



## **Submission in relation to the removal of Housing Indemnity Insurance in Tasmania.**

### **EXECUTIVE SUMMARY**

The removal of the requirement for builders to provide mandatory Housing Indemnity Insurance has wide reaching implications for existing building legislation, accredited building practitioners, the construction industry, consumers and the wider community.

It is imperative that any legislation implemented has a nexus with existing legislation such as the Building Act and Regulations and that the all industry bodies are fully consulted in the development of the legislation.

The following issues were identified for consideration after examining the current legislative environment and its operation:

- a. The proposed legislation to be clearly structured to remove any risk of frivolous litigation against building surveyors, other insured building practitioners and permit authorities over building defect issues that are the clear responsibility of the builder and his sub-trades.
- b. A system of licensing of sub-contract builders/carpenters to be implemented with obligations for ongoing continued professional development training. This could be achieved within amendments to the Occupational Licensing Act 2005.
- c. Direct consultation to be undertaken with Council Permit Authorities and Building Surveyors through the AIBS to examine ways of improving the system of recording and tracking the builders or owner builders responsible for the work and conformation that the nominated person has in fact undertaken the building work.
- d. The Tasmanian Building Act & Regulation be amended to require a copy of the builders contract is to be supplied to the Council Permit Authority as part of the documentation for a building permit and that such contract is to be supplied prior to the issuing of the building permit.
- e. The Building Permit be amended to detail the nominated builder or owner builder and reference the contract number on the permit where required.
- f. Robust legislation be introduced detailing who and how due diligence assessments of the financial security of the builder is to be undertaken. The new legislation should establish a system which limits the number of projects depending on value which a builder can have under construction at any one time.

- g. A clause similar to section 114 of the Building Act which refers to defective plumbing work should be drafted for inclusion in the Building Act for building work. Variations to Section 114 should include reference to the Building Surveyor for certification of the defect, not the Permit Authority and the defect period should be considerably greater than the one year.
- h. Consumer affairs to introduce a system of registration, level of qualification and mandatory PI Insurance for the providers of pre-purchase inspection, Building inspection services and others who advertise as building inspectors and building consultants who are not suitably accredited under the Accredited Building Practitioner (ABP) scheme.

The issues identified and recommendations proposed in this submission are considered critical to ensuring frivolous costly litigation is avoided and the implementation of best practice consumer protection in the building industry is achieved.

## **INTRODUCTION**

This submission was formulated in response to the Governments decision to scrap the mandatory housing indemnity insurance scheme. The Australian Institute of Building Surveyors is the peak body representing Building Surveyors throughout Australia. Building Surveyors are the sole accredited building professional responsible for the certification of building work and in a co-regulatory partnership with the State Government responsible for the administration of the Tasmanian Building Act and Regulations. Aside from legislative obligations the Building Surveyor more so than any other building practitioner have professional obligations that extend to the consumer and the wider community.

The "Housing Indemnity Act" was proclaimed on 21 December 1992, the intention of the act was to implement Housing Indemnity Insurance (HII) and provide consumers with some protections when entering into construction contracts from builders becoming insolvent, disappearance, death and or latent defects for a period of 6 years. Unfortunately through industry pressure over the years the insurance has been diluted to insurance of last resort (this was never the intent). With constant criticism of the scheme and the questionable adequacy of the existing Housing Indemnity Insurance the Government has recently decided to scrap the mandatory scheme in favour of a yet to be developed building dispute resolution process.

Over the 16 years that the Housing Indemnity Act has been operating Building Surveyors throughout the state have been at the forefront of the administration process undertaking the day to day educative role for builders and the consumers over the need for insurance and where to go and what to do in the event of a claim. It is these years of experience while working at the coal face that has provided us with a sound understanding of the good, the bad and the ugly that has resulted from the implementation of this legislation.

Building Surveyors in Tasmania have for many years supported a review of the current HII legislation to ensure consumer protection is maintained and improved. Since its implementation we have seen constant lobbying and efforts from other representative bodies from within the construction industry to dilute and/or remove the consumer protections originally established in the Act. Recently this lobbying has

intensified and centred on the removal of the legislation altogether; albeit with significant vested interests in favour of the some sectors within the construction industry and not necessarily in the interests of consumer protection!

As Building Surveyors we have serious concerns as to the implications for the construction industry, consumers and the wider community if the legislation is dumped without extensive consultation with ALL industry sectors and in isolation of other legislation. The issues identified in this submission are critical to the implementation of best practice consumer protection for the building industry. The proposed consumer building legislation has not addressed the issues outlined in this discussion paper.

## **ISSUES & CONCERNS WITH REMOVAL OF MANDATORY HOUSING INDEMNITY INSURANCE**

### **1. *Inequity between Builders and other Accredited Building Practitioners***

The proposed removal of HII establishes a significant inequity between builders and other accredited building practitioners (ABP's). Builders have the option to forgo insurance cover against their work, warranty, bankruptcy and disappearance while other accredited building practitioners are legislated to fund and carry Professional Indemnity Insurance each year of their operations depending on the value of their turnover. Some ABP's must also fund runoff cover for a period of over 10 years after they cease operating their business activities.

### **2. *Potential for increased litigation***

With the removal of the insurance there is an increased risk that other building professionals and local councils will be engaged in frivolous and vexatious claims for building defects as litigators seek out those **with a capacity to pay** through the retention of PI Insurance whether or not there is a justifiable case for professional negligence. Building Surveyors in particular will be the subject of increased risk as they certify the building work and undertake regular inspections during construction.

Currently these claims are currently circumvented by Housing Indemnity Insurance. Such accusations and litigation even if dismissed will have significant cost implications on building professionals in reputation, time taken to defend an action and legal costs all of which will have to be passed on within the service fees charged to the end consumer.

### **3. *Professional Indemnity Insurance costs will rise***

The increased risk of litigation will inevitably increase the costs to building professionals through higher PI Insurance and costs associated with any defence of a claim. AIBS preferred insurance provider has indicated PI Insurance costs may rise due to the removal of HII depending on the supporting legislation and the increased risk to Building Surveyors being drawn into litigation.

**4. *Increased costs to building professionals will be passed onto the consumer***

The increased risk of litigation and the need for Building Surveyors to review or change their risk mitigation strategies will increase service costs. With the likely result being increased due diligence and number of inspections during construction all increases in costs will be passed onto the end consumer.

**RECOMMENDATION:**

**4a.** That the proposed legislation is clearly structured to remove/reduce the risk of building surveyors, other ABP's and permit authorities being brought into litigation over issues that are the responsibility of the builder and his/her sub-trades.

**5. *Owner builders will be on the increase***

With the removal of HII there is no incentive and or obligation for builders to remain accredited under the Building Act. Requirements for accreditation as a building practitioner are not mandatory only the "person responsible" needs to be accredited, accreditation is not occupational licensing.

Where there is no obligation to maintain accreditation there is no obligation to undertake continued professional development (CPD). Work place standards own statistics will show a drop in the number of builders maintaining accreditation under the current system. These builders have not left the industry they are just operating as subcontractors to owner builders and other builders and do not undertake CPD training.

With the removal of HII an accredited builder has little difference in which to market their skills and services as opposed to a subcontractor. Owners can and do legally engage subcontract builders to undertake work for them to any value as long as the builder is a subcontractor to the owner. Non accredited subcontractors will again actively encourage owners to be owner builders and use subcontract labour with no risk and no responsibility; and why not it's cheaper to engage a subcontractor as opposed to an accredited builder.

The above concerns would be alleviated by introducing a system of occupational licensing for sub-contract builders/carpenters. Such licensing would have obligations for the licensee to under take CPD training on an ongoing basis.

Occupational licensing is different to that of an accredited building practitioner. The licensee is not considered the "*Responsible Person*" under the Building Act. They are a subcontractor to the responsible person (Accredited Builder or Owner) just as the Plumber or Electrician is.

Plumbers and Electricians are licensed under the yet to be implemented Occupational Licensing Act 2005. This act compels licensees to undertake CPD training among other responsibilities it is AIBS opinion that by including subcontract carpenters under this legislation a nexus is achieved with a qualification path to accreditation as a building practitioner.

Most importantly such a system would give owners the confidence that they are engaging a competent tradesperson to undertake work on their behalf (Not a back yarder). Further it will ensure ALL sub-trades are maintaining a level of training within the construction industry not just plumbers, electricians and/or accredited building practitioners.

#### **RECOMMENDATIONS:**

- 5a.** That a system of licensing of sub-contract builder/carpenters be implemented with obligations for ongoing continued professional development training.
- 5b.** Consideration be given to amending the existing Occupational Licensing Act 2005 to include carpenters.

#### **6. *Proposed legislation and nexus with Tasmanian Building Act & Regulations***

Building Surveyors & Council Permit Authorities are advised of the proposed builder name, address details and accreditation number by the applicant on the application form for Building Permit. Building Surveyors may have no dealings with the builder until such time as inspections are undertaken and even then they may not be on-site during inspections. Council Permit Authorities may have no dealings with the builder at all.

- Q. How do building surveyors and permit authorities confirm that a nominated builder on an application form is in fact the builder who has been contracted to undertake the work?
- Q. Has the owner/applicant changed builders since the initial application was submitted?
- Q. Has the owner decided to become an owner builder?

Currently both the Building Surveyor & Permit Authority can rely on the requirement under the Building Act for the applicant to provide a copy of the insurance certificate issued for the project in the builders and owners name at the time of application to council for a Building Permit. This certificate will confirm the responsible builder or where there is no certificate provided for the owner to apply to the director of Building Control for an Owner Builder Licence.

With the removal of the requirements for HII the current checks and balances for the nominated builder or owner builder will be removed.

Even with the current system Building Surveyors can offer examples where builders listed on the Building Surveyors records have not been the person responsible for the construction. The nexus between the applicant nominating a builder and conformation the nominated builder is indeed the contracted

builder undertaking and responsible for the building work needs to be improved.

#### **RECOMMENDATIONS:**

- 6a.** A thorough discussion be held with Council Permit Authorities and Building Surveyors through AIBS to examine ways in which systems can be implemented within the building permit application process to ensure that the checks and balances for the nomination of responsible builders and / or owner builders is improved.
- 6b.** The Tasmanian Building Act & Regulation is amended to require a copy of the builders contract is to be supplied to the Council Permit Authority as part of the documentation for a Building Permit and that such contract is to be supplied prior to the issuing of the Building Permit.
- 6c.** The Building Permit (Form 18) be amended to detail the nominated builder or owner builder and reference the contract number where required.

#### **7. *Builder's financial status and exposure to risk.***

Currently HII insurance providers undertake the due diligence assessments of a builders financial position and the financial performance of their business to limit the risk of a builder becoming insolvent. The insurer limits the builder's exposure to debt by restricting the number of projects that the builder has under construction at any one time. The prudential criterion used by the insurers includes an assessment of the builders liquidity, asset / debt ratio's and that such liquid assets are accessible to the business and not tied up in family trusts and the like.

- Q. What rigour can the industry and the consumer expect for the financial assessment of builders within the new system?
- Q. Who and what experience and qualifications will any such assessors have to fulfil the financial assessment of a builder's liquidity and what is the criterion to be assessed?
- Q. Will the legislation restrict the number of projects a builder can have under construction at any one time and what systems will be implemented to ensure that builders do not become over exposed to debt?

Such restrictions are fundamental in maintaining (if not improving) the principals of consumer protection and protection of payments to sub-trades and suppliers.

## **RECOMMENDATIONS:**

- 7a.** Robust legislation be introduced detailing who and how due diligence assessments for financial security of builders is to be undertaken.
- 7b.** The new legislation should establish a system which limits the number of projects depending on value which a builder can have under construction at any one time.

### **8. *Builder's bankruptcy.***

Tasmania has experienced first hand the impact to the consumer and the wider community from various large domestic builders going bankrupt.

For example, Y & B Homes located in Launceston collapsed in 2000 with 50+ homes in varying stages of construction around the state. We as Building Surveyors were dealing directly with the owners of these homes and experienced the grief and aggravation felt by the owners who were in a constant battle to get their homes completed.

The collapse was made worse by the poor level of workmanship which had been employed in the construction of these houses as the company was sliding into bankruptcy. Many of the homes had to have significant remedial work undertaken to the existing construction to bring the buildings to a satisfactory standard prior to the buildings being completed.

There is no doubt that unless the new legislation implements a rigorous assessment system for the viability and financial security of a builder and their business and limits are imposed on builders for the number of projects they can have under construction at any one time, there will be a an increase in builders sliding into bankruptcy in Tasmania.

### **9. *Other Acts and Regulations***

The Building Act and regulations should be reviewed to ensure that the obligations on builders are spelt out in relation to faulty and or poor workmanship for example Section 114 of the Building Act for plumbing work:-

#### **“114. Defective plumbing work**

A person who carried out plumbing work or under whose control plumbing work was carried out must make good a defect in the plumbing work at his or her own expense if –

**(a)** the defect is found within one year after the day on which the certificate of completion (plumbing work) was issued for the plumbing work; and

**(b)** the permit authority certifies that the defect is due to faulty workmanship or the use of a defective or unauthorised material, fitting or plumbing product.”

## **RECOMMENDATIONS:**

- 9a.** A similarly effective clause should be drafted for inclusion in the Building Act for building work.
- 9b.** The proposed clause should refer to the Building Surveyor for certification of the defect not the Permit Authority.
- 9c.** The defect period should be considerably greater than one year.

## **OTHER ISSUES**

### **10. *Regulation and qualification of Building Consultants, Pre-Purchase Inspectors & Building Inspectors***

In the past 5 years or so there has been a significant increase in requests for pre-purchase inspection of residential and commercial building stock. With vendors to be obligated to disclose building work at time of property sale greater reliance is being placed on pre-purchase inspection reports. Very Few Building Surveyors undertake pre-purchase inspections as work loads do not permit and the cost associated with the PI Insurance for pre-purchase inspection is cost prohibitive.

However there is anecdotal evidence of a significant increase in the number of persons describing themselves as “Pre-Purchase Inspectors”, “Building Inspectors” and “Building Consultants” who are undertaking these inspections most without any insurance, level of qualification and experience in structural assessment. Even fewer are providing written inspection reports in compliance with the *Australian Standard 4349.1 for Inspection of Buildings – Pre Purchase Inspections, Residential Buildings*.

Consumers have an expectation that when an inspection report is carried out that it is done so by a suitably qualified and experienced person who holds appropriate insurances for the provisions of the service. AIBS is concerned at the lack of warranty and consumer protection provided to property purchasers who engage the services of unqualified and uninsured building inspectors.

## **RECOMMENDATION:**

- 10a.** Consumer affairs introduces a system of registration, level of qualification and mandatory PI Insurance for the providers of pre-purchase inspection services and others who advertise as building inspectors and building consultants and who are not suitably accredited under the ABP scheme.

## **CONCLUSION**

AIBS strongly supports improvements to consumer protection legislation but remain unconvinced that removing the mandatory housing indemnity

insurance scheme without due consideration will provide the level of cost effective and efficient consumer protection desired.

Consultation with ALL of building industry organisations must be undertaken to ensure the best possible outcome in consumer protection while improving the professional standard and competency of all building practitioners.

The AIBS remains committed to working with government and other professional organisations to ensure the objectives of suitable satisfactory consumer protection are obtained together with an improved cost effective quick dispute resolution process.

It is the firm belief of AIBS that the above recommendations will help foster improved consumer confidence and assist in reaching the level of consumer protection desired.

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