resolution system;
(e) raising consumer awareness of available remedies when things go wrong; and
(f) increasing penalties for non-compliance with the Act.

In this regard, the proposed reforms cover the areas of insurance, licensing, dispute resolution, Tribunal procedures and penalties under the Act and the Regulation.

3. INSURANCE REFORM

The current home warranty insurance scheme was introduced on 1 May 1997 when the former *Building Services Corporation Act 1989 (NSW)* was renamed and replaced by the Act. In essence, Part 6 of the Act which deals with the insurance matters provides[3] that builders who contract to carry out residential building work valued over $5,000 must arrange insurance cover for the work. A consumer may make a claim on the insurance policy for defective work, faulty design or non-completion of work.[4] Since 1 November 1999, all builders applying for a new builder's license or a renewal of an existing license are required to provide proof that they have, or are eligible to obtain, insurance cover for future work.[5]

Since the insurance scheme was implemented, problems had arisen which rendered it not only desirable but positively mandatory that reforms were required. One of the proposed reforms deals with the effects on a builder of its failure to take out insurance on the work. The relevant sections regulating this matter are sections 92(2) and

94(1) of the Act, which in themselves had been the subject of amendment.[6] Section 92 (1) of the Act provides that a builder must not carry out residential building work unless it has taken out insurance on the work. If it fails to do so, under sections 92 (2) and 94(1) of the Act, the builder must not demand or receive payment for the work from the other contracting party, is not entitled to damages or to enforce any remedy for breach of contract by the other party and is also prohibited from recovering money for that work under any other right of action (including a quantum merit or unjust enrichment). However, the builder remains liable to the other contracting party for the builder's own breaches of contract.

As can be seen, the consequences of sections 92(2) and 94(3) can be pretty draconian on a builder, in particular builders who had innocently or inadvertently failed to comply with the insurance requirements. The two classic scenarios were:

(a) where an innocent builder was unaware of its obligation to take out insurance on the residential building work, especially if the builder was based in another State; or
(b) where an innocent builder had genuinely and mistakenly believed that it was not required to take out insurance for the work, either because of an exemption under the Act or Regulation, or otherwise.[7]

In both these cases, a developer may have actively encouraged the builder to carry out work, only to refuse payment to the builder because it had not complied with its insurance obligation under the Act. A developer may do so knowing full well that the builder was required to insure the work, but had deliberately failed to draw this to the builder's attention. In effect, innocent builders were being 'exploited' by developers to carry out building works for free.

Faced with the law as it stood, the courts found themselves having to comprehensively review the Act and the Regulation in order to find a way out for innocent builders.[8] The problem was recognised by the Supreme Court of NSW in *Casa Maria Pty Ltd v Trend Properties Pty Ltd*,[9] which criticised the harshness of sections 92(2) and 94(1). As a result, on 30 July 1999, section 94(3) was enacted.[10] The section provides that builders may subsequently take out insurance for the work already completed in order to comply with the Act. While section 94(3) has to a significant extent ameliorated the harshness of sections 92(2) and 94(1), its scope is nonetheless restricted by section 30 of the *Interpretation Act 1987 (NSW)*[11] to only work carried out *from* 30 July 1999. This means that work carried out *before* 30 July 1999 remains subject to the draconian effects of sections 92(2) and 94(1).

In this regard, the proposed reforms go some way to further mitigate the harshness of sections 92(2) and 94(1) by allowing a builder to recover payment for work done even if it has not taken out insurance where it is 'just and equitable' to do so. This would provide the court with a discretion to overlook strict non-compliance with the Act in appropriate circumstances.

Other complaints about the system relate to the claims handling processes of the insurers, and the increase in insurance premiums as well as financial requirements of insurers.

Proposed Insurance Reforms

The proposals for reform include:

General

(a) as mentioned above, to empower the courts to allow a builder who has failed to take out insurance to recover money for work done where it is 'just and equitable'. While the media release does not define what is 'just and equitable', the author respectfully submits that, bearing in mind the problems created by sections 92(2) and 94(1), the court should have regard to a list of non-exhaustive factors, which may include:

    (i) the knowledge of the builder and the developer on the requirement to insure;
    (ii) whether the builder had genuinely believed that insurance was not required;
    (iii) the conduct of the developer in relation to such requirement i.e. whether the developer had deliberately concealed the obligation to insure from an unsuspecting builder, whether the developer had engaged in misleading and deceptive conduct under section 52 of the *Trade Practices Act* or whether the developer had acquiesced in the

builder's conduct and is therefore estopped from relying on sections 92(2) and 94(1);

(iv) whether there was wilful misconduct on the part of the builder;

(v) the value of the work in proportion to the amount of the builder's fees;

(vi) the value of the dwelling;

(vii) where part of the work carried out may be cured by section 94(3), the proportion and value of the remaining work to the entire project; and

(viii) whether the builder is able to insure any part of the uninsured work.

(b) to ensure that a consumer is still covered by an insurance policy taken out in a builder's individual name. The proposed reform arose out of recent cases[12] where a builder had taken out insurance in his personal name but had entered into the building contract in his company's name. When a claim on the insurance policy was made by the consumer as beneficiary of the policy, the insurance companies had sought to avoid liability on the basis that the insured was a separate personality from the builder who carried out the work. It appears that there have been conflicting decisions which had either upheld the insurance companies' position or had held that the insured and the builder were one and the same, on sometimes not entirely convincing grounds. It is considered that the law should be clarified in this respect to allow a claim on the insurance policy to proceed so as to uphold the intention of the Act, which is to protect the consumer, and to promote judicial uniformity. From a practical point of view, it would certainly not hurt to require builders to state in their insurance policy forms whether the building contract would be entered into in their individual names or their company's name;

(c) to ensure that where a certificate of insurance is provided by the builder, and the insurance policy commenced after the date of the contract, the consumer is still protected. This proposed reform arose out of a recent case[13] which held that an insurance company may refuse to indemnify a consumer as the insurance period of cover was from 24 June 1998 to 24 June 1999, whilst the building contract was entered into in April 1998. In that case, the policy expressly stated that the insurance company would indemnify the insured only if the building contract was made during the policy period.[14] It would be interesting to see how the proposed reform would seek to get around this. On the face of it, it might appear unfair that an insurance company which had expressly agreed a fixed period of cover with the insured should now be made to extend that period by reason of statute. It is submitted that perhaps a more equitable solution may be to require the builder to take out additional insurance for any period outside the existing cover. This may be done by simply extending the period of insurance cover under the existing policy by payment of an additional premium, or by entering into another insurance contract;

(d) to clarify when a consumer may be permitted on reasonable grounds to refuse access to the builder without prejudicing his insurance claim. This proposed reform arose out of situations where an insurance company would attempt to engage the same builder who carried out the residential building work to fix a defect. The consumer may in fact prefer another builder to remedy the defect. In this event, it is proposed that where the consumer can show reasonable grounds for refusing the first builder, his claim on the insurance should not be prejudiced. It would be interesting to see whether the proposed reform would give any guidance as to what constitutes 'reasonable grounds', and it is submitted that this may conceivably include the nature of the defect, the skill and expertise of the builder and the alternate builder, any history of defective work by the builder, the cost of rectification and any timing issues which may be relevant;

Quantum

(e) to require a builder to take out insurance for residential building work where the labour and material cost exceeds $5,000. This is regardless of whether part of the labour and material is provided by the other party to the contract. This proposed reform effectively extends the $5,000 threshold required for insurance cover to the value of the project as a whole, and not merely the value of the builder's work under the existing law.[15] In theory, this would result in more building projects being subject to the insurance requirement under the Act. However, in practice, as the value of most residential building work would exceed the $5,000 threshold anyway, the

effect of this reform may not really be all that significant;

(f) to adjust the $200,000 minimum cover under the Act[16] to reflect the increase in the "Price Index of Material Used in House Building, Six State Capital Cities" (as published by the Australian Bureau of Statistics) since 1 May 1997. This would enable consumers to recover more under the insurance scheme;

(g) to replace the existing $500 excess on insurance claims[17] with a minimum claim of $500. This proposed reform arose because of the perceived injustice which the excess has caused in many cases, in particular with smaller claims;

Procedure

(h) to reduce the period in which an insurance claim is deemed to have been refused (where no written notice has been given to the beneficiary) from 60[18] to 45 days of lodging a claim. This will expedite any appeal which a consumer beneficiary may bring against an insurance company;

(i) to increase the period of appeal against an insurance company's decision from 30[19] to 45 days. Further, to empower the Tribunal to extend the period of appeal, with leave, in appropriate cases. This may be particularly useful in cases where the builder is insolvent or in administration;

(j) to empower the Director General to reduce the general 7 year period of cover[20] in appropriate circumstances. It is considered that a shorter period of cover may be appropriate for some work, such as certain painting or landscaping work. Further, this will assist some builders who face difficulty in obtaining insurance or in having to pay exorbitant premiums because of the nature of the work they perform;

Information

(k) to clarify the losses covered under the scheme in order to remove any doubt as to when a claim can be made, with the aim of reducing litigation and saving costs. This proposed reform seeks to relate the limitations on recovery under the Act[21] with what losses are expressly permitted[22];

(l) to provide that insurance claims be in a form approved by the Director General. This proposed reform seeks to address consumer concerns on this issue, in particular to bring greater certainty when a claim has been made;

(m) to strengthen the conditions of approval for insurers by making the reporting requirements more relevant to the monitoring of the insurance scheme;

(n) to empower the Director General to require insurers to provide material information about claims, and to allow such information to be given to any other insurer;

(o) to enable the DFT to play a central role in the provision of information and guidance to consumers affected by the insolvency of a builder, including liaising with the insurer and the administrator or liquidator; and

Penalties

(p) to empower the Minister of Fair Trading to censure an insurance company which fails to comply with the requirements of the Act and its conditions of approval for home warranty insurance, including:

  (i) to suspend the approval of an insurer;
  (ii) to impose a civil penalty on an insurer of up to $50,000; and
  (iii) to issue letters of censure to insurers.

Comment on Proposed Insurance Reforms

From the above, it can be seen that in general, the proposed reforms are aimed at increasing consumer protection by extending the scope and quantum of cover, increasing the procedural speed in which a claim may be made, enhancing the provision of information to consumers and tightening the penalties for non-compliance with the insurance requirements.

Whilst it is certainly encouraged that the consumer should increasingly benefit from the protection of the law, a consumer-oriented approach should be balanced with a builder-sensitive perspective. After all, the builder is the primary person affected by the obligation to insure. The lessons from sections 92(2) and 94(1) are still fresh, and the initial 'all guns blazing' approach which

had to be tempered by subsequent amending legislation should be avoided at all cost. To assist the Act to achieve a more workable and balanced framework, the author respectfully submits that the following additional matters may be considered as subjects for proposed reform:

(a) requiring a developer to ensure that a builder has the required insurance in place when work commenced, or at the very least to notify a builder that the required insurance should be in place. Failure by a developer to do so will be a breach of the Act attracting a penalty. This proposal seeks to achieve 3 things, namely:

  (i) to facilitate the ultimate objective of the Act, which is to ensure that insurance for the work is in place so that the consumer is protected;
  (ii) to the avoid the effect of the *Casa Maria* case discussed above; and
  (iii) to distribute the responsibility to take out insurance in a more equitable manner. At first sight, it may be accepted that of all the parties involved in the building project, the primary responsibility should fall on the builder to take out insurance as it is its work which is the direct subject matter of any claim.

However, an argument may be made that the developer should also shoulder some responsibility as it is the owner of the project and has some form of control over the works and materials used.

For example, a situation may arise where a developer may direct that inferior materials be used. Consequently, these inferior materials may contribute to a defect in the works, resulting in a claim on the insurance being made by a consumer.

The developer may even deliberately direct that inferior materials or a faulty design be used and justify this on the basis that any loss resulting may be pushed to the insurers when a claim is made.

The possibilities for abuse by a developer are not limited to the above, and it may well be equally or even more blameworthy than the builder. While the builder may in some cases be able to negotiate a contract sum with the developer which takes into account the cost of taking out the insurance, this may not occur where the builder is unaware of the obligation to insure, or becomes aware only after the contract sum has been fixed.

In cases where the developer then becomes insolvent, the problem becomes more acute. Further, if the question came down squarely to who is in a better financial position and who the consumer will look to recover any loss, in more cases than not, it would be the developer.

In this regard, it is respectfully submitted that perhaps a more equitable scheme which imposes joint liability on both developers and builders to effect home warranty insurance should be seriously considered;

▶to define with greater particularity what work constitutes 'residential building work' under the Act so that a builder may properly decide whether insurance is required. The present definition in section 3 (1) of the Act is imprecise and subject to an overly broad interpretation. While the definition is narrowed somewhat by the exclusions in Regulation 8(1) of the Regulation, in the everyday world of building construction where the scope of an early works contract often varies greatly with that of a main building contract, there is a very real need to expressly spell out whether 'residential building work' under the Act includes the following types of work:

  (i) demolition work (generally thought to be excluded);
  (ii) excavation work (generally thought to be included);
  (iii) erection of hoardings and scaffolding (equal debate);
  (iv) design work (generally thought to be excluded); and
  (v) work associated with obtaining approvals of various authorities (generally thought to be excluded).

4. LICENSING REFORM

Under the Act, a person who contracts to carry out residential building work must be licensed.[23] Generally, this means that all builders must be licensed, and it appears that all sub-contractors must also be licensed.[24] The licensing requirement seeks to ensure that only builders who meet certain criteria may be licensed to carry out residential building work[25] so that there will be some form of quality control. The Review of Licensing in the New South Wales home building industry, which was conducted by a steering committee comprising representatives from the DFT, has

recommended that a number of changes be made to the licensing system. Following consultation with builders, consumers, the industry associations and other interested groups, the DFT also considers that the current licensing system should be enhanced to provide a greater level of protection for consumers and a simpler procedure for builders.

To this end, the proposed reforms seek to balance the interests of the consumer with that of the builder.

It is proposed that a further review of the reforms will be conducted three years from their commencement.

Proposed Licensing Reforms

The proposals for reform include:

Licensing Merits

(a) the requirement that before a licence is issued or renewed, the Director General must be satisfied that:

  (i) the applicant is not insolvent;
  (ii) there are no Tribunal orders against the applicant which remain unsatisfied; and
  (iii) the number of complaints, penalty notices or insurance claims against the applicant has not exceeded a specified number;

(b) the introduction of a licensing scheme for building consultants who carry out inspections of building works and report on the quality of such works. In recent years, these consultants have been increasingly engaged by consumers to carry out "pre-purchase inspections" of properties and by parties to a building dispute. As the experience and training of these consultants may vary greatly,[27] it is considered that the requirement of licensing will impose at least a minimum standard of expertise so as to better protect consumers;

(c) in the same vein, the licensing of air conditioning and refrigeration contractors and installers will also be maintained.[28] These proposals are in accordance with the Review of Licensing mentioned above;

Licensing Scope

(d) the imposition of additional requirements for owner-builder permits (about 20,000 permits are issued yearly). The requirement to take out insurance on owner-builder properties applies only to sale of these properties within 7 years after completion of the work.[29] It is considered that owner-builders should be required to inform purchasers and subsequent purchasers of these properties of the home warranty insurance scheme so that the purchasers may be able to make a claim if necessary;

(e) to restrict the licensing of roof plumbers to builders carrying out work on residential properties only and to remove roof plumbing from the definition of "specialist work" under section 3(1) of the Act. It is considered that roof plumbing by its nature does not carry health and safety risks. In this regard, it is considered that the licensing of roof plumbers is not required for commercial building work, but should be retained for residential building work purely to protect the consumer;

Information

(f) providing more information on the register of licenses issued to builders maintained by the DFT, such as:

  (i) orders of the Tribunal that have not been complied with;
  (ii) formal caution letters issued to particular builders;
  (iii) penalty notices issued to particular builders; and
  (iv) refusal of insurance to particular builders or for a specific project.

Information on the number of complaints against builders, which previously used to be on the register, has been taken off since September 1997, thereby creating a void in the information facility. The proposed information above may be accessed by consumers and provides an important source of information to assist them in making informed decisions on their investments in a particular home building project;

(g) the development and implementation of cross-referencing facilities in:

  (i) the electronic licensing records which would disclose whether an individual builder is also licensed through a company. This will help to avoid inappropriate individuals from circumventing the licensing system under the guise of a corporate personality; and

(ii) the license renewal procedure which is linked to the number of complaints and other matters, such as warning letters, penalty notices, unsatisfied Tribunal orders etc in relation to the particular builder;

(h) the development and implementation of a continuing professional education program targeted primarily at builders and consumers. Part of the reason for this proposal is the somewhat astonishingly high number of cases where the parties involved were not even aware of the requirements of the Act to have a written contract and to take out insurance. Although the proposed reforms have not addressed the issue of content, it is considered that the program may include increasing awareness amongst developers, builders, consultants, sub-contractors and consumers alike of the building codes, legislative rights and responsibilities and essential contract management aspects of a building project. Consumer groups and industry associations have also supported the introduction of some form of continuing professional development as a condition of license renewal, and it is submitted that this proposal is recommended, especially where there is new legislation being introduced;

Procedure

(i) The need to rationalise and streamline the number of categories of building licenses. At present, there are approximately 420 categories of building licenses in NSW. The effect of this is that it encourages an unduly narrow specialisation of skills and potential license avoidance, as well as causing confusion to consumers. A broader more user-friendly approach is being considered which is aimed at facilitating the procedural aspects as well as simplifying the consumer's perspective;

(j) the introduction of photo licenses; and

(k) delegating the responsibility for conducting disciplinary inquiries to the Director General of the DFT in place of the Tribunal. The purpose of this reform is two fold, namely:

(i) to bring the jurisdictional responsibility for conducting disciplinary inquiries in this area in line with other occupations, such as motor dealers and pawn brokers; and

(ii) to significantly speed up the process and ensure builders who should not have a license are removed as efficiently as possible. In this regard, the Director General may exercise powers of delegation of his functions under the *Fair Trading Act*. It is envisaged that the basic originating process, which is the issue of a notice to show cause to the builder, would remain the same. Thereafter, it is at the Director General's discretion to direct the most effective procedure to deal with the case at hand, which may range from purely paper determinations for simple matters to the appointment of an independent arbitrator in more complex cases. A right of review will exist to the Administrative Decisions Tribunal as the appellate forum;

(l) the redesigning of the DFT's complaint forms so that they are consistent with the proposed dispute resolution system (discussed below);

Penalties

(m) to empower the Director General to revoke a builder's license in appropriate circumstances, such as:

(i) where the builder becomes bankrupt. This is clearly important as a bankrupt builder should not be allowed to continue to trade, and is also in line with general insolvency law. Although the media release does not mention a builder company becoming insolvent, it is considered that this proposed reform applies equally to an insolvent corporation as well as a bankrupt individual;

(ii) where the builder is convicted more than twice for a breach of the insurance provisions within 12 months. The assumption here is one of wilful breach by the builder, in which case there is really no excuse for its continual flouting of the law; or

(iii) where the builder fails to maintain home warranty insurance cover. As mentioned above, the Director General must consider all the circumstances of the case, such as whether there are reasons to justify the builder's failure;

(n) to empower the Director General to suspend a builder's license held by a company where the company is placed in administration. Again, this is an important power on the Director General, as it may not be desirable for a company in administration to continue to trade. The license may only be suspended and not revoked to cover the eventuality that the company may be 'rescued' in the administration. If, however, the company is not 'rescued' and is subsequently wound up, it is considered that the Director General's power to revoke a builder's license may be invoked; and

(o) to empower the Director General, where a builder's license is revoked or suspended, to make orders for the completion of any outstanding work by other builders and the insurer. This is an essential ancillary power to the powers in (m) and (n) above.

Comment on Proposed Licensing Reforms

From the above, it can be seen that in general, the proposed reforms seek to balance the interests of consumer and builder with the ultimate aim of increasing consumer protection. This is sought to be achieved by penalising insolvent licensees, extending or narrowing the licensing scope as appropriate, tightening the procedural aspects of the licensing system, broadening the information facility and education of consumers and licensees and enhancing the penal sanctions for non-compliance with the licensing requirements. It is submitted that the proposed reforms are recommended as they go a few steps further to achieve the desired effect intended by the Act.

5. DISPUTE RESOLUTION REFORMS

Following consultation with consumers, building and insurance groups, other interested parties and the Home Building Advisory Council, as well as the DFT's ongoing monitoring of the insurance scheme, a clear need for the following has been identified:

(i) to better define when an insurance claim can be made; and
(ii) to establish a new dispute resolution process for the industry.

In addition, it is recognised that an integral feature of any resolution process is early intervention. Unless the parties are brought together to attempt a settlement at the initial stage of the dispute, the dispute can rapidly escalate and the chance of effectively resolving the dispute decreases substantially.

In this regard, an alternative dispute resolution model has been developed which focuses on mediation. It was also generally recognised that the alternative dispute resolution process should be as user-friendly as possible. Essentially, the process must be easy to follow, inexpensive and be able to expedite resolution of a dispute. The process should also be under the purview of the Tribunal.

Proposed Dispute Resolution Reforms

The proposals for reform include:

(a) establishing an early intervention alternative dispute resolution process which focuses on mediation. Although it has not been decided yet at this stage whether a compulsory form of mediation should be introduced, it is considered that parties who do not wish to mediate would need to advance reasons to justify their reluctance;

(b) requiring builders to provide an information brochure about the operation of the home warranty insurance scheme and the resolution of building disputes at the time the contract of sale is signed. This requirement will follow similar requirements already in place in relation to residential parks, retirement villages and tenancy matters. It is considered that this proposed reform will greatly benefit consumers in assisting them to make informed decisions on issues such as when an "insured event" has occurred, how they may proceed in the event of a dispute, who they may contact and how to lodge a claim. It is proposed that any failure to provide the information brochure will constitute an offence, although it is envisaged that the likely penalty may be in the nature of a warning, penalty notice or fine;

(c) introducing a five working day cooling-off period for home building contracts between a consumer and a builder. This will make building contracts consistent with sale of land contracts, and enable a

consumer to terminate a home building contract within that period. It is considered that any costs incurred by the builder during the cooling off period would necessarily be minimal and should be borne by the consumer. The proposed reform is not intended to apply to building contracts for commercial projects between a developer and a builder, or owner-builder developments; and

(d) making provision so that certain matters must be included and excluded from home building contracts. Apart from two currently specified matters,[30] builders have a general free rein in stipulating any clause in their building contracts, including clauses which are detrimental to the consumer. For example, builders may add special conditions to standard contracts which force consumers to accept sub-standard work or unnecessary delays. Consumers are also often obliged to pay the builder no matter how bad the work.

It is envisaged that the scheme will be attached to the "front end" of the Tribunal in the following manner:

1. Consumers will be able to contact the DFT for preliminary information in relation to options for dispute resolution;

2. If the dispute cannot be resolved through informal discussions between the consumer, builder and/or insurer, a building claim should be lodged with the Tribunal;

3. The claim must then be assessed to determine whether the matter is appropriate for alternative dispute resolution. Unless the dispute is considered inappropriate, it must go through the alternative dispute resolution process;

4. Matters which are appropriate for mediation will be allocated a mediator from an approved panel of Tribunal mediators, unless the parties agree to use their own mediator;

5. The Tribunal will have the power to give effect to any agreement or arrangement arising out of a mediation. Enforcement will be available. This is a significant power and further enhances the effectiveness of the alternative dispute resolution option;

6. If the dispute is not resolved at the mediation or if mediation is not appropriate in the first instance, the matter proceeds to a hearing before the Tribunal; and

7. Following the hearing the Tribunal will be able to make orders binding on all the parties to the proceedings.

Comment on Proposed Dispute Resolution Reforms

The author respectfully submits that a compulsory form of mediation should in the first instance be engaged in by the parties. The reasons in support of mediation are many, not least the success rate of settlements in various jurisdictions which make mediation or alternative dispute resolution compulsory, the saving of time and costs, privacy and publicity considerations and the chance to salvage a commercial relationship which would almost certainly be destroyed in litigation.

However, the reforms should not be so inflexible as to not recognise cases where mediation is clearly inappropriate and would only escalate costs. To this end, it is respectfully submitted that the reforms should enable the parties to opt out of mediation in appropriate circumstances, taking into account relevant considerations such as:

- the nature and complexity of the dispute;
- the quantum and costs involved;
- the relationship between the parties;
- the remedy required; and
- any other relevant matter.

6. TRIBUNAL REFORMS

The Tribunal currently receives around 4,800 building claims each year. With the increase in building claims, there have been delays in the hearing of home building disputes. To complement the alternative dispute resolution system outlined above, a series of other reforms were proposed to the Tribunal.

Proposed Tribunal Reforms

The proposals for reform include:

(a) capping the monetary jurisdiction of the Tribunal in building claims at $500,000 instead of the current unlimited jurisdiction. Although large claims are a small percentage of the Tribunal's list, they consume a considerable amount of resources and delay other matters. It is

considered that cases involving larger sums of money should be more appropriately dealt with by the courts;

(b) giving the Tribunal primary responsibility for the hearing of building claims for amounts up to $500,000. Under the current system, a court action which is commenced first takes precedence over a Tribunal action. Under the proposed reform, it is considered that the Tribunal should have sole jurisdiction in relation to claims up to $500,000;

(c) enabling the Tribunal to convert work orders to money orders. This is an essential power as a builder who is subject to an order to perform work may refuse to do so. In this event, the proposed reforms will enable the consumer to engage or obtain a quotation from another builder for the purpose of carrying out the work, and then apply to the Tribunal to convert the work order against the first builder into a money order to the value of the alternative builder's work; and

(d) ensuring fees can be prescribed for specialist building assessors. Under the existing law, the Tribunal does not have power to change the fees of specialist building assessors in certain circumstances.

7. PENALTIES

The Act contains a range of offences, including unlicensed contracting, taking of excessive deposits, the carrying out of work by unqualified persons and the failure of builders to insure work. The current maximum penalty for carrying out work without a licence or insurance is $11,000 (100 penalty units). However, the maximum penalty is rarely imposed. It is considered that the current level of penalties do not act as a sufficient deterrent against breach of the Act, nor do they sufficiently impress upon the courts the seriousness of the offences under the Act. It is therefore proposed that the maximum penalties for all offences be doubled.

8. FUNDING

To fund the proposed reforms and their implementation, it is estimated that recurrent annual funding of approximately $3 million will be required. It is proposed that the source of the funding may be derived from a one-off increase in building licence fees of 10 per cent. It is further proposed that the fee for owner-builder permits be increased. Any additional revenue arising from the increase in fees will be retained by the DFT to meet the recurrent cost of the reforms. The scheduled Consumer Price Index increase, originally to take effect in March 2001, will not proceed in the light of this one-off increase.

9. ADMINISTRATIVE AND COMPLIANCE ACTION TO COMPLEMENT REFORMS

In addition to the proposed reforms, the DFT has taken or will take a number of steps to further improve consumer protection. These steps include:

- the formation of the new Legal Services and Compliance and Standards Divisions;
- the appointment of a Solicitor Advocate whose role is to concentrate on major cases, many of which are in the building area;
- the appointment of six new building investigators to investigate breaches of conduct by builders or insurers;
- a move away from reliance on warning letters towards a greater emphasis on penal notices, prosecution or disciplinary action for breaches of the Act or other improper conduct;
- a review of existing building complaints to establish and accelerate the investigation of serious matters;
- a review of the criteria for home building grants;
- a revision of the DFT's series of plain English building contracts;
- the development of a comprehensive consumer guide on insurance, licensing, contracts etc;
- ongoing discussions with other departments associated with home building, including the Departments of Urban Affairs and Planning and Local Government for the purpose of improving the standard of building work in New South Wales; and
- use of new laws passed during 2000 in building matters. For example, the new 'substantiation power'[32], which requires a trader to 'prove' the claims made in advertisements was applied to one builder. Three building licenses have been suspended, since August 2000 under the new power to suspend a trader's license for 60 days where there is a likelihood of significant loss or harm to consumers.

10. CONSULTATION TO DATE

The proposed reforms have been approved by the Cabinet. In developing this package of reforms, the views of key interested parties have been sought.

This has included:

- extensive community consultation was undertaken through the Review of Licensing in the NSW Home Building Industry. Over 250 submissions were received;
- a series of forums throughout 2000 with the building industry and insurers;
- Ministerial meetings with representatives of the building industry and its associations;
- Ministerial meetings with builders and consumers about home building issues; meetings with the Building Action Review Group;
- consultation with the Home Building Advisory Council, established to provide advice to the Minister on consumer-related issues in the home building industry; and
- discussions/correspondence with Members of Parliament who have represented their constituents' concerns.

11. CONSULTATION IN FUTURE

In late February 2001, the Government announced the release of a draft Home Building Legislation Amendment Bill 2001 which incorporates the proposed reforms discussed above. At the time of writing, consultation on the Bill is being undertaken and comments are invited up to the end of March 2001.

References

1. Through the *Building Services Corporation Legislation Amendment Act 1996 No. 122* (section 3; Schedule 5(2))
2. The proposed reforms in the media release have now been incorporated into a draft bill entitled the 'Home Building Legislation Amendment Bill 2001'. At the time of writing, consultation on the draft bill is being undertaken and comments are invited up to the end of March 2001.
3. Subject to certain limited exceptions.
4. Regulation 43(1) and (3) of the Regulation
5. Section 19(2A) of the Act
6. See the *Home Building Amendment Act 1999 (NSW)*
7. *Casa Maria Pty Ltd v Trend Properties Pty Ltd* (unreported)
8. See for example *Casa Maria Pty Ltd v Trend Properties* (unreported) where the court held that the defendant did not carry out residential building work because the nature of its supervisory work was excluded as residential building work under clause 7(1)(f)(iii) of the Act
9. Unreported, decision of Windeyer J on 20 August 1998 at first instance in *Trend Properties Pty Ltd v Casa Maria Pty Ltd*, and decision of the Court of Appeal on 18 December 1998
10. See the *Home Building Amendment Act 1999 (NSW)*
11. Section 30 of the *Interpretation Act 1987 (NSW)* essentially provides that an amendment to a legislation does not have retrospective effect on the law existing before the date the amendment commenced.
12. See for example *FIA General Insurance Company Ltd v Brookman & Anor* [2000] NSWSC 56
13. *FIA General Insurance v Gallagher* [2000] NSWSC 453, judgment of Windeyer J on 17 May 2000
14. Note that the law has since changed via the *Home Building Amendment Act 1999* so that from 30 July 1999, a builder is required to have a contract of insurance in force at the time it commences work, and not at the time it entered into the building contract.
15. Section 92(3) of the Act
16. Section 102(3) of the Act
17. Section 102(6) of the Act
18. Regulation 54 of the Regulation
19. Regulation 55(1) of the Regulation
20. Section 103B(2) of the Act
21. Section 102(4) of the Act and Regulations 44 and 45 of the Regulation
22. Regulations 43 of the Regulation
23. Section 4 of the Act
24. Section 5 of the Act
25. Section 19 of the Act
26. A major recommendation – to change from a contractor licensing system to business licensing system – is not supported at this time.
27. As opposed to other consultants who are considered to have a minimum professional standard by virtue of their qualifications and training, such as geotechnical engineers.
28. The *Regulatory Reduction Act 1996 (NSW)* (Schedule 1.1) had amended the *Building Services Corporation Act 1989 (NSW)* by no longer requiring air conditioning and refrigeration contractors to be licensed. However, this provision was never commenced and it is now considered that the licensing requirement should be maintained.
29. Section 95(3) of the Act
30. Residential building contracts are currently prohibited from referring disputes to arbitration, and from having clauses which permit a builder to lodge a caveat entitling it to any title on the consumer's property for payment due under the building contract.
31. Such as Singapore and Hong Kong.
32. Introduced by the *Fair Trading Amendment (Substantiation of Claims) Act 2000 (NSW)* which required a person to substantiate a claim or representation made in any advertisement or statement in trade or commerce. ■