THE INDEPENDENT VOICE OF STRATA OWNERS

16 March 2022

Building & Construction Policy
Better Regulation Division
Department of Customer Service

By email: HBAreview@customerservice.nsw.gov.au

***Home Building Act* Review and Tranche II/DBP Reforms Roundtables**
**Feedback Via Written Submissions for Owners Corporation Network**

The Owners Corporation Network (**OCN**) appreciates the opportunity to provide further feedback in respect of the Roundtables conducted in February 2022.

OCN has attempted to follow the general format and questions used in the three sessions in providing the feedback as set out below.

**9 February 2022**

Session 1

Issue 1 – Definition of Developer

Issue 2 - Building Work As Gateway to Licensing

Issue 3 - Who Is Not Included

**1. If the definition of Developer is aligned to the definition in the RAB Act, how could the definition be further refined to apply specifically to residential building work? What considerations are specific to the residential building industry?**

The *Home Building Act 1989* (NSW) (**HBA**) definition of developer liable under the statutory warranties should be aligned with the definition of "developer" under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) (**RAB Act**) liable to have a rectification order made on it.

The threshold for the size of project should be dropped from the current threshold under section 3A of the HBA, from 4 dwellings to 3 dwellings in the strata scheme or sub-division. 2 dwellings would be too low and catch duplexes.

The crucial issue is the definition of "residential building work" which is based on what is defined as a "dwelling". In turn, there are many exemptions to what is "residential building work" that allows it to escape regulation by the HBA when it should be. E.g. car stackers and lifts have been exempted from regulation since about 2010. This equipment is highly valuable and complex, and when there are

issues with it – as has been uncovered several times during pre OC audits - they can be costly to investigate and repair. Currently they are exempted and consumers are not properly protected for defects in that work when they should be.

Also relevant are the various thresholds for being considered residential building work. E.g. $5,000 contract price. In many ways the issue is the potential effects not the value of the work. A $4,999 job done badly can do a lot of damage to a multi-million dollar project or building.

The HBA should have clear anti-avoidance provisions that ensure any attempt to avoid the provisions by contractors can be set aside or read down or found invalid by the courts. The current bar under section 18G of not contracting out of the statutory warranties is well short of what is required. The entire Act requires anti-avoidance provisions.

**2. Does the definition of Building work allow enough flexibility to license professionals in the industry?**

Yes. The issue is with ensuring compliance, and ensuring relevant professionals have the appropriate education and ongoing training to do their roles properly. E.g. the extensive issues with waterproofing and fire & life safety defects in residential building work make it clear there is a need for ensuring those contractors are properly trained and complying with requirements. Regulation means nothing without proper compliance. The current defects issues show a failure of the regulation and compliance regimes for at least those specialists for the last 2 decades or more.

**3. Do you have any initial thoughts or comments about maintaining the status quo for certain professionals e.g. Architects and Certifiers?**

Given there is already extensive legislative regulation that has been in place for some time and/or been subject to recent reform, that legislation should continue to stay in place. However, that legislation should as much as possible seek to be uniform with or similar to the regulation of other building professionals provided by the proposed Building Act, and/or be intended to eventually be as uniform and work with the regulation under the Building Act as part of a larger legislative framework – all the legislation needs to work together.

**Session 2**

**Builder Licenses**

**Who should be licenced?**

**Exemptions?**

**1. Are any local adjustments to the NRF recommended to implement a 3-tiered builder licensing scheme? What eligibility criteria should apply to obtain a licence?**

The OCN has sought such tiered licencing for Class 2 work for some years, and welcomes the indications of an intent to adopt same. Larger and more complex projects should necessarily be only undertaken by larger and more experienced builders. The current system actually provides less regulation and consumer protection for larger high rise strata schemes than smaller schemes (3 storeys or less) and single dwellings eligible for HBCF, which makes no sense. The opposite should apply.

The NRF should be used as much as possible given its importance, and also simplicity (As apparently intended). However, it is clearly only one of a number of criteria that can and should be considered.

The Classes of buildings and works under the NCC/BCA is also clearly relevant, and provides a basis for a further category for dealing with relevant types of works and licencing.

Issues that do not appear to have been taken into consideration as yet are:

(a) the extra protection provided by HBCF insurance being in place for renovations, single dwellings (Class 1 under BCA), and "low rise" strata schemes. That insurance ensures an extra layer of scrutiny applied to contractors doing that work, so as to have eligibility for insurance, and extra protection (such as it is, noting it cannot be claimed under until the contractor is dead, disappeared or insolvent) to consumers.

(b) The extra protection provided by having the statutory warranties against developers (noting such is often worthless where developers are "special purpose vehicles" wound up soon after the project is finished with any profit paid out from the company). The licencing of developers, or at least parent company developers who will be made liable for defects, could be used to improve that situation.

**2. Do you support the NCC classes as a delineation method for Builder licensing?**

The NCC classes make sense as a sub-category of licencing within a larger set of criteria, as indicated above.

Some classes of work are sufficiently specialist that they have their own needs and requirements that require the licence holders to have appropriate training and qualifications, but which would not be required for others.

Some contractors only undertake certain types of, and thus build certain classes of, building. Some builders only do residential building work and, say, only single dwellings. Others do not do residential building work.

Licencing needs to be able to cater for that flexibility. A licencing scheme that allowed anyone with a licence to do any class of work would be a recipe for disaster in the wrong circumstance, and amount to no real regulation at all.

**3. Would you support using building height as a delineation method for Builder licensing (e.g. low rise, medium rise, unrestricted)?**

The threshold for medium rise, and stricter licencing requirements, should be for buildings where HBCF is not required as those buildings do not have the extra consumer protection of HBCF insurance or the underwriting requirements of HBCF insurance to filter out contractors who should not be doing such work.

Statistical analysis of the size of strata schemes being constructed should also be had regard to. Strata schemes are becoming larger and more complex to design, build and maintain. Schemes are now being constructed involving hundreds of units over dozens of levels that would have been inconceivable only a few years ago.

Assessment of the number and size of the "extreme" schemes being built, and industry trends, should be undertaken. Those projects at the "extreme" end of size and complexity would appear to properly be only undertaken by the most experienced and well-resourced contractors.

**4. Should licencing exemption be administered by work type or by value threshold? What are the key risks with both methods?**

Licencing exemptions are a concern, given the types and significance of some work exempted from the definition of residential building work as raised above.

Any licencing exemptions would preferably be determined by risk profile, in that work less likely to cause significant damage or defects of a size, would be more likely to be exempted. E.g. internal painting would appear to be less risky than lifts and thus more likely to enjoy some sort of exemptions. Preferably such exemptions would be limited, where applying, to subsequent repair and refurbishment works and not as part of the original construction of buildings (see how the exemptions for painting versus lifts apply here).

Again, a value threshold can be misleading as shown by the current $5,000 contract price threshold, in that a $4,999 job done badly can do a lot of damage to a multi-million dollar project or building. The OCN submits that the previous threshold of $1,000 should be reinstated.

**5. Infrastructure (roads, bridges, rail) is generally excluded from licensing (except some specialist work). Does the rationale for the exclusion remain?**

Such work is not a Class under the NCC/BCA, and thus would seem easy to leave out if licencing is only required to do work on the classes under the NCC/BCA. However, it would appear to make little sense to leave such work unlicenced even with the due diligence applied by clients to such projects. Eventually including such work under a licencing scheme would appear to make sense, and allow such due diligence to be more easily undertaken. Licencing would also allow contractors in those areas to be more easily monitored for compliance, and "bad operators" identified and dealt with.

**Contracts**

1. **We have seen the impacts of sharply rising costs of materials in the industry. What process needs to be in place to allow contracts to be fairly negotiated once signed to protect licence holders and the customer?**

   OCN notes that this issue has been the subject of a further round table by industry stakeholders, and is more appropriately left to input by those stakeholders. This issue would not generally be one that OCN has any direct interest in making submissions about for its members (i.e. consumers). The exception to that would be remedial projects. There would be merit in considering a standard (and fairly worded) rise **and** fall provision to automatically apply for residential building work. If that is implemented, it should be complemented by an offence provision for a contractor not passing on a material cost fall saving and the ability for consumers to later recover such costs not passed on with a penalty interest rate applying.

2. **The HBA currently prescribes certain terms in contracts for residential building work. Are the currently prescribed terms striking the right balance, should new terms be included or should others be removed? Which terms?**

   This is far too large and complex an issue to be dealt with here. The statutory warranties alone are a complex area, which has been touched on here. Prescribed contract terms require more time and detail to be properly addressed. Generally, the prescribed terms for home building contracts have been sufficient.

**16 February 2022**

**Supervision**

**Supervision endorsements**

**How can the electrical project be scaled up?**

**How can supervision be responsible and realistic?**

**Session 1**

**1. What is your feedback on the proposed supervision approach for electrical trades.**

OCN supports exploring the proposed supervision approach for electrical trades to improve consumer protection. OCN also raises that the experience of fire & safety contractors in recent years as a licencing regime was developed provides good guidance for specialist trade work and regulating same.

**2. Would the proposed approach for electrical supervision also work for other specialist/occupational trades?**

OCN supports using the approach for electrical supervision in other specialist/occupational trades, subject to the findings and outcomes within the electrical trade area, to improve regulation and consumer protection.

**3. What are some innovative/new ways a corporate/entity licence holder can maintain its responsibility to supervise work?**

The current system for corporate licences, with a nominated supervisor, is clearly insufficient and needs reform. Such nominated supervisors are usually only one or two persons that are usually directors, and who are not supervising work on site in any meaningful way if at all. Unless nominated supervisors are expected to be and are held responsible for poor work practices on sites, then the position of nominated supervisor means nothing.

Every work site for a corporate licence should be required to have at least one site supervisor that is nominated as responsible for supervision of the relevant work on that project. That person should be responsible and held liable (including under the DBPA) for ensuring proper records are kept, and works are properly done on site by the corporate licence holders and contractors under its supervision. They should also be required to live in NSW.

**Session 2**

**Residential Building Work**

**Owner-Builder Permits**

**Statutory Warranties**

**1. The purpose of the definition of residential building work is to refine the application of the Act to consumer protections such as statutory warranties and trigger the need for a contract. Is there a need for further refinement?**

The statutory warranties should be tied to the undertaking of work like the *Design & Building Practitioners Act 2020* (NSW) (**DBPA**), not the entering into of a contract to do that work.

The threshold for such work should apply irrespective of the price of the work being done, including as work can be done by a builder-developer for itself with no real contract or meaningful contract price in place. Such would also remove the ability of parties to try to avoid the provisions of the HBA for "nominal" work.

It would also ensure the warranties are clearly applied to any repair works done by contractors or sub-contractors post completion, which can often not be the subject of written agreements and the details of such unclear as a result.

As flagged by the February 2022 Industry Update, it would be helpful to simplify the definition of "residential building work". The current complexity invites misinterpretation by members of the industry and consumers of what is covered by the definition and thereby regulated by the HBA.

The draft refined definition on page 13 of the industry update could be improved by adjusting it along the lines of the following:

> *In this Act,* ***residential building work****, means any work involved in, or involved in co-ordinating or supervising any work involved or in connection with the erection, construction, renovations, addition, extension, alteration, improvement, decoration, repair or protective treatment or maintenance of a home or any other improvement on land that is designed, constructed or adapted for residential use including but not limited to any of the following:*
>
> ***[COMPLETE THE DEFINITION BY INSERTING THE LIST OF EXPRESSLY INCLUDED IMPROVEMENTS AND SERVICES, THEN INSERT POINTS (D) TO (G) FROM THE INDUSTRY UPDATE DRAFT DEFINITION AND THEN A DEFINITION OF "HOME"]***

**2. Should owner-builders be allowed to apply for work relating to dual occupancy? What special circumstances should be prescribed to allow for this kind of work to be completed?**

Owner-builder work does not directly affect stakeholders represented by the OCN, and it does not seek to make submissions on same at this time.

**3. Do you agree that statutory warranties are tied to the work as opposed to the contents of the contract? If not, why not?**

As for question 1 above, the statutory warranties should be tied to the undertaking of work like the DBPA, not the entering into of a contract to do that work. The current legislation providing for the nexus of the warranties being the contract has produced various issues and loopholes, and reduced consumer protection, as raised in previous submissions by OCN on these issues. OCN prefers the approach taken in the DBPA in tying a duty of care to the doing of work, not a contract. That approach should be taken to the statutory warranties.

**Group Discussion**

**Building Compliance & Enforcement Bill**

**• Currently, the RAB powers only apply to class 2 buildings. What transitional period would be needed to expand to other classes?**

Similar to that allowed under original RAB Act. Regard might be had to what contractors are doing what work under other Classes, and thus best positioned to easily adapt due to already complying under current RAB Act.

**• Developers for Class 2 buildings currently need to notify the Secretary when they are nearing completion and intend to apply for an occupation certificate. Is it feasible to expand to other classes of buildings, such as Class 3 and 9? Why/why not?**

Where Occupation Certificates are required then such is comparable.

Otherwise, practical completion under the relevant building contract might be considered a similar stage or point in time.

**• What types of offences should a licensing demerit scheme address?**

In brief terms:

(a) Insolvency.
(b) Failure to comply with a rectification order by Fair Trading or under RAB Act or NCAT or a Court.
(c) Repeated defective works found by Fair Trading or RAB Act or NCAT or a Court.
(d) Repeated failure to properly supervise specialist trades and/or sub-contractors resulting in defects.
(e) Repeated payments under strata bond scheme made due to defects present.
(f) Repeated failure to fulfil ongoing professional development education requirements.
(g) Repeated failure to comply with DBPA design or other requirements.
(h) Lack of maintaining proper insurances, including for appropriate periods after completion of projects (i.e. professional indemnity insurance for design liability for 7-10 years after completion, as usually required under relevant contracts).
(i) Relying upon or not taking issue with incorrect or incomplete certification when the contractor knew or should have known that the certification was incorrect or incomplete.

**23 February 2022**

• Other Tranche II reforms not in HBA review (including, Building Product Safety, Strata defects, Security of Payment)

• Expanding DBP/RAB to class 3/9c

• Update on RAB levy

**Security of Payment reforms**

- Form of payment claim
- Adjudication review:
    - Scope
    - Preconditions

- Timeframes
- Appointment

OCN supports the proposal to include additional information to consumer respondents of payment claims.

OCN supports a prescribed payment claim form to remove any prospect of confusion or claimants not properly setting out their payment claims.

**1. What practical implications do we need to consider in determining which option to adopt?**

Poorly drafted or late lodged responses would mean valid arguments or issues might not be before the adjudicator, but obvious on the face of the case. These would then not be capable of being raised in the review.

A proposed threshold of $100,000 for reviews would leave substantial amounts especially on smaller jobs unable to be reviewed. $99,000 or $50,000 or less is still a significant amount of money for many consumers, and a serious effect on cashflow and solvency.

**2. Do you support adjudication reviews? Should the scope of a party's right to review be limited? Why? What model do you support, or is there another proposal you would suggest?**

Adjudication reviews should reduce the time and costs that would otherwise be required to seek review of such through the Supreme Court. The review should be limited in the same way appeals to the Supreme Court are currently, being limited to procedural errors or decisions clearly wrong on their face on the basis of the evidence before the adjudicator. Otherwise, the review process would risk defeating the purpose of the entire SOPA process which is to ensure a quick decision allowing cashflow. Substantive disputes and final decisions should still be the subject of proper litigation as provided for under the current legislation.

Reviews should be limited to claims involving a minimum threshold value, to avoid "minor' claims, and only to issues and evidence before the initial adjudicator.

**Q. Who should pay for the adjudication determination review application, the applicant, respondent, or both parties? Or is this a matter that should be left to the discretion of the adjudicator to determine based on the circumstances?**

The applicant should pay the costs involved in a review to deter frivolous applications. However, the adjudicator should be able to determine if the respondent has to pay some or all of those costs as part of the application based on the circumstances, to allow valid applications to recover the costs (in part or whole) when such is appropriate.

**Q. Should there be any criteria for being a review adjudicator such as the review adjudicator being more senior or experienced than the original adjudicator? Would it be acceptable for the authorised nominating authority who dealt with the original adjudication to use its own discretion and allocate an adjudicator they consider would be best placed to be the review adjudicator?**

Reviews would preferably be dealt with by more experienced adjudicators, and with some legal training to properly understand the different role or process of a review (to the extent different to a simple rehearing of the matter in toto). ANAs should have some discretion to appoint appropriate adjudicators, but guidance from the government under the legislation would assist in this regard.

**Extra Questions (if time):**

1. **Other reforms proposed include:**

    a. **Extend obligations for retention money to be held in trust to projects valued at $10 million.**

    b. **Require adjudicator to do a visual verification of the work/goods where parties dispute whether completed or supplied (corresponding power of entry for adjudicators).**

2. **Do you have feedback on these proposals?**

    While (a) prima facie infringes the ability of parties to agree on their own contractual arrangements, requiring retention money provisions would ensure such was an industry standard and avoid builders from refusing as a group to consider such except when forced by a client with sufficient commercial bargaining power.

    (b) would add extra time and costs to the process. However, it would provide extra certainty and validity for decision. Query if capable of being appealed as to findings in this regard in review, as hard for reviewer to assess error without doing same review.

3. **If these reforms were implemented, what lead time do you think industry would need before they commence?**

    Better left to industry to make submissions but presumably at least 12 months, including after full Regulations giving effect passed.

4. **What type of guidance do you think industry would need to support the adoption of these reforms?**

    It is not clear what distinction is drawn between guidance to be provided by the legislation and regulations, and beyond such.

**Design & Building Practitioners reforms**

**DBP expansion to class 3/9c**

**RAB levy update**

**1. Some building work is excluded from compliance declaration requirements. What further exemptions are needed to expand to classes 3 and 9c?**

OCN's main concern is for Class 3 buildings involving strata schemes with consumers requiring consumer protection, which will usually be serviced apartments bought by investors. These consumers should have the same protections as for residential building work under the HBA, but for statutory warranties and also under the DBPA and RAB Act.

Class 9c similarly creates concerns for OCN where the construction of a building results in a strata scheme with lot owners, such as an over 55s self-care aged care facility.

**2. Should any current exemptions not apply to class 3/9c work?**

OCN submits that the exemptions should not apply to the above work involving consumers requiring protection for any defects in property purchased by them.

**3. Should practitioners registered for class 2 be automatically eligible to work for class 3 and 9c once the scheme expands?**

Only if the work involved in Class 3 and 9c requires the same qualifications and experience as Class 2. To the extent that it does not, then extra qualifications should be required.

Further, the government needs to consider whether providing automatic eligibility will encourage contractors it would prefer not to become involved in those Classes of buildings to do work they might not otherwise.

For example, fire & life safety systems are arguably more important in such Classes of buildings where:

(a) For serviced apartments residents may not be as familiar with the layout and egress paths, meaning the design and compliance of those aspects are more important.
(b) For aged care facilities, residents are more likely to be limited in movement and agility and thus less able to exit a building easily and quickly, making the systems' design and compliance more crucial.

Finally, there are benefits in maintaining separate licence records and eligibility, to ensure record keeping, compliance and complaints to be dealt with separately.

**4. What extra classes of practitioner, if any, will be needed for classes 3 and 9c**

This is more appropriately dealt with by the relevant industry stakeholders with technical experience, especially certifiers who will be aware of what areas and issues are of concern.

**5. DBP currently recognises existing HBA licences which aren't required for class 3/9c work. Should the same qualifications be recognised for registration under DBP? If not, what should the eligibility requirements be?**

Contractors doing Class 3 and 9c work should be required to be (separately) licenced. The requirement for such are likely to be almost identical as for Class 2 work, but OCN repeats its indications above about the specific needs for those Classes being taken into account.

**6. Are the current restrictions for low and medium rise buildings appropriate for class 3/9c?**

The same or similar restrictions are likely to be appropriate, noting that the size and scale of such may not be the same at the high extremes and some statistical analysis may be relevant to when the relevant categories or thresholds apply.

**7. Should there be restrictions on scope of work authorised under registration for practitioners who have less experience?**

Yes, similar to those for Class 2 work, for the same reasons as dealt with above in this submission.

**Building Products Safety reforms**

- Duties on persons in the chain of responsibility for product supply and use
- Information to be provided with products

**1. Do you think placing these duties on building supply participants will ensure building products used in NSW are safe and fit for an intended purpose? Why?**

Yes. Making participants liable as well as requiring insurance be in place for such liability will ensure that participants take steps to ensure their products are safe and fit for purpose.

NSW should ensure that the scheme is as uniform as possible with the Queensland scheme, thus also ensuring uniformity across state borders for what is a national construction industry.

**2. Do you support the list of participants captured in the 'chain of responsibility'?**

Yes. Persons certifying products should also be liable, including:

(a) Persons issuing what amount to compliance certificates under the *Environmental Planning & Assessment Act 1979* (NSW), either for the design or installation/construction of building materials and products.
(b) Persons certifying products or materials for use in general terms, such as the Codemark Certificates issued for certain ACP cladding products that were later withdrawn, and which were relied on by various other participants in the building industry.

**3. What is your experience with the adequacy of information supplied with building products?**

Extremely variable. Information also has issues with:

(a) Being subject to detailed terms and conditions that can be unclear, and/or sometimes ignored by other industry participants (e.g. ACP cladding being certified to be used as "attachments" on buildings, and then used by some participants in ways that were not attachments or that was subject to argument).
(b) Being subject to terms and conditions that were so restricted or impractical that they seemed deliberately drafted to enable the supplier and manufacturer to be able to argue they were not complied with and thus absolved of liability for any problems.

**4. What information is critical to be supplied or made available for building products?**

All products and materials should be required to comply with an applicable Australian Standard, or applicable BCA/NCC provisions. To the extent no such standards are in place, then applicable European, US, Japanese or NZ standards should be used until an Australian standard can be developed for Australian circumstances.

Clear guidance on for what purposes it can be used, and in what circumstances and conditions. Clear (and practical) maintenance and cleaning guidelines where applicable. Further, clear indications as to the expected life span of the product or material when installed properly.

Any and all certification relied on in alleging that the materials or products are suitable for a certain purpose or use. Such certification should need to be kept up to date. Many building products rely on AS testing done years prior on a limited or single example, in limited or specific circumstances, for a

product that may have changed and/or continued to have been developed. Materials and products should be subject to a practical and sensible ongoing certification system.

**Extra Questions:**

1. **These reforms are currently operating in Queensland. Do you have any experience with the impact of these reforms on your business or others?**

OCN supports the reforms as enacted in Queensland being applied to NSW, to ensure national uniformity and to improve consumer protection.

2. **If these reforms were implemented, what lead time do you think industry would need before they commence?**

Sufficient time to ensure participants had reasonable time to put insurance in place to cover liabilities.

It is noted that many industry participants operate across Australia, including Queensland, and to the extent they are already complying with the Queensland scheme then those participants should be able to more easily comply.

3. **What type of guidance do you think industry would need to support the adoption of these reforms?**

Queensland can probably provide a good indicator of what guidance industry may need.

4. **What other measures can Government consider to ensure building products used in NSW are safe and fit for an intended purpose?**

See comments above about information to be supplied, and also an ongoing obligation to update and maintain certification for products and materials.

**Strata/CPD/unlawful conduct reforms**

- Strata Defects
    - Identifying defective work in final report
    - Payment for building inspectors
- Unlawful/unethical conduct
- Certifiers
- CPD and training

**Strata bond reforms**

1. **Can you share any experiences with the types of building defects that are common in strata building work in the first two years after construction?**

   Waterproofing to internal and external wet areas; fire & life safety system defects.

2. **What practical issues, if any, arise if the strata bond is made available to rectify defects identified in the final report?**

The current scheme only allows defects identified in the interim report to be dealt with in the final report and repaired using the bond. The strata bond should be available for the rectification of defects first identified in the final report. However, such a change should be complemented by provisions that provide the developer an opportunity to repair those newly identified defects in accordance with a scope identified by the building inspector before the bond is called upon for the newly identified defects.

3. **Have you experienced, or are you aware of instances where building inspectors haven't been paid, or payment has been delayed?**

   No. However, the number of schemes that have participated in the scheme is limited to date given it only commenced for schemes built only contract since 1 January 2018.

4. **Which option do you consider will be more effective and practical to resolve the non-payment of building inspectors?**

   Payment of the relevant funds by the developer into trust or escrow to be released upon provision of the relevant report, avoiding the developer not having or withholding the funds even when the relevant work has been completed and payment due.

**CPD/training reforms**

1. **What is/isn't working in existing CPD schemes across the building and construction industry?**

   There is clearly a long term and ongoing lack of sufficient skills and experience in various specialist trades, but also in building contractors supervising them. This reflects a clear failure in the continuing professional development schemes.

   When water-proofers continue to install defective membranes to wet areas on an endemic basis, when fire & life safety specialists continue to fail so badly to properly install their relevant systems that they are easily observable to an expert once destructive investigations are undertaken *i.e. the defective work has been covered over by finishes and linings), and builders clearly fail to observe or ensure the work was done properly by those sub-contractors, then the scheme has failed. Either the contractors have no idea what they are doing, or they are doing defective work knowingly (which is worse, and amounts to fraud).

2. **What have your experiences of training/education as a form of disciplinary action been like?**

   Such does not appear to be used in the residential building industry, but it should be. Where contractors are identified as having insufficient experience and knowledge leading to defects and issues, then education should be used as part of the process to ensure that problem does not recur. Other professions (such as lawyers) can and do direct training/education to be undertaken as part of the process of dealing with unsatisfactory professional conduct. The alternative is either banning the person as they lack the relevant skills without that training, or allowing the person to continue operating despite the fact they lack those skills.

**Licence condition for unlawful conduct**

1. **In your experience, is unlawful and criminal conduct such as illegal phoenixing common in the building and construction industry?**

   Yes. However, those responsible for investigating and prosecuting such are limited in their roles, resources and funding. This role usually falls to ASIC who lack the resources and often the will (not always seeing it as their role), or the Administrators/Liquidators of companies who are usually reliant on being funded by creditors for whom doing so can make no commercial sense.

2. **Do you support a licence condition that puts a positive obligation on participants <u>not</u> to work/associate with companies or individuals who engage in unlawful conduct?**

   Arguably such already applies under the current Corporations Act and the duties and obligations of directors, and the law generally. Such a licence condition is also likely to have the same result, being little meaningful change. Further, unless the NSW government put serious resources and funding into ensuring compliance, such regulation would amount to nothing. As always, regulation without ensuring compliance achieves nothing – in fact it undermines the authority of government by creating an impression amongst wrongdoers they can operate freely despite the law. This is what has happened in the building industry for the last 20 years.

3. **Are there any non-legislative actions (other than our proposed approach) that the NSW Government could implement to prevent this behaviour?**

   Making directors and shareholders of companies that are placed into Administration or Liquidation and thus unable to meet their obligations in respect of breaches of the statutory warranties deemed liable as if they did the work. Such would render phoenixing pointless.

   However, it would undermine the basis of how the industry and businesses generally work, in "piercing the corporate veil". As such, it would be rejected and opposed by almost all industry stakeholders. But that should not stop government acting to protect consumers from phoenixing and taxpayers from contributing to a failing HBCF scheme. Government needs to make the hard decisions, to protect the good operators and the community. A halfway position would be to make the directors and shareholders liable up to a certain amount that is tied to the value of the development work.

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