



6 June 2022

Peter Graham
Executive Director
Consumer, Building and Occupational Services
Tasmanian Department of Justice

By email to: benjamin.price@justice.tas.gov.au and haveyoursay@justice.tas.gov.au

RE: HOME WARRANTY INSURANCE CONSULTATION

Dear Mr Graham,

On behalf of the Tasmanian Chapter of the Australian Institute of Architects (the Institute), we thank you for the opportunity to provide feedback on proposal to reintroduce a Home Warranty Insurance Scheme as proposed in the *Home Warranty Insurance (HWI) for Tasmania* consultation paper. Our Chapter, together with our Institute's Policy and Advocacy Unit, has reviewed the consultation paper. We look forward to the rapid re-introduction of a scheme which provides proper protections for consumers and strengthens public confidence in Tasmania's residential construction sector.

The Institute and the Tasmanian Chapter support the re-introduction of a scheme for HWI to ensure that Tasmanian consumers have equivalent protections to consumers in other Australian states and territories. However, this support is subject to our qualifications, recommendations, suggestions and areas identified for further clarification or options for different settings, as set out below.

In scope residential building works.

The insurance should be for dwelling owners in respect of domestic (non-commercial) works and fundamentally be ascribed to the Building Code of Australia (BCA) building class of Class 1a or Class 2. The Institute supports the out-of-scope limit for Class 2 buildings of greater than three storeys with the exception that renovation works for a single individual dwelling in an apartment complex of any size should remain in scope. An example of such works that could also exceed \$20,000 would be bathroom or kitchen renovations, or replacement of window units (e.g. window upgrades to double glazed units). We note that, while not commonly found in excess of three storeys, that there should be no limit in the rise of buildings (no. of storeys) for Class 1a buildings.

Upper limit (caps) for cover.

The Chapter supports the overall proposed 5% / 20% cap.

However, under Section 41 (1) of the Residential Building Work Contracts and Dispute Resolution Act 2016 and resulting Section 6 of the Residential Building Work Contracts and Dispute

Resolution Regulations 2016 a maximum deposit amount of 10% is allowed for contracts below the prescribed set amount of less than \$50,000, and 20% for contracts of any price, where the value of the work to be performed off-site is more than half of the total price. Off-site work would include prefabrication of building elements such as frames, trusses and even modular sections of a building. This raises the question as to whether the deposit cover should more closely follow the provisions set out for the receiving of deposits under the Residential Building Work Contracts and Dispute Resolution Act 2016 and its regulations.

There is strong evidence of rapidly rising and volatile construction costs since the commencement of the Covid-19 pandemic, attributable to a range of market demand and supply chain issues. We note \$200,000 to be a clearly arbitrary rounded amount rather than a statistically derived amount from actual data. Should an arbitrary rounded amount be used, our recommendation is that this be commenced at \$300,000. The value of construction, e.g., cost of construction per square metre in Tasmania, is similar to Victoria and NSW and may be found to be at a premium due to the cost of materials inclusive of freight. The amount should be reviewed annually according to the annual Australian Bureau of Statistics' construction cost index (see: <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/producer-price-indexes-australia/latest-release>). The annually reviewed amount could be brought into effect each year through a Director's Determination.

As noted above, the commencing upper amount could also be determined statistically by a thorough analysis of data from CBOS (or whomever at a Tasmanian state level collates building permit data). We note that in Victoria there is publicly available detailed data through the Victorian Building Authority (VBA) at <https://www.vba.vic.gov.au/about/data>. We were not able to locate an equivalent dataset on any Tasmanian Government or authority's website.

In the example of the VBA data, this is resolved down to every individual project per building permit issued and includes total project value, class of building /structure and even qualifies the nature of works as to whether it is renovations or new build, as well as whether prior demolition has been required. Such data would enable a proper statistical determination of an absolute upper limit for residential works.

Lower limit threshold to trigger HWI requirement.

We note that the simple dollar for proposed works might not be sufficient to appraise the lower limit threshold.

There is a risk that a small number of unethical contractors in collusion with consumers might underquote on paper to avoid paying the insurance to start with. One suggestion to discourage such behaviour would be to establishing a legally required declaration on quotes that the amount quoted is the true total cost (or best estimate) of the value of the project.

Another issue is the collateral damage that arises from defective work. One of the more common defects is waterproofing. An upstairs bathroom renovation may have cost \$15,000 but subsequent water damage from incorrectly installed membrane may cause other structural damage to flooring, building structural elements (bearers, joists) and the ceiling below requiring far more costly remediation than just the bathroom itself. Therefore, a series of threshold amounts might be established according to the type of work and the likelihood of collateral risks.

Consideration of a first resort scheme.

The Institute urges the Tasmanian Government to commence with the default position of a scheme that provides the highest level of protection for Tasmanian consumers and promotes confidence in the residential construction sector. While the principle of expedience would suggest commencing with a last resort scheme, the Institute recommends that the Tasmania Government fully models and evaluates the financial viability of a “first resort” scheme as described in the paper, while concurrently commissioning a last resort scheme as the starting point.

It is noted that in commenting on a first resort scheme the consultation paper states, as a rationale for not pursuing a first resort scheme that,

“It also recognises that there a[re] more cost-effective mechanisms exist to resolve disputes between builders and property owners where the builder remains available to address identified incomplete or defective work.”

While the cost-effectiveness appraisal may hold true for the operators of the scheme, this may not be the case for either property owners or builders. These alternate mechanisms may involve adjudication by the independent expert panel under the provisions of the Residential Building Work Contracts and Dispute Resolution Act 2016 (the Act) within 12 months of practical completion or other more adversarial processes in the Tasmanian Magistrates or Supreme Courts when defects become apparent outside of twelve months.

The additional cost burden borne by consumers and/or building practitioners includes attendant legal costs. It also includes costs arising from delays in commencing remediation works and subsequent deterioration of the defect, and the rise in cost of remediation works while awaiting adjudication or a court decision.

Grandfathering and transitioning arrangements.

The Institute supports an interim grandfather scheme for projects underway as proposed on page 16 of the consultation paper. We also support a risk-based transition arrangement (pp 15-16) if this brings the scheme into operation as quickly as possible rather than a delayed start while each builder’s eligibility is determined.

Owner builders.

The Institute supports the requirement for owner builders to be required to subscribe to the scheme noting that cover would only be required for defects after the issuing of certificate of completion for the protection of the subsequent owners if the property was to be sold.

The scheme model (entity, contract manager vs state).

The Institute notes the stated preference of the Tasmanian Government for the contract manager model. However, we recommend the final decision takes into consideration important criteria or principles as follows:

- The scheme should be easy to use for domestic (non-commercial) consumers with no risk of consumers falling between the cracks.
- If the Tasmanian government pursues its preferred contract manager model, then it should ensure:
 - there are legislated/ regulated minimum cover terms

- the insurers should have a legislatively requirement to make clear the difference between both the legislated HWI component and any additional optional cover the builder and their client might seek so that consumers are clear about what they are paying for.
- that the scheme does not fall over if another disruptive change occurs as previously occurred with HIH collapse.

Furthermore, to prevent and/or mitigate the risk of another collapse the Tasmanian Government might consider the following measures:

- legislatively underwriting the scheme to mitigate the occasion of another collapse of major provider(s) and/or market failure due to insurers exiting the market under unfavourable conditions.
- potentially requiring the insurers who come into the market to pay a percentage of insured risk into a government trust to offset the repeat occasion of a catastrophic collapse.
- alternatively, along the lines of prudential requirements for Australian banks, regulated requirements of insurers to hold a proportionate amount of cash and other current assets to specifically cover the risk pool of Tasmanian building projects underway. These holdings would require periodic (e.g quarterly/half-yearly certified declarations).

We note that a major climate change related event similar to the Queensland and NSW floods, or bushfires, could effectively collapse scores or hundreds of small builders because of the impact on their own personal circumstances leaving a legacy of incomplete projects. Could the scheme cover that scale of claims? It is essential that this type of scenario testing also be undertaken as the scheme is established.

Other related matters.

Insurances are an important safeguard for consumers and practitioners alike. However, insurance of itself does not prevent the occurrence of a non-completion of works nor defective work.

The Institute has advocated for a number of years to introduce monthly progress payments into the Tasmanian residential building sector.

Our Institute wrote to CBOS in July 2020 advocating for the introduction of a true monthly 'progress' payments model as the changes that had been brought into effect through Residential Building Work Contracts and Dispute Resolution Act 2016: Director's Determination – Mandatory Contract Provisions (the 2016 Determination) had only introduced a 'staged' payments model based on set percentages. At the time we stated that a monthly progress payments model better aligned to the intent of the 2016 determination.

In our July 2020 letter we advised as follows on the matter of monthly progress payments,

An architect also is required by the building contract to act impartially in specific circumstances, between the owner and the builder, to ensure a fair and reasonable outcome for both parties. Especially so, when the architect assesses a builder's claim for payment and then certifies the work done and the value of the work, so that the owner can have confidence about the contract price they are to pay the builder.

An important economic consideration here, particularly for small residential builders, is that the preferred method of progress payments should support the builder's cashflow relative to project works costs (labour and materials). In turn, this can serve to ensure that the builder remains solvent through the construction phase so the project is completed and delivered for the client.

An important financial risk consideration for the owner as consumer, is to have checks and balances in the building contract that ensure that the consumer does not pay for works that are not yet completed, nor overpays for works that are complete.

The Institute still strongly advocates for monthly progress payments to be introduced. The Institute notes that monthly progress payments rely upon a third-party practitioner who:

- holds a suitable qualification
- is deemed competent by an examination or assessment process before obtaining a practice licence
- is bound by a regulated professional code of conduct
- is subject to accountability mechanisms through a practitioners' board who have a defined investigations and disciplinary process for practice which is alleged to demonstrate a lack of competence or failure to adhere to a prescribed professional code of conduct.
- is required to undertake annual continuing professional development
- is required to hold professional indemnity insurance as a pre-requisite for licensing.

Monthly progress payments also rely upon specific contract clauses such as those present in the ABIC 2018 Simple Works Contract¹. To that end we also advised CBOS that the ABIC 2018 Simple Works includes the following clauses as the 'model' provisions for monthly progress payments in architect-administered residential building contracts:

- A6.3—The architect administers the contract on behalf of the owner, but not when assessing or certifying a payment claim.
- A6.4—When assessing and certifying a payment claim, the architect acts independently, fairly and impartially.
- N3—Procedure for contractor to submit a (monthly) progress claim.
- N5—Procedure for Architect to assess a progress claim and to certify progress payment amount.
- N7—Obligation on Owner to promptly pay a certified progress payment amount.

The Institute therefore recommends that the Tasmanian Government brings into effect a monthly progress payments scheme administered by a third party with the required contract provisions. It would reduce the likelihood of:

¹ A 'reference only' copy of the contract which is a joint product of the Australian Institute of Architects and the Master Builders Association can be viewed at: <https://members.architecture.com.au/ComDocs/RC/reference-contract-abic-sw-2018-c.pdf>

- consumers being left in a situation of incomplete work and having already paid for work not performed
- defective works in a situation where the builder is commercially inactive or unavailable to remedy the defects
- builder insolvency that gives rise to the non-completion of works or no longer being present to remedy defects

Such a preventive measure would reduce the risk of HWI claims and therefore de-risk and strengthen the overall HWI scheme. Over time, this may permit premiums to be adjusted downward according to the overall quantum of claims.

Thank you for providing the opportunity provide important feedback on this important matter for consumers and practitioners alike. Please feel free to contact us if you need further clarification or explanation on any of the above points.

Kind regards,



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President, Tasmanian Chapter
Australian Institute of Architects



Jennifer Nichols
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Australian Institute of Architects

The Australian Institute of Architects (Institute) is the peak body for the architectural profession in Australia. It is an independent, national member organisation with over 13,000 members across Australia and overseas. The Institute exists to advance the interests of members, their professional standards and contemporary practice, and expand and advocate the value of architects and architecture to the sustainable growth of our communities, economy and culture. The Institute actively works to maintain and improve the quality of our built environment by promoting better, responsible and environmental design. To learn more about the Institute, log on to www.architecture.com.au.