REFORMS ON THE QUALITY OF CONSTRUCTION OF BUILDINGS

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INTRODUCTION

Following the Campbell Inquiry headed by Mr David Campbell (MP), a Joint Select Committee on the Quality of Buildings report was released in July 2002 which recommended changes to make the home building industry in New South Wales more responsive to the needs of consumers. As a result of the recommendations, a bill was introduced and eventually passed in December 2002 as the *Building Legislation Amendment (Quality of Construction) Act 2002* (NSW) ('Amending Act').

The Amending Act amends 3 main types of legislation relating to:

(a) environmental planning and assessment. The key amendments are to:

(i) the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA'); and

(ii) the *Environmental Planning and Assessment Regulation 2000* (NSW) ('EPAR');

(b) home building. The key amendments are to:

(i) the *Home Building Act 1989* (NSW) ('HBA'); and

(ii) the *Home Building Regulation 1997* (NSW) ('HBR'); and

(c) conveyancing. The key amendments are to the *Conveyancing (Sale of Land) Regulation 2000* (NSW) ('CSOLR').

COMMENCEMENT

The Amending Act was assented to on 18 December 2002. Apart from some minor sections, the majority of the provisions are expected to commence by proclamation in July 2003.

OBJECT

The objects of the Amending Act are to:[1]

(a) improve the home building structures in NSW so that they would be more efficient, less complex and costly, and better understood by both builders and consumers;

(b) focus attention at the point where homes are actually being built, with locally based building inspectors intervening when things go wrong; and

(c) streamline coordination between government regulatory bodies involved in home building so that key functions are no longer fragmented.

To achieve these objects, the Amending Act focuses on the following matters:

(i) certification of a completed building;

(ii) occupation certificates;

(iii) notification of HBA requirements;

(iv) licensing of builders;

(v) dispute resolution in relation to home building claims; and

(vi) terms of building contracts.

The amendments to the matters above sit alongside recently announced structural changes, including the establishment of:

(A) a Building Professionals Board to act as a single accreditation and registration authority for building certifiers and design professionals. It is intended that the Board will be similar to the existing Architects Registration Board, and its members will report to the Ministry for Planning;

(B) a Building Coordination Committee to improve coordination between the government agencies involved in the home building policy making;

(C) the Office of Home Building within the Department of Fair Trading portfolio, which focuses on regionalised service delivery and resources allocated on the basis of business activity; and

(D) an independent body to provide home building advisory and advocacy services to the public.[2] This seeks to further increase consumer protection and enhance their education and awareness of home building issues.

CERTIFICATION

The certification reforms are primarily found in amendments to the EPA and EPAR. They include:

(a) prohibiting the builder from appointing a principal certifying authority for the building work unless the builder itself is the land owner.[3] An accredited certifier may be appointed as the principal certifying authority.[4] Currently, the person having the benefit of the relevant development consent or complying development certificate (usually the developer/owner of the building but may also be the builder itself) can appoint the principal certifying authority. The builder can now only appoint the principal certifying authority if it is the land owner. The amendment is intended to avoid situations where a builder-appointed certifier may be more willing to certify that building work is of a satisfactory standard because of the certifier's relationship with the builder whom it relies on for work;

(b) defining the functions of a principal certifying authority to improve its role, namely:[5]

(i) to ensure that a construction certificate is issued in relation to the building works;

(ii) to ensure that each person by whom the work is carried out is properly licensed under the HBA (i.e. has a valid builder's licence);

(iii) to ensure that the building work is inspected at the critical stages as prescribed by the Amending Act;[6]

(iv) to ensure that compliance certificates are issued for each matter which the certifier must be satisfied before issuing the relevant occupation certificate/sub-division certificate;

(v) to ensure that all requirements of the EPA must be satisfied before an occupation certificate/ sub-division certificate can be issued;

(vi) to issue the relevant occupation certificate/ sub-division certificate for the work; and

(vii) to comply with such other requirements as may be prescribed by the EPAR;

(c) the critical stages at which the certifier must carry out its inspections are:[7]

(i) where a concrete structure is erected (other than the placement or relocation of a pre-fabricated concrete structure), for each stage of construction that involves a concrete pour:

(A) after any steel reinforcement has been positioned and before any formwork has been completed; and

(B) after any formwork has been completed and before the concrete is poured;

(ii) here construction of a building involves the placement or relocation of a pre-fabricated concrete structure, immediately after the completion of the placement or relocation;

(iii) where construction of a building involves floor framing, immediately after completion of the framing;

(iv) where construction of a building involves wall framing, immediately after completion of the framing;

(v) where construction of a building involves roof framing, immediately after completion of the framing;

(vi) where construction of a building/structure involves the installation of waterproofing, immediately after completion of the installation; and

(vii) in all cases, after the building/structure has been completed and before an occupation certificate is issued;

(d) it is an offence to influence an accredited certifier acting as the principal certifying authority, or for the certifier to seek or accept any benefit in carrying out its certifying functions.[8] The maximum penalties for breach are $1.1m and/or 2 years imprisonment;[9]

(e) accredited certifiers are also subject to regulatory controls and may be investigated by the Director General of Planning NSW where they may be liable for unsatisfactory professional conduct or professional misconduct.[10]

In addition to the above, failure by a building owner to give an annual fire safety statement to the council within prescribed times under the EPR constitutes a separate offence for each week beyond the expiry of that time.[11]

OCCUPATION CERTIFICATE

The amendments in this area are to the EPA and the CSOLR.

The EPA has been amended to the effect that *all* residential buildings will be required to have an occupation certificate before they can be used or occupied.[12] Currently, residential buildings which are defined under the Building Code of Australia as Class 1a (e.g. single dwellings being a detached house or a terraced house) or Class 10 (e.g. non-habitable buildings such as a

private garage, carport or shed) are not required to have an occupation certificate. The amendment brings the requirement for *all* residential buildings to have an occupation certificate in line with the existing position in relation to commercial buildings.

Further, it is an offence to occupy or use a new building before an occupation certificate has been issued. A breach of this provision attracts a maximum penalty of 1,000 penalty units (an increase from the current 25 penalty units) or $110,000.[13]

The Amending Act also amends the CSOLR by stipulating that contracts for sale of new strata units and house and land packages are not required to proceed to settlement until at least 14 days after the purchaser has been provided with a final occupation certificate.[14]

NOTIFICATION OF HBA REQUIREMENTS

The amendments in this area are to the EPAR.

Under the existing provisions of the EPAR, a complying development certificate for residential building work must not be issued unless the requisite insurance for the work under the HBA is in place.[15] However, it is unclear who bears the responsibility for checking that this requirement is complied with. The amendment to the EPAR clarifies the position by placing the responsibility for checking compliance on the principal certifying authority. Accordingly, residential building work within the meaning of the HBA must not be carried out unless the principal certifying authority has given council written notice of the following:[16]

(a) where work is to be carried out by a licensed contractor under the HBA:

(i) the name and licence number of the contractor;

(ii) the name of the insurer by whom the work is insured under Part 6 of the HBA;

(b) where work is to be carried out by a licensed owner/builder, the name and permit number of the owner/builder; and

(c) where, while the work is in progress, the information above becomes out of date, further work must not be carried out unless the principal certifying authority has given the council written notice of the updated information.

LICENSING

The amendments in this area are to the HBA.

The amendments to the HBA require applicants for the issue, renewals or restoration of builder licences to meet financial solvency standards.[17] Exactly what the standards are remain uncertain and informal inquiries with the Department of Fair Trading at the time of writing have not shed any light. These amendments take the regulation of the builder licensing scheme even further from the raft of amendments promulgated under the *Home Building Legislation Amendment Act 2001* (NSW).[18]

DISPUTE RESOLUTION

These reforms are found primarily in the amendments to the HBA.

In essence, the responsibility for handling home building disputes in the first instance will shift from the existing regime under the Consumer Trader & Tenancy Tribunal ('CTTT') to the Department of Fair Trading ('Department').[19] Currently, all home building disputes within the CTTT's jurisdiction of $500,000 should firstly be referred to its arm, the Building Conciliation Services ('BCS') (previously the Building Disputes Unit).[20] On 17 February 2003, the Department officially launched the Office of Home Building ('Office') which is intended to take over the role of the BCS in

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administering disputes. The operation of the BCS is expected to cease in July 2003. This new regime is in line with the second object highlighted above aimed at promoting a more regionalised approach to enforcement, and addresses concerns that the present system was too centralised as all disputes had to be referred to the BCS, which is based in Sydney.

Under the new scheme, home building disputes should in the first instance be referred to the Office as part of the Department, which has offices all over NSW and is therefore more accessible to the public.[21] A local officer of the Department will be assigned to review the case,[22] and will attempt to resolve matters quickly before the dispute escalates.

If the dispute cannot be resolved, the officer may proceed in any of the following ways:

(a) refer the dispute to an inspector who will conduct an on-site investigation. The inspector will have power to issue a rectification order if satisfied that there is incomplete or defective/damaged work.[23] The rectification order must be complied with. If, however, an appeal against the rectification order is lodged with the CTTT within the time for rectification, the matter is then determined by the CTTT;[24]

(b) refer the dispute to the CTTT in appropriate cases. This will to a large extent depend on the nature of the dispute;

(c) if the claim exceeds the CTTT's jurisdiction of $500,000, recommend that the dispute be referred to the courts instead.

If the matter proceeds to the CTTT, an independent expert may be appointed by the tribunal and this expert's report will be used to determine the dispute (unless the tribunal gives leave for any other expert report to be adduced).[25] The costs of appointing this independent expert will be borne equally by the parties.[26]

TERMS OF BUILDING CONTRACT

The changes are found primarily in the HBR, and include:[27]

(a) all plans and specifications for work done are to form part of the building contract;

(b) any agreement to vary the contract will only have effect if it is in writing signed by each party; and

(c) all building work is to comply with the Building Code of Australia, other relevant standards and the conditions of any relevant development consent or complying development certificates. This gives statutory effect to what is already largely being employed in practice.

OBSERVATIONS

The amendments to the dispute resolution procedures were passed less than a year after the CTTT and the BCS were established on 25 February 2002 to replace the old Fair Trading Tribunal regime. The anticipated demise of the BCS in July 2003 will therefore occur less than 1° years after it was introduced with much fanfare as being part of the then new super consumer tribunal that is the CTTT, which was touted as the 'magic pill for all ills'. Whilst one can see the justification in making the dispute resolution mechanisms more accessible to regional disputants, one can also be forgiven for being lost in the maze of changes which have occurred in speedy succession even before the BCS has really taken off. The real concern therefore is whether, faced with new amending legislation which will come into effect even before previous amending legislation has been fully proclaimed,[28] the various authorities advocating these changes are in fact communicating and coordinating effectively between them in line with the objects of the Amending Act.

Further, the financial solvency standards to be imposed on builders for licensing should in theory be the same standards required by insurers in issuing home warranty insurance policies under the HBA, which must be obtained before residential building work can commence. However, in the absence of any statutory provision on this, in practice, insurers are at liberty to require more stringent conditions before issuing policies to builders. Even now, insurers can refuse to issue policies unless the builder obtains an indemnity from the developer to recompense the insurer for any claims made under the policy by a consumer (there is no point in obtaining an indemnity from the builder as claims can now only be made as a last resort if the builder is insolvent, dead or has disappeared[29]). Faced with a situation where if the developer refuses to give the indemnity, its builder cannot commence the work, the developer usually has no choice but to give in. While one may initially feel some sympathy for the developer at being 'held to ransom' by the insurer, there appears to be nothing to prevent the developer from pushing the indemnity back onto the consumer by increasing the purchase price of the residential property to the value of the indemnity. Therefore, ultimately, it is still the consumer who ends up paying for any 'protection' which the HBA had committed to provide to it in the first place. It is respectfully submitted that these fundamental issues facing the continuing home warranty insurance crisis, which has evolved to a stage where the insurers are effectively controlling the scheme, need to be more vigorously addressed before any perceived attempt to skirt around them by the passing of more amending legislation is made.

REFERENCES

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1. See second reading of *Building Legislation Amendment (Quality of Construction) Bill* on 20/11/02.

2. New s.115A of the HBA.

3. New s.109E(1A) of the EPA.

4. New s.109E(1) of the EPA.

5. New s.109E(3) of the EPA.

6. New Cl 162A of the EPAR.

7. New Cl 162A of the EPAR.

8. New s.148A of the EPA.

9. New s.148A of the EPA.

10. New s.118Q of the EPA.

11. New Cl 177(2A) of the EPAR.

12. New Cl 156 of the EPAR.

13. New s.109M(b) of the EPA.

14. New Cl 2 in Schedule 2 of the CSOLR.

15. Section 133 of the EPAR.

16. New Cl 98B and 136C of the EPAR.

17. New s.20(4) of the HBA.

18. See *Law Society Journal* November 2001 article *'Amendments to the Regulation of Home Building in NSW Won't Fill the Gaps'* by the author.

19. New s.48D of the HBA.

20. See *Law Society Journal* April 2002 article *'Introducing the New Super Consumer Tribunal'* by the author.

21. New s.48C of the HBA.

22. New s.48D of the HBA.

23. New s.48E of the HBA.

24. New s 48F(2) of the HBA.

25. New s.48N(2B) of the HBA.

26. New s.48N(2C) of the HBA.

27. New Cl 59 of the HBR, new Schedule 3A of the HBR.

28. For example numerous sections of the *Home Building Legislation Amendment Act 2001 (NSW)* have yet to commence.

29. See *Law Society Journal* May 2002 article *'State Reforms Fast-tracked in Wake of Continuing Insurance Crisis'* by the author.