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Mr Rod Stowe
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21 August 2014

To be sent via email: policy@finance.nsw.gov.au and Richard.Potts@finance.nsw.gov.au

Dear Commissioner

Thank you for the opportunity to comment upon the proposed *Home Building Regulations* 2014.

The SCA has previously provided comprehensive submissions in relation to the reforms proposed to the Home Building legislation. Regrettably a number of our suggestions have not been incorporated into the new *Act*. Unfortunately, the new *Act* places NSW trailing other States in terms of providing consumer protection. The ill-defined nature of major defects and statutory warranties that are almost half those of 'enjoyed' by our nearest neighbour, Victoria, are compelling reasons why the date of 1 December 2014 to start the new laws needs rethinking. What has emerged as the *Home Building Amendment Act* 2014, is legislation that is both misconceived and will be condemned as the worst consumer protection legislation for home owners in Australia. Many of the reforms seem more about limiting the SICorp's liability than consumer protection. Much of the legislation, which contains provisions that are internally contradictory, will enviably force owners corporations into a position of having to seek redress in the Supreme Court for declaratory interpretations – litigation that becomes a further burden upon consumers. Buying off the plan will amount to 'Russian Roulette' and consumers/investors may seek better comfort in neighbouring states.

If the SCA were asked for a summative comment upon the proposed Home Building Amendment Act 2014, and now the regulations, it would have describe them as anti-consumer protection and pro developer and pro insurer.

Comments regarding the draft Regulations:
In relation to the proposed regulations, a preliminary observation needs to be made about the legacy of confusion that remains from previous regulations and the potential to further compound that confusion. The 2011 changes amended only the 2004 Regulations not the 1997 Regulations which had some effects upon home warranty insurance. The new draft Regulations appear to be replacing the 2004 Regulations, how the new Regulations will interface with the legacy of both the 1997 and 2004 Regulations needs to be addressed.

The other preliminary observation that we feel needs to be made in relation to the general drafting of these Regulations, is that the transitional provisions may contain unintended consequences – at least we would hope these are unintended. The SCA may need to seek legal advice, but from our reading, it does appear that there is to be a 'windfall' to private insurers in as much as contracts not claimed on or issued after 1 July 2002 will be subject

to the new conception of defects. Instead of the defects being "structural" the liability is for "major" defects. This change will mean no liability for insurers, as the new criteria of being a major defect is a much higher bar to achieve than the current provisions. This change also reduces the liability for SICorp. We hope this transitional provision is a case of poor drafting, rather than an intention of the legislation.

(Proposed reforms that are detrimental and not supported by the SCA)

Unfortunately the proposed Act puts in place much of the framework within which the Regulations are to have effect. We have already commented upon the anti-consumer protection provided by the proposed Act, but unfortunately the draft Regulations seem to be largely in the same spirit, further curtailing consumer protection. In this regard, we note the following proposed changes that will have a negative effect upon consumer protection:

1. *Increase the 'general works' contract threshold from $5,000 to $20,000.* This represents a loss of consumer rights. We are too familiar with 'quotes' that fall under thresholds only to have 'variations' extend the costs with no consumer protection. This will simply amplify the problem;

2. *Insurance exemption for cabinetry works.* This appears to be a reform designed to reduce the insurance 'burden' to the SICorp and developers/builders. The problem with such a reform is that 'stand-alone projects' can, and often are, cabinetry work to install kitchen and bathroom cabinets as part of new construction. We recommend that this intended reform be deleted and the status quo remain;

3. *Align definitions of 'storey'.* This proposed change will increase the number of strata schemes that will qualify for exemption under the high-rise provision. A building that has three levels with car-parking that provides more than four car-parks, will now be classified as a four storey building. The current definition, although inadequate, should continue and in the alternative, the affect of the change should not be retrospective;

4. *Definition of 'disappeared'.* The proposal is to extend the burden for having to show that a person such as the builder or developer cannot be found within Australia rather than NSW. This poses an extra burden upon the consumer to ensure they have access to the insurer of last resort;

5. *Definition of defect and major defect.* This proposal is both conceptually and legally flawed. The underlying philosophy of the Regulations is to change practices in the future. The manner in which this current reform is worded is such that it will have retrospective effect. This will create massive problems for consumers who are acting in accordance with the current provisions and are relying upon those time frames built into the legislation. If a claim is not currently on foot, this proposed retrospective legislation will effectively deny consumers of the protection they thought they had under the current legislative regime.

   Currently there is a six-year warranty for structural defects. The new legislation seeks to replace the current provision with a six-year warranty for "major defects" only. The practical effect is to confine many defects that were captured under the "structural defect" definition, to a two-year warranty period, reducing consumer protection. This change is in contrast to claims by previous Minister

Roberts that the legislation was to increase consumer protection. External waterproofing and safety measures clearly do not meet the "major defects" test, yet these are the most common and often latent defects that are the cause of very significant expenditure for owner corporations and body corporates.

6. *Review of building categories to fast-track IPART recommendations –excavation work.* Excavation work needs to be regulated under the Home Building Act. One can point to numerous instances where over-excavation, under-excavation and a failure to adequately compact fill to a required standard have had costly and detrimental impact upon residential buildings. Australian standards need not only to be in place, but enforced and where compliance breaks down, insurance provided. One of the 'sickening' outcomes of a failure to adequately compact fill can be noted in a widely distributed photograph of a 20-storey residential buildings in Hong Kong and China laying on their side; and,

7. *Insurance exemptions for building works in retirement villages.* There appear to be no legitimate reasons to exempt this form of strata living from the protection afforded other consumers who choose to live in other strata schemes. The fundamental principles remain unchanged, in that a retirement village operator/developer stands in the same relationship to consumers who choose to live in any other form of strata scheme.

(Reforms that are supported)

Reforms that are welcomed by the SCA are:

1. *Increasing training requirements for owners-builders.* This reform is welcomed, but must be accompanied by measures to ensure that potential owner-builders actually attend such training. The media has highlighted numerous instances of 'buying certification' and others where the applicant does not attend such training but provides evidence of prior 'competency'. Such 'slippage' in the certification process must be addressed if consumers are to be protected;

2. *Exemptions for Government funded works.* The scope of the exemption appears appropriate except in instances where a Government agency may become involved in projects where home warranty insurance would have applied. An appropriate safeguard needs to be built into Clause 57; and,

3. *Changes to plumbing, gas-fitting and restricted electrical categories:* Changes to ensure fire protection plumbing is to be a specialist area are a welcome reform due to the specialist nature of that work;

In summary, a number of the proposed reforms represent a significant erosion to existing consumer protection – protection that is crucial for what is perhaps the largest purchase by a consumer, their home. We urge a re-think on some of these reforms such that NSW becomes a leader in consumer protection.

Should you have any questions in relation to this submission, the SCA would welcome the opportunity to discuss these matters.

Yours sincerely,

Greg Haywood
President
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