



NEW SOUTH WALES POLICY PRIORITIES

Key policy priorities for the
building and construction
industry in NSW.

March 2019



**Master
Builders
Association**
New South Wales



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EXECUTIVE SUMMARY

PRIORITIES POLICY 2019 FOR THE NEW SOUTH WALES BUILDING AND CONSTRUCTION INDUSTRY

During the months of November, December 2018 and January 2019, the Master Builders Association of NSW (MBA) undertook active discussion with the building industry in NSW to develop a “Policy Priorities Document” for the upcoming State Election.

These Priorities have been developed through direct consultation with building contractors, specialist contractors and key industry stakeholders from all sectors of industry, including residential, commercial and civil contracting.

An industry survey also formed part of the industry consultation process.

There is general acceptance that opportunities for those who undertake work in the building and construction industry in NSW is strong, however, there are issues affecting the industry's operations which, if addressed would lead to a more cohesive and productive industry.

These issues include:

- The establishment of an independent, centralised authority to administer, regulate and oversee the building and construction industry (Independent Building Commission) in NSW.
The establishment of a single building industry regulator is a deserving response to the industry's economic contribution to the State economy. A single building regulator will, over time, draw together the various government agencies currently overseeing our industry;
- Architects, building designers and engineers should be accountable for the provision of their services, and be subject to a licensing structure.

The MBA views the licensing system as fundamental to the competency of practitioners, quality outcomes and consumer confidence in the building industry. It provides a mechanism for consumer protection by qualifying persons seeking work in the industry but, more importantly, it provides a compliance process to address unacceptable practices and poor performance.

The MBA is concerned the key professional services of designers, architects and engineers, which are fundamental to the construction process reside outside the current licensing regulatory system. Consequently, there is little accountability in the delivery of design and specification documentation by these practitioners, which leads to a direct risk transfer to builders and certifiers.

- The need for a dedicated senior Cabinet Minister to oversee the building and construction industry.
The NSW building and construction industry contributes over \$67 billion to the NSW economy and is a major job creator, with the sector employing an estimated 395,000 people. The building and construction sector is integral to the NSW Government's infrastructure renewal program.
- The NSW Security of Payment Legislation should be amended to include the relationship between the home owner and the builder;
- A specific building industry workplace relations agency should be established in NSW to act as a deterrent against unlawful industrial conduct and coercive behaviour;
- Subcontractors / specialist contractors should be subject to a 'Continuing Professional Development' (CPD) program;

Other issues identified through industry consultation and the survey concern Apprentices, cross border (various jurisdictions) construction, education and training as well as the establishment of a consolidated Building Act.

The Association believes that the matters identified above, as well as other industry issues could all be administered by an independent Building Commission.

Sincerely,



Brian Seidler

EXECUTIVE DIRECTOR



● ESTABLISHMENT OF A BUILDING COMMISSION

Many reports and enquiries into the NSW building and construction industry advocate the establishment of an independent building commission.

In 2002 an inquiry into the Quality of Buildings in NSW (Campbell Report) reported there were a number of structural problems within the home building process, including the fragmentation of the regulatory regime. An example was provided whereby certifiers and building practitioners were regulated by different government agencies. A key recommendation of the Campbell Report was for establishment of a Home Building Compliance Commission, independent of the State Department of Fair Trading.

Master Builders supported the recommendation. However, the Association sought as a policy position that the establishment of a Building Commission should hold an overarching responsibility for all sectors of the NSW building and construction industry – and not just the residential sector.

Master Builders has, for over 15 years, continued to present this key policy position in order to consolidate the regulation and administration of the building and construction sector in NSW.

More inquiries into the NSW building and construction sector have given support, and also made recommendations for establishment of a single state building regulator.

The 2013 independent Bruce Collins Inquiry into Insolvency in the NSW Construction Industry made the key recommendation that the NSW Government undertake a cost benefit analysis for the establishment of a separate autonomous statutory authority called the “NSW Building and Construction Commission”. (The Baird Government committed to undertake the cost-benefit analysis in 2015).

The NSW Independent Pricing and Regulatory Tribunal (IPART) has also given its support for establishment of a single building authority, to improve building compliance and enforcement. In 2014, the NSW IPART outlined its recommendation to establish a single state building regulator in its draft report into Local Government Compliance and Enforcement.

The independent review of the Building Professionals Act, (2005) undertaken by Michael Lambert released his report in late 2015. The report, amongst other things, called for the establishment of Office of Building Regulation to consolidate building regulations in the state of NSW.

Other state and territory jurisdictions have for some time, taken a co-ordinated and consolidated approach in recognition of the significance of a vibrant building and construction industry. While there has been inquiries and reviews into the Victorian and Queensland Building Commissions, the outcome of these inquiries resulted in structural changes to the effect of establishing authorities which provide for a co-ordinated approach to building regulation and oversight.

A clear example of the duplication of industry regulation and administration is licensing of the residential building sector by NSW Fair Trading and separately, the accreditation of building certifiers by the Building Professional Board (BPB) – the latter itself an agency of the Department of Planning and Infrastructure (DoPI).

Further to this, ICARE has responsibility for the administration of the Home Building Compensation Fund which in effect acts as a de facto licensing scheme, by ensuring builders meet rigorous financial criteria for eligibility to procure Home Warranty Insurance coverage.

An example of the duplication and inefficiencies due to the responsibilities of the three agencies above, can be seen by amendments to the Home Building Act, which established a Public Register of Home Warranty Insurance certificates, which is in addition to the current public registers for licensing administered by Fair Trading and the register for accredited certifiers administered by the BPB. Clearly a simple example where a single authority would be better positioned to establish a consolidated register, providing greater access for consumers and industry practitioners.

In recent years wide-ranging regulatory reform of building and building related legislation (e.g. planning, home building, strata) has provided clear evidence of the difficulties and lack of coordination where building and building related legislation is administered across different agencies.

Further, we believe that introduction of a consolidated “Building Act” would make future reforms across planning, strata and building easier and ensure consistency and coordination in all jurisdictions.

MASTER BUILDERS POLICY

Master Builders advocates the establishment of an independent building commission, and is a deserving response to the industry’s contribution to the state economy.

This Commission will draw together the current fragmented approach of various departments and Government agencies to deliver efficiencies and eliminate duplication.

● EXTEND LICENSING TO BUILDING DESIGNERS, ARCHITECTS AND ENGINEERS

Master Builders views a licensing system as fundamental to the competency of practitioners, quality outcomes and consumer confidence of the building industry. It provides a mechanism for consumer protection by qualifying persons seeking work in the industry but, most importantly, it provides a compliance process to address unacceptable practises and poor performance.

Master Builders is concerned the key professional services of designers, architects and engineers, which are fundamental to the building and construction process, continue to reside outside of the current licensing regulatory system. Consequently, there is little accountability in the delivery of design and specification services by these practitioners, which leads to a direct risk transfer to builders and certifiers.

There is no statutory obligation that those providing design, engineering and specification services are obliged to hold professional indemnity insurance coverage in respect of such services. Consequently, there occurs a substantial risk transfer to accredited certifiers, who are obligated under the Building Professionals Act to hold professional indemnity insurance. This risk transfer is in-turn impacting upon insurance underwriter's willingness to provide cover to accredited certifiers.

The most recent reforms to section 18F of the Home Building Act 1989 were supported by the MBA, and provide a defence for a licensee for breach of statutory warranty where the licensee has acted on advice provided by a building professional engaged by the client or consumer. However, there is little protection or recourse for the consumer in respect of adverse or poor professional

advice because, the providers of professional services reside outside of the Act. A default to National Consumer Law does not provide the same wide-ranging protection offered by the Home Building Act, especially in relation to repeated poor performance.

Making a case for government intervention may be difficult particularly when seeking to compile a history of complaints in respect of professional services, which are not easily identifiable due to being recorded amongst other consumer or trader complaints.

Anecdotally however it is common knowledge that many complaints occur concerning inadequate residential design and specification, and architectural designs not fulfilling the design brief, in particular, within the client's budget brief. Consequently, builders are reluctantly positioned as de facto designers and specifiers in order to fill gaps in design detail or amend designs and specifications in order to satisfy the client's budget.

Furthermore, it is illogical to those with an understanding of the construction process that licensing should start with builders and trades, and not begin at the fundamental and critical process of architectural design, specification and engineering.

MASTER BUILDERS POLICY

Master Builders advocates the inclusion of architects, designers and engineers into a licensing system for building and construction work in NSW.

● DEDICATED CABINET MINISTER

The NSW building and construction industry contributes over \$60 billion to the NSW economy and is a major job creator, with the sector employing over 395,000 people in NSW. The building and construction sector is integral to the NSW Government's infrastructure renewal program.

The NSW building and construction industry is the second largest sector of the economy, is the largest provider of full-time employment and employs and trains more trade apprentices than other States and Territories across the nation.

Master Builders calls for a dedicated Cabinet Minister to work with industry to drive new reforms, modernize industry policies and programs, and support private sector investments.

MASTER BUILDER POLICY

Master Builders calls for a senior Cabinet Minister to be responsible for the building and construction industry in NSW.



● CONSOLIDATION OF BUILDING REGULATION

The establishment of a consolidated Building Act would underpin and enhance a single building regulatory authority (Independent Building Commission).

Furthermore, future regulatory reform would be greatly facilitated through the benefit of a consolidated Building Act, which would allow consistency across all jurisdictions which impact on the building and construction industry in NSW.

MASTER BUILDERS POLICY

That the NSW Government commits to commencing a process of consolidating building and building related legislation into a consolidated NSW Building Act.

● CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

Master Builders recognizes Continuing Professional Development (CPD) as an investment in building success, leading to better quality in building practice. The Master Builders' industry survey identified a strong view that CPD should be extended to licensed trade contractors (sub-contractors).

MASTER BUILDERS POLICY

Master Builders supports to requirement for sub-contractors to undertake Continuing Professional Development

● HOME BUILDING COMPENSATION FUND (HOME WARRANTY INSURANCE)

The Home Building Compensation Fund (HBCF) or Home Warranty Insurance as it is known, remains a prominent issue and priority for members and the wider industry.

The overall cost of the home warranty system must be reduced and that is best achieved via a holistic industry approach.

The system can be positively impacted in the short to medium term by the following 5 initiatives:

- Provide better support for builders - less builders become insolvent
- Introduce new system of building practices for 'wet areas'
- Introduce a quality inspection regime for medium density buildings
- Disallow individuals entry to the system who phoenix
- Review and enhance claims management.
- Provide client training in 'assessing a quote' (don't just accept the lowest)

Better support for builders involves:

- Transparent and clear eligibility criteria
- Safe haven when experiencing financial difficulties
- Less administration - use KPIs (not only financial) and submit online
- Training in financial management
- Client provides larger upfront deposit
- Mandatory and binding dispute resolution at no cost to the parties

MASTER BUILDERS POLICY

Master Builders advocates that a holistic approach to reforming the home warranty insurance is needed.

● SECURITY OF PAYMENT

The NSW Building and Construction Industry Security of Payment Act 1999 (SoPA) was launched by the State Government as a means to achieve, "... swift and fair settlement of any payment dispute as a vital part of the State Government's reform agenda for the NSW construction industry".

The NSW SoPA however, specifically excludes homeowners or owner-occupiers from the SoPA Act.

Maintaining cash-flow is an important issue for housing builders and small business, particularly when the focus by the Home Building Compensation Fund (HBCF) is on a builder's financial capacity. Default on final payment(s) by

home owners is a significant issue for the industry. Relying on tribunal or court processes is time consuming and very costly for all parties.

MASTER BUILDERS POLICY

Master Builders advocates that the Building and Construction Industry Security of Payment Act be amended to include the contract relationship between homeowner or owner occupier and builder.

● NSW CIVIL AND ADMINISTRATIVE TRIBUNAL (NCAT) ORDERS TO BE OFFSET WHERE OUTSTANDING MONIES OWED TO THE ORDER BUILDER

Payments unreasonably withheld from residential builders are a significant issue for the industry and commonly occur in the latter stages of the project. This creates problems of cash flow, leading to insolvency and claims on the Home Building Compensation Fund (Home Warranty Insurance).

This issue has been continually ignored and in so doing reflects a common industry view that the regulatory regime is unapologetically biased towards the consumer. Many consumers today are well educated in pursuing building matters, with the assistance of building consultants readily offering advocacy services, and aided with the availability of the free Consumer Advice and Advocacy Service.

The primary jurisdiction for residential building disputes in NSW is the Consumer and Commercial Division of the NSW Civil and Administrative Tribunal (NCAT). NCAT can make orders against builders to rectify or complete work.

Such orders can also be converted to money orders. There is no provision to require or enable NCAT to order setting off of monies owed to the builder which are related to the dispute. Furthermore, there is no mechanism to allow the Office of Fair Trading to take into account monies owed or ordered in favour of the builder when suspending the builders licence for non-compliance with a Tribunal order.

MASTER BUILDERS POLICY

Master Builders advocates that provision be made for NCAT to be able to offset monies owed and/or outstanding under a home building contract, and be subject to release once NCAT orders have been complied with.



• WORKPLACE RELATIONS

With a changing approach to workplace relations at a national level, the commercial sector of the building and construction industry in NSW believes an industry specific regulatory framework should be established to ensure a strong and disciplined approach to the rule of law. Such a framework will ensure that responsible behaviour of industry parties continues to be encouraged.

Master Builders advocates for the establishment of a well-resourced building and construction industry specific agency in NSW.

This industry specific regulatory agency would also need to be equipped with sufficient statutory powers and penalty provisions to act as a meaningful, ongoing deterrent against coercive behaviour and unlawful industrial conduct.

Further, Master Builders advocates that the NSW Code of Practice and Industrial Relations Management Guidelines should be revised and strengthened, so the State Government is better able to enforce acceptable standards of behaviour across its projects, as a major client to the building and construction industry.

MASTER BUILDERS POLICY

Master Builders advocates for the establishment of a well-resourced specific building and construction industry agency in NSW, to act as a deterrent against coercive behaviour and unlawful industrial conduct.

Master Builders advocates that the NSW Code of Practice and industrial relations guidelines should be revised and strengthened, so acceptable standards of behaviour are achieved and maintained on projects throughout NSW

• WORK HEALTH AND SAFETY

A number of Royal Commissions into the Building and Construction industry have documented the misuse of Right of Entry Permits, particularly in matters relating to alleged safety breaches.

Master Builders advocates for greater accountability on Right of Entry Permit Holders when entering a workplace for WHS purposes.

Consequently, Master Builders advocates that Right of Entry Permit Holders provide 24 hours written notice before entering a workplace for WHS purposes. Permit Holders must provide the PCBU (Person Conducting a

Business or Undertaking) and the Regulator with a written report outlining the nature of the visit within 7 days of visiting the workplace.

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• EDUCATION AND TRAINING

Master Builders' survey of industry clearly reveals that the building and construction industry has an aging work force.

The main feeder to replenish licensed builder numbers is through the apprenticeship system which, at the current rate, will only be able to replace half of the retiring tradespeople and/or those who leave our industry.

Industry studies indicate that over the next four to five years the amount of building and construction work to be undertaken in NSW is substantial. The industry, as whole, needs to embrace the training of young people through apprenticeships and traineeships, so that we have the necessary skills to meet this demand.

In order to meet the demand of the future skills needs of the industry, Master Builders recommends the NSW

Government continue the requirement of a specific ratio of apprentices to tradespersons on all State Government-funded projects.

The ratio should be incorporated into the NSW Code of Practice for the building and construction industry and tender documentation.

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• WORKERS COMPENSATION – NON SPECIFIC WORK INCIDENT INJURIES

The cost of claims borne by employers of employees for nonspecific work incidents, for example, loss of hearing and bad backs is high. In many instances, these

nonspecific incident injuries can greatly impact on a company's ability to continue trading.

MASTER BUILDERS POLICY

Master Builders advocates that all non-specific work incident injuries be treated as an industry injury and funded through an industry claim pool established for such injuries.

• WORKERS COMPENSATION – DEEMED WORKER

Industry surveys have consistently rated workers compensation as a major issue confronting building businesses. The definition of a deemed worker continues to be a major issue, particularly for the residential building sector, which is heavily reliant upon small contracting entities - often single operators - undertaking specialised trade work.

Master Builders believes simply adopting the common law definition does not deliver the desired clarity or certainty.

MASTER BUILDERS POLICY

Master Builders seeks the ambiguity surrounding the definition of employee versus contractor be clarified through legislation.

• WORKERS COMPENSATION – APPRENTICES / TRAINEES

The cost, liabilities and exposure of workers compensation to employers training apprentices and/or trainees is a major barrier to their engagement. Master Builders' survey clearly identifies that builders would rather forego training apprentices than confront this inherent risk.

MASTER BUILDERS POLICY

Master Builders advocates that in order to give added incentive to employers to engage young people in apprenticeships and traineeships, the workers compensation premium and the cost of any claim, should not be borne by the employer, regardless of the size of the employer, for the duration of the apprenticeship.

• CROSS BORDER CONSTRUCTION

NSW is in a unique position with state borders with four jurisdictions, namely Queensland, Australian Capital Territory, Victoria and South Australia.

Contractors who conduct work in cross-border regions continue to face a myriad of variances in legislative and technical procedures when working in a number of cross-border regions. This "red tape" often leads to delays in projects which, can often cause cost increases for all involved. Differences in Home Warranty Insurance, licencing requirements - (both in the commercial and residential sectors), and continuing professional development are but a few.

MASTER BUILDERS POLICY

Master Builders recommends that a detailed study of the various cross border jurisdictions be undertaken to identify and remove impediments to timely construction.



Master Builders Association

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