

Review of Building
Industry Regulatory
Framework in the
Northern Territory

November 2015

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Preface, Executive Summary and Recommendations

I. Preface and Acknowledgments

The Northern Territory's building industry is the engine room of its economy creating employment and producing critical housing and infrastructure. A healthy building industry is consequently essential for the well-being of all Territorians.

The building industry relies upon extended contracting 'chains' or 'pyramids' of subcontractors and suppliers to construct its projects. Further the contractors at every link in that contracting chain do not self-fund their works and require progress payments to be made in a timely and dependable manner.

These two characteristics make the building industry particularly vulnerable to payment default and cash flow crises.

Governments across Australia have introduced a range of responses to payment default and contractor failure. Regulation of the building industry certainly is not a case of red tape for the sake of it. The need for government regulation to try to manage the causes and consequences of contractor failure is both self-evident and widely acknowledged. Some of these policy initiatives span back decades (and in the case of workmens' liens back to the nineteenth century) so the issues confronting the building industry and governments seeking to respond to these issues are nothing new. This Report seeks to provide a broad analysis and understanding of the spectrum of policy tools and models available to the Territory to progress and improve its building industry regulatory framework.

It is acknowledged that ongoing reform to the building industry regulatory framework is challenging, as there are always strong sectional interests and differences of opinion, given the very broad spectrum industry participants and consumers. There is never a good time to confront the hard issues and particularly when contracting times are tough. It is however precisely because of the more challenging commercial outlook for the building industry that reform fatigue cannot be allowed to overwhelm the drive for a strategically sensible, coherent and cost effective regulatory environment.

The Report looks at information publically available in the Northern Territory and to those other reports and models found interstate and in comparable overseas jurisdictions. The authors acknowledge their reliance upon the extensive work and thought of the authors of and participants in the many insightful inquiries and reviews that have been conducted into the building industry across the country.¹ In so far as is practicable, consideration of any national initiatives and agreed principles has been given in this Report.² That does not however mean that the particular issues and challenges for the Territory's building industry have been ignored. The authors of this Report are very aware from experience of the challenges confronting building consumers and contractors in the Territory.

A driving consideration for the combined recommendations is that they will together reduce the time and cost burden of red tape for many Territory contractors whilst improving the levels of protection afforded to Territory consumers and subcontractors.

If these outcomes are to be achieved the recommendations of this Report must be approached holistically. The model will not work if individual components of the recommended framework are selected (or not) and particularly if the reasons for that selection are related to sectional interests.

Finally, this Report makes recommendations as to what can be further done to prevent and reduce the consequences of payment defaults and construction failures in the building industry, concentrating on the protection of the particularly vulnerable, namely residential home owners and subcontractors.

What this Report is not:

¹ We must especially acknowledge our particular indebtedness to:

- Final Report of the Independent Inquiry into the Construction Industry Insolvency in NSW November 2012; and
- Final Report – Inquiry into Western Australia's Home Indemnity Insurance Arrangements (Economic Regulation Authority, 2013).

² For example consideration was given for the need for nationally coordinated action on security for payment legislation as agreed by the States and Territories at the Australian Procurement and Construction Council meeting in Adelaide 1996.

- This Report is not the product of a formal review of the existing building legislation and regulations. This Report simply seeks to identify the existing legislative and regulatory regime in the Territory and elsewhere to the extent needed to understand and recommend strategic directions for reform and further action.
- This Report does not seek to find a permanent cure for financial incompetence, inexperience, neglect and fraud being encountered in the Territory's building industry. This Report simply tries to identify and recommend ways of better ways of preventing or reducing the incidence and consequences of payment default and contractor failure.
- This Report considers the existing regulatory framework of the building industry and the major policy initiatives that have been taken in the Territory and comparative jurisdictions. In doing so, this Report does not address many other, important, aspects of building industry regulation. For example, this Report does not explore the industry's use of voluntary and government mandated codes of conduct and the impact that these are having on the industry. Nor does it deal with the critical issue of education and training being used to raise competency standards and business disciplines (other than identifying the importance of linking these competency standards to any contractor registration system).

The objective of this Report is to try to provide practical recommendations for the Territory to consider and use as a strategic framework for further discussion and action. Accordingly, this Report is broken into three main sections:

- residential warranty schemes;
- builders' registration; and
- payment protection (security of payment and subcontractors' trust accounts).

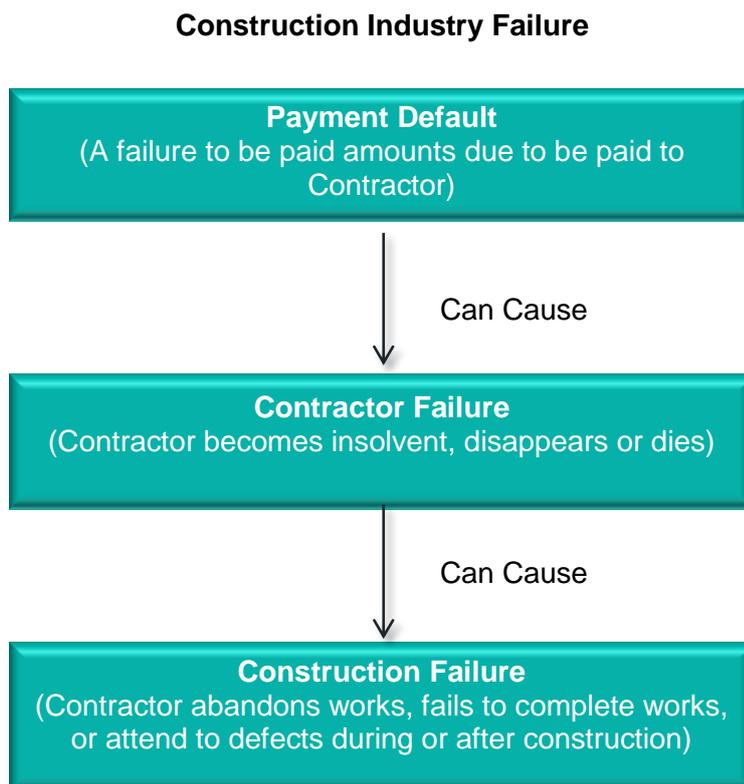
Although an expansive definition of 'construction' industry and 'construction' contract is often used in this Report, there are compelling legacy reasons why some of the construction industry sectors (residential building, for example) are more regulated than others (civil contracting, for example). This Report does not make recommendations that fundamentally reorganise these historic patterns of regulation. For example, there are no significant recommendations for the general inclusion of civil contractors in an extended contractors' registration system, as historically registration and licensing systems have been confined to building (not civil) industry regulation.

It is sincerely hoped that this Report can be an effective tool for the Government, building industry and community to discuss the best building industry regulatory framework for the Territory, and how that is going to be achieved.

II. Executive Summary

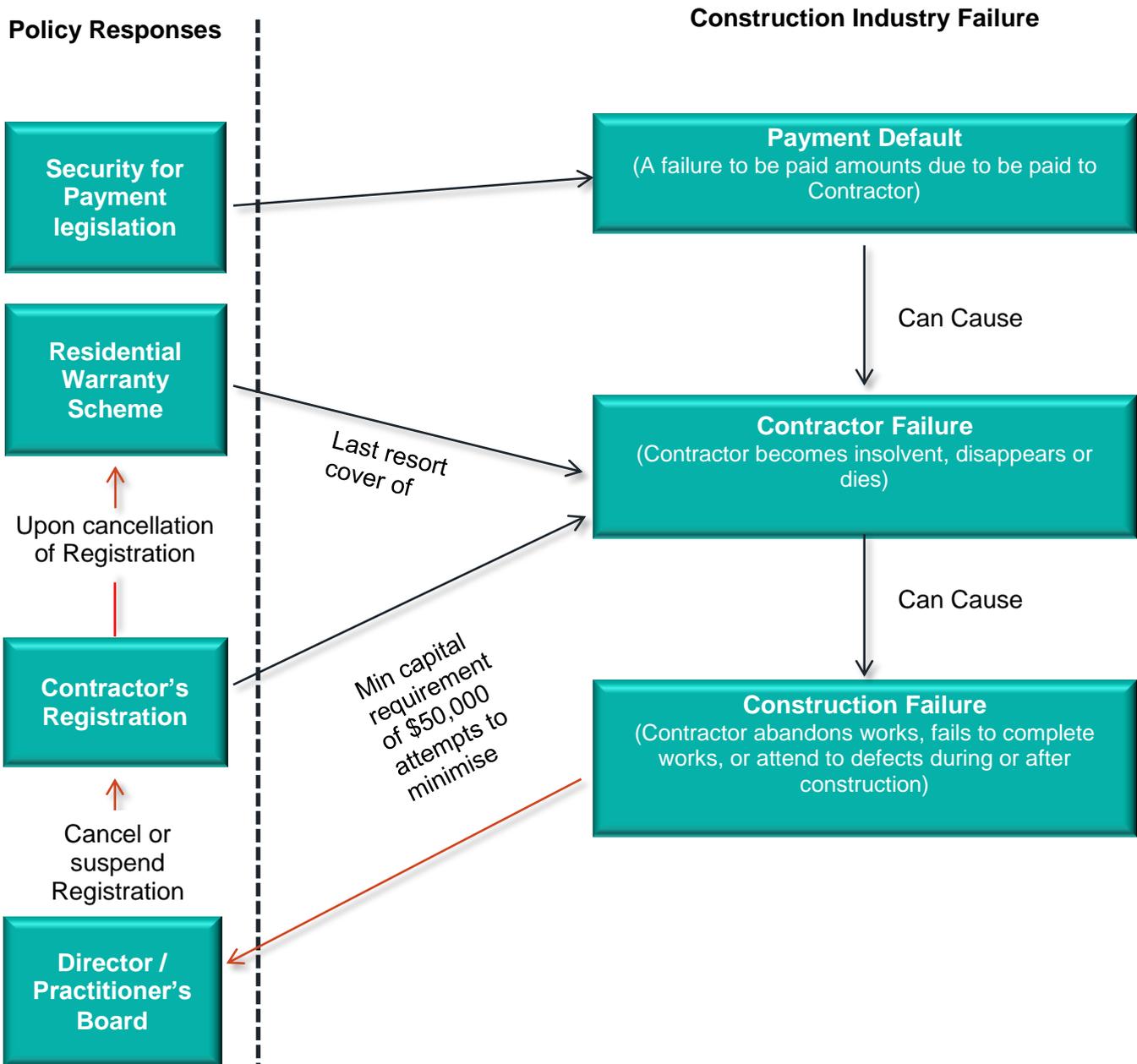
A. Tackling the systemic weaknesses of the industry

As identified in the Preface this Report looks to the building industry regulatory framework in so far as it seeks to address the consequences of payment default, contractor failure and consequent construction failure.



The Report is consequently very much about having the regulatory framework meet and address, in a coordinated way, the commercial conduct of building contractors in their relationships between themselves and with vulnerable project principals (residential home and unit owners).

The existing regulatory framework approaches the basic components of: contractor registration, residential warranty scheme and security of payment, as separate issues. There are some, but not many, links between these components to be found in the present regulatory framework. The following diagram taken from the body of this Report highlights this:



The Report's guiding principle is that only by approaching all the aspects of building industry support and regulation in a coordinated manner will progress be made against the systemic weaknesses of the industry and consequential loss of community trust in the industry and Government.

B. Reducing duplication, cost and distortion in the present regulatory framework

The recommendations made in this Report are aimed at reducing the duplication of red tape and cost presently suffered by contractors in the Territory under the existing framework. The differently administered systems of voluntary contractor pre-qualification (presently the CAL administered scheme), residential warranty cover (the MBA Fidelity Fund) and residential builders' registration (administered by Government) not only causes duplication of administration and additional costs for Territory contractors, but also practically inhibits a coordinated policy response from Government.

Improvement in the costs and risks of residential warranty cover will be unlikely to be achieved in the longer term if the rates of contractor default and construction failure amongst residential builders are also not improved. The two things are obviously inescapably linked, but effecting improvement can only really be

achieved by a coordinated approach of both the registration system (matched with appropriate disciplinary processes) and the residential warranty scheme, which is presently not occurring.

By a coordinated approach across all of the components of the regulatory framework, distortions and misuse of certain mechanisms can be ironed out, and the correct tools applied to the tasks at hand.

The Report contemplates a regulatory framework that reduces the cost and administrative burden on those contractors that do the right thing by ensuring that those that do not are dealt with fairly but expeditiously.

In this way those building contractors that engage in deliberate and fraudulent behaviours that lead to payment defaults and construction failures will be progressively taken out of the industry by suspension and cancellation of their registration. This reduces the risks placed on the residential warranty scheme in the residential sector and thereby reduces the costs to the scheme and ultimately the consumer.

This is an example of where a coordinated approach to the regulatory framework, taken with an understanding of the deep level of interconnection between its various components, can lead to better outcomes for industry and consumers.

C. Increased coverage of contractors in the registration system

The contractors' registration system is the basic scaffold for building industry regulation.

Accordingly this Report recommends that the registration system be expanded in its scope from the present system's limited application to residential builders. The recommendation is to include all contractors (whether builders or trade contractors) across all industry sectors, excepting for civil contractors.

The registration classes need to be expanded to accommodate the various types of contractor.

Registration will be for a reasonable period (3 years is recommended) and will be subject to renewal. There should be a reasonable, small, registration fee charged on application and renewal, with renewal fees to be paid periodically or annually (as the contractor may elect).

The need for corporate contractors to also have nominated individuals, with appropriate personal registration, as directors of the company is recommended to better guard against the practice of phoenixing.

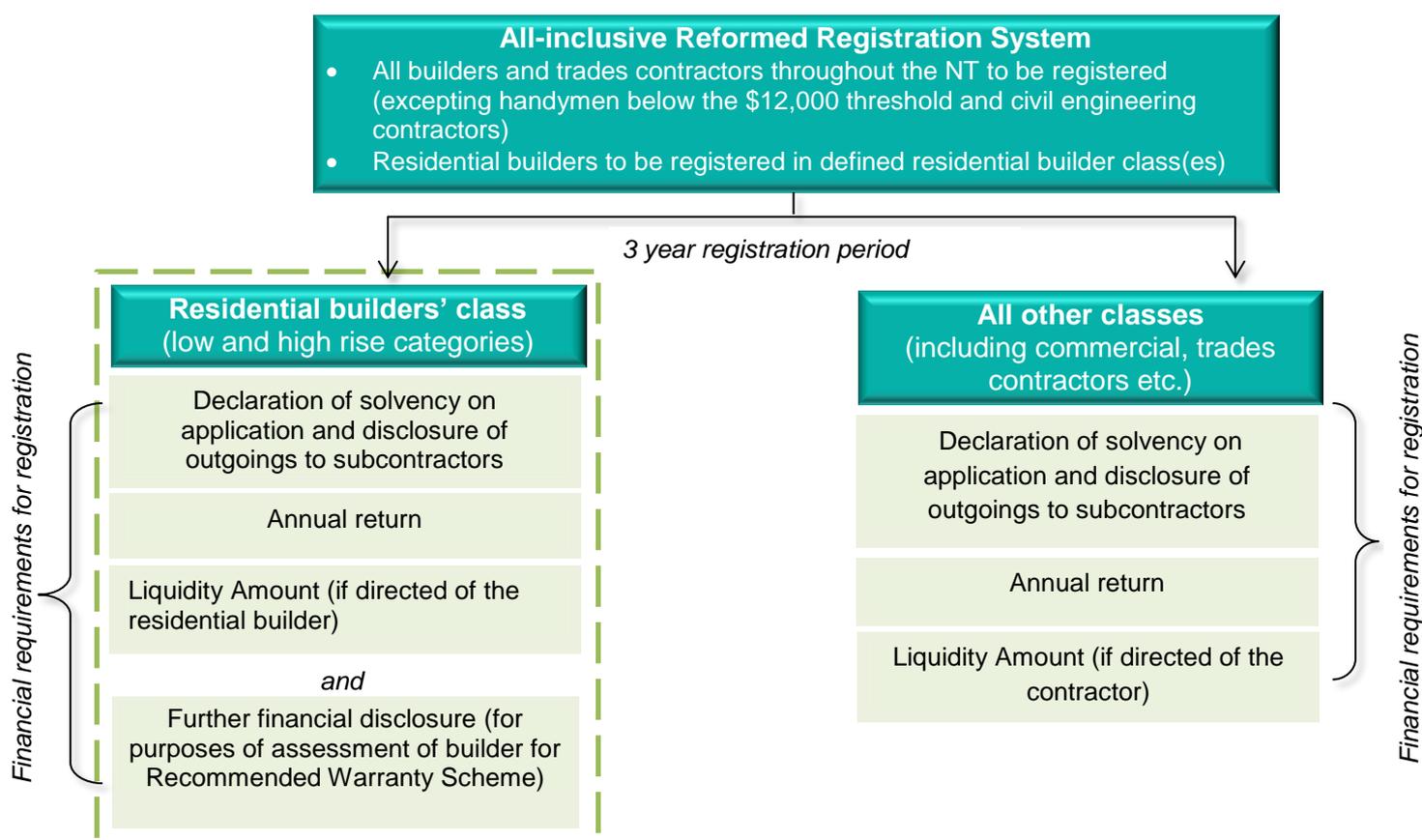
The registration requirements for contractors will include individuals achieving appropriate levels of qualification and competency under the appropriate national competency and qualification systems.

The residential builder registration classes will include requirements for substantially more financial information to be provided than other registration classes. This will be used to assess the risk of that builder failing or causing payment default, and to set a levy for the residential warranty scheme cover for that residential builder's consumers. The residential warranty levy should be applied per project as is presently the practice.

Rather than have excessive demands for financial information or overly restrictive or arbitrary capital requirements imposed across all contractor classes, it is recommended that the regulator have reserve powers to director of any particular contractor or a class of contractor as the regulator may require, a liquidity reserve. The liquidity amount could take the form of having a minimum balance in the subcontractor construction trust account that this Report also recommends.

The recommendations for the registration system are illustrated below:

Reformed Registration System



D. Improving the scope of compensation available for residential consumers

By:

- using the contractor registration system and an aligned disciplinary system to remove high risk contractors from the marketplace over time; and
- recommending a retention trust scheme that has security offered by residential builders placed into trust and held for one year past the issue of an occupancy permit,

this Report's recommendations identify there ought to be less need for arbitrary caps or limits on the compensation extended by the warranty scheme, so that consumers can get their home completed and rectified, without the warranty scheme becoming unaffordable.

A similar recommendation is included against arbitrary exclusions of claims made by consumers outside any prescribed time limits for notifying claims. The impact of that late notice on the ability of, and costs to, the scheme administrator in addressing the construction failure ought to be considered and set against the amount of compensation, if this is appropriate, but the entitlement to claim under the scheme ought not to be automatically time barred.

There ought however to be a standing fraud exception to compensation being extended where there is any evidence of collusion between a claiming consumer and a defaulting contractor. This fraud exception could be developed to prevent ridiculous underquoting being accepted by complicit consumers.

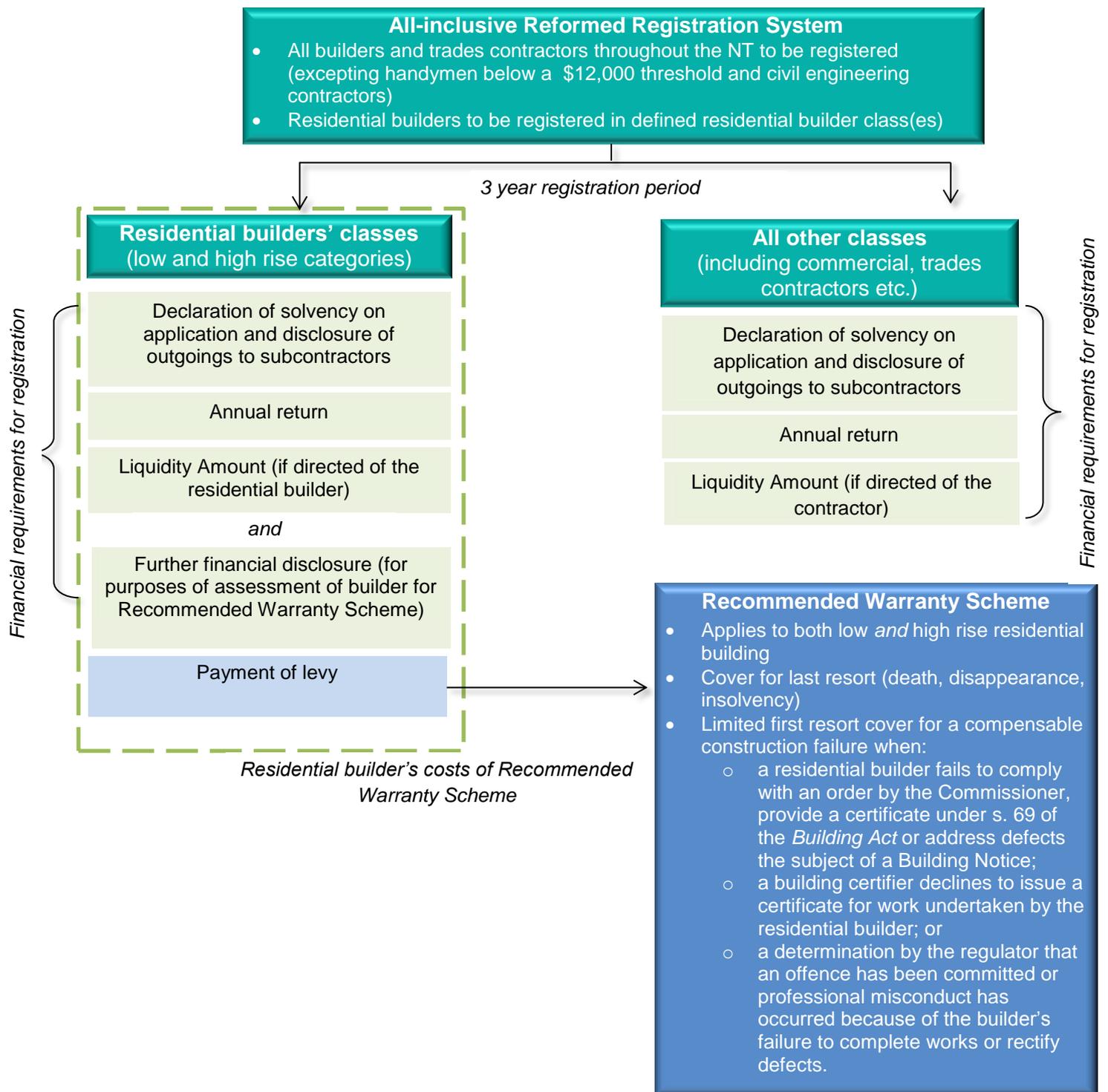
In addition to the 'last resort' grounds of death, disappearance or insolvency of a residential builder, a recommendation of this Report is to include limited 'first resort' grounds for recovery in defined circumstances where a registered residential builder's default or conduct is already the subject of an objective determination (such as the contractor failing to comply with an order of a court, or determination of the Commissioner of Residential Disputes arising from a breach of consumer guarantee under the *Building Act*) or when its registration is suspended or cancelled (drawing upon the link found in the present

scheme). This mechanism addresses the need to afford the contractor natural justice, as each of the nominated 'first resort' compensable events generally has a process for the residential builder to contest or be heard on the issue, before the making of the determination or order.

The primary manner of compensation under the recommended residential warranty scheme ought to involve a pro-active scheme administrator that can step in to promptly assist the consumer in the circumstances of the construction failure, such as by engaging others to complete the work or fix the defect. This will enable the scheme administrator to manage and mitigate the costs of rectification or completion, and will reduce the immediate financial and personal stress placed on a home owner trying to manage the construction failure of their residential builder.

The Report's recommendations for the registration system and the warranty scheme together are illustrated in the following diagram:

Reformed Registration System and Recommended Warranty Scheme



E. High rise (above 3 storeys) protection of bodies corporate and unit holders

The Report has reviewed the history of residential warranty cover being removed for 'high' rise residential construction (above three storeys) in response to the commercial difficulties of private insurers operating interstate schemes in the mid 2000's.

The lack of protection of residential unit holders and bodies corporate (for the common property created in unit schemes, which is where structural defects on multi-story construction tend to run) is, from a community perspective, a significant absence in the existing warranty scheme given the rapid development of multi-storey apartment living in the Territory.

The recommended residential warranty model extends cover to unit holders and body corporates of 'high rise' (above three storey) residential construction.

There is no compensatory principle that would operate to exclude high rise residential construction from the consumer protections afforded by a residential warranty scheme. (High rise unit purchasers and bodies corporate are not better protected from construction failure, for example.) The Report recognises the significant cost and risk impacts of this extension for the Recommended Warranty Scheme however and that no other scheme in Australia covers high rise development.

F. Statutory retention trusts for residential building works

Partly to address the cost impact of the recommended high rise extension to warranty cover, this Report further recommends a statutory retention trust scheme be established, that will have all *residential builders* (which includes developers, as per the present scheme) contributing 5% of the contract price (or deemed construction value if no lump sum contract price) to a statutory trust as security for the builder's due completion of the works and attendance to defects.

2½% of the security amount is returned to the builder on completion of the works, evidenced by way of issue of an occupancy permit under the *Building Act*, and 2½% of the amount is to be held in trust for one year following issue of the occupancy permit, effectively as security for defect rectification.

Security can be submitted and held on trust or in escrow in the form of cash retention, bank guarantee or insurance bond in the normal course of present commercial practices.

That security is held on trust for the benefit of the consumer, including any body corporate created if the works relate to a unit development. If the home/unit holder or body corporate of a unit development is entitled to call upon the residential warranty for compensation in respect of the residential development, the scheme administrator can access the security on behalf of the home/unit holder or body corporate, and apply it towards its costs of attending to the residential builder's construction failure under the warranty scheme.

It is recognised by this Report that the extensions to the Recommended Scheme's coverage need to be costed and the Scheme must be viable and affordable for all consumers. The plea made in this Report is that such analysis be done and that caps and limits to warranty cover that have accreted onto the existing warranty schemes in the Territory and elsewhere not be automatically accepted as being necessary for the viability of the recommended scheme.

G. Securing payment of subcontractors

Recognising the truism that payment defaults cause contractor failures, this Report reviews the policy tools and models used for improving payment down the contracting chain and makes a number of recommendations to improve payment security for subcontractors.

The existing system is restricted to security of payment legislation that seeks to prompt the payment of progress claims on account, and provides an adjudication system to expedite determination of payment disputes. The Report does not recommend the Territory embark upon any significant review or changes of the present security of payment legislation until national initiatives are further identified and their impact on the Territory legislation understood. There are however significant issues surrounding the present security of payment system's inability to address circumstances of insolvency, and not being integrated with

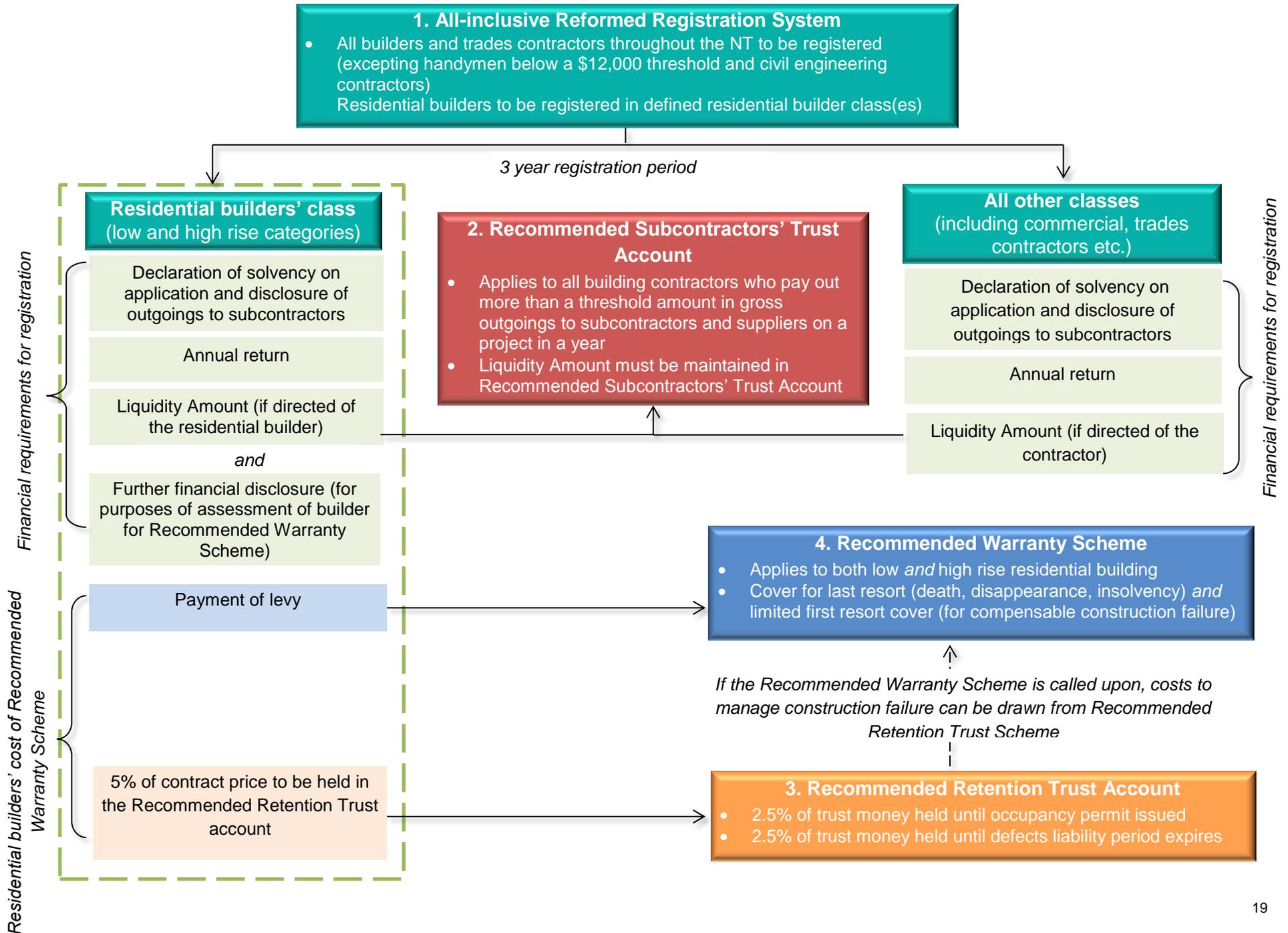
other aspects of the building regulatory framework. (The failure to pay an adjudication determination is not an express default by a contractor under the present residential builders' registration system, for example.)

The Report makes a strong recommendation for the introduction, linked to the contractor registration system, of statutory subcontractors' trust accounts. This model of payment protection has contractors with a certain level of payments being made to subcontractors and suppliers in any given period (\$500,000 and above, over a registration year, is recommended as the threshold to apply) opening and running a separate subcontractors' trust account (alongside its general operating accounts) into which progress payments are made by that contractor's principals for its works. The contractor is able to draw its cash flow from the trust account *after* the subcontractors have been paid first in any payment cycle. The compulsory subcontractors' trust account model is considered the most effective way of dealing with subcontractors losing payments because of contractor failure.

H. Summary of Recommendations

The combination of this Report's recommendations across the regulatory framework is best expressed in the following diagram:

Reformed Registration System, Recommended Warranty Scheme, Recommended Subcontractors' Trust and Recommended Retention Trust Schemes



III. All Recommendations

For ease of reference each section of this Report has its Recommendations identified and number consecutively in the body of this Report. All the identified Recommendations found in the Report are listed below.

A. Residential Warranty Scheme

- 1 The Territory establish a new, public model, residential warranty scheme (**Recommended Warranty Scheme**) to replace the existing Master Builders Association Fidelity Fund Scheme (**MBA Fidelity Fund**) (page 76).
- 2 The Recommended Warranty Scheme and the Reformed Registration System be closely aligned and singularly administered so that:
 - qualification in a residential builders' class of registration automatically qualifies that registered residential builder's consumers to cover under the Recommended Warranty Scheme (so there is no duplication of application processes or divergent qualification criteria for a builder to become registered and to be able to get cover under the Recommended Warranty Scheme); and
 - the registration fee will include a levy applied to the class(es) of residential builder for the cover of their consumers by the Recommended Warranty Scheme (page 77).
- 3 The Recommended Warranty Scheme ought to apply to all residential construction, including multi-storey residential construction above 3 storeys (page 80).
- 4 The Recommended Warranty Scheme ought not to apply to commercial (e.g. non-residential) construction (page 80).
- 5 Cover under the Recommended Warranty Scheme ought to be legislatively extended to subsequent purchasers of residences and to the body corporates that are created under the *Unit Title Schemes Act* for the cover period (page 80).
- 6 Developers are to remain treated as residential builders and required to contribute levies to the Recommended Warranty Scheme. However, developers ought not to be entitled to access the Recommended Warranty Scheme themselves as this could create a significant risk of 'moral hazard' (page 80).
- 7 The Recommended Warranty Scheme Administrator ought to be given powers and resources to enable it to manage construction failure for the consumer including the ability to promptly 'step-in' to the shoes of the defaulting residential builder by:
 - electing to receive the assignment of any subcontracts (or to require they be assigned to another contractor appointed by the Recommended Warranty Scheme Administrator);
 - paying the defaulting residential builder's subcontractors and suppliers (on the basis that they will also pay their sub-subcontractors down the contracting chain and subject to any insolvency issues that might arise); and
 - managing the completion of the residential construction (including by the Recommended Warranty Scheme Administrator directly engaging a new construction contractor if necessary) (page 82).
- 8 The Recommended Warranty Scheme Administrator to be given statutory rights of recovery (including entitlement to prove as a creditor in any administration of a residential builder that has become insolvent). Consideration to be given to extending those statutory rights to enable pursuit of directors of the residential contractor directly (page 82).
- 9 The Recommended Warranty Scheme to cover construction failure of residential builders outside the circumstances of that residential builder having failed (that is become insolvent, died or disappeared) in defined circumstances of a 'compensable construction failure' (page 83).

- 10 If the recommendation to extend cover for compensable construction failure events is not accepted, expedited disciplinary processes ought to still be adopted so that construction failures can be the subject of cancellation of registration and this becomes a compensable event under the Recommended Warranty Scheme (page 84).
- 11 The Recommended Warranty Scheme's period of cover for construction failure ought to extend for the same period as the limitation period for claims arising from defective structures (presently 10 years from the date of the issue of the occupancy permit). Alternatively, the present period of 6 years ought to be retained (page 84).
- 12 The Recommended Warranty Scheme contemplates the Recommended Warranty Scheme Administrator stepping in and organising the completion of works or rectification of the defect in the absence of the defaulting residential builder.
 - Compensation is best provided in the form of early intervention and direct address of the construction failure that consumers are ill-equipped to deal with. The Recommended Warranty Scheme should consequently strive to achieve the outcome of the consumer's residential dwelling being completed or rectified despite the residential builder's failure.
 - Arbitrary caps or limits (including precluding any entitlement for late claims by consumers) on the compensation are contrary to this compensatory principle. Such mechanisms for limiting Scheme exposure ought to only be introduced, and the compensatory principle compromised, if the viability of the Scheme demands it (page 86).
- 13 There ought to not be a policy disposition towards arbitrary capping or limiting of compensation to achieve other policy outcomes, such as underquoting. A fraud exception ought to be included in the Recommended Warranty Scheme, granting powers to the Scheme Administrator to refuse compensation where home owners are complicit in fraudulent conduct (including clear underquoting with intent for the Recommended Warranty Scheme to pick up the completion of the dwelling) (page 87).
- 14 If the recommendation to establish the Recommended Warranty Scheme is not adopted and an industry or insurance model is retained, then it is recommended that an 'emergency backup', akin to the nominal insurer in the workers compensation scheme, ought to be established. Civil penalties and rights of restitution ought to be legislated against a residential builder and its directors for failing to obtain cover from either model (page 87).
- 15 The MBA Fidelity Fund and the HBCF Scheme liabilities on extant certificates under those schemes ought to be subsumed into the new Recommended Warranty Scheme and the administrator of the MBA Fidelity Fund indemnified for any residual liability (page 88).

B. Contractor Registration

- 1 A reformed registration system ought to be established and used as the basis for prequalification of contractors and the Government's procurement directions (**Reformed Registration System**) (page 134).
- 2 The Reformed Registration System to be applied universally across the Territory (page 134).
- 3 The Reformed Registration System ought not to include civil contractors. Consideration ought to be given whether the Reformed Registration System should extend to civil contractors executing civil works incidental to the construction of a building (page 139).
- 4 The Reformed Registration System ought to retain the existing requirement that residential developers be registered (page 140).
- 5 The Reformed Registration System includes relevant classes or categories of contractor, including retaining residential builders as specific registration classes (to accommodate differences between low and high rise residential builders) (page 140).

- 6 The Reformed Registration System includes a power for the regulator to direct nominated contractors or classes of contractors to hold a designated minimum balance (the 'Liquidity Amount') in its construction trust account established under the Recommended Subcontractors' Trust Scheme (page 142).
- 7 The regulator will have general powers to require further declarations of solvency from time to time during the period of the contractor's registration and to ask for disclosure of relevant financial information at any time (page 143).
- 8 Contractors will supply all necessary information at the time of application or renewal of registration. Additional financial information will be needed from residential builders to enable confirmation of their ability to access the compulsory participation in the Recommended Warranty Scheme and to enable the levy to be set (page 144).
- 9 The registration period be of reasonable duration (3 years) to reduce the time and cost impacts of renewals but simple annual statements or returns, incorporating declarations of solvency, be introduced (page 146).
- 10 The disciplinary processes leading to cancellation or suspension of registration ought to be streamlined (page 146).
- 11 A company seeking registration as a contractor under the Reformed Registration System must nominate a director registered in the class of contractor in which they seek to be registered. Any disciplinary action taken against the company contractor will automatically be applied to the nominee director (page 148).
- 12 Payment default by a registered contractor will be clearly identified as an actionable breach of its registration conditions (page 149).

C. Payment Protection and contract reform

- 1 In anticipation of advocating a national approach to security of payment based on the West Coast model, the Government not consider substantially reforming the *Construction Contract (Security of Payments) Act* (NT) at this time (page 172).
- 2 The Territory not re-introduce older forms of contractor security, such as contractors' liens or subcontractors' charges, but instead adopt the recommendation to introduce a construction trust scheme (page 173).
- 3 A statutory scheme of credit insurance covering contractors for contractor default not be implemented (page 176).
- 4 The Territory ought to implement a legislated, cascading, subcontractors' construction trust scheme (the **Recommended Subcontractors' Trust Scheme**) (page 191).
- 5 There be a minimum threshold of \$500,000 and greater of a registered contractor's gross outgoings to subcontractors, for the contractor's compulsory use of the Recommended Subcontractors' Trust Scheme (page 193).
- 6 The Recommended Subcontractors' Trust Scheme ought to be tied to the Reformed Registration System, so that a breach of a trust obligation by a contractor is an actionable breach of that contractor's registration conditions (page 194).
- 7 A retention trust scheme ought to be established (the **Recommended Retention Trust Scheme**) for residential builders only.
 - Under the Recommended Retention Trust Scheme 5% retention of the contract price (or estimated contract construction value, if there is no lump sum price) for each residential construction project is held in a statutory trust account for the consumer (being the home owners and the bodies corporate for unit constructions) and the Recommended Warranty Scheme Administrator as beneficiaries.
 - 2½% of the retained amount will be returned to the builder on issue of an occupancy permit for the works under the *Building Act*.

- The remaining 2½% of the retained amount will be returned to the builder at the end of a statutory defects period, which is recommended to be one year from the issue of an occupancy permit under the *Building Act*. (This period accords with the consumer guarantee period for non-structural defects under the *Building Act*.)
 - If there is a trigger event for the consumer to access the Recommended Warranty Scheme, then the Recommended Warranty Scheme Administrator can draw upon the retention as a beneficiary of the retention trust and apply it to managing the construction failure, thereby defraying costs incurred by the Recommended Warranty Scheme (page 196).
- 8 The Territory should not introduce a payment bond system because the small size of the Territory market cannot support such a scheme (page 200).

IV. Implementation Strategy

This Report emphasises the need to approach the building industry regulatory framework holistically, as the interconnections that exist between its various components demands this for any effective reform to be achieved.

The sheer size of this regulatory landscape (challenging enough for the preparation of the 'high level' review found in this Report) makes implementation of significant changes a significant task for Government and the industry. Without that effort however, the systemic weaknesses of the building industry will continue to cause significant economic and social damage (given the devastating effect of contractor and construction failures for subcontractors and home owners) to the Territory.

Once the Government has identified the industry and community positions on the issues and potential models highlighted by this Report, implementation of any reforms that are adopted from the Recommendations, will likely need to be made incrementally.

What is a sensible sequence of such incremental introduction of changes to the building industry regulatory framework?

A four step programme is contemplated (see also the numbering on the diagram set out at page 19 above):

- 1 This Report considers that a basic system of comprehensive, simple, building contractors' registration to be the cornerstone of any building industry reform. It is consequently recommended that the Reformed Registration System and the reconciliation of contractor disciplinary processes to that new registration system should be implemented as the first priority. The Recommended Registration System can include relevant classes of residential builder and the existing requirements for residential builder registration can be simply retained until the introduction of the recommended residential warranty scheme requires these to be revised.
- 2 The establishment of the Recommended Subcontractors' Trust Scheme can also immediately follow the introduction of the Reformed Registration System, so that this important payment protection mechanism can be rapidly introduced and any minimum liquidity amounts as may be directed of a contractor can be deposited and held on trust in an easily auditable location.
- 3 The two primary recommendations relating to residential builders (being the establishment of the retention trust system and of the public residential warranty insurance scheme) can be dealt with together, but after the recommended registration and subcontractor trust systems, permitting time for the actuarial analysis needed and for transitioning the existing industry fidelity scheme in an orderly fashion. First, the retention trust system can be established with the existing fidelity fund scheme continuing to operate. Presumably there could be some discount applied to the fidelity fund rates, applied in consideration of the 5% of the contract sum available to be applied to defaults in completion or failure to attend to defects in residential dwellings, in circumstances where a call is made on the fund.
- 4 Secondly, the Recommended Warranty Scheme could be introduced and the necessary changes could be made to the application requirements for the residential building classes enabling the registration information to set the levy for the builder. This will strip out of the regulatory framework the need for duplicitous applications for warranty cover and registration as are presently suffered by the builders in the Territory.

Introduction

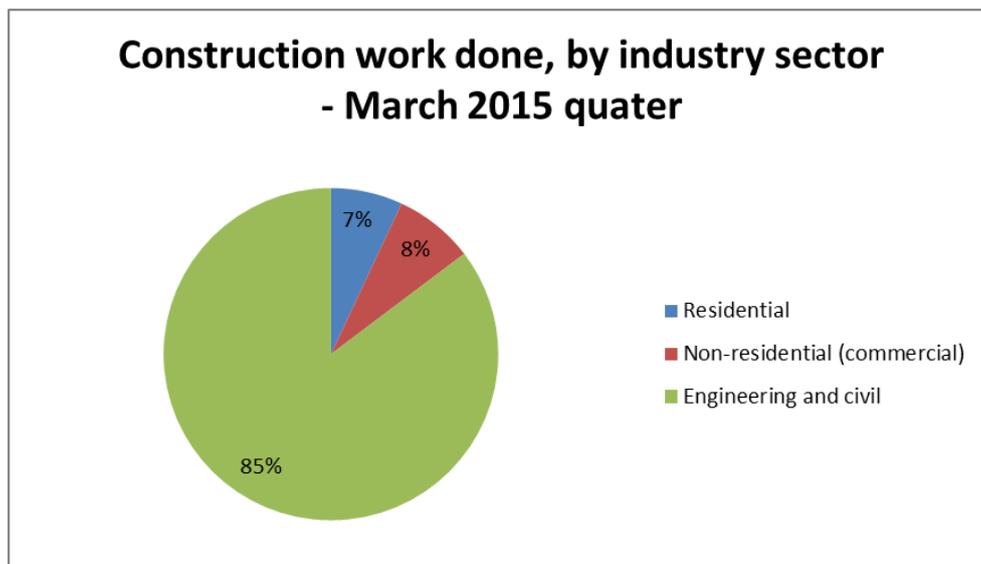
I. Overview of the Construction Industry in the Territory

A. Introduction to the different sectors of the Construction Industry

The construction industry in the Northern Territory (the **Territory**) can be defined to encompass several, diverse, sectors. This Report attempts to capture the diversity of the industry by adopting an expansive definition of 'construction' (broadly reflecting the scope of the application of the *Construction Contracts (Security of Payments) Act* (NT)³ as potentially including:

- residential building (which may extend to multi-storey, high rise, residential construction);
- non-residential or 'commercial' building (which may upon occasion be further subdivided into Government capital works projects, major projects and private sector commercial construction); and
- civil engineering works.

The value of construction work done in each industry sector in the March 2015 quarter⁴ was:



Any review of construction industry regulation quickly identifies that, for a number of cogent policy reasons and also because of industry's historical evolution, different sectors of the construction industry are subject to different regulatory regimes.

By way of example:

- regulation of civil engineering contractors is very low. If a civil contractor in the Territory is not performing works for the Territory Government, its activities are not regulated. There are also relatively few policy initiatives extending to the civil contractor (excepting for the application of security of payment legislation); however
- conversely, residential builders are more heavily regulated, as they are obliged to submit to a registration process under the *Building Act*, and unable to build certain classes of dwelling without participating in a compulsory residential warranty scheme.

³ See section 6 of the *Construction Contracts (Security of Payments) Act* (NT) which defines 'construction work' broadly.

⁴ Australian Bureau of Statistics, Cat. No: 8755: Construction Work Done, Australia (Preliminary), June 2015.

Both Government and construction industry participants need to regularly review whether existing industry regulation is appropriate and achieving its objectives. This continuous review process ought to contemplate whether policy initiatives applied in one sector of the construction industry are appropriate to extend to other sectors and whether the particular issues that one sector may face also need to be addressed across the industry as a whole.

Consequently, this Report advocates for a holistic approach to construction industry regulation and reform initiatives in the Territory and assessing when the potential application of such initiatives and their impact across all the sectors of the construction industry.

The undertaking of a strategic approach (and including as many of the industry sectors as possible in the analysis) is particularly important because:

- those industry sectors share common commercial and contractual underpinnings as well as some common vulnerabilities;
- from a cost perspective, the size of the construction industry in the Territory (although critically important for the Territory's economy and community) is not on a scale that pragmatically permits different regulatory approaches being taken by a variety of different agencies or organisations; and
- there is simply not the scale to justify and support a sector by sector approach to administration by different sector bodies.

By streamlining the regulation of the construction industry in the Territory, as well as the persons or bodies charged with administering it, Government can reduce red tape and the costs to industry and community in delivering vital housing, infrastructure and commercial projects. Importantly, a strategic approach that seeks to reconcile and systemise policies improves the policy responses for the construction industry overall.

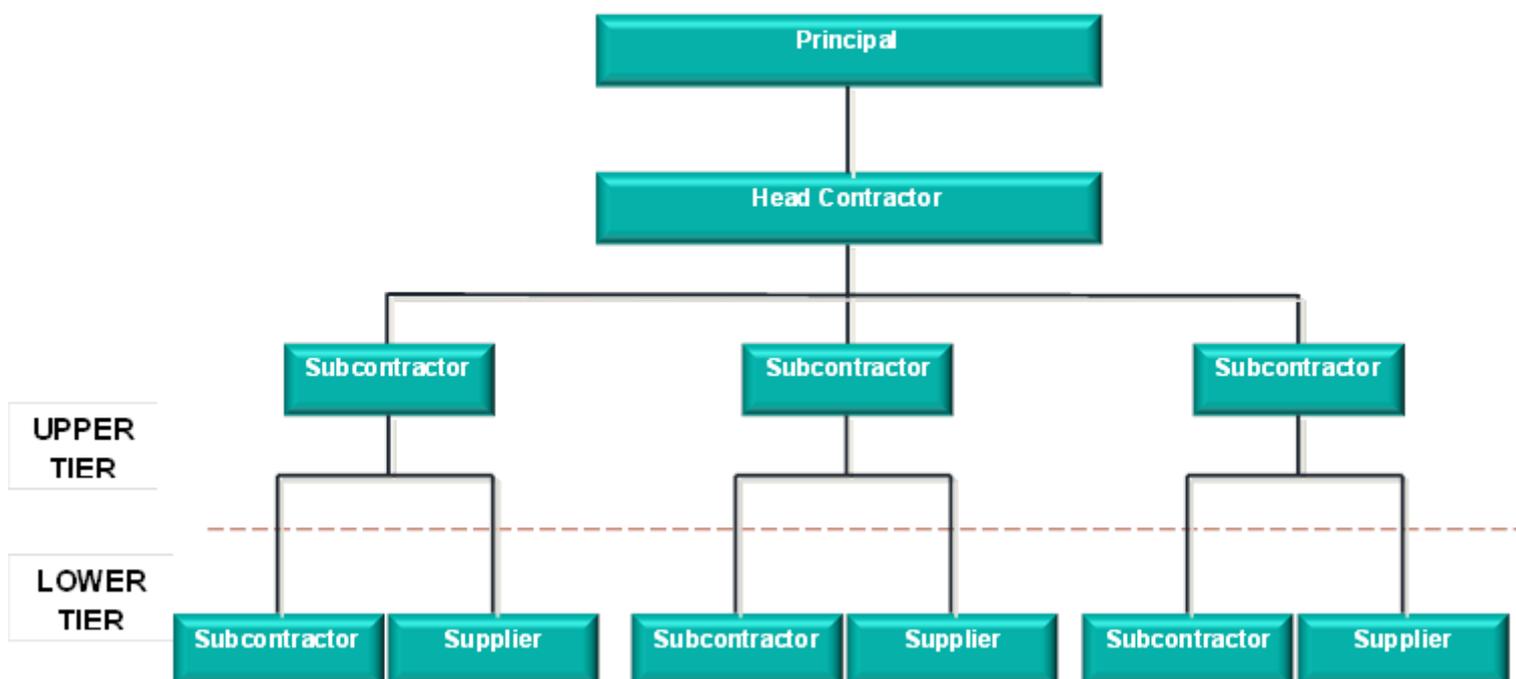
It is recognised that when it comes to some regulatory and policy initiatives, industry sectors have particular characteristics and a 'one size fits all' regulatory response is not always appropriate. The methodology used in this Report is based on a 'whole of industry' perspective but recognising the unique features of particular industry sectors.

B. Contracting Chains

The extent to which construction contractors self-perform their works (as opposed to subcontracting those works to be done by others) fluctuates across industry sectors. Compared to commercial contractors, civil and engineering contractors undertake a greater proportion of their projects themselves. Further, some residential builders perform more of their own works than others within their sector.

The construction industry as a whole however is dominated by and reliant upon contractors engaging 'chains' or 'pyramids' of subcontractors and suppliers to deliver the majority of a construction project's labour, materials and services.

Contractual Matrix for Typical Building Contract



This industry wide contracting methodology has certain advantages. The contractor does not need to be of a sufficiently large scale (having cash, debt funding or capital reserves equal to the value of its order book) to carry the whole range of activities needed for a project. Increased sophistication and complexity of construction methodologies, employing specialised plant, materials and processes, now often demands complex supply chains with sophisticated contractors (who can often be larger than the contractors with whom they contract that are 'higher' up the contracting chain).

The disadvantage to the contracting chain is when it is paired with each contractor's reliance on progressive payment. This is the second feature of the construction industry that we discuss below.

C. Progressive Payment

The construction industry runs on cash flow. Since contractors do not have to self-fund works as they progress, they can be engaged to perform works of a significant contract value which they may otherwise not have cash on hand, debt financing or capital reserves to have supported themselves. Contractors of all sizes typically have order books substantially exceeding their capitalisation and they are dependent on progressive payment for their works, services and materials.

The law regarding progressive payments has, however, only developed in relatively recent times.

An old principle of contract law is the 'entire contract' doctrine. This doctrine requires a contractor who contracts to do something, such as executing construction works, to execute the entirety of those works before it can recover any payment of the agreed contract price.⁵

Applying this doctrine to construction contracts meant that contractors needed to self-fund substantial performance of their works as they were not contractually entitled to be paid anything for partially completed works. Given the challenge this imposed on contractors:

- courts became involved in the late 19th and early 20th centuries with undertaking case by case assessments⁶ of the parties' intentions in construction contracts brought before them, determining whether the parties intended the contracts to be 'entire' contracts caught by this rule, or whether they were 'divisible' contracts entitling contractors to recover payment for partially completed works; and

⁵ *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221 at 233-4 per Starke J.

⁶ For example: *Lucas v Borough of Drummoynne* (1895) 16 LR (NSW) 55; *Markham v Bernales* (1906) 23 SR (NSW) 420; *Smith v Jones* (1924) 24 SR (NSW) 444; *Parkinson v Lord* [1925] VLR 22; *Bunting Cabinets Pty Ltd v Halperin* (1986) 4 SR (WA) 75.

- courts also started implying terms into construction contracts that progress payments are to be made on account of the contract price given the contractor's work extended over a considerable period.

Drafters of construction contracts were also establishing a practice of including express entitlement to progress payment for works progressively executed in construction contracts.

Entitlement to bring progress claims for the contract price progressively during the course of the works is a universal practice in written construction contracts.

Courts, needing to give certainty to the progress payment systems found in construction contracts, also came to identify that although a principal had an obligation to pay a progress payment due to a contractor, that payment was described to be 'on account' and did not bind a principal into accepting the works as having been satisfactorily completed.

This principle of progress payments being payments 'on account' only is now adopted in security of payment legislation across Australia.

II. The Construction Industry's systemic vulnerabilities to contractor default and failure

A. Systemic weaknesses in the Construction Industry

The contracting chain, combined with the construction industry's structural reliance on cash flow, creates a systemic weakness of the industry to payment default and contractor failure.

Construction contractors are uniquely vulnerable to interruptions in their cash flow. They often do not have the liquidity reserves to cover a sustained cash flow shortage. A contractor that does not get paid what it is due to be progressively paid under a contract may, in turn, commit a payment default down the contracting chain depriving lower tiers of subcontractors and suppliers of cash.

The domino effect of a payment default down the contracting chain can be devastating:

- Lower tier subcontractors and suppliers do not have the contractual relationships permitting them to directly pursue recovery of the money due to them against the higher tiered principal or contractors that may have initiated the payment default.
- Typically, the only option for a lower tier sub-subcontractor or supplier, when faced with a payment default, is to take action against the party with whom it contracted to recover the money due. That subcontractor will then, in turn, take action against the party with whom it contracted, and so on, with the claims and disputes following the payment defaults up the contracting chain. There are however substantive time lags in this 'tier by tier' approach to payment and recovery. In these time lags for recovery of payment that the contracting chain inflicts on lower tier subcontractors (often months and even years), unpaid contractors can run out of money and fail, or they can simply commit their own payment default in an attempt to push financial hardship upon those further down the contracting chain.
- There is not necessarily an orderly and progressive recovery of payments in the contracting chain. As there may not be any good contractual reason for the non-payment of a progress claim at the lower tiers of the contracting chain (other than the defaulting subcontractor having not been paid what it is due) the defaulting subcontractor may be forced into prompt payment by an astute subcontractor or supplier, properly equipped with adequate subcontract or supply terms.
- For example, whilst the practice of directors guaranteeing payment of moneys due under the company's contracts is not common between construction contractors and subcontractors in works contracts (and tends to be vigorously resisted, for obvious risk reasons) suppliers often include such security devices with their credit terms for supply of materials. Suppliers (particularly the larger, national companies with sophisticated debt collection practices) often put substantial pressure on lower tiered subcontractors to immediately pay money due under supply agreements, which can occur months or even years before that subcontractor can get satisfaction of its claims up the contracting chain, through traditional legal processes.

This means that there can be payment defaults, disputes and contractor failures breaking out at various links in the contracting chain.

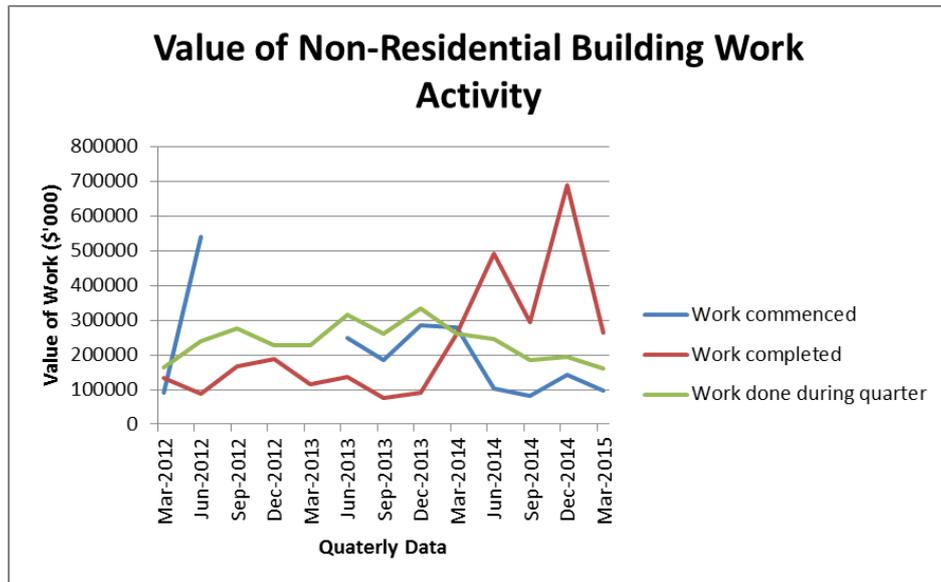
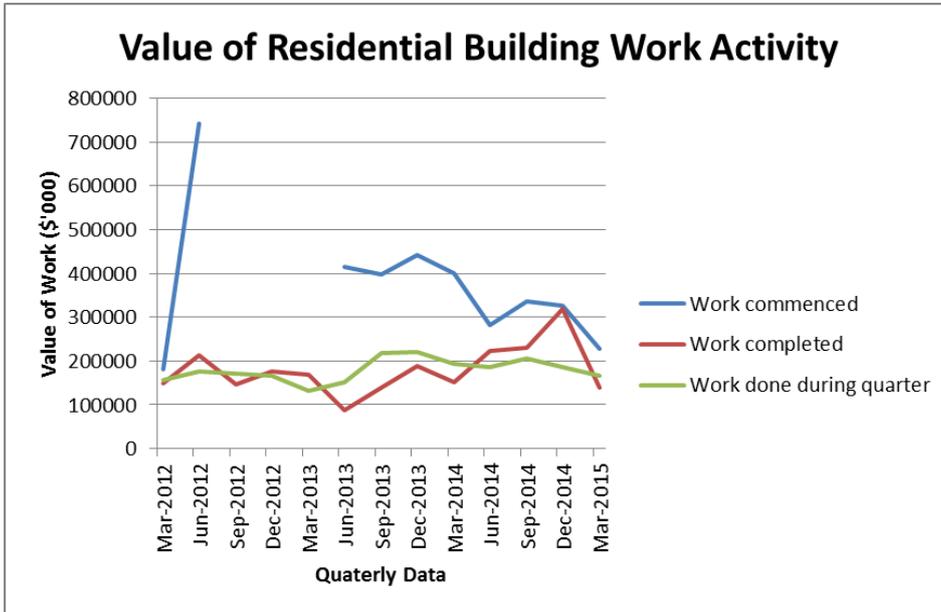
In summary, the contracting practices of the construction industry are what defines it, but are also what makes it uniquely vulnerable to payment default and contractor failure.

This explains the reason why the construction industry is the subject of sustained regulatory intervention and Government policy initiatives. Governments are compelled to be constantly trying to prevent, reduce or ameliorate the consequences of endemic payment defaults and consequent contractor failures that at times threaten community confidence in the industry and adversely impacts the Territory community and its economy.

Some further characteristics that heighten the risk profile of various sectors of the construction industry are summarised below.

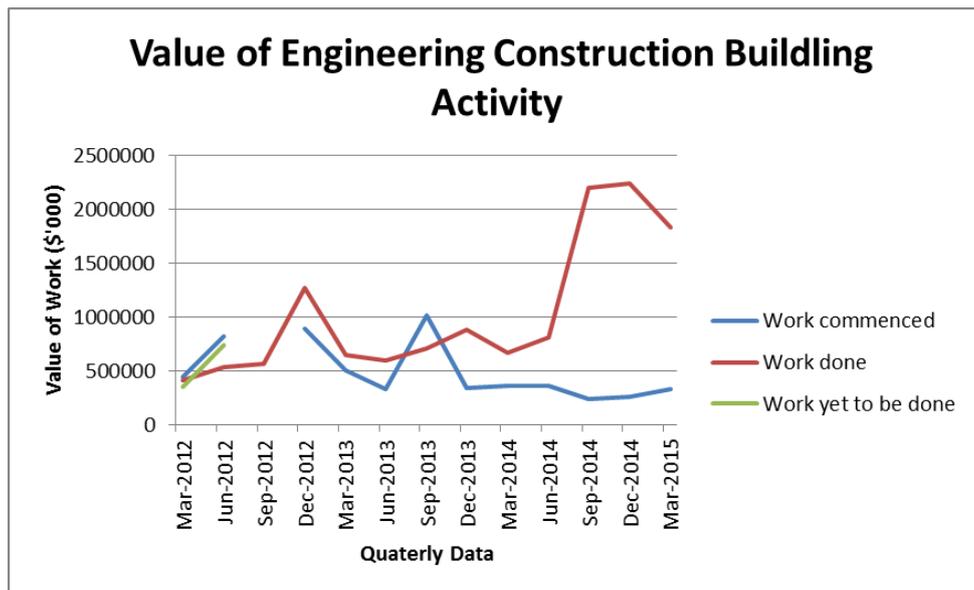
B. Cyclical and volatile

The Territory construction industry is historically highly cyclical.⁷ The cyclicality and volatility of the construction sector in the Territory can be illustrated through mapping the value of construction works undertaken, commenced and completed over the past 3 years. From quarterly data available from the ABS,⁸ we have prepared the following graphs to illustrate volatility in each of the commercial, residential and civil and engineering industry sectors.



⁷ NT Build, 'Portable long service leave: Annual Report 2013-14', p. 7; Australian Bureau of Statistics, 'Understanding the Building Lifecycle by its Cyclical Nature' (December 2003).

⁸ Australian Bureau of Statistics, Cat. No: 8752.0 Building Activity Australia, March 2015; Australian Bureau of Statistics Cat. No. 8762.0, Engineering Construction Activity, Australia, March 2015. Data regarding the value work commenced in the residential and non-residential (commercial) construction industry was not available for the September 2012 – March 2013 quarters. Data regarding the value work yet to be done engineering construction industry was not available from the ABS from the June 2012 quarter.



The volatile nature of the Territory construction industry and its various sectors may have been insulated in recent years by:

- greenfield suburban land releases and development of new residential building stock;
- large amounts of multi-storey residential construction particularly in the inner city areas of Darwin;
- Government infrastructure programmes, such as major road and port developments, prisons, schools, hospitals and urban redevelopment projects;
- significant Government funding and procurement of remote and regional housing and social projects;
- ongoing Defence build-up in the Top End; and
- large scale resources projects.

This sustained growth in work across most sectors of the construction industry brings its own dynamic.

New entrants into Territory Industry and market share bidding

In recent times there have been new entrants into each sector of the industry, seeking to capitalise on the growth in work opportunities. Some are interstate entrants that must strive to establish themselves in the local market. Often they move into the Territory on the back of a good job but then must sustain themselves in the market thereafter. These contractors often find the Territory's cost structures (particularly if they are not familiar with remote and regional contracting) a problem when they underestimate jobs, or deliberately underquote to win market share. Costs of labour and materials, their delivery times and the general lack of availability of plant and materials at the work site, can all become very volatile and costly for Territory contractors.

Whilst consumers and principals benefit from the increase in the supply of construction service providers, the practice of contractors under-pricing (as compared to the costs of the works) to try to gain market share can cause distress within the industry sector, as those contractors that cannot afford to underbid for the work are forced out of the market for the period of 'excessive exuberance'.

The practice of under-pricing is also a potential cause of payment default, as certain industry sectors are notorious for contractors winning works by underquoting (often below cost), securing the contract, and then finding ways and means through assertive claim strategies to claw the job back to profitability. It is not unusual for such disputes to become payment disputes, as principals become adversarial in response and start withholding or off-setting their alleged damages. This can of course lead down the slippery slope of payment default and contractor failure.

The industry is supported by principals (and particularly institutional principals across different sectors, such as the Department of Infrastructure) employing tendering and selection processes that identify value for money in tenders instead of defaulting to selecting the tendering contractor with the lowest price. This philosophy of looking for value ought to extend from contractor to subcontractor down the contracting chain, but this has not always been the case. Only those contractors with a long term view and who value their relationships with subcontractors and suppliers can resist the cheapest price even when they know that it comes at some risk. Long term, sustained, relationships are tested in the transactional world of construction contracting and there are casualties in the rush to the bottom that a volatile contracting marketplace creates.

Over commitment of existing Territory Contractors

Construction contractors in the Territory had also expanded to capture the increased opportunities a previously buoyant market had created. Sometimes that growth is unplanned, with contractors taking on substantially larger projects or more projects concurrently, than they had historically. This can strain the capital ratios of the contractor's business and make them vulnerable to the slightest interruption in cash flow. Additionally there are overheads and contract administration levels that need to be met and properly administered for the larger and more complex projects. Such projects tend to be under-resourced by contractors who are not experienced at working such projects. This is particularly evident where contractors cross over industry sectors. There have been a number of instances of contractors successful in one sector, housing construction for example, moving into commercial and government projects and then struggling to adapt to those new environments and project demands.

Downturn in Construction Industry cycle

Within each sector cycle there are periods of downturn, often occurring when a major project that has monopolised resources (and competition) comes to an end, or capital works projects dry up. Contractors that have pushed the boundaries of their financial capacity for whatever reason are notorious in relying on the next job to get cash to pay their subcontractors and suppliers for the last job.

The effect of even a moderate slowdown in an industry after a sustained period of rapid expansion can be particularly dramatic as people's perceptions and businesses' cost structures overshoot the new reality of longer periods between profitable projects or diminished volumes of work upon which they need to survive.

C. Spectrum of Construction Contractors

The construction industry in the Territory is characterised by a broad diversity of size and resources of construction contractors. There are a large number of small contractors, who may be individuals or small companies, in each sector of the industry. There are also a small number of dominant players that take a significant portion of the market share of each sector.

The contracting chain often means that the whole spectrum of this diversity in the industry is thrown into a single construction job. For example:

- an institutional principal may contract with a national commercial contractor;
- the national commercial contractor may subcontract a whole range of subcontractors and suppliers; and
- those subcontractors or suppliers may further subcontract with other sub-subcontractors who could be individual or very small enterprises.

The divergent contracting and financial capacities of contractors dealing with payment defaults and contracting failures is consequently enormous and makes appropriate regulation challenging and complex.

This Report does not however advocate that there ought to be barriers created by regulation and policy initiatives (such as residential warranty schemes) that purposely:

- seek to restrict or stifle the ability of contractors to grow (including taking some risks that expansion entails);
- change sectors; and
- enter (or exit) different sectors or markets.

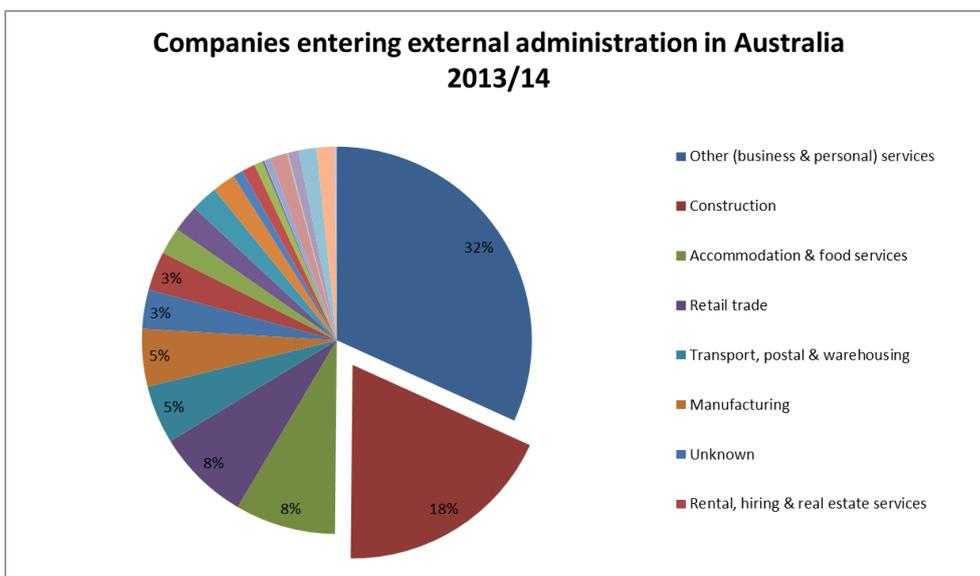
Freedom of trade and the privity of contract between contracting parties negotiating their contractual terms ought to be preserved wherever possible.

Any form of regulatory intervention must consequently be carefully evaluated as being absolutely necessary to protect the vulnerable from the adverse events of contractor and construction failure.

Insolvency in the Industry

A major cause of contractor failure (and a typical cause of payment defaults down the contracting chain) is insolvency.⁹

The construction industry in Australia experiences a high rate of insolvencies in comparison to other industries.¹⁰ Eighteen percent of the insolvencies which occurred in Australia in 2013/2014 occurred in the construction industry, as illustrated below.¹¹



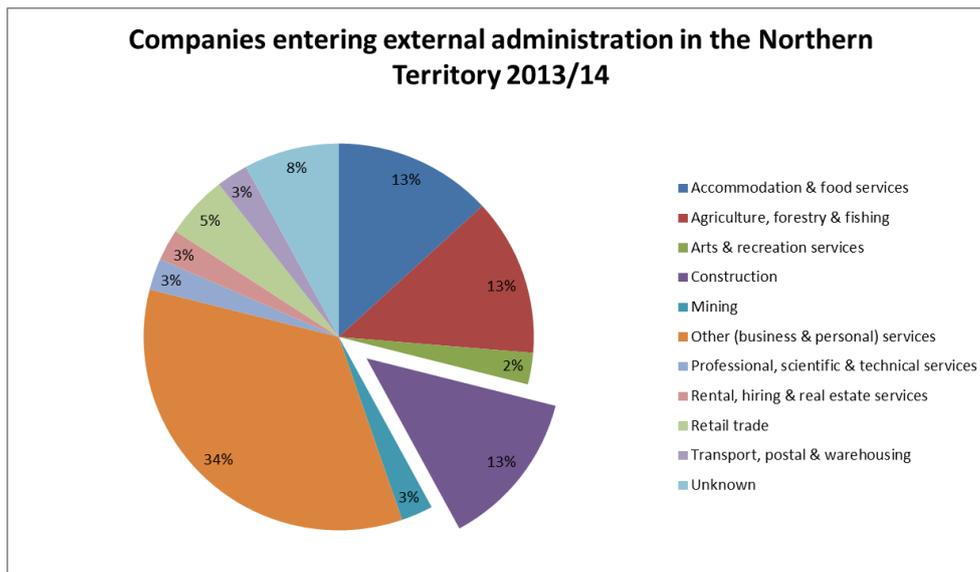
In the last financial year, 13% of companies entering external administration in the Territory were from the construction sector, as illustrated below:¹²

⁹ Of the 36 claims made to the MBA Fidelity Fund since its inception on 1 January 2013, all have been triggered by the insolvency of the relevant builder.

¹⁰ Australian Securities and Investment Commission, 'Insolvency statistics - Series 1A Companies entering external administration - by industry' (Released July 2015).

¹¹ Australian Securities and Investment Commission, 'Insolvency statistics - Series 1A Companies entering external administration - by industry' (Released July 2015).

¹² Australian Securities and Investment Commission, 'Insolvency statistics - Series 1A Companies entering external administration - by industry' (Released July 2015).



The construction industry nationally also suffers a high incidence of the phenomenon known as ‘phoenixing’.¹³ ‘Phoenixing’ is when a company is deliberately pushed into insolvency to avoid paying its creditors and then a new company, with essentially the same controllers and business is incorporated. In this way, the new company is said to ‘rise from the ashes’ of its failed predecessor.

The phenomenon of phoenixing might therefore contribute to the high turnover in the construction industry, although data about the prevalence of phoenixing is hard to source. While it would be reasonable to infer that such practices would struggle in small market places such as the Territory, there are likely to be more informal ways for small contractors to engage in similar conduct. This is because the lack of regulation of contractors (excepting residential builders) means there is the ability to simply leave the Territory or relocate within it, re-establishing elsewhere or in another industry sector.

Aside from phoenixing and the low barriers of entry, the cyclical nature of the building industry means that capitalised contractors can purchase existing business or establish new businesses at a relatively low cost. This can accelerate the high number of entrants into the industry.¹⁴

In addition to the number of contractors entering and exiting the industry, a further consideration regarding the impact of volatility on the construction industry and its consumers is:

- the length of a contractor’s lifespan within the industry; and
- the chronological frequency of contractors exiting the industry.

The challenge for the construction industry is that its product is the built form (i.e. civil and constructed elements are generally intended to last a long time). The present period of a construction contractor’s liability for any structure it builds in the Territory is 10 years from the issue of the occupancy permit for the structure under the *Building Act*.¹⁵ The frequency with which contractors leave the industry or fail is high given the length of time they need to be in the business to undertake the works and stand by their products (10 years from completion of their works).

The summary conclusions to be taken from this snapshot of the construction industry in the Territory is that it suffers a relatively high level of insolvency and volatility across all its sectors, with contractors both joining

¹³ Submission by Monash University into the Senate Economic References Committee Inquiry into Insolvency in the Construction Industry, (24 March 2015), p. 5.

¹⁴ Final Report – *Inquiry into Western Australia’s Home Indemnity Insurance Arrangements* (Economic Regulation Authority (June 2013), p. 50.

¹⁵ This does not include civil contractors where causes of action are governed by the limitation periods under the *Limitation Act* (NT), being generally 3 years for breach of contract or negligence.

the industry, changing sectors and expanding their business, but also witnessing a steady rate of departures from the industry.

III. Challenges to the Construction Industry: targets for reform

A. Fundamental issues that need to be addressed

As stated earlier, the construction industry's reliance upon contracting chains and progress payments gives it a unique vulnerability to payment default.

Industry reform and policy initiatives that have been taken over recent years have largely focused on minimising the frequency and severity of the consequences arising from payment default, given its potential effects on contractors caught within contracting chains and depending upon progressive payment to keep themselves alive.

If 'payment default' is defined to mean both:

- the obvious default (i.e. a contractor is not being paid what it is due to be paid or when it is due to be paid); and
- the more extended inclusion of delayed or deferred payment (whilst the parties have an extended payment dispute),

then the need to focus reform initiatives on this issue is obvious.

Payment default is also readily identified as a leading cause of contractor failure. Payment default is the ceasing of that contractor as an operable entity, typically by insolvency or more informally, by ceasing to trade and disappearing from the market or jurisdiction.

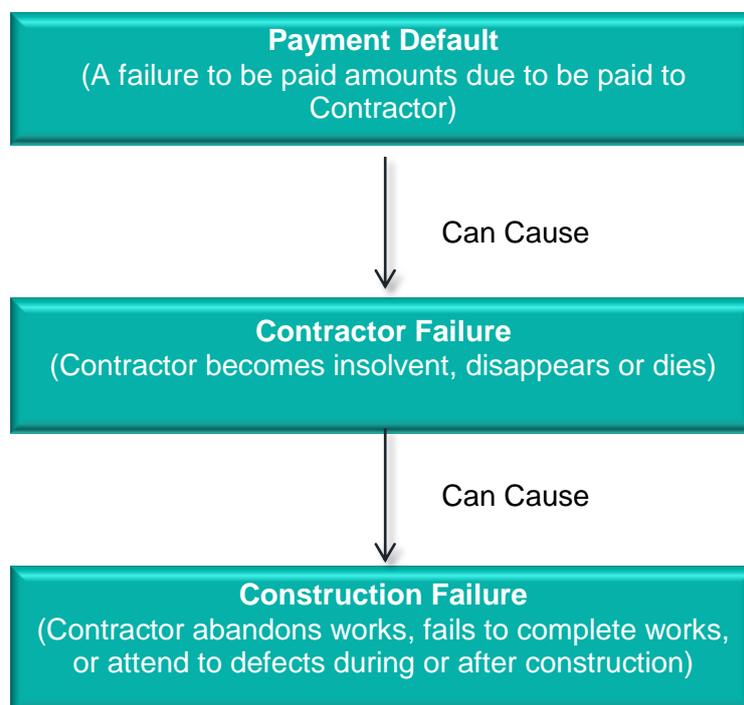
Drawing from the terminology used by last resort residential warranty schemes, the working term 'contractor failure' can be defined to include the disappearance of a builder and in the case of a builder who is a natural person, that individual's incapacitating injury, or death.

Contractor failure, in turn, typically causes construction failure, being:

- the failure of a contractor to properly execute and substantially complete its works; or
- post-construction, to properly and adequately attend to and rectify any defects that may become manifest in its works.

This can be represented through the illustration below:

Construction Industry Failure



Governments have been continuously mindful of the interrelationship between the causes of construction industry failure as identified above when implementing regulatory reform and policy initiatives.

Many of the policy initiatives have concentrated on:

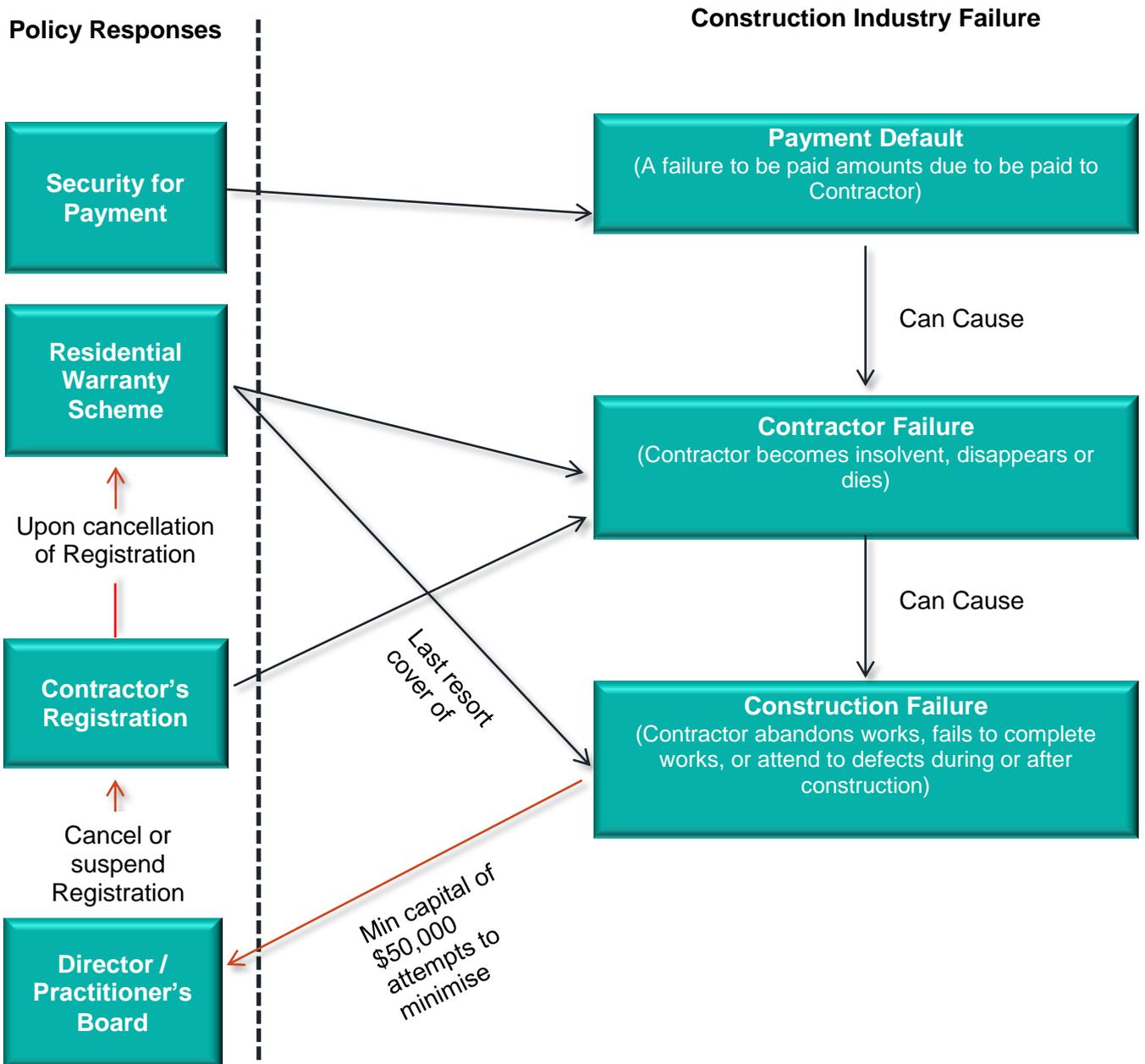
- creating improved payment and recovery rights for contractors at all levels of the contracting chain; and
- attempting to better manage payments disputes (than simply accepting extended court processes).

Regulation has also been focused on implementing preventative measures to guard against the causes of contractor failure. Historically pre-qualification and licensing systems have also been used to ensure a basic level of financial viability of contractors operating in the industry.

The compulsory residential warranty schemes that exist in jurisdictions around Australia are directed to a particular class of construction failure (namely construction failure in the residential home building sector) where vulnerable home owners are afforded some consumer protection by way of compensation.

Finally, the disciplinary processes for contractors that commit a payment default or a construction failure can provide avenues back into other policy reforms by using the revocation of the registration approval or licence of that contractor to effectively deem a construction failure to be a contractor failure.

The following diagram broadly illustrates the existing policy responses to the fundamental issues of payment default, contractor failure and construction failure facing the construction industry:



This Report:

- summarises a strategic overview of each of those policy and regulatory responses to the challenges posed by the construction industry in the Territory;
- recommends some further improvements to the existing policy responses; and
- recommends some new policy responses.

Residential Warranty Scheme

I. Objectives of Residential Warranty Schemes

A. Why are Residential Warranty Schemes needed?

The inherent nature of the construction industry nationally and in the Territory predisposes it to a disproportionately high level of contractor failure.

The repetitiveness with which construction contractors fail financially and are thereby unable to complete their works or address major post-construction defects frequently results in significantly adverse consequences for residential home owners.

There are a range of policy initiatives that governments across Australia have adopted to try to mitigate the consequences of contractor failure for home owners.

Different models of (generally mandatory) residential warranty schemes are one such initiative.

In general terms, a residential warranty scheme is a scheme implemented to provide consumers a means to be compensated by a third party fund or insurer for construction failures that a home owner cannot recover under its contract with the residential builder.

It has been asserted¹⁶ that governments, when looking at whether a warranty scheme ought to be introduced, should address:

- the size of the potential losses that consumers may face as a result of contractor and construction failure;
- the ability of consumers to be able to make informed decisions about the residential builder they choose; and
- the availability of a market-based solution which the consumer can access (such as private insurance) to protect themselves against contractor and construction failures.¹⁷

What can be said about the residential building market in general terms is that:

- the wealth of Australians and Territorians is particularly concentrated in property.¹⁸ For the large majority of the population their residential property is their major asset;
- the majority of individuals embarking on building a dwelling are entering into a building contract for the first time and it will likely be (along with buying the property) the largest commercial transaction that they enter into;
- home owners building their house have invariably borrowed money to fund the build and do not have financial capacity to deal with those build costs substantially exceeding their budget, including the costs of substantial delays in the project preventing occupation of the home; and
- post-construction defects may be identified a substantial time after completion of building (deemed to be when the occupancy permit is issued for the construction under the *Building Act*) and invariably when the loan for the construction has been converted into a long term home loan secured by mortgage. The costs of trying to address a major post-construction defect for a home owner can be crippling and beyond the home owner's capacity to fund if they do not have sufficient equity built up in their (new) homes to leverage further borrowings. Unit owners also suffer this problem through the body corporate having to make special calls on those home owners to fund the costs of addressing major construction defects in the common property.

¹⁶ Final Report – *Inquiry into Western Australia's Home Indemnity Insurance Arrangements* (Economic Regulation Authority (June 2013), p. 56.

¹⁷ Final Report – *Inquiry into Western Australia's Home Indemnity Insurance Arrangements* (Economic Regulation Authority (June 2013), p. 56.

¹⁸ Australian Bureau of Statistics, Cat No: 6554.0 Building Activity Australia, April 2013.

Given the importance of the domestic building industry to the economic and social sustainability of the Territory, there is consensus that Government intervention is justified to protect or compensate a home owner against damage that they would otherwise suffer through no fault of their own.

It is the vulnerability of the home owner that drives the consumer protection ethos of Government policy initiatives in domestic building regulation generally. It is the underpinning rationale of residential warranty schemes compensating home owners that have suffered because of contractor and construction failures.

This leads to further policy and regulation questions including the question of where the balance lies between on the one hand, allowing participants in the construction market to operate unencumbered and on the other hand, the cost of distortions to the market that intervention to protect vulnerable participants in the market inevitably creates.

Residential warranty schemes in Australian jurisdictions have not, generally, attempted to intervene in the residential construction sector to actively prevent or modify the particular characteristics of the industry that tend to cause contractor and construction failures in the first place. Residential warranty schemes are about dealing with the *consequences* of contractor and construction failures *after* the event. They are sometimes described as 'last resort' measures accordingly.

To immediately qualify that statement, the present MBA Fidelity Fund does attempt to take preventative steps by way of its pre-qualification criteria of residential builders. Particularly, residential builders are required to submit financial information, have financial checks and be subject to conditions which involve setting annual limits to the volume of residential jobs they can do to be able to participate in the Fidelity Fund (which is presently the only way that a contractor can satisfy the compulsory requirement for warranty cover in the Territory).

Unique vulnerability of home owners

Consumers who choose to build their own home are said to be particularly vulnerable since most only build once (or infrequently), as opposed to residential contractors who have years of industry experience. This infrequency of building experience on the part of consumers also means that consumers lack the technical experience concerning housing construction techniques.¹⁹

Furthermore, many information anomalies exist between residential builders and consumers which attribute to the special vulnerability of consumers who choose to build their own home, particularly in relation to contractor failure.

For example, consumers are not privy and do not have access to reliable information regarding:

- the likelihood that a residential builder will become insolvent or disappear during the life of the project;
- the quality of workmanship of the residential builder; and
- the health (financial or otherwise) of the residential builder.

Additional reasons why it is difficult for consumers to make informed choices when building their own home have been identified to include:

- the potential individuality of new homes which can add complexity to a comparison of cost and quality of engaging a residential builder;
- the long duration to build a home which increases the risk of adverse financial and economic events arising affecting the building industry or the individual residential builder engaged; and
- the long life of the 'product' which may make it difficult to assess the quality of workmanship or detect defects in the house, once built.²⁰

¹⁹ Final Report – *Inquiry into Western Australia's Home Indemnity Insurance Arrangements* (Economic Regulation Authority (June 2013), p. 62.

²⁰ Final Report – *Inquiry into Western Australia's Home Indemnity Insurance Arrangements* (Economic Regulation Authority (June 2013), p. 62.

Why all schemes are limited in application to residential sector

The prevailing position is that commercial contracting is different from domestic construction because:

- commercial principals are less vulnerable and can better protect themselves from contractor and construction failure than home owners;
- construction failure that is not caused directly by contractor failure can be better managed by commercial principals than home owners; and
- commercial principals generally ought to have greater financial and administrative resources to deal with contractors that are not performing contractually and this non-performance ought to be managed by commercial contactors.

Often, however, commercial contractors are in no better a position than domestic home owners to assess and manage the risks of default.

There are no substantial tools available for commercial principals to be able to objectively assess the risk of contractor failure or protect themselves from it.

Further, it would appear that the Government also has some concerns about contractor failure for its own capital works, as it requires the accreditation of commercial and civil contractors doing work for it. The Government does not however presently require that same level of review for commercial contractors in the private sector, as the Territory's present residential builder's registration system does not extend to commercial and civil contractors.

Size of potential (consumer) losses

a. Deposit

In the event of contractor failure, a consumer may stand to lose the value of any deposit that they paid to a residential builder prior to the commencement of the residential building work. The *Building Regulations* presently restrict the size of that deposit to not more than 5% of the total contract price. So, the size of the potential loss of deposit to a consumer due to a residential contractor failure can be up to 5% of the contract price.²¹

Given the average price for the construction of a home in the Territory (in 2012, being the latest year for which information has been identified) was \$346,000²² a 5% loss on the price of the contract would be \$17,300, which is considered a significant loss for a consumer.

b. Incomplete Construction

If a residential contractor failure occurs before the completion of construction, the consumer will have to engage another residential builder to complete the unfinished home.

In order to be satisfied of the workmanship of the building completed so far, an incoming contractor will typically investigate the existing work and may have to demolish and rebuild any areas which that new builder or other building practitioners (i.e. a structural engineer or a certifier) do not consider to have been built to the requisite standards. In addition to those costs, the second residential builder may also charge a premium for the risks involved with finishing another contractor's building.²³

Further, the costs of mobilisation to site and establishment costs typically covered in 'preliminaries,' will have to be paid again to an incoming contractor.

It has been estimated that such costs of arranging for a second residential builder to complete a residential building can be up to 20% higher than the original contract price.²⁴

²¹ *Building Regulations* (NT), r. 41H(e).

²² Australian Bureau of Statistics, Australian Government, 2012, Building Activity: Australia, June 2012.

²³ Final Report – *Inquiry into Western Australia's Home Indemnity Insurance Arrangements* (Economic Regulation Authority (June 2013), p. 59.

²⁴ Final Report – *Inquiry into Western Australia's Home Indemnity Insurance Arrangements* (Economic Regulation Authority (June 2013), p. 59.

Consumers that have entered into loan agreements with their banks to fund the construction of a home are often already at the outer limit of their borrowing capacity and may not be able to extend their loans or source other funds to be able to bridge such an increase in construction costs. This problem can be compounded by the costs arising from the delay in completion having to get another builder or contractors in to complete the works. Delay in the completion means that the consumer has to pay the costs of living elsewhere as well as continue to fund the construction of the new home.

c. Defects

Consumers also face the risk of loss arising because of defects in workmanship or materials.

In the case where a contractor failure has occurred the residential builder will not be either physically or financially available to rectify defects.

It is recognised that in addition to the quantum of the loss arising from construction failure, the timing of when the defect manifests itself and requires rectification, must also be considered. This is because:

- sometimes defects do not manifest themselves until well after the consumer has fully extended themselves financially, with the original home loan having been expended in buying the land and paying for the construction of the dwelling;
- many consumers do not have sufficient equity in their homes to raise further loans to fund the defect rectification costs;
- with serious, structural defects manifesting and remaining unaddressed for lack of funds, the consumer may not be able to sell their home either and therefore becomes trapped; and
- this situation is compounded where the defect becomes manifest post-construction and after the dwelling has been sold to another owner. That new home owner inherits the defects but not the original construction contract with the residential builder. Often new owners that suffer a major defect in their home have little or no legal rights of recovery against the residential builder or against the vendor and are in an invidious position. This is invariably the situation for body corporates of multi-storey residential construction. The body corporates are created after the construction is completed and occupancy permit has issued.

Since all of the claims brought under the MBA Fidelity Fund were due to the 'last resort' of insolvency of the residential builder, it can be reasonably concluded that no claims have been made under the MBA Fidelity Fund for stand-alone defects that may be covered by the limited 'first resort' trigger of the residential builder's registration being suspended or cancelled. This Report has not identified any records of the claims for stand-alone construction failure made under the TIO administered HBCF Scheme.

d. Conclusion on size and risk for consumers

Since the Government resumed its administration of the HBCF Scheme in the last 2 years, the average cost of each claim made when assessed across 32 completed rectifications, was approximately \$22,300.²⁵

The average quantum of claims made under the MBA Fidelity Fund was \$26,685 per claim.

As stated above, the average price for the construction of a home in the Territory was \$346,000 in 2012. This means that a potential loss of \$22,000 to \$26,000 per home (representing approximately 6% to 7.5% of the average build cost of a home) is the approximate average cost that consumers will suffer for a construction failure. This exceeds the amount of the maximum deposit allowable under the *Building Regulations*, which is a significant amount for a consumer to lose. As stated earlier, it is not only the quantum of the cost for the consumer, but the timing of when it is suffered, that compounds the impact of construction failure on consumers.

²⁵ This figure is comprised of average cost of \$20,500 for rectification costs, plus loss assessor average administration fee of \$1,830. The costs of the Building Administration Service's staff and administration resources are not included in this figure.

B. Models of Residential Warranty Schemes

Industry schemes – fidelity funds

Fidelity fund schemes in Australia are extended and administered by construction and housing industry associations such as the MBA or the Housing Industry Association (**HIA**).

Residential warranty schemes have been promoted by these industry associations as examples of the industry's residential sector supporting and protecting consumers and self-regulating residential builders participating in the industry through their ability to access the compulsory scheme.

The Territory and in the Australian Capital Territory are the only jurisdictions in Australia that operate a fidelity fund scheme and this is by virtue of the fact that no insurer has taken the opportunity to enter the indemnity market.

Essentially the fidelity fund model of a scheme works by having residential builders pre-qualify to be able to seek cover under the scheme for their residential building projects. At this stage the administrators of the fidelity fund act as gatekeepers of which contractors can and cannot participate in the compulsory scheme and thereby who can and cannot be a residential builder. Approvals can be given with conditions including the capacity and output of each residential builder for the period of the cover.

Once assessed and qualified to participate in the scheme, approved residential builders apply for and obtain fidelity certificates from the fidelity fund for each project, contributing an amount to the fidelity fund for each project. These contributions are pooled in the fidelity fund and used to provide compensation to home owners who incur losses because:

- their dwelling is not completed; or
- a defect is not rectified (e.g. construction failure),

due to or coinciding with the death, disappearance, insolvency or loss of registration of their residential builder (e.g. contractor failure).

In this model:

- the fidelity fund is the sole means by which residential builders can obtain appropriate cover required by law;
- contributions to the fidelity fund by residential builders is (practically) mandatory;
- the level of contribution is mandated at a fixed rate payable by all residential builders, irrespective of the risk of that residential builder suffering a contractor failure. The level of contribution is set to try to cover the fidelity fund's indemnity payouts and administration costs and is not intended to make a commercial return or profit for the scheme's administrator (the MBA);
- fidelity funds are not reinsured by the government, but are subject to statutory oversight to ensure appropriate capital is maintained by the fidelity fund;
- the administrative functions of the fidelity fund are administered by the relevant association; and
- although the cover taken out by the residential builder who has prequalified to seek and obtain certificates of cover by the fidelity fund for each project, obviously the fidelity fund extends indemnity to the residential builder's customer, the home owner. It is this consumer that receives the benefit of the last resort indemnity cover (with limitations and caps) in the event that there is both:
 - a construction failure (the work is defective or incomplete or, in the Territory, fails the consumer guarantees now included in the *Building Act*); and
 - the residential builder suffers a contractor failure (that is the residential builder becomes insolvent, disappears or dies, or its residential builder's registration has been cancelled).

Insurance schemes

Private insurance schemes work on the basis that a private insurer indemnifies the beneficiary of a policy of insurance (the home owner/consumer) issued to the insured (the residential builder) for that beneficiary's damage or loss resulting from a construction failure caused or arising in the circumstances of a contractor failure.

Private insurance providers necessarily determine insurance premiums based on the risk rating of the individual residential builder and seek a commercial return on the premium to compensate it for the risks assumed.

The extent of the insurance cover offered in schemes can vary between 'full' or 'limited' cover. An example of full cover is a policy that provides cover to consumers for losses due to incomplete construction and for defects incurred within a 6 year period commencing at completion of construction. Limited cover may extend similar cover, but for shorter warranty periods, such as 2 years.

In a mandatory insurance model, residential builders are required to take out insurance cover with the one or more approved insurers in the market, prior to the commencement of construction.

In an 'opt out' model, residential builders are not required to take out insurance and consumers can choose whether they engage an insured residential builder or not. Obviously it is intended there be a price differential for the consumer. This 'opt out' model reasserts the contracting independence of the home owner to make the choice of whether they want indemnity insurance or not. Such freedom of contracting choice does however challenge the notion that home owners, as consumers, are particularly vulnerable to contractor failure (which they generally cannot control) and construction failure (which they might not have the financial and technical capacity to take on and successfully address).

Whilst consumers have the freedom of choice in an 'opt out' model, the more vulnerable consumers will likely be those that elect to opt out of cover for the benefit of the cheaper cost, which defeats the philosophy of warranty schemes generally. Inevitably, it is those residential builders offering the cheaper alternative of not carrying indemnity insurance that are more likely to be more susceptible to contractor failure. This Report consequently assumes that an 'opt out' model does not achieve the objectives of the residential warranty scheme and will not be considered.

Finally, the ability to opt out of an insurance based scheme reinforces the problem inherent with small premium pools that exists in the Territory and which threatens the viability of the private insurance model.

Residential warranty schemes are often not a purely 'private' sector model, because governments have been required to provide some form of reinsurance to encourage private insurers to participate in the scheme. For example, government may come to an agreement with an insurer with significant market share to reinsure that insurer for a specified range of loss, such as a loss resulting from the failure of a single residential builder. This may be necessary because of the significant concentration of the home building market in the hands of a few, large, contractors.

Government cover

Government models of residential warranty schemes are those where the government (sometimes through an agency or fund) acts as the primary provider of the indemnity cover to the consumer.

In recent history, government models are generally contemplated because the other models of indemnity are simply not commercially viable in the jurisdiction.

A government scheme may contemplate 'full' or 'limited' indemnity similar to an insurance scheme.

Typically a government agency is identified as the administrator of the scheme. Occasionally, the administration of the scheme may be contracted out to another entity. If this occurs, it is important that the government scheme has strong legislative and regulatory underpinnings to ensure it is not compromised by the manner that the scheme is administered by an out-sourced administrator approaching it from a different perspective.

In summary, the Government model outlined is:

- a 'last resort' indemnity model, focused on indemnifying consumers in the event of a construction failure;
- publically administered by a government agency or its agent, and may be fully funded, partially funded or unfunded (for the government) from any payments that may be mandated to be made by participating residential builders projects; and
- operationally, generally a monopoly.

Cover having to be obtained by a residential builder

In both the industry fidelity fund and the insurance models the consumer's entitlement to indemnity is dependent upon the issue of the certificate of coverage (the fidelity certificate under the present MBA Fidelity Fund or the insurance policy in the case of an insurance model) to the residential builder and it paying the contribution amount or premium.

If the residential builder does not do the right thing and fails to obtain the relevant certificate of coverage for a home owner's particular dwelling (or a policy of insurance, under the insurance model) then no indemnity has been extended by the residential warranty scheme to the consumer.

Government models of indemnity may be created and administered in a similar manner to industry and insurance models, requiring some form of certificate or evidence of indemnity cover being issued on receipt of the payment due under the scheme. However, they also have the indemnity cover for consumers prescribed in a combination of legislation, regulation and administrative instruments, so that non-compliance or fraud on the part of a residential builder (trying to evade the immediate costs of the compulsory residential warranty scheme) ought not mean the consumer loses cover under the scheme.

The industry fidelity fund and insurance models are consequently more dependent upon checks and balances operating successfully to compel the residential builder to do the right thing and obtain the relevant certificate of cover or policy of insurance from the indemnity provider.

Whilst relying on practical checks for the necessary cover certificates or policies by building practitioners (such as private building certifiers) gives some comfort that the necessary precondition for indemnity is being taken out by residential builders, this role needs to be formally recognised and built into the regulatory system, otherwise:

- the building practitioner informally charged with the job of checking for evidence of cover may be assuming a liability to the consumer that they may not have any or adequate indemnity insurance to cover themselves for; and
- the consumer may not have any rights at law (and may be in the challenging position of having to pursue any rights as may exist against the building practitioner and its professional indemnity insurer through the courts) to pursue recovery from that building practitioner for failing to check that the cover certificate or the insurance policy note was properly issued.

Essentially, by hinging cover to consumers on compliance with the processes of issuing and paying for a policy or cover certificate, and then relying upon other building practitioners to check for this, the warranty schemes (such as the present MBA Fidelity Fund) shift compliance risk from the scheme to those other building practitioners and their professional indemnity insurance. This may significantly impact on the cost and availability of professional indemnity insurance for those building practitioners.

If the residential warranty scheme intends to rely on building practitioners (and their professional indemnity insurance) to protect consumers from residential builders not properly obtaining or paying for crucial certificates of coverage in the residential warranty scheme, the impact on those building practitioners and the costs of their professional indemnity cover ought to be more thoroughly understood.

This Report identifies the range of options for the Territory to address builders avoiding compliance with the residential warranty scheme, being:

- relying upon that practitioner (and the professional indemnity insurance that may be standing behind them) and formalising it within the regulatory regime (recognising the impact that has on the building practitioners in question);
- having the residential warranty scheme provide ‘first resort’ cover to consumers irrespective of whether or not the requisite cover certificate or policy note is properly obtained by the residential builder under the regulations (and to maintain a statutory release from claim²⁶ for other building practitioners that are required to become involved in cross-checking compliance with the scheme requirements); or
- that a last resort ‘nominal insurer’ type arrangement be contemplated by Government to stand behind an insurance or industry (fidelity fund) model.

There are circumstances where the beneficiary (the home owner) of the scheme may well not have any legal rights of recovery from the building practitioner who fails to properly check whether a residential builder has paid the appropriate fee and received the fidelity certificate or policy of insurance in place to cover their home.

The home owner may not have any contractual link to that building practitioner (who may have been engaged by the residential builder directly) and the building practitioner possibly may not owe a duty of care to consumers that would allow for a claim in negligence. Also, the failure to have a valid certificate of cover for the home build may be due to fraud on the part of the residential builder, and it is not negligent for the building practitioner to have been deceived by such a fraud.

Finally, the consumer may need to pursue his or her legal entitlements against the building practitioner (and its professional indemnity insurer), which can be just as hard and as expensive as pursuing a claim against a defaulting contractor, so this mechanism of relying on the building certifier to check for appropriate cover does not really address the vulnerability of the home owner that is the underpinning philosophy of the warranty scheme.

There is a longstanding model in the Territory’s workers compensation statutory scheme to have ‘back up’ in the event there is a failure to actually obtain the compulsory employer’s insurance policy. The Territory workers compensation scheme has a nominal insurer that is contributed to by a small levy from premiums and who can step in to provide compensation where there has been a triggering event (compensable injury) and compulsory insurance has not been obtained by the defaulting employer.

The Territory’s residential warranty scheme should apply the principle that a person ought not to lose their entitlement to compensation because of defaults and failings of others.

If the Territory accepts the principle that a ‘backstop’ (e.g. some equivalent administrative entity as the nominal insurer) is needed, then cost/benefit analysis might weigh in favour of simply:

- embracing the government model in its entirety; and
- ensuring the Recommended Warranty Scheme extends coverage to consumers irrespective of any non-compliance with the procedures of the Recommended Scheme by the residential builder. (That is the builder fails to pay the required levy for the consumer’s residential project or otherwise is not properly registered).

Civil penalties and rights of restitution of the costs can be legislated to be recoverable by the Recommended Warranty Scheme Administrator against a defaulting residential builder (and its directors, if a company) that has not complied with the requirements of the Recommended Warranty Scheme.

²⁶ See section 153(2)(a) of the *Building Act* for the present immunity from suit arising from their discharge of the certification role under that Act.

Hybrid models

Hybrid models of residential warranty schemes are available (in concept) by combining the cover available through insurance, fidelity fund and government schemes. The commercial practicality of achieving a successful hybrid scheme in the present commercial environment in the Territory where insurers are completely absent from the market is, however, another matter.

a. Private Ancillary

In the private ancillary model, the government has the role of providing a minimum level of indemnity coverage. Consumers then have the option of purchasing further private insurance to 'top up' the indemnity.

The basic level of cover offered by the government agency or fund under an ancillary model might have restrictive caps on the amount of indemnity payable, or a restricted basis upon which the indemnity responds.

For example, the category of construction failure that the indemnity extends to might be quite narrow, such as limiting defects identified within a year of completion and not extending the period of indemnity to 10 years, that may then be offered in the 'top up' private insurance policy.

b. Insurance with Industry Supplement

Under this model, private insurers would offer mandatory insurance protection for consumers against non-completion of dwellings for contractor failure.

Consumers that wish to guard against the consequences of post-completion construction failure (essentially defects arising after practical completion of the dwelling by the residential builder that are not rectified by the residential builder) can then avail themselves of an option to take up an indemnity issued by an industry association fidelity fund.

This model is premised on a preference of consumers for mandatory protection against non-completion of works for contractor failure, with the occurrence of defects after completion being the subject of supplementary, optional cover.

This hybrid model presupposes a fidelity fund is more suited to provide cover against post-construction defects since the incidence and quantum of claims ought to be lower than claims for non-completion.²⁷

c. Private with Government Support

Nearly all private models have an element of government support underwriting the private insurer or industry to underpin the viability of the private scheme.

The following table illustrates the types of schemes currently in place in Australian jurisdictions:

Jurisdiction	Name of Scheme	Type of Model	Threshold value of project before insurance is required	Applicable to	Cover for structural defects (after practical completion)	Cover for non-structural defects (after practical completion)	Covered to a value of (subject to conditions)
NSW	NSW Home Building Compensation Fund	Government, (private insurers act as agents)	\$20,000	Residential	6 years	2 years	\$340,000
QLD	Home Warranty insurance	Government	\$3,300	Residential	6 years 6 months	2 years	\$200,000

²⁷ Final Report – Inquiry into Western Australia's Home Indemnity Insurance Arrangements (Economic Regulation Authority (June 2013), p. 91.

Jurisdiction	Name of Scheme	Type of Model	Threshold value of project before insurance is required	Applicable to	Cover for structural defects (after practical completion)	Cover for non-structural defects (after practical completion)	Covered to a value of (subject to conditions)
SA	Building Indemnity Insurance	Hybrid - Private with Government reinsurance	\$12,000	Residential	5 years	5 years	\$80,000
VIC	Domestic building insurance	Government and private	\$16,000	Residential	6 years	2 years	\$300,000
ACT	Housing indemnity insurance	Private, plus MBA Fidelity Fund	\$12,000	Residential	6 years	2 years	\$85,000
WA	Home indemnity insurance	Private with government reinsurance	\$13,000	Residential	6 years	6 years	\$100,000
NT	MBA Fidelity Fund	Hybrid - MBA Fidelity Fund with Government reinsurance	\$12,000	Residential	6 years	1 year	\$200,000
TAS	N/A (voluntary insurance)	N/A	N/A	N/A	N/A	N/A	N/A

C. Present scheme: overview of the Territory MBA Fidelity Fund

MBA Fidelity Fund in concept

a. Legislative background

The Government announced in July 2010 that it would move to introduce consumer protection measures following the collapse of a number of residential builders.²⁸

The MBA Fidelity Fund was created concurrently with a suite of legislative reform in 2012 which formed the 'Residential Building Cover Package'. The following legislative instruments comprise the Residential Building Cover Package:

- *Building Amendment (Registration and Other Matters) Act 2012;*
- *Building Amendment (Financial Assets and Residential Building Contracts) Regulations 2012;*
- *Building Amendment (Residential Building Consumer Protection) Act 2012;*
- *Building (RBI and Fidelity Fund Schemes) Regulations 2012;*
- *Building (Resolution of Residential Building Work Disputes) Regulations.*

b. Application of mandatory cover

The *Building Act* provides that a residential builder undertaking prescribed residential building work worth more than \$12,000 in the Territory must take out cover under either:

- an authorised RBI policy; or

²⁸ Second Reading Speech, *Building Amendment (Residential Building Consumer Protection) Bill 2011*.

- a fidelity certificate.²⁹

Collectively, this is referred to as 'Residential Building Cover'.

The mandatory requirement for a residential builder to take out Residential Building Cover arises when that residential builder undertakes work of *at least* \$12,000 in value, for the construction of the following buildings:

- a new Class 1a building (which are houses, duplexes, townhouses) and an extension to a Class 1a building;
- a new Class 2 building up to three residential storeys (which are apartments, units, flats);
- an extension to a Class 2 building (also only if the Class 2 building does not exceed 3 residential storeys);
- a Class 10 building (which includes garages, retaining walls, verandahs) attached to a Class 1a or 2 building (under three residential storeys), if the Class 10 building is constructed at the same time as that building; or
- a Class 10 building that is a retaining wall (whenever constructed) that is not attached to a relevant building but on which the integrity of the relevant building depends.

The *Building Regulations* require relocated houses to be brought up to building standards in force at the time of relocation, unless the house is being moved to a rural area. Buildings that are relocated to rural areas under that exemption do not require Residential Building Cover. All other relocated houses, where the value of the work is over \$12,000, will require the cover.

Work that does not require Residential Building Cover includes:

- work that has a value of less than \$12,000;
- renovations or alterations to an existing building (Class 1a or Class 2 up to 3 residential storeys) that do not increase the floor area of the existing building (unless the renovation under the same contract with the same residential builder that is carrying out an extension), including re-cladding of roofs or walls, replacement of windows, construction of new external openings and enlargement or filling in of existing external openings;
- prefabricated dwellings;
- all other classes of buildings and Class 2 buildings that exceed 3 residential storeys; and
- work done for the Government.

An authorised RBI policy is a policy under which an approved residential building insurer provides residential building insurance in accordance with the *Building Act*.³⁰ A fidelity certificate is a certificate which is issued by an approved fidelity fund scheme.³¹

As there is no residential building insurer operating in the Territory it is only a fidelity certificate issued by the MBA Fidelity Fund that will provide protection to an owner for financial loss incurred because of a residential builder's failure to complete the work or contravention of a consumer guarantee and:³²

- the residential builder has died, disappeared or gone insolvent,³³ or
- the residential builder's registration has ceased.³⁴

²⁹ *Building Act* (NT), s. 54AB(1).

³⁰ *Building Act* (NT), s. 54CB.

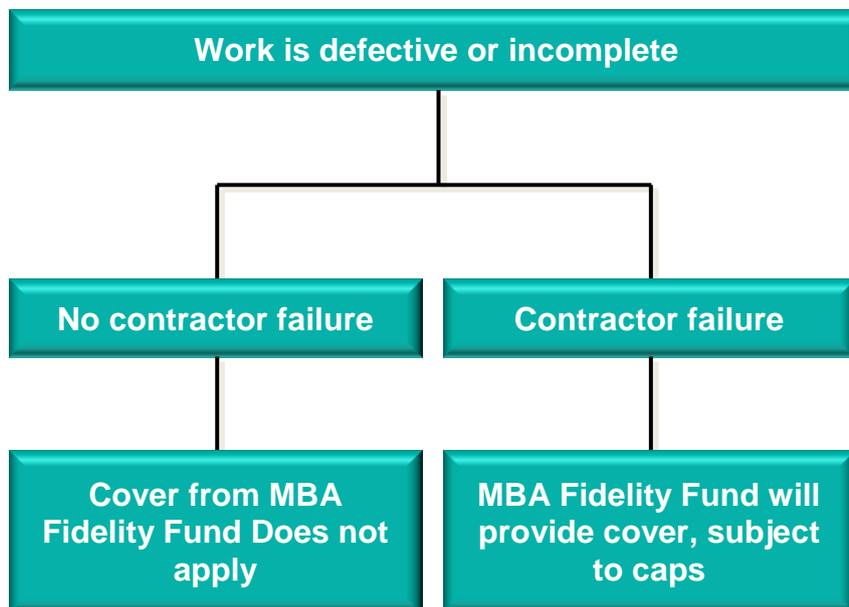
³¹ *Building Act* (NT), s. 54D.

³² *Building Act* (NT), ss. 54C(a), 54D(2)(a).

³³ *Building Act* (NT), ss. 54C(b)(i), 54D(2)(b)(i).

³⁴ Due to the circumstances in Part 3 Div 3B, 3C or 4 of the *Building Act: Building (RBI and Fidelity Fund Schemes) Regulations* (NT), r 8(3), *Building Act* (NT), ss. 54C(b)(ii), 54D(2)(b)(ii).

These contractor failures are the ‘trigger events’ that enable an owner to make a claim. The ability to make a claim can be represented as follows:



c. Consumer Guarantees

The *Building Act* contains a number of consumer guarantees which apply to building work of any value in connection with residential building work, including that:

- the residential builder carrying out residential building work (residential builder) will carry out the building work in a proper and workmanlike manner in accordance with the plans and specifications specified in the building permit for the work and the contract (if applicable);
- all materials supplied by the residential builder will be good and suitable for the purpose for which they are to be used and new (unless the builder is an owner builder or developer of the contract specified otherwise);
- the residential builder will carry out the building work in accordance with the *Building Act* and the *Building Regulations*;
- the residential builder will carry out the building work with reasonable care and skill; and
- the residential builder will complete the work by the date specified in the contract or, if no date is specified, within a reasonable period.³⁵

These consumer guarantees cannot be excluded from a contract for residential building work and are in addition to other consumer rights in force under any other law.³⁶

Essentially these consumer guarantees are codifying those terms that courts have historically (but not always consistently) implied into construction contracts that are silent on the subject.

If the residential builder contravenes a consumer guarantee resulting in defective residential building work, the current home owner can claim for a breach of the consumer guarantee:

- up to 1 year after the end of the construction period (usually from when the occupancy permit is issued) for non-structural defects; and

³⁵ *Building Act* (NT), s. 54B.

³⁶ *Building Act* (NT), ss. 54BA-54BC.

- up to 6 years after the construction period (usually from when the occupancy permit is issued) for structural defects.³⁷

If the current home owner becomes aware of the defect within 30 days of the end of the defect period, that defect period can be extended for a further 30 days.³⁸

Consumer guarantee dispute resolution process

A current home owner can only apply to the Commissioner of Residential Building Disputes (the **Commissioner**) for a decision about a consumer guarantee dispute where there is no contractual relationship between the current home owner and the contractor in relation to the residential building work to which the dispute relates.³⁹ This includes situations where:

- the work has been completed under the contract and the parties consider the contractual obligations fulfilled; or
- regardless of the state of the work, the parties' relationship has broken down irretrievably.⁴⁰

If the Commissioner makes a decision that one or multiple consumer guarantees have been breached the Commissioner may:

- Where the breach of the consumer guarantee involved the non-completion of work, order the respondent to complete the work or where that order would be impracticable, the respondent to pay a specified amount (not exceeding \$100,000) as compensation to the applicant.⁴¹
- Where the breach relates to defective work, order rectification of that work, or where that order would be impracticable, the respondent to pay a specified amount (not exceeding \$100,000) as compensation to the applicant. The Commissioner may also require the respondent to pay the costs of inspection of the rectified work.⁴²

If the contractor fails to comply with a *rectification order*, this will constitute professional misconduct⁴³ entitling the Building Practitioners Board (**BPB**) to take disciplinary action including the possible suspension or cancellation of that contractor's registration.⁴⁴ If the contractor fails to comply with a *completion or compensation order*, that contractor may be subject to disciplinary action, including the possible suspension or cancellation of that contractor's registration.⁴⁵

Consumer guarantee dispute resolution process where a trigger event has not occurred

If a trigger event of contractor failure has not occurred, and there are allegations by the current home owner of defective or incomplete work, the home owner may apply to the Commissioner to seek to resolve the dispute arising from the breach of a consumer guarantee.

Despite this consumer guarantee dispute resolution process, unless there has been some form of disciplinary action or review under the residential builders registration system having led to the revocation of the residential builder's registration under the *Building Act*, the home owner cannot access the RBI policy or fidelity fund for compensation for the breach of the consumer guarantee.

Consumer guarantee dispute resolution will provide access to recovery under mandatory cover only when trigger event has occurred

Where a trigger event for access to the present scheme has occurred and there are breaches of the consumer warranties, the home owner can apply for relief under the RBI policy or fidelity fund. These

³⁷ *Building (Resolution of Residential Building Work Disputes) Regulations* (NT), r. 7(2).

³⁷ *Building (Resolution of Residential Building Work Disputes) Regulations* (NT), rr. 7(2)-7(7).

³⁸ *Building (Resolution of Residential Building Work Disputes) Regulations* (NT), r. 7(7).

³⁹ *Building Regulations* (NT), r. 18(1).

⁴⁰ *Building (Resolution of Building Work Disputes) Regulations*, r. 18.

⁴¹ *Building (Resolution of Building Work Disputes) Regulations*, r. 33.

⁴² *Building (Resolution of Building Work Disputes) Regulations*, r. 34.

⁴³ *Building Act* (NT), s. 34X.

⁴⁴ *Building Act* (NT), s. 34Y, *Building (Resolution of Building Work Disputes) Regulations*, r 92.

⁴⁵ *Building Act* (NT), s. 34Y, *Building (Resolution of Building Work Disputes) Regulations*, r 93.

rights are expressly stated to not exclude any other rights or remedies which the home owner has under the Australian Consumer Law.⁴⁶

Consumer guarantees do not necessarily displace express terms of the construction contract or the ability to argue equivalent contractual terms are implied into the parties' construction contract by operation of law. Importantly, where the construction contract is at an end, or a dispute arises under the construction contract such that the residential builder refuses to rectify the defect or non-compliance, the avenue for the consumer to pursue the breach of consumer guarantee before the Commissioner remains open.

d. Scope of mandatory cover

The ambit of the coverage of the fidelity certificate or authorised RBI policy is prescribed by the *Building (RBI and Fidelity Fund Schemes) Regulations*.

These regulations prescribe that the authorised RBI policy or fidelity certificate must cover:

- loss for defective guaranteed work (including defective design work under a contract) or the non-completion of guaranteed work;
- the costs of alternative accommodation, removal and storage for a period not exceeding 60 calendar days, reasonably incurred as a result of the defective guaranteed work or non-completion of the work;
- the loss of a deposit or progress payment under a contract relating to the work (except the payment of a deposit or progress payment above the amount specified in the contract relating to the guaranteed work);
- legal or other reasonable costs incurred in seeking to have a residential builder rectify or complete the work;
- an increase in costs for rectification of the work caused by the passage of time;
- any acts or omissions of persons engaged as contractors by the residential builder in relation to the work; and
- any additional reasonable costs associated with engaging another residential builder to rectify or complete the work (excluding the costs associated with the work carried out by that builder).⁴⁷

e. Limits and exclusions on mandatory cover

The *Building (RBI and Fidelity Fund Schemes) Regulations* also prescribe what ought not to be covered by the authorised RBI policy or fidelity certificate:

- the payment of a deposit or progress payment above the amount specified in the contract relating to the guaranteed work;
- if the beneficiary is a subsequent purchaser of the residential building – defects that are readily apparent at the time of purchase;
- damage that could reasonably be expected to result from fair wear and tear or from the current owner of the building failing to maintain the work;
- damage caused by a person or made worse by the failure of the current owner to take reasonable and timely action to minimise the damage;
- legal liability resulting from any event that is not expressly insured under the policy;
- a defect that is due to residential building work (including design work) or materials not specified in the contract relating to the guaranteed work (for example, materials supplied by the contracting owner);

⁴⁶ *Building Act (NT)*, ss. 54B, 54BC.

⁴⁷ *Building (RBI and Fidelity Fund Schemes) Regulations* rr. 8, 14, 17, 45, 48.

- a person's injury or impairment (including injury or impairment of the person's mental condition), death, disease or illness;
- loss of rent, income, value or opportunity;
- inconvenience or distress;
- the unreasonable refusal of the beneficiary to allow access to the insurer, or the insurer's agent, for the purpose of assessing the beneficiary's claim;
- the failure of the beneficiary to maintain adequate protection against pests;
- the malfunction of any mechanical or electrical equipment if the insurer can prove the malfunction was not attributable to the workmanship of, or installation by, the residential builder;
- fraud or dishonest conduct of any kind by the residential builder;
- an appliance;
- asbestos contamination or removal; and
- war, civil unrest, a nuclear event or an act of nature.⁴⁸

In the event of non-completion of the work by the residential builder, the current home owner is covered for 90 days commencing from the earlier of when the residential builder stopped or failed to start work.⁴⁹

A claim must be made under the authorised RBI policy or fidelity certificate within 90 days of the beneficiary of the policy becoming aware of the defect.⁵⁰

Cover available under the authorised RBI policy or fidelity certificate must be at least 20% of the contract price, up to a maximum of \$200,000. The excess that can be charged to the home owner is capped at \$500.⁵¹

f. Operation of the Fidelity Fund

The *Building Act* provides for the operation of a fidelity fund on very similar terms to the equivalent ACT legislation.⁵² The Explanatory Statement to the *Building Amendment (Residential Building Consumer Protection) Bill 2011* states that Division 4 and 5 of the *Building Act* are in fact modelled on the ACT scheme.

The *Building Act* and the *Building (RBI and Fidelity Fund Schemes) Regulations* set out in precise detail how a fidelity fund is to be established and operated:⁵³

- The trustees of the fidelity fund must apply to the Minister for approval to issue fidelity certificates.⁵⁴ The Minister will assess the relevant fidelity fund and grant approval subject to conditions, if certain criteria are satisfied.⁵⁵
- Prudential standards regarding financial and actuarial matters and recording have been prescribed for approved schemes.⁵⁶ Penalties, including cancellation or suspension may apply for non-compliance with conditions and prudential matters.⁵⁷ The Minister also has powers of inquiry regarding the ability of the approved scheme to meet its liabilities and potential liabilities.⁵⁸

⁴⁸ *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), r. 15.

⁴⁹ *Building Act* (NT), s. 54B(2); *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), r. 7(2); *Building (Resolution of Residential Building Work Disputes) Regulations* (NT), r. 7(2).

⁵⁰ *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), rr. 19,40.

⁵¹ *Building (RBI and Fidelity Fund Schemes) Regulations* (NT) rr. 18(2), 49(2).

⁵² *Building Act 2004* (ACT).

⁵³ *Building Act* (NT), ss. 54D-54FF; *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), rr. 28-35; 53-93.

⁵⁴ *Building Act* (NT), s. 54DA(1).

⁵⁵ *Building Act* (NT), s. 54DA(3).

⁵⁶ *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), Part 3.4.

⁵⁷ *Building Act* (NT), s. 54DD-54DE; *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), r. 62.

⁵⁸ *Building Act* (NT), s. 54DE(1)(b); *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), r. 61.

- The appointment of auditors and actuaries by the approved scheme must be approved by the Minister.⁵⁹ Prudential standards apply to these positions and the individuals concerned will incur monetary penalties if they do not comply with the relevant prudential standards.⁶⁰ The actuary must, as soon as practicable after the end of every financial year, calculate the appropriate amounts that a builder is required to contribute to the scheme.⁶¹
- Assets of the approved scheme may only be used for prescribed purposes regarding the operation of the scheme and must be invested in certain ways.⁶² The trustees must always have an approved capital management plan which has certain monetary minimum threshold requirements.⁶³
- At the end of every financial year the trustees of the approved scheme must submit annual reports to the Minister regarding financial and actuarial matters, and to the Commissioner of Consumer Affairs regarding the operation of the scheme, including the number and type of claims made to the approved scheme.⁶⁴

MBA Fidelity Fund in practice

a. Practical administration of the MBA Fidelity Fund

Although the *Building Act* has been drafted to include mandatory cover under either an authorised RBI policy or a fidelity certificate, the industry-run fidelity fund is currently the only operational way to obtain the compulsory cover in the Territory.

The fidelity fund is operated by the MBA as a not-for-profit trust. As there are currently no authorised insurers to issue authorised RBI certificates, all residential builders in the Territory have to register with the MBA Fidelity Fund.

To obtain a fidelity certificate, the residential builder must first satisfy the MBA of its eligibility. The MBA requires residential builders to apply for an eligibility re-assessment every year in order to maintain their coverage with the MBA Fidelity Fund. An annual contribution is payable by the residential builder towards their MBA Fidelity Fund cover.

It does not appear that any publically available policy or criteria is set out by the MBA which prescribes the specific requirements regarding a residential builder's eligibility for fidelity cover.

It is emphasised that the requirements for residential builder's registration under the *Building Act* administered by the BPB (such as the requirement to hold a minimum of \$50,000 in net tangible assets), is a completely separate process and there is no sharing of information between the registration system and the MBA's eligibility criteria to participate in the MBA Fidelity Fund, requiring some duplicity of red tape and costs for residential builders.

The application form for builders sets out the following financial and commercial information from applicants:

- personal details;
- business structure information;
- building experience and building company ownership experience;
- financial (insolvency) history;
- financial position including credit referees, personal and business assets and liabilities; and
- an estimation of the future value of projects to be undertaken for the year.

⁵⁹ *Building Act* (NT), s. 54E.

⁶⁰ *Building Act* (NT), s. 54EC.

⁶¹ *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), rr. 76-77.

⁶² *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), rr. 80-81.

⁶³ *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), rr. 79.

⁶⁴ *Building (RBI and Fidelity Fund Schemes) Regulations* (NT), rr. 92-93.

The MBA states that it uses an independent chartered accountant to assess a residential builder's eligibility and assign the residential builder with a rating reflecting the residential builder's 'risk profile'.⁶⁵

We understand that the MBA assesses the financial probity of residential builders by sending the information gathered on their application forms to an independent Chartered Accountant in Canberra. This is partly because it has experience in the operation of the ACT fidelity fund scheme and partly to ensure confidentiality and objectivity in the assessment, being disassociated from the Territory.

The assessment considers the trading structure (i.e. company, sole trader, trust etc.), character, capital, capacity and collateral of the applicant. We have been informed that the financial assessment is only one aspect of the overall assessment, however the whole of the assessment criteria employed, and their relative weighting, are not publically available. Also, it is understood that the report and recommendations of the Chartered Accountant are delivered to the MBA, but the decision to extend admission into the MBA Fidelity Fund (and the conditions of that acceptance) are ultimately determined by the MBA Assessment Panel, which includes senior members of the building industry.

The rating limit imposed in the annual assessment of a residential builder applying to the MBA Fidelity Fund caps what a residential builder can take on by assigning a monetary limit on the value of projects that the residential builder can undertake in one year.⁶⁶ Residential builders can apply for a free re-assessment if they think their assigned value is too low.⁶⁷

Once it has received the MBA's approval, before commencing work, a residential builder must:

- pay the contribution for the fidelity certificate;
- give a copy of the fidelity certificate to the building certifier that has been engaged (often by the builder itself) to issue the building permit and to ultimately issue the occupancy permit; and
- give a copy of the fidelity certificate to the home owner.

If the value of the contract varies during the course of the works by more than 5% the builder must apply for a varied fidelity certificate.

The cost of the fidelity certificate is invariably passed onto the home owner in the contract price charged under the construction contract.

b. Costs of the MBA Fidelity Fund to industry and consumers

The cost paid to the MBA for the individual fidelity certificates confirming cover by the MBA Fidelity Fund for the job is called a 'contribution rate'.

The MBA website publishes the applicable contribution rates, which do not appear to have been revised since 2012. The contribution rate is a tiered system and is allocated depending on the value of the contract. The current contribution rates (as published)⁶⁸ are set out below:

Contract Value	Contribution Rate
\$12,000 - \$24,999	\$700
\$25,000 - \$74,999	\$850
\$75,000 - \$94,999	\$900
\$95,000 - \$99,999	\$1,100

⁶⁵ Master Builders Northern Territory, *Process Sheet*, available from <http://www.fidelityfundnt.com.au/builders-information/>

⁶⁶ Northern Territory Government, *Residential Building Cover Package: Questions and Answers*.

⁶⁷ Available from: <http://www.fidelityfundnt.com.au/builders-information/> (accessed August 2015).

⁶⁸ Available from: <http://www.fidelityfundnt.com.au/builders-information/> (accessed August 2015).

Contract Value	Contribution Rate
\$100,000 - \$149,999	\$1,300
\$150,000 - \$199,999	\$1,550
\$200,000 - \$249,999	\$1,750
\$250,000 - \$299,999	\$2,000
\$300,000 - \$349,999	\$2,200
\$350,000 - \$399,999	\$2,450
\$400,000 - \$449,999	\$2,650
\$450,000 - \$499,999	\$2,900
\$500,000 - \$549,999	\$3,100
\$550,000 - \$599,999	\$3,350
\$600,000 - \$649,999	\$3,550
\$650,000 - \$699,999	\$3,800
\$700,000 - \$749,999	\$4,000
\$750,000 - \$799,999	\$4,250
\$800,000 - \$849,999	\$4,450
\$850,000 - \$899,999	\$4,700
\$900,000 - \$949,999	\$4,900
\$950,000 - \$999,999	\$5,150
\$1,000,000 - \$1,099,999	\$5,350
\$1,100,000 - \$1,199,999	\$5,600
\$1,200,000 - \$1,299,999	\$5,800
\$1,300,000 - \$1,399,999	\$6,050
\$1,400,000 - \$1,499,999	\$6,250
\$1,500,000 - \$1,599,999	\$6,500
\$1,600,000 - \$1,699,999	\$6,700
\$1,700,000 - \$1,799,999	\$6,950
\$1,800,000 - \$1,899,999	\$7,150
\$1,900,000 - \$2,000,000	\$7,400
≥ \$2,000,000	\$7,400 plus \$450 for each additional

Contract Value	Contribution Rate
	\$200,000

Developers (where the builder is the owner of the property but who are not 'one off' owner builders) are entitled to a 10% discount. For multi-unit developments (where one builder is constructing adjacent units or houses) there is a discretionary scale of discounts depending on the financial assessment of the builder, the builder's experience and quality of previous work and the number of contiguous units (commenced together) according to the following scale:⁶⁹

Number of Units	Maximum Discount
2 to 5	up to 5%
6 to 10	up to 10%
11 to 20	up to 15%
21 to 50	up to 20%

The following table compares the costs of cover under the MBA Fidelity Fund in the Territory with the Queensland Home Warranty Insurance Scheme and the Victorian Domestic Building Insurance Scheme:

Contract value	Territory 'contribution' ⁷⁰	Queensland 'premium' ⁷¹	Victoria 'premium' ⁷²
\$12,000	\$700	\$218	\$473.11
\$50,000	\$850	\$545.25	\$534.82
\$100,000	\$1,300	\$1,090.50	\$671.55
\$300,000	\$2,200	\$3,103.90	\$1,144.66
\$500,000	\$3,100	\$4,823.60	\$2,286.90
\$1,000,000	\$5,350	\$5,683.45	\$1,829.52
\$2,000,000	\$7,400	\$5,683.45	\$2,079.99

Key:	Most expensive	Least expensive
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⁶⁹ Available from: <http://www.fidelityfundnt.com.au/builders-information/> (accessed August 2015).

⁷⁰ Available from: <http://www.fidelityfundnt.com.au/builders-information/> (accessed August 2015).

⁷¹ Based on rates published on QBCC website. Available from: <https://www.qbcc.qld.gov.au/home-warranty-insurance/insurance-premium-fees> (accessed August 2015).

⁷² Based on rates published on VMIA website for Category A structural works. Available from: <http://www.dbi.vmia.vic.gov.au/stats-and-facts> (accessed August 2015).

This table shows that the contributions mandated by the MBA Fidelity Fund in the Territory tend to be the most expensive of the mandatory insurance cover contributions required for both the lower and higher values of work to be undertaken.

The MBA cites compliance costs with legislative standards and other administrative expenditures as a significant expense which contribute to fidelity certificate costs. The MBA also proposes that costs are higher under the MBA Fidelity Fund than premiums for other residential warranty schemes in place in other States because the cost of building a house is higher in the Territory compared to other jurisdictions.⁷³

c. Recovery under the MBA Fidelity Fund

The MBA Fidelity Fund seeks to compensate consumers against the losses that may arise from risk of the death, insolvency or disappearance of their contracted residential builder. However, (aside from the further trigger event of the cancellation of the residential builder's registration under the *Building Act*) access to relief under the MBA Fidelity Fund is preconditioned on a contractor failure occurring and is consequently a 'last resort' scheme.

We have been informed that since the commencement of its operation on 1 January 2013, 36 claims averaging \$26,685 have been made against the MBA Fidelity Fund:

- These claims were all triggered by the insolvency of the contractor for the financial loss resulting from the costs of transitioning to a new builder.
- Of claims made, 21 were paid out to the home owner. Those claims that were not paid was on the basis that the home owner had 'sufficient funds', meaning that the home owners had not suffered a financial loss to transition to a new builder.
- We have received information that five residential builders have been subject to claims under the MBA Fidelity Fund.

d. Eligibility assessment for residential builders

The eligibility assessment of residential builders is designed to limit instances of contractor failure in the industry by ensuring that residential builders have the financial capacity and experience to undertake a permitted level of building work which is set by the MBA. No transparent eligibility criteria are however publicly available or apparently made available to prospective applicants.

The lack of objective transparency and accountability in exercising this decision-making function can be criticised for two reasons:

- as an industry group, the individuals sitting on the MBA Board have the capacity to influence the number or value of jobs that potential competitors may undertake; and
- the lack of transparency in the assessment criteria means that arbitrary ceilings on the value of works may be imposed.

One key difference between a fidelity fund model and an insurance model is that insurers use their actuarial expertise to assess the relative risks of each policy and price premiums according to that assessment. In a fidelity fund, the industry generally does not possess the same risk assessment expertise, which is why contributions are made to the fund on a fixed-rate basis.

This means that the fixed contribution rates set by the MBA Fidelity Fund may be overly expensive for some residential builders and that high risk residential builders are possibly receiving a better rate than they ought to in order to cover the MBA Fidelity Fund's risk.

The accuracy of the risk profile assigned to each individual builder is also of concern, as this risk profile determines the financial cap assigned to the residential builder for works it can complete in the coming year. For this reason the financial cap on the value of works to be undertaken by an assessed residential builder can also appear to be arbitrary.

⁷³ Available from: <http://www.fidelityfundnt.com.au/faq> (accessed August 2015).

The eligibility assessment under a fidelity fund model can also be flawed because it is based on prospective data which forecasts the number and type of jobs a residential builder may undertake in the coming year. This method does not respond to the core issue of contractor failure, as it is open to abuse by residential builders who may manipulate or over-estimate the number and value of speculative jobs in order to gain a higher building limit under the eligibility assessment.

Until very recently, the MBA Fidelity Fund was not refusing residential builders cover and on publically available information it is stated that 95% of residential builders have been given the level of cover for which they applied.⁷⁴

Accordingly, there is a concern that eligibility assessment method might not protect the consumer or the MBA Fidelity Fund against contractor failure. Historically high levels of insolvency in the building industry suggest that less than 100% (or even less than 95%) of residential builders are going to be financially solvent at the end of any given financial year.

If the MBA qualifies the significant majority of all residential builders to participate in the MBA Fidelity Fund then the time and cost of the extensive application process and looking into a contractor's confidential financial information is largely wasted, particularly if the application process is duplicitous (but not consistent) with the application requirements for the Government's residential builder registration system under the *Building Act*.

e. Financial viability of the MBA Fidelity Fund

As the MBA Fidelity Fund is in its early years of operation it might be seen as vulnerable until the contributions from fidelity certificates build an adequate reserve to satisfy a possible cluster of claims. Although the state of its reserves is not publically disclosed, in the case where it has not built up enough reserves from residential builder contributions, it would be in a precarious position if there was a catastrophic exposure to a run of contractor failures or a dominant residential builder became insolvent. The MBA acknowledges this risk.⁷⁵

The MBA has not ruled out the possibility of 'reinsurance' in the future. The MBA Fidelity Fund is underwritten by the Government for the first five years to ensure it can make any pay-outs required before the scheme is able to build up sufficient cash reserves from contributions.

In summary, the present MBA Fidelity Fund is a last resort, hybrid scheme as the Government is needed to underwrite it.

f. Underquoting and the MBA Fidelity Fund

Concern exists among industry regulators that the practice of underquoting is prevalent in the construction industry. If a residential builder underquotes the contract price, this harms the home owner under a residential warranty scheme that caps the home owner's right to recover up to a percentage limit of the contract price.

When the suite of legislation that established the MBA Fidelity Fund was introduced to the Territory Parliament, the issue of underquoting was canvassed.⁷⁶ In that debate, it was said that underquoting would be dealt with in two ways.

Consumer Guide

Firstly, it was thought that the introduction of a consumer guide alerting consumers to the practice of underquoting and encouraging consumers to get several quotes and an expert's opinion, would decrease the instance of underquoting.

⁷⁴ We have received information that no applicants have been assigned financial thresholds lower than for which they applied with the exception of two contractors who have had the financial thresholds they were seeking reduced as owners had paid for work in advance.

⁷⁵ Available from: <http://www.fidelityfundnt.com.au/faq> (accessed August 2015).

⁷⁶ Second Reading Debate, *Building Amendment (Registration and Other Matters) Bill and Building Amendment (Residential Building Consumer Protection) Bill*, (27.03.2012) Eleventh Assembly, Parliamentary Record No. 25.

Information regarding the instance of underquoting is difficult to obtain and (to our knowledge) not publically available. Therefore, it is not clear if the introduction of the *Consumer Guide to Building and Renovating in the NT* has helped to decrease instances of underquoting.

MBA Fidelity Fund as a safeguard

Secondly, it was proposed that the MBA Fidelity Fund would become a type of gatekeeper to safeguard against underquoting:

“...if a company underquotes and starts building a house and then goes broke, people are left with the cost of that. It seems that will be covered because the fidelity fund, before they assess whether the builder is capable of carrying out that work, will have a good look at the policy that has been put forward for that house. If they see a three-bedroom block house being built in Palmerston at half the price of all the other three-bedroom block houses being built it, I imagine they would say they do not believe you can build a house for that amount and would question the builder.”⁷⁷

“The partnership between builder and the fidelity fund will allow the fund to identify significant underquoting and take the appropriate action.”⁷⁸

It is not apparent under which of the activities conducted by the MBA Fidelity Fund such an assessment of the validity of the contract price would be made. As outlined above, the MBA Fidelity Fund:

- conducts an eligibility test of residential builders;
- assigns a financial threshold of works to residential builders; and
- issues fidelity certificates based on the contract value.

Unless the MBA in the issuing of the fidelity certificate, conducts an assessment of whether the contract is underquoted, it is not otherwise clear how the MBA Fidelity Fund identifies underquoting, nor ‘takes action’ against it.

To the contrary, the assignment of a financial threshold for the total number of jobs that can be undertaken by any one builder, on its face, might actually encourage underquoting.

D. Past scheme: overview of the former (TIO) Home Builders Compensation Scheme

HBCF Scheme in concept

In 1993 the Home Building Certification Fund (**HBCF Scheme**) was introduced as part of the privatisation of building certification in the Territory.

The HBCF Scheme was not introduced with the same sweeping legislative package which accompanied its successor, (the Residential Building Cover Package) 20 years later. In fact, the *Building Act* and the *Building Regulations* at that time (and subsequently) provided very little guidance on the operation of the HBCF Scheme.

HBCF Scheme in practice

The HBCF Scheme has been managed since its inception by the Territory Insurance Office (**TIO**) on behalf of the Government.

The HBCF Scheme ceased issuing new policies and was replaced by the Residential Building Cover Package on 1 January 2013. Responsibility for the HBCF Scheme was transferred to the Department of Lands, Planning and the Environment Building Advisory Services branch (**BAS**) on this date. Policies issued under the HBCF Scheme remain valid until the ten year cover period expires.⁷⁹

⁷⁷ Mr Nelson Wood, Second Reading Debate, *Building Amendment (Registration and Other Matters) Bill and Building Amendment (Residential Building Consumer Protection) Bill*, (27.03.2012) Eleventh Assembly, Parliamentary Record No. 25.

⁷⁸ Mr McCarthy, Second Reading Debate, *Building Amendment (Registration and Other Matters) Bill and Building Amendment (Residential Building Consumer Protection) Bill*, (27.03.2012) Eleventh Assembly, Parliamentary Record No. 25.

⁷⁹ Available from: <http://www.lands.nt.gov.au/building/home-building-certification-fund> (accessed August 2015).

In the Second Reading Speech for the *Building Amendment (Residential Building Consumer Protection) Bill 2011* the following comments were made about the HBCF Scheme:

“While its purpose was to underpin the certification process, in practice it has underpinned the building process, giving unlimited cover for 10 years for non-compliance with the Building Code. The Home Building Certification Fund is first resort and is unable to recover funds from a building practitioner, including the builder. This product has been overtaken by the events and needs to be wound up. It will have liabilities for 10 years after the last policy is issued.”

The HBCF Scheme was a first resort scheme that provided cover to policy holders in the event that building work, at the time of construction, were non-compliant with the then Building Code of Australia. However, as the Building Code of Australia does not relate to standards of workmanship or the quality of products used, the HBCF Scheme did not cover matters relating to workmanship, wear and tear and quality of building products.

In particular, the HBCF Scheme does not provide cover for matters relating to:

- aesthetics (i.e. minor cracks relating to thermal movement, paint finishes and floor coverings);
- installations that require ongoing maintenance/regular inspections (i.e. termite barriers and external rendering);
- normal wear and tear (i.e. tile grouting, tap washers and water proofing products); and
- stormwater systems (i.e. the installation of downpipes, eaves, valley and box guttering). This is because stormwater systems are excluded from the requirements of the National Construction Code (**NCC**) in the Territory).⁸⁰

The HBCF Scheme was not available to an owner builder although subsequent home owners are covered (for the remaining time period) if the property was sold by the owner builder.

In contrast to its successor, the HBCF Scheme did not protect consumers if a residential builder became insolvent, died, or disappeared without completing a home if there was not a breach of the Building Code of Australia.

Given the lack of legislative or policy framework surrounding the administration of the HBCF Scheme, TIO administered the HBCF Scheme as a *de facto* insurance policy. For example, under the HBCF Scheme the TIO unilaterally imposed a \$200 excess prior to the commencement of rectification works. Furthermore, although no regulation required the TIO to refuse to indemnify a home owner in the event that the residential builder had not contributed to the HBCF Scheme or received a policy, it was the practice of TIO to refuse to indemnify home owners unless there was a policy issued for the residential builder in question.

Consequently pro-active intervention and management of the consumer’s situation by the HBCF Scheme was limited, and the period for consideration of claims (absent any statutory or regulatory framework that typically imposes time limits for accepting or rejecting claims) became quite extended. We note that the HBCF Scheme website (for the scheme now administered by BAS) states that subsisting claims generally take 4 weeks to process, which recognises the need for prompt assessment of a claimant’s entitlement.

Additionally the lack of regulatory framework for the HBCF Scheme suggests that there was a degree of subjectivity in the assessment of claims submitted to the TIO. The TIO could unilaterally assess and determine that a claimant was not eligible because the alleged defect was not a breach of the Building Code of Australia. Practically, this would make it was very challenging for a home owner to dispute or seek a review of these assessments. The realm of litigation (involving court action with substantive evidence needed of engineering and building experts) is practically even further beyond the reach of home owners than bringing a claim against a recalcitrant residential builder.

⁸⁰ Available from: <http://www.lands.nt.gov.au/building/home-building-certification-fund> (accessed August 2015).

Review of decisions was also challenging given that there was not a regulatory framework identifying the TIO as an agent of the Government. This meant that administrative law principles applicable to the Government were not extended to the TIO.

It can be anticipated that some consumers may have been disenfranchised from their compensation entitlements because of some of the features of the HBCF Scheme.

The present 'run off' of the HBCF Scheme, which has now returned to direct Government administration by the BAS has not (and practically cannot, without injustice to earlier claimants) fundamentally depart from the general approach to indemnity of claims taken during the 20 years of its administration.

Currently, appeals against partially or wholly invalid claims can be made to BAS. Appeals are received by the BAS work unit and these are considered by the Assistant Director of BAS, with a recommendation being made to the Director of BAS. Ultimately the Director of BAS makes the determination on whether or not to uphold the BAS staff decision on an appeal. This is an improvement, as there is at least transparency in the process and opportunity to apply the principles of administrative law to the decisions in the process.

Although there is no legislative right to review or appeal a decision of the Director of BAS under the HBCF Scheme, judicial review by the courts may be available to a claimant dissatisfied with the BAS Director's decision because it might offend a principle of administrative law, such as having been made in breach of natural justice. However the costs and uncertainty of taking legal action (or the BAS Director having always made decisions that were accepted by claimants under the HBCF Scheme) will be a substantial deterrent to judicial review.

E. Reasons why a private insurance scheme has not worked in the Territory insurance market (and elsewhere)

The circumstances of the residential construction industry throughout Australia and particularly the risks of contractor and construction failure are such that 'for profit' insurance companies cannot be attracted to or relied upon to remain in the business of participating in residential warranty schemes, even with hybrid schemes seeing considerable government underwriting and reductions being made in the scope of compensation and when the 'last resort' claims trigger compensation as:

- The premium pool is simply too small and the risk profile too significant to have private insurers remain in the market. The failure of HIH (who had taken over FAI who was active in the residential warranty area) in the early 2000's substantially destabilised the residential warranty schemes operating in a number of States, as compulsory insurance was simply unavailable or unaffordable.
- This has led to a series of Faustian bargains between governments and remaining residential warranty insurers who have to be encouraged to remain in those jurisdictions in which they still operate. Under some of those models, the government has had to cap benefits and entitlements so that the risk for the insurer is better managed and actuarial analysis can support the insurers' participation in the scheme. There are not many examples (and none presently) of a successful 'pure' insurance model operating in Australia, with governments often having to step in and provide underwriting support of varying degrees to permit the insurance model to operate.
- Presently, there is also little competition for residential warranty cover between those insurers remaining in the insurance model jurisdictions. Dominant sole or duopoly major insurers generally operate. The market cannot drive efficiency without competition. The costs to consumers of home indemnity cover being extended by sole or uncompetitive insurers must consequently be higher than it would be if there was the ability to have a market offering insurers adequate (unsubsidised) cost and profit structures to be able to sustain an adequate number of competitive insurers in a stable warranty scheme for the construction industry.

For example, the failure of the major insurer HIH in the early 2000's substantially destabilised nearly all the private residential warranty schemes operating at that time. As remaining insurers withdrew from the residential warranty markets, there were periods during 2002 to 2004 where compulsory insurance was simply not available, forcing builders to either build illegally or to cease operations in some States. Governments were required to legislate restrictions and introduce caps to the cover extended by the

residential warranty insurance schemes. Exclusion of any cover to high-rise (more than three storey) residential developments was progressively introduced across the private sector jurisdictions at this time, sometimes by inter-governmental agreement (there was a '10 point plan' agreed between Victoria and NSW) to try to entice insurers to remain in the marketplace and to permit the private warranty schemes to resume some basic functionality.

All of these issues with the private insurance model are compounded for the Territory, with its comparatively high risk of contractor and construction failure and exceptionally small premium pool. This is demonstrated by the fact that although the 2013 reforms have introduced the ability for an insurer to come into the Territory market none have taken up the opportunity to do so.

We cannot expect that the insurance model will be available to the Territory in the foreseeable future, so any review as to the pragmatic alternatives for Government is limited to either the government model or a hybrid private industry model, such as the present MBA Fidelity Fund Scheme.

F. Residential Warranty Schemes in other jurisdictions

Western Australia

In WA, the Home Indemnity Insurance scheme (**HII**) requires mandatory full private insurance cover.

In practice, the HII is provided by approved private insurers, although the WA legislation does provide that cover may be provided by an approved fund. Despite this option, it appears that an 'approved fund' has never been operational in WA.⁸¹

Under a heads of agreement with QBE (who provides the majority of cover under the HII) the WA Government, in exchange for 10% of the premiums paid to QBE, must pay any cumulative liabilities from a single residential builder failure worth between \$10m to \$90m.⁸² This heads of agreement was due to expire on midnight on 30 June 2013. Interim arrangements extended the agreement until 1 October 2013. It is not clear whether this agreement has been renewed or extended beyond this date.

The Economic Regulation Authority released its review of the HII scheme in 2013 (the **ERA Report**).⁸³

The ERA Report recommended that coverage under the *Home Building Contracts Act 2011* (WA) be separated into the following two categories:

- mandatory private sector insurance cover for non-completion risks; and
- voluntary warranty period insurance for structural defects, provided on terms determined by the building industry.⁸⁴

The ERA Report considered that private sector efficiencies should be accessed in the provision of non-completion risk insurance. It also recommended that:

- if the WA Government's reinsurance was to continue, that the WA Government's share of premiums received be increased to reflect the risk borne by the WA Government;⁸⁵ and
- residential builders who cannot obtain insurance from private insurance providers be able to access a 'reserve fund', to be funded by a building services levy.⁸⁶

The ERA Report also indicated that a self-regulated voluntary warranty period insurance scheme might involve the establishment of fidelity funds to which residential builders could voluntarily subscribe (for a fee). Consumers would be free to choose residential builders who are parties to the fidelity fund.⁸⁷

It appears that the ERA Report's recommendations have not yet been adopted.

⁸¹ Final Report – Inquiry into Western Australia's Home Indemnity Insurance Arrangements (Economic Regulation Authority, 2013), p. 83.

⁸² Final Report – Inquiry into Western Australia's Home Indemnity Insurance Arrangements (Economic Regulation Authority, 2013), p. 8.

⁸³ Final Report – Inquiry into Western Australia's Home Indemnity Insurance Arrangements (Economic Regulation Authority, 2013).

⁸⁴ Final Report – Inquiry into Western Australia's Home Indemnity Insurance Arrangements (Economic Regulation Authority, 2013), p. 12.

⁸⁵ Final Report – Inquiry into Western Australia's Home Indemnity Insurance Arrangements (Economic Regulation Authority, 2013), pp. 12-13.

⁸⁶ Final Report – Inquiry into Western Australia's Home Indemnity Insurance Arrangements (Economic Regulation Authority, 2013), p. 13.

⁸⁷ Final Report – Inquiry into Western Australia's Home Indemnity Insurance Arrangements (Economic Regulation Authority, 2013), p. 14.

Queensland

Residential builders and other contractors who carry out residential construction work directly for consumers for a value of \$3,300 or greater must pay a contribution to the Queensland Building and Construction Commission (**QBCC**) under the Queensland Home Warranty Scheme (**QHWS**).

The QHWS is a mandatory full government model and provides the widest level of cover of any residential warranty scheme in Australia.

The QHWS covers the home owner if during the course of the contract:

- the contractor becomes bankrupt or goes into liquidation;
- the contractor fails to complete the contracted works for reasons that are not the consumer's fault;
- the insured suffers loss through vandalism or forcible removal; and
- the insured suffers loss through damage by a fire, storm or tempest.

The QHWS will also cover the home owner after completion of the work, if:

- the contractor fails to fix defects that have been the subject of a QBCC direction;
- the contractor for various reasons (e.g. the builder has become bankrupt or gone into liquidation, left the country, or died) cannot attend to rectification; or
- the building suffers from the effects of subsidence or settlement.

After giving the residential builder opportunity to respond, if QBCC pays out any claim under the policy, it may pursue the relevant residential builder for the costs of rectifying any defect caused by that residential builder.

The QHWS affords a greater degree of protection for consumers than residential warranty schemes operating in other States and Territories. If a residential builder refuses to rectify defects, the QBCC will complete the work and pursue the residential builder for the cost. The QBCC has the power to pursue the residential builder because in Queensland the licensing regime is linked with the residential warranty scheme. Directors of building companies are liable for any debts which QBCC pursues against them.⁸⁸

Although the power of the QBCC affords greater protection to consumers, it has been criticised as exercising 'unfettered' power resulting to injustices to residential builders. In particular, the building industry criticises the QHWS because under the scheme the QBCC is the 'accuser, judge and jury' in relation to defective work.⁸⁹

Consumers have also complained about poor quality rectification work being undertaken by the original residential builder under such an order.⁹⁰

New South Wales

The NSW Home Building Compensation Fund (**NSW HBCF**) (formerly Home Warranty Insurance Fund) has been operating in various forms since 1 May 1997.

The NSW HBCF scheme is mandatory and provides full cover. The scheme is funded by the NSW Government, with private insurers acting as its agents. The NSW HBCF requires that residential builders take out insurance cover which indemnifies the home owner for delay or defects arising from contractor failure or resulting from the residential builder's suspension of licence. The threshold is \$20,000.⁹¹

From 1 July 2010, the NSW Self Insurance Corporation (now trading as the NSW Home Building Compensation Fund) became the sole provider of insurance. QBE Insurance (Australia) Limited and

⁸⁸ Submission by the Housing Industry Association, WA Home Indemnity Insurance Review 16 August 2012, 5.1.3.

⁸⁹ Submission by the Housing Industry Association, WA Home Indemnity Insurance Review 16 August 2012, 5.3.2.

⁹⁰ Final Report – Inquiry into Western Australia's Home Indemnity Insurance Arrangements (Economic Regulation Authority, 2013), p. 174.

⁹¹ *Home Building Act 1989* (NSW) s. 92.

Calliden Insurance Limited have been appointed as insurance agents of the NSW Self Insurance Corporation.

In the case where an insurer under the NSW HBCF becomes insolvent, the NSW Government will indemnify the home owner under the relevant insurance contract to the extent that they are entitled to recover in respect of that policy.⁹² A body corporate called the Builders Insurers' Guarantee Fund, from which such indemnities will be paid, is administered by the Building Insurers' Guarantee Corporation.⁹³

Information on the NSW Fair Trading website indicates that the Builders Insurers' Guarantee Fund was developed following the collapse of HIH and FAI as a 'rescue package'. Currently, recovery is only available under the Builders Insurers' Guarantee Fund in connection with the HIH collapse.

G. Criteria for evaluation of different Residential Warranty Schemes models in the Territory

Practical implementation in the Territory

In order for a model to be considered as a legitimate option, it must be demonstrated that it can be practically implemented in the Territory.

Practical implementation issues in the Territory – residential warranty scheme models	
Scheme Model	Protection afforded
Industry Fidelity Fund	A fidelity fund has been operating in the Territory since 1 January 2013 and in the ACT since 2003.
Private Insurance	An insurance scheme is not considered to be able to be practically implemented in the Territory due to the small and concentrated residential building sector.
Government Funded	A government full coverage model can be practically implemented in the Territory.

Stability

In order for a residential warranty scheme to be implemented in the Territory, it must be feasible over the long term. Having a stable model is in the interests of the Government and the industry, since the cost of any bail-out of the industry or replacement of a scheme will ultimately be borne by the Government.

Protection for contractor failure – residential warranty scheme models	
Scheme Model	Protection afforded
Industry Fidelity Fund	As the MBA Fidelity Fund in the Territory is in its infancy, it is presumed that it has not accumulated sufficient reserves to reduce its vulnerability to pay out claims particularly if a cluster of claims occurred or a large residential builder became insolvent. This means that the fund would not be particularly stable and the Government is exposed to the possibility of having to underwrite and support the fund. However, as funds are accumulated over time (claims against the fund are not exceptional) it can be anticipated that the stability of the MBA Fidelity Fund will increase over time.
Private Insurance	An insurance scheme is considered to be inherently unstable because of the small size of the building market in the Territory. The small pool of premiums that could be

⁹² Home Building Act 1989 (NSW) s. 103I.

⁹³ Home Building Act 1989 (NSW) s. 103P.

Protection for contractor failure – residential warranty scheme models

	obtained from residential builders in the Territory is unlikely to attract the interest of private insurers. If private insurers did choose to participate, only a small number may offer residential warranty insurance. A lack of competitive supply response from private insurers does not promote stability since the exit or insolvency of one insurer can have devastating impact on the operation and viability of the model for consumers and would likely leave the Government exposed to the costs of any fallout.
Government Funded	<p>A government model is considered to have the highest degree of stability because the Government has the willingness and financial capacity to maintain a consumer protection scheme. This is particularly suited to the Territory because of the small size of the building sector and because of the industry’s importance to the Territory economy and community.</p> <p>It is considered that the Government has the capability to operate a government funded scheme which is more stable than a fidelity fund or private insurance scheme, since it could withstand and recover from significant failures by major construction players that private and industry schemes may not be able to withstand.</p>

Benefits and costs of residential warranty scheme

The chosen residential warranty scheme model must bring net benefits to consumers, residential builders and the relevant fund underwriters.

a. Consumers

Benefits and costs to consumers - various residential warranty scheme models

Scheme Model	Benefits	Costs
Industry Fidelity Fund	<ul style="list-style-type: none"> Consumers are protected by mandatory cover under the MBA Fidelity Fund. Penalties apply to residential builders who do not obtain a fidelity certificate and building permits will not be granted unless a fidelity certificate is presented.⁹⁴ Therefore, if the residential building work requires fidelity cover, there is minimal risk to consumers that they will not be protected by the fidelity fund because of a failure by their contracted residential builder to obtain cover. Consumers are protected if they suffer loss as a result of construction failure (non-completion of works or if defects arise), but only in the event of contractor failure (the death, insolvency or disappearance 	<ul style="list-style-type: none"> The fact that the MBA Fidelity Fund will not respond to a consumer’s claim for compensation without a fidelity certificate having issued and the reliance of the MBA Fidelity Fund Scheme on others outside the scheme. The MBA Fidelity Fund Scheme is only available upon a contractor failure. There is no cover for substantial or structural defects despite the high cost of the cover. There are a number of arbitrary caps and limitations to compensation (needed to try to limit the risk of claim events collapsing the MBA Fidelity Fund). The MBA Fidelity Fund has a high cost of fidelity contributions, which are ultimately passed on to the consumers. As the scheme is not-for-profit, the MBA

⁹⁴ *Building Act* (NT), s. 59(1B).

Benefits and costs to consumers - various residential warranty scheme models

	<p>of the contracted residential builder, or the cancellation of its registration).</p>	<p>Fidelity Fund does not have the cost-saving incentives associated with the private insurers risk assessment of individual residential builders. (This characteristic is common to government models as well).</p>
<p>Private Insurance</p>	<ul style="list-style-type: none"> • The benefits of insurance cover to consumers will depend greatly on the terms of the insurance cover. Typically there are caps and limitations on claims, and some elements of government underwriting or support needed to maintain the insurer's commitment to the scheme. 	<ul style="list-style-type: none"> • If private insurance providers did enter the Territory market, given the small number of residential builders (and therefore a lower pool of premiums from which to fund insolvency claims) consumers are likely to bear the burden of very high insurance premiums. This negates any saving that might be made from opening the cover up to the private insurance market. • If there is no government safety mechanism, consumers might be vulnerable to a collapse or unregulated withdrawal of an insurer.
<p>Government Funded</p>	<ul style="list-style-type: none"> • Consumers can benefit from a government scheme through the scheme being extended by Government to include construction failure outside of having been caused by contractor failure. • A government model can be administrated together with other components of the regulatory system, such as builders' registration, so that duplicitous processes can be eliminated and compliance costs and red tape for residential builders reduced. • Consumers benefit from increased confidence and 'peace of mind' knowing that they are financially secured by a regulatory regime that can be more transparent and decisions can be more easily reviewable than either the industry or insurances model can provide. 	<ul style="list-style-type: none"> • Costs of contributions to a government model may be higher because the Government does not have any competitive pressures on it to retain low cost structures for administration of the scheme.

b. Construction contractors

Benefits and costs to construction contractors - various residential warranty scheme models		
Scheme Model	Benefits	Costs
Industry Fidelity Fund	<ul style="list-style-type: none"> Approval and assessment of a builder by the industry body might promote confidence in that builder (from potential consumers) and the residential construction industry more generally, which suffers from instability due to its cyclical nature and high levels of insolvency. 	<ul style="list-style-type: none"> The current operation of the MBA Fidelity Fund places restrictions on the number of houses a residential builder may build and thereby interferes with the residential construction market. This may also inhibit a residential builder's ability to expand its business and generate more income, which can actually increase the risk of insolvency. If residential builders with a high risk of contractor failure are not prevented from participation in the scheme (and consequently from undertaking residential construction) the considerable administrative and cost burdens placed on residential builders having to apply to participate in the industry scheme appears wasted, as it is unlikely to prevent contractor failure. A high threshold test causes the residential builder duplicative (but not consistent) costs and administration with other government initiatives and particularly builders' licensing or regulation. Compliance costs in providing eligibility assessment paperwork to the fidelity fund for re-assessment every year. Compliance costs are associated with re-applying for a risk assessment if the residential builder wishes to take on projects of a greater value than its assigned threshold.
Private Insurance	<ul style="list-style-type: none"> It is presumed that the private industry has expertise beyond that of an industry run fidelity fund or government funded model and that would result in greater efficiency and better service to the residential builders covered by an insurance policy. 	<ul style="list-style-type: none"> Where insurance is provided by a small number of insurers in the private sector, smaller residential builders may experience difficulty in obtaining insurance.
Government Funded	<ul style="list-style-type: none"> If the government model, such as the Recommended Warranty Scheme links residential builders' registration with the cover, then this 	<ul style="list-style-type: none"> There is potential for a government funded model to conflict with policy motives of the Government. In particular, it might be difficult for the

Benefits and costs to construction contractors - various residential warranty scheme models

	will reduce the red tape burden for residential builders when they submit information for their financial assessment.	Government to refuse to pay claims in large and high profile cases of builder failure, although it may be justified in doing so.
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c. The funders or underwriters (insurers, government or industry fund)

Benefits and costs to funders or underwriters - various residential warranty scheme models

Scheme Model	Benefits	Costs
Industry Fidelity Fund	<ul style="list-style-type: none"> The MBA Fidelity Fund is funded from fidelity certificate contributions and is a not-for-profit scheme. In the event of its facing financial strife, the scheme is currently underwritten by the Government, so the MBA is never itself directly exposed to risk of failing to meet consumer claims. 	<ul style="list-style-type: none"> The MBA Fidelity Fund will take time to accumulate sufficient funds to cover potential claims arising from major risk events transpiring.
Private Insurance	<ul style="list-style-type: none"> Given the small size of the Territory's residential warranty scheme market, any insurer who enters the market is likely to have a monopoly in the provision of insurance. 	<ul style="list-style-type: none"> The capital reserves required to be held by insurers are large, given the relatively small size of the construction market in the Territory and the small premium pool that this would generate.
Government Funded	<ul style="list-style-type: none"> A government fund will collect the whole amount of the premiums paid by residential builders (through the consumers). This money can be directly used in the administration of the Government fund and to pay out any consumer claims. In the event that one major residential builder becomes insolvent, rather than in the case of an insurer bailout or when underwriting a fidelity fund drawing first on Government reserves to satisfy the large volume of claims, the Government will have access to the premium pool to at least offset this cost. 	<ul style="list-style-type: none"> Administrative costs in establishing arrangements such as introducing and amending legislation may be incurred. Costs associated with calculating risks of residential builders and appropriate levies may be incurred, although this could be mitigated with the engagement of private sector insurance companies to carry out these tasks as an agent, such as is in place in NSW and Victoria.

Choice

A scheme which affords a consumer a certain degree of choice allows the consumer to weigh up the costs and benefits of purchasing a certain level of protection and to match their risk profile to the protection of choice.

A degree of consumer choice must be balanced against the special vulnerability of consumers in the construction industry. Consumers stand to suffer substantial losses arising from contractor failure and are vulnerable to the disadvantages associated with unequal bargaining power and the inability to access information needed to make informed decisions on the risks they are assuming when dealing with a construction contractor.

It is considered that in the Territory, residential builders are part of a particularly vulnerable class of consumers because of the regularity of residential builder insolvency. For that reason, the protection of consumers ought to take preference over the degree choice afforded to those consumers. Each of the evaluated models therefore considered involve mandatory cover only.

Protection

The degree of consumer protection offered by the various models is a key criterion in their respective evaluation. A model which offers a higher level of consumer protection is preferred to a model that offers a lower level of consumer protection.

The level of protection afforded by a model will depend on the following factors:

- the mandatory or voluntary nature of the protection;
- the length of the warranty period; and
- whether the model is predicated on contractor failure occurring.

As mentioned above, all of the models considered are mandatory in nature.

Protection for contractor failure – residential warranty scheme models	
Scheme Model	Protection afforded
Industry Fidelity Fund	Recovery under the MBA Fidelity Fund is not possible unless a contractor failure has occurred.
Private Insurance	Currently, all the private insurance models of residential warranty insurance in Australia do not provide cover under the private insurance policy unless contractor failure has occurred.
Government Funded	The Recommended Warranty Scheme extends cover to compensable construction failure, and would extend to the circumstances where the residential builder abandons or refuses to continue the works, or executes defective works (that may be confirmed to be a compensable construction failure by an expedited process of determination).

Affordability for consumers

The costs of any measure to protect consumers will ultimately be borne by the consumers who benefit from that protection. As a matter of efficiency, models which provide the same level of protection for a lower cost to consumers are preferred.

Affordability for consumers – residential warranty scheme models	
Scheme Model	Affordability
Industry Fidelity Fund	The MBA Fidelity Fund requires contributions from residential builders (which are passed on to consumers) to be made before the MBA Fidelity Fund will issue a fidelity

Affordability for consumers – residential warranty scheme models

	<p>certificate to the residential builder. The cost of the contribution is outlined in the table above.⁹⁵ Of jurisdictions where a comparison of costs is possible, it appears that the costs under the MBA Fidelity Fund are generally higher at the lower and higher values contracts than other residential warranty schemes in Australia.</p>
Private Insurance	<p>Private insurers charge premiums to residential builders for mandatory cover that necessarily include a profit margin. This cost is passed on to consumers. Efficiencies in an insurers' risk assessment and individual allocation of a specific risk rating to each residential builder insured ought to mitigate the premium costs, despite the profit margin included.</p> <p>A comparison of the contributions payable under the QHWS and the VDBIS against the contributions required by the MBA Fidelity Fund is provided above.⁹⁶ This shows that for those presently operating schemes compared (with the exception of those contract works under the threshold value of \$12,000) the VDBIS provides the most affordable coverage.</p> <p>However, it should be noted that the QHWS does provide a significantly broader cover than is available under both the VDBIS and the MBA Fidelity Fund.</p>
Government Funded	<p>A government model does not have incentive efficiencies that are built into a private sector model, therefore it can be expected that the cover funded by the Government may come at a greater contribution cost to the consumer than the insurance model.⁹⁷</p> <p>However, this observation may not hold true in the Territory, where insurance premiums under private insurers would need to be substantially higher due to the small premium pool. Also, the insurance and the industry models are monopolistic in practice so arguably they have no greater competitive driver than the government model in actuality.</p> <p>The industry fidelity fund model (despite the restriction to consumers' rights to compensation) is still a high cost model, presumably because it does not attempt any individual risk profiling of individual contractors. Its industry contributions are levied on residential builders using a fixed scale which is tied to the contract price. Furthermore, the industry model has the same problem as the insurance model, which is that the pool of contributors is very small, and potentially high risk events might mean the model cannot be fully self-funded.</p> <p>The Government is likely best placed to absorb the risk of some unfunded liability of its scheme whilst its reserves are built from contributions over time, and does not have any commercial imperative to pass that risk onto the consumer, unlike the insurance or industry schemes.</p>

Conclusion

The present industry model has consumers paying high costs for quite limited compensation cover.

The other concerning feature of the industry model as presently implemented, is that the qualification procedures and the conditions placed upon residential builders needing to get fidelity certificates actively restricts their commercial activities, distorting the residential construction market in the Territory.

⁹⁵ See the table at page 61 of this Report.

⁹⁶ See the table at page 61 of this Report.

⁹⁷ Final Report – *Inquiry into Western Australia's Home Indemnity Insurance Arrangements* (Economic Regulation Authority (June 2013), p. 109.

II. Government funded scheme should be established

Given that:

- the insurance model is practically unavailable in the Territory (and its retreat from operating in far larger markets interstate suggests that it will not be a viable option in the Territory for the foreseeable future); and
- the presently operating MBA Fidelity Fund has fundamental shortcomings for residential builders and consumers (not to mention retaining considerable risk for the MBA and the Government of any extraordinary risk events eventuality whilst the Fund is still building its reserves from contributions),

only a Government model is practically viable to form the framework to deliver further substantive reform to the Territory's residential warranty scheme.

RECOMMENDATION 1: Residential Warranty Schemes

The Territory establish a new, public model, residential warranty scheme (**Recommended Warranty Scheme**) to replace the existing MBA Fidelity Fund.

A. Nature of Recommended Warranty Scheme

Recommended Warranty Scheme to be coordinated with the administration of the contractors' registration system

An important benefit of a Government scheme being adopted is the ability to unify and streamline in a single government agency both the roles of administering the:

- Recommended Warranty Scheme (the role called the 'Recommended Warranty Scheme Administrator' in this Report); and
- the contractors' registration system (the role called the 'regulator' in this Report).

The fact that the contractors' registration system may extend to include construction contractors outside the residential sector does not mean the benefits of having a single coordinating entity cannot be achieved. Queensland's experience in establishing the QBCC is a model of a unifying entity.

The proper coordination between any warranty scheme and the contractors' registration system can only be achieved using a Government model warranty scheme. Whilst it is appreciated that concern may arise that this increases cost and red tape, in reality much of the power that would be vested in a centralised Government agency already exists in the present regime, it is just presently split between the present industry scheme's administrator (the MBA) and Department of Business as the regulator of the contractors' registration system.

As stated in this Report, the Territory is simply too small a jurisdiction to be able to support diverse and duplicitous administration of these two important limbs of the construction industry's regulatory system.

RECOMMENDATION 2: Residential Warranty Schemes

The Recommended Warranty Scheme and the Reformed Registration System be closely aligned and singularly administered so that:

- qualification for a residential builders' class of registration automatically qualifies that registered residential builder's consumers to cover under the Recommended Warranty Scheme (so there is no duplication of application processes or divergent qualification criteria for a builder to become registered and to be able to get cover under the Recommended Warranty Scheme); and
- the registration fee will include a levy applied to the class(es) of residential builder for the cover of their consumers by the Recommended Warranty Scheme.

Multi-storey construction to be included and commercial construction to be excluded

Both Residential Building Cover under the existing MBA Fidelity Fund and the residential builders' registration scheme are limited in their application to class 2 buildings (being buildings up to 3 residential storeys) under the *Building Act* and *Building Regulations*.

If, as we have described in this Report, the fundamental rationale of residential warranty schemes is to compensate vulnerable consumers for construction failure, then there is no logical reason why a warranty scheme ought not to extend to cover those purchasers of units in multi-storey residential construction over three storeys high. These unit holders are just as vulnerable to construction and contractor failure as purchasers of a single dwelling.

It is also hard to argue that developers of multi-storey units are less likely to suffer an insolvency event than house builders. A purchaser of a residential unit 'off the plan' whose vendor/developer of the multi-storey building suffers an insolvency event, or commits a construction failure by not completing the building or not attending to a substantial structural defect in it, faces an even greater challenge than a consumer who has a construction contract for the construction of a single dwelling.

Generally a pre-completion construction failure by a multi-storey residential developer is dealt with through the property aspects of the parties' sale and purchase contract. Essentially, if the construction of the multi-storey development is not completed by the developer, occupancy permits cannot be issued, units cannot be created by scheme statements being registered so as to create a proprietary interest capable of conveyance under that contract, and typically purchasers will address this by rescinding or terminating that sale and purchase contract and pursuing the developer for damages (if possible).

Accordingly, we do not necessarily anticipate the Recommended Warranty Scheme will be covering claims from consumers who are purchasing units 'off the plan' when the construction failure has occurred *before* the creation of the unit and transfer of the proprietary interest in it to the consumer. These consumers are not 'vulnerable', because they can protect their interests through the rights to terminate the purchase transaction with the developer.

A construction failure post-completion of a unit is, however, a different matter.

A failure to attend to a major or structural defect after the consumer has settled on the purchase of his or her unit can be more fraught for the consumer than a construction failure relating to a single, stand-alone, dwelling. The construction failure of the developer in this circumstance is not solely related to the construction of the purchaser's individual unit. 'Construction failure' in multi-storey construction will invariably involve areas of common property such as the slabs, beams, external walls and foundations of the building, and often other people's property, if the defect manifests itself across the internal aspects of a number of units (which substantial defects will often do).

This means that a number of legal entities may suffer damage. The damage an individual unit owner suffers may also include consequential loss, in the form of having to contribute to an extraordinary call of the body corporate needing to fund rectification of post construction defects in the structural elements that

are typically common property. The position of bodies corporate who attempt to compel developers to attend to construction failure for defects manifest in common property is notoriously hard. The body corporate was not in legal existence at the time of formation of the 'off the plan' contract between purchaser and developer.

The present law of negligence is also not encouraging for body corporates seeking to establish and pursue developers for major defects, as the law generally declines to establish a duty of care being owed.⁹⁸

So, the body corporate suffers the damage, but it has no ready causes of action available to recover against the developer for breach of contract or likely negligence. The original purchaser of the unit may not suffer physical damage to its property but suffers economic loss by way of having to contribute to extraordinary calls made on unit holders by the body corporate to fund rectification works. Typically purchasers at this point in time will struggle to recover those indirect damages under the sale and purchase contract as the conveyance has been affected and property contracts are generally replete with principles that the 'buyer beware'.

In order to try and provide some measure of protection against the potential devastating consequences of post-construction failure of a residential developer of multi-storey units (and we would emphasise that this category ought to include multi-storey residential developments that may include commercial units in a mixed use building complex) we recommend that the Recommended Warranty Scheme extend home warranty cover to purchasers of 'off the plan' units and subsequent purchasers during the cover period in all multi-storey residential construction (including mixed use residential/commercial buildings).

The Recommended Warranty Scheme ought to also expressly extend rights of indemnity and compensation to the bodies corporate who have suffered loss because of a construction failure impacting upon the common property created upon registration of the units plan for the development. Similarly, any extraordinary calls required of individual unit holders to contribute to the costs of the body corporate rectifying such major or structural defects caught by the Recommended Warranty Scheme, ought to be a damage included in the list of things for which relief will be extended under the Recommended Warranty Scheme.

Additionally, this Report considers recommendations of further policy initiatives to improve the ability of bodies corporate to pursue recovery, including:

- a statutory deeming of the 'off the plan' purchase contract to contain certain construction warranties and that this contract is deemed to have been assigned to the body corporate;
- establishing a contractual nexus between the body corporate and residential developer that is otherwise absent; and
- allowing bodies corporate to access funds from the Recommended Retention Trust Scheme (discussed in the Payment Protection part of this Report) in the event of a trigger event under the Recommended Warranty Scheme.

This Report's recommendation to include multi-storey construction within the ambit of the Recommended Warranty Scheme's residential building cover is made because it accords with the principle of protecting vulnerable consumers (in this case purchasers of units 'off the plan' and subsequent entities that inherit liability for damages, such as bodies corporate) from the effects of construction failure from which they cannot otherwise properly defend themselves.

The extension of a residential warranty scheme to high rise (i.e. more than three storeys) residential construction and the ability of body corporates to receive the benefit of cover has not been established in other jurisdictions. It is contemplated that this is partially a legacy issue arising from the perceived need to support private insurance models under pressure in the wake of the collapse of HIH Insurance and partly because of the risk of substantial costs of the liability assumed by the Scheme.

⁹⁸ See *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor* [2014] HCA 36.

The reality is however that increasing numbers of Territorians are investing and living in multi-storey accommodation, and the lack of account of residential developers and builders for 'high rise' residential construction because of the difficulties inherent with the unit titles, is an obvious anomaly in the consumer protection principles of building regulation generally and the residential warranty scheme particularly.

The complaints of unit holders that cannot get their high rise building rectified by the residential builder/developer are just as corrosive to confidence in the building industry and its products, as the position of a house owner. Indeed the impact of a single, significant, high-rise development with construction issues that the body corporate is without legal recourse against the developer/builder or any retention or warranty cover can have a disproportionate impact on the values of high rise units across the market. It is consequently in the construction industry's best interests to have a regulatory system that promotes confidence in the value of its products amongst consumers.

The recommendation of this Report for the establishment of a Recommended Retention Trust, that would see 2½% of the multi-storey building's contract price or estimated construction value (where there is no building contract, as the developer self-executes the construction with trade contractors) held in a statutory retention account and accessible by the unit holder, body corporate or the Recommended Warranty Scheme Administrator (if the warranty cover triggers) for the year following completion, will provide some mitigation of the increased costs and risk associated with expanding the Recommended Warranty Scheme's cover to high rise residential construction.

This Report urges the Territory not reject extending the Recommend Warranty Scheme's cover to high rise residential construction simply because the surviving private insurance schemes inter-State have necessitated the removal of such cover in the past, or that no other jurisdiction currently extends warranty cover in this circumstance.

Actuarial analysis of the costs and risk of extending the Recommend Warranty Scheme ought to contemplate that:

- a developer will be contributing a significant levy to the Recommended Warranty Scheme; and
- if the Recommended Retention Trust is also adopted there will be a 2½% retention available to be called on in the year following completion, when many defects are manifest and can be attended to without call on the Recommend Warranty Scheme.

Additionally, we consider that the practice observed in other schemes of preventing the developer from calling upon the scheme be included in the Recommended Warranty Scheme. In this way the extension of the risk to be assumed by the Recommended Warranty Scheme can be contained and there is a minimisation of the 'moral hazard' of developers walking away from their developments on the assumption that the Recommended Warranty Scheme will pick up the mess for the unit holders.

We consider that the moral hazard of the developer accessing the Recommended Warranty Scheme is remote for the following reasons:

- the Recommended Warranty Scheme is primarily a last resort scheme. This means that the body corporate's entitlement to draw on the Scheme is limited to circumstances where the developer has died, disappeared, become insolvent or lost their registration. Resultantly, the developer is in no position to gain an advantage from claiming under the Scheme in any event;
- aside from its last resort triggers, the Recommended Warranty Scheme can also be accessed in the limited circumstances where a compensable construction failure has occurred.⁹⁹ It is anticipated that instances of compensable construction failure will be limited, since the robust nature of the Reformed Registration System ought to address their causes; and
- there is little incentive for a developer to fail to carry out the contract, or engage in building practices that require rectification, since the Recommended Warranty Scheme Administrator has the right to step in and rectify defects or incomplete works, then to seek recovery from the developer in any event.

⁹⁹ The concept of a 'compensable construction failure' is canvassed below, at Recommendation 9 of this part of the Report.

Further, it is again emphasised that the consumer protection of vulnerable home owner/consumers is the underpinning rationale for warranty schemes and the fundamental reason why they are confined to covering residential construction only. This Report accordingly does *not* recommend that the Government expand the Recommended Warranty Scheme to include commercial or civil contractors. To do so would cause the Recommended Warranty Scheme to depart significantly from its consumer protection objectives and the costs and risks associated with such an expansion would likely threaten the viability of the scheme.

This does not however mean that commercial contractors ought not to be caught within a general contractor's registration system. They ought to be, as is addressed in the following section of this Report.

RECOMMENDATION 3: Residential Warranty Schemes

The Recommended Warranty Scheme ought to cover all residential construction, including multi-storey residential construction above 3 storeys.

RECOMMENDATION 4: Residential Warranty Schemes

The Recommended Warranty Scheme ought not to apply to commercial (e.g. non-residential) construction.

RECOMMENDATION 5: Residential Warranty Schemes

Cover under the Recommended Warranty Scheme ought to be legislatively extended to subsequent purchasers of residences and to the body corporates that are created under the *Unit Title Schemes Act* for the cover period.

RECOMMENDATION 6: Residential Warranty Schemes

Developers are to remain treated as residential builders and required to contribute levies to the Recommended Warranty Scheme. However, developers ought not to be entitled to access the Recommended Warranty Scheme themselves as this could create a significant risk of 'moral hazard'.

Assessment of financial capacity be reconciled with contractors registration system

As discussed above,¹⁰⁰ the precise criteria and methodology the MBA uses to conduct a financial assessment of residential builders who apply to it for a threshold level of cover is not clear. It seems a variety of factors are considered, including a contractor's financial position and strength for the purposes of setting conditions, including limiting the number of jobs and total value of works that can be conducted by the contractor.

The Recommended Warranty Scheme will coordinate with the Reformed Registration System so that there is for the relevant class of registered contractor (residential builder category) a single set of financial criteria applied. The financial criteria for registration under the Reformed Registration Scheme is discussed below.¹⁰¹

Risk factors for residential builders other than those of a financial nature should be considered by the Government when pricing the Recommended Warranty Scheme.

¹⁰⁰ See the Residential Warranty Schemes part of this Report, section I.C.d.

¹⁰¹ See Contractor Registration Systems part of this Report, section VII.D.

Step in powers to be granted to the Recommended Warranty Scheme Administrator

The Territory has had past experience with the HBCF Scheme being administered in a traditional manner where a claim was lodged, assessed over a period and if the claimant was found to be covered by the HBCF Scheme, generally the home owner would receive a lump sum compensation payment sometime after the damage had been suffered. In those circumstances, the home owner was left to fend for itself until the compensation payment was received and payment defaults were often cascading down the contracting chain whilst the compensation entitlement was being processed.

In order to try and mitigate the consequences of contractor or construction failures for both the consumer and for subcontractors caught by the payment defaults, we would advocate the Recommended Warranty Scheme's principle form of relief not be lump sum compensation but that Recommended Warranty Scheme Administrator be proactive and seek to intervene and address the construction failure by 'stepping in' to the shoes of the contractor to rectify any defects or completing the job (including supplying materials necessary). We consider that this approach, in so far as is being currently taken by the MBA, is one of the best aspects of the present scheme and that it should be adopted and developed by the Recommended Warranty Scheme Administrator. There are also positive examples of the type of powers that ought to be given to the Recommended Warranty Scheme Administrator and how they should be proactively exercised to intercede at the earliest possible opportunity in managing the consequences of a construction failure to be found in the Queensland reforms and powers of the QBCC.

Government will need to properly resource and ensure adequate skill sets are available within the Recommended Warranty Scheme Administrator's organisation to enable it to undertake the task of early intervention and amendments of construction failure. It may be that Government chooses to contract out for specific industry and professional services to enable it to deliver the relief in the form of intervention rather than compensation. Any such outsourcing will of course need to be done in accordance with relevant public procurement and probity rules.

Further initiatives, including looking to include statutory rights of assignment of subcontracts, supply agreements and consultancy arrangements from the defaulting residential builder to the Recommended Warranty Scheme Administrator or its nominated alternative builder ought to be considered in the suite of powers that would be needed to permit the Administrator to provide relief in this form.

When exercising 'step in' rights the Recommended Warranty Scheme Administrator will also need to carefully assess the extent to which it can pay a defaulting builder's subcontractors in circumstances where insolvency laws may be in operation. The object of such payments will be to try to stem payment default from cascading down the contracting chain, and to mitigate the damage to the consumer in having to engage others to complete the works at a greater cost. This will conflict at times with (overriding) principles of insolvency law found in the *Corporations Act 2001* (Cth) (for contractors that are companies) and the *Bankruptcy Act 1966* (Cth) (for contractors who are natural persons) including when such a payment to a creditor may constitute an unfair preference. The supporting regulations for the Recommended Warranty Scheme Administrator will therefore need to be carefully crafted to avoid conflict or inconsistency with the Federal laws operating in circumstances of insolvency.

If the principle form of relief under the Recommended Warranty Scheme is that the Recommended Warranty Scheme Administrator is charged with the duty under the supporting legislation and regulations to intervene and manage construction failure, then it must also have strong powers to pursue recovery of the costs it expends from the defaulting residential builder.

We note the regulatory framework of the Queensland model grants significant powers of recovery action to the QBCC including seeking to lift the corporate veil of company contractors and pursue directors personally for their company's liabilities.

Furthermore, as indicated above, in some circumstances where the Recommended Warranty Scheme Administrator has 'step in' rights to complete unfinished work or remedy defects, it can access the funds allocated in the Recommended Retention Trust to cover the cost of such work.

The exercise of 'step in' rights and the ability to draw on the fund or the Recommended Retention Trust, in accordance with natural justice principles, must of course be subject to the builder having a reasonable opportunity to rectify the works themselves.

RECOMMENDATION 7: Residential Warranty Schemes

The Recommended Warranty Scheme Administrator ought to be given powers and resources to enable it to manage the construction failure for the consumer including the ability to promptly 'step in' to the shoes of the defaulting residential builder by:

- electing to receive the assignment of any subcontracts (or to require they be assigned to another contractor appointed by the Recommended Warranty Scheme Administrator);
- paying the defaulting residential builder's subcontractors and suppliers (on the basis that they will also pay their sub-subcontractors down the contracting chain and subject to any insolvency issues that might arise); and
- managing the completion of the residential construction (including by the Recommended Warranty Scheme Administrator directly engaging a new construction contractor if necessary).

RECOMMENDATION 8: Residential Warranty Schemes

The Recommended Warranty Scheme Administrator to be given statutory rights of recovery (including entitlement to prove as a creditor in any administration of a residential builder that has become insolvent). Consideration to be given to extending those statutory rights to enable pursuit of directors of the residential contractor directly.

Expanded scope to include compensable construction failure

The major benefit of adopting a government model will be the ability to extend the Recommended Warranty Scheme's coverage to consumers who suffer damage resulting from 'pure' construction failure, irrespective of whether or not it has been caused by contractor failure.

Choosing not to predicate the coverage of construction failure on a contractor becoming insolvent, disappearing or dying is not without precedent. The QHWS includes cover for contractor failure to complete the contract works for reasons that are not the consumer's fault. The former Territory HBCF Scheme compensated for a specific form of construction failure, namely the failure to construct in accordance with the Building Code of Australia.

Whilst the impulse is to seek to extend the ambit of a warranty scheme's cover with as little exception and exclusion as is possible, we anticipate the costs of a scheme which incorporates blanket coverage of building works and defects left uncompleted by the builder, for whatever reason, is simply not viable.

We consequently recommend that the Recommended Warranty Scheme continue the existing scheme's residential cover for works left uncompleted or a post-completion defect left unrectified when the construction failure is caused by contractor failure.

The Recommended Warranty Scheme may be extended to cover a restricted class of construction failure that is not consequential upon contractor failure, namely where there is a determination that a residential builder has simply failed to comply with its contractual obligations to complete works or attend to defects (and there is no good contractual reason for doing so). This category of compensable event is described in this Report as 'compensable construction failure'.

If this recommendation is accepted, Government should prescribe in the Recommended Warranty Scheme's regulations a careful standard of what constitutes a 'compensable construction failure' for the

purposes of accessing the Recommended Warranty Scheme outside those circumstances where the construction failure has been caused, or is in some way associated with, contractor failure. This Report recommends that 'compensable construction failure' can be defined as one or more of any of the following events:

- a failure of a residential builder to comply with an order of the Commissioner of Residential Building Disputes to rectify or complete work or compensate the consumer;
- a building certifier declines to issue a relevant certificate in respect of the residential builder work undertaken by the residential builder under the *Building Act*;
- the residential builder fails to provide a proper certificate under section 69 of the *Building Act*;
- a failure of the residential builder to address defects that have been the subject of statutory Building Notices issued by the Director or a builder certifier under the *Building Act*;
- a determination of the regulator (presently the Director of Building Control or the BPB) that an offence has been committed or professional misconduct has occurred because of the residential builder's failure to complete works in accordance with the NCC, or attend to and rectify defects.

In order to accord with principles of natural justice, before the Recommended Warranty Scheme Administrator steps in, the builder must be given a chance to rectify any defects or complete the works himself or herself. In the event were a compensable construction failure instance outlined above does not contain a legislative opportunity for the residential builder to respond to the determination,¹⁰² the Recommended Scheme Administrator should serve notice on the residential builder, advising of the compensable construction failure.

Once a determination of compensable construction failure is made and the builder has been given the opportunity to respond to it, the Recommended Warranty Scheme ought to respond immediately and address the consumer's need to complete construction or attend to defects. The relevant event ought to also be the basis for immediate disciplinary processes against the defaulting contractor under the contractors' registration system, which may result in suspension or cancellation of the registration.

RECOMMENDATION 9: Residential Warranty Schemes

The Recommended Warranty Scheme to cover construction failure of residential builders outside the circumstances of that residential builder having failed (that is become insolvent, died or disappeared) in defined circumstances of a 'compensable construction failure'.

(Alternatively) Expedited disciplinary process to apply

It is understood that costing analysis of the Recommended Warranty Scheme may result in the Government not wishing to extend the Recommended Warranty Scheme's operation to encompass compensable construction failure.

An alternative strategy that would still permit consumers to be extended compensation from the Recommended Warranty Scheme in defined (and more containable) circumstances, is to maintain a revocation or suspension of the contractor's registration under the residential builders' registration system as a trigger event for compensation under the Recommended Warranty Scheme.

There have apparently not been any claims for compensation brought to the present MBA Fidelity Fund as a result of the cancellation of registration. Serious disciplinary processes leading to a cancellation of a

¹⁰² For example, the compensable construction failure event where the residential builder fails to provide a proper certificate under section 69 of the *Building Act*.

residential builder's registration have been relatively infrequent, and the processes are extended, making it impracticable to use them as triggers for timely compensation under the present scheme.

RECOMMENDATION 10: Residential Warranty Schemes

If the recommendation to extend cover for defined compensable construction failure events is not accepted, expedited disciplinary processes ought to still be adopted so that construction failures can be the subject of cancellation of registration and this becomes a compensable event under the Recommended Warranty Scheme.

Cover period to be extended

The present limitation period for claims arising or connected with defective building's (structures) is 10 years from the date of the Occupancy permit, otherwise the general limitation period for claims of negligence or breach of contract is 3 years. However, the cover period under the existing Scheme is 6 years. This 6 year period appears to be modelled off examples from interstate jurisdictions.

The Recommended Warranty Scheme's period of cover ought to match the limitation period for the bringing of a claim, that is, it ought to be for 10 years from the grant of the occupancy permit under the *Building Act*.

Otherwise, Government may wish to address the limitation period issue under the *Building Act*, and bring that back to the 6 years or 3 years' limitations for torts and contract found in other jurisdictions (and also address what happens for the calculation of the limitation period if an occupancy permit is not issued for a building).

The extended period included in the *Building Act* for bringing of claims in respect of defective structures was presumably included as a policy measure to benefit consumers because building defects may take considerable time from completion of the building to become manifest.

RECOMMENDATION 11: Residential Warranty Schemes

The Recommended Warranty Scheme's period of cover for construction failure ought to extend for the same period as the limitation period for claims arising from defective structures (presently 10 years from the date of the issue of the occupancy permit). Alternatively, the present period of 6 years ought to be retained.

Arbitrary limits to entitlement should be avoided

The *Building (RBI and Fidelity Fund Schemes) Regulations* which provide the present regulatory framework for the MBA Fidelity Fund Scheme currently operating in the Territory incorporates:

- limitations on the period in which a consumer can make a claim against the scheme (90 days from when the builders stopped or failed to start work, or to consume it became aware of the defect); and
- caps on the total amount of the compensation cover that is paid by the scheme to the eligible consumer (20% of the contract price up to a maximum of \$200,000).

Whilst it is appreciated that the rationale behind limiting the period in which a consumer can bring a claim against the MBA Fidelity Fund (so that the matter can be dealt with in a relatively timely manner and hopefully the damages and losses of the consumer better mitigated) it is contrary to the compensation principle (that the injured party ought to be restored, as best as can be achieved, to the position it was in if the default had not occurred) to exclude consumers from compensation in the event they do not comply with any particular time period for the bringing of their claim.

Given the nature of residential warranty schemes as 'safety nets' of last resort, it seems somewhat unfair if there is an absolute prohibition on entitlement to recover from the scheme because of a delay on the part of the consumer bringing his or her claim forward. Such 'claim bars' often give rise to disputes and elaborate

arguments to avoid their strict application, particularly over when the trigger event actually occurred and was reasonably known to the claimant. When a person actual 'knows' of a defect, particularly when it may be a technical or hidden defect, can be quite difficult to properly ascertain.

The Recommended Warranty Scheme will seek to encourage prompt claims, so that the Recommended Warranty Scheme Administrator can undertake early intervention and management of the fallout from a construction failure (e.g. trying to prevent payment defaults amongst subcontractors and suppliers) rather than just paying a lump sum to the consumer.

This Report consequently does not advocate that notice periods be used to absolutely bar or preclude a claimant's entitlement to compensation. Rather, provisions could be included in the supporting regulations for the Recommended Warranty Scheme that would permit the Recommended Warranty Scheme Administrator to consider whether a substantially delayed or late claim has affected the ability of the Recommended Warranty Scheme to address the relevant construction failure, or has caused it substantially more cost in doing so. If such an assessment is made, the Recommended Warranty Scheme Administrator may then reduce the compensation to the claimant, but would not disenfranchise the claimant from compensation completely.

If the manner in which compensation is delivered under the Recommended Warranty Scheme focuses on proactively interceding and addressing the failure to complete the works, or attending to the defect, then limiting the maximum amount of compensation may also work arbitrarily and unfairly for the scheme. Arbitrary caps of compensation payable will make the Recommended Warranty Scheme Administrator's task of proactively trying to manage and remedy construction failure more challenging. The Recommended Warranty Scheme Administrator may not be able to definitively forecast the final costs of any intervention and therefore may not commit to, for example, doing something such as engaging another contractor to complete remaining works promptly, in fear that the total costs of intervening may exceed the maximum amount of compensation otherwise payable under the *Building Regulations*.

This Report recommends that regulations limiting the amount of compensation to any particular cap or maximum amount only be retained for the Recommended Warranty Scheme if absolutely needed for Government to maintain the Recommended Warranty Scheme on a properly funded basis. Consideration ought to then be given as to how any retained cap to compensation can be required in the supporting regulations to the Recommended Warranty Scheme in a manner that does not actively work against the prompt intervention and management of the construction failure by the Recommended Warranty Scheme Administrator.

The overriding 'compensatory principle' in any 'last resort' residential warranty scheme is to restore the homeowner to the position it would have been in if the builder had not died, disappeared or become insolvent. In the case of the Recommended Warranty Scheme, this also includes if a compensable construction failure had not occurred.

The compensatory principle should only be departed from if the financial viability of the Recommended Warranty Scheme, or its basic affordability for consumers is at risk. That is, arbitrary caps and time limits, popular with residential warranty schemes using private insurance providers in other jurisdictions, should not be retained as a matter of course. (Some commentators have gone as far to say that it is a 'myth' that first resort schemes are not viable.)¹⁰³

Caps and time limits are only two of a number of tools available to the Government to ensure the viability of the Recommended Warranty Scheme in the long run. For example, in considering whether to retain caps and time limits, consideration should be given to:

- the financial contribution to the Recommended Warranty Scheme that would be made by the Recommended Retention Trust Scheme; and
- the robust registration system created under the Reformed Registration System.

¹⁰³ Smith, D, "Builders' Warranty: First resort or last resort or does it really matter", *The Institute of Actuaries of Australia*, CVth General Insurance Seminar 16-19 October 2005, p.21.

Strong controls over builder registration, combined with a strong monopoly residential warranty scheme provider have been promulgated as a recipe for a successful first resort home warranty scheme.¹⁰⁴ We consider the rapid consequences for non-compliant builders under the Reformed Registration System (thereby reducing contractor failure) will necessarily protect against construction failure. When construction failure is reduced, any extra costs of including compensable construction failure as a trigger for cover under the Recommended Warranty Scheme should be neutralised, or at least tempered.

RECOMMENDATION 12: Residential Warranty Schemes

The Recommended Warranty Scheme contemplates the Recommended Warranty Scheme Administrator stepping in and organising the completion of works or rectification of the defect in the absence of the defaulting residential builder.

- Compensation is best provided in the form of early intervention and direct address of the construction failure that consumers are ill-equipped to deal with. The Recommended Warranty Scheme should consequently strive to achieve the outcome of the consumer's residential dwelling being completed or rectified despite the residential builder's failure.
- Arbitrary caps or limits (including precluding any entitlement for late claims by consumers) on the entitlement to compensation are contrary to this compensatory principle. Such mechanisms for limiting Scheme exposure ought to only be introduced, and the compensatory principle compromised, if the viability of the Scheme demands it.

Underquoting and Collusion

Aside from financial viability, an expressed concern in removing financial caps and time limits is that this might undermine efforts to reduce underquoting in the residential building industry. The usefulness of caps and time limits as a toll in reducing the instance of underquoting should be assessed against the compensatory principle. As outlined above, caps based on a percentage of the contract price¹⁰⁵ might well not work against underquoting, since a builder might be incentivised to underquote a job so that the homeowner's recovery for any defects is limited.

Concerns have been raised that the expansion of the scope of the residential warranty scheme to include compensable construction failure, in the absence of caps or time limits, creates the capacity for collusion between homeowners and builders. The concern is that the builder might deliberately underquote a contract, fail to complete it and the owner will claim against the Recommended Warranty Scheme for the shortfall.

We consider that the risk of collusion is low, since under the Reformed Registration System, a breach of the *Building Act or Regulations* or the contravention of a consumer protection order will result in the suspension and cancellation of the builder's registration. Underquoting by a residential builder that results in the triggering of the recommended warranty scheme will be a one way ride for the defaulting contractor out of the industry with suspension or cancellation of its registration. Under the measures against phoenixing introduced under the Reformed Registration System, the nominee of the company will also lose his or her registration for any breach of the company. Therefore, it is not likely that a residential builder will repeatedly collude with homeowners to underquote jobs on the basis that the warranty scheme (without an arbitrary cap to its compensation) will step in and complete those jobs for the builder in the suggested way.

A fraud exception ought to be included in the Recommended Warranty Scheme however, so that where there is reasonable evidence and inference of collusion between a home owner and defaulting residential

¹⁰⁴ Smith, D, "Builders' Warranty: First resort or last resort or does it really matter", *The Institute of Actuaries of Australia*, CVth General Insurance Seminar 16-19 October 2005, p.34.

¹⁰⁵ See paragraph I.C.f of this part of the Report.

builder (including of cases of gross underquoting in which the home owner can be reasonably inferred as being complicit with).

In conclusion, to balance the primacy of the compensatory principle against these concerns as to the policy needs for arbitrary caps and limits to compensation, we recommend that a limits be placed on recovery under the Recommended Warranty Scheme where:

- a claim has been made so late that it will increase the costs of rectifying or completing any work under the contract; or
- the value of the constructed works to be undertaken clearly exceeds the price to be paid and the home owner can be inferred to have been complicit with a scheme to have the Recommended Warranty Scheme used to address the difference between the contract price and the cost of completion of the works,¹⁰⁶

by the Recommended Scheme Administrator being given the powers to reduce the amount payable to the homeowner in such circumstances. Any finding of fraud ought be referred for disciplinary action to the administrator of the registration system

RECOMMENDATION 13: Residential Warranty Schemes

There ought to not be a policy disposition towards arbitrary capping or limiting of compensation to achieve other policy outcomes, such as underquoting.

A fraud exception ought to be included in the Recommended Warranty Scheme, granting powers to the Scheme Administrator to refuse compensation where home owners are complicit in fraudulent conduct (including clear underquoting with intent for the Recommended Warranty Scheme to pick up the completion of the dwelling).

Alternative recommendation for 'nominal insurer'

This Report considers that a person ought not to lose their entitlement to compensation because of defaults and failings of others.¹⁰⁷ Accordingly, if the recommendation of this Report for the establishment of the Recommended Warranty Scheme is not adopted, it is alternatively recommended that a nominal insurer, similar to that established in the workers' compensation scheme, be created. That entity will seek to cover consumers that have suffered loss or damage because of a qualifying construction failure (e.g. the residential builder has died, disappeared or become insolvent, or another qualifying, compensable event has occurred) and there has been a failure by the residential builder to properly obtain the relevant cover for the project under the scheme (e.g. the builder did not get a fidelity certificate and contribute the premium of the particular job under the present MBA Fidelity Fund scheme).

RECOMMENDATION 14: Residential Warranty Schemes

- If the recommendation to establish the Recommended Warranty Scheme is not adopted and an industry or insurance model scheme is retained, then it is recommended that an 'emergency backup', akin to the nominal insurer in the workers compensation scheme, ought to be established.
- Civil penalties and rights of restitution ought to be legislated against a residential builder and its directors for failing to obtain cover from either model.

¹⁰⁶ This exception is similar to that exception provided for under the QBCC Policy (Edition 8), clause 1.6.

¹⁰⁷ We refer to the above discussion regarding the 'backstop' mechanism of the nominal insurer above at page 50.

B. Transitional matters

If a Government model is adopted by the Territory appropriate arrangements to address the legacy schemes, particularly the MBA Fidelity Fund, will need to be put in place. Although the MBA Fidelity Fund is administered by the MBA on a not-for-profit basis, there will be substantial organisation and management considerations for that industry association to address.

RECOMMENDATION 15: Residential Warranty Schemes

The MBA Fidelity Fund and the HBCF Scheme liabilities on extant certificates under those schemes ought to be subsumed into the new Recommended Warranty Scheme, and the administrator of the MBA Fidelity Fund indemnified for any residual liability.

Contractor Registration

I. Nature and Objectives of the existing Builders' Registration System

A. *Building Act* objects

The *Building Act* presently incorporates a registration system for residential builders operating in specified Building Control Areas of the Territory¹⁰⁸ ('existing builders' registration system').

The stated objectives of the existing residential builders' registration system are to:

- ensure consumer protection;
- maintain minimum standards; and
- protect public safety and amenity.¹⁰⁹

This is reinforced by the broader objectives of *Building Act* which underpin the registration and regulation for building practitioners and building works. The various objects of the *Building Act* (for the building sector of the construction industry) include to:

- establish, maintain and improve building standards;
- facilitate the adoption and efficient application of national uniform building standards;
- facilitate national uniform accreditation of building products, construction methods, building designs, building components and building systems;
- maintain, enhance and improve the safety, health and amenity of people using buildings;
- promote and provide for the construction of environmentally efficient buildings;
- provide an efficient and effective system for granting building permits, administering building matters and resolving building disputes;
- reform aspects of the law relating to the legal liability of regulatory agencies and building practitioners;
- facilitate national uniformity in the training and qualifications of certain building practitioners and the recognition of qualifications on a national basis;
- provide for the registration of building practitioners;
- provide for the investigation, audit and disciplining of building practitioners;
- establish a scheme relating to residential building consumer protection and the provision of residential building insurance or fidelity certificates;
- facilitate the cost effective construction of buildings; and
- aid the achievement of an efficient and competitive building industry.¹¹⁰

The existing builders' registration system does not extend to commercial, civil and engineering contractors.

It is said that the purpose of the existing builders' registration system is to impose minimum standards for the qualifications and experience of building contractors for both individual and corporate builders participating in the residential market. This, in turn, is intended to assist in maintaining building quality standards, reducing the incidence of poor quality work, increasing standards of work safety and amenity,

¹⁰⁸ That is, those builders operating in the category of 'building contractor residential'.

¹⁰⁹ Northern Territory Building Practitioner's Board, *BPB-010: Registration Policy for Building Contractors*, [1.1].

¹¹⁰ *Building Act* (NT), s. 3.

prohibiting misleading conduct and providing a system for the protection of consumers of services provided by building contractors in the residential market.¹¹¹

The consumer protection objective of builder's registration is identifiable in the following registration provisions of the *Building Act*:

- section 22(1)(a), which affords certain titles only to registered building practitioners and prohibits persons or corporations who are not registered as building practitioners from holding themselves out as being registered or qualified to practise;
- sections 22(1)(b) and (c), which prohibit a person from performing a function or exercising a power of, or working as a building practitioner of a particular category of building practitioner unless he or she is appropriately registered;
- section 25, which requires corporations to have a nominated person within the corporation who is registered as a building practitioner in the appropriate category and subject to the jurisdiction of the Building Practitioners Board; and
- section 24F, which requires an applicant for renewal of registration to demonstrate that they have performed competently in their category of performance reporting.

¹¹¹ Northern Territory Building Practitioner's Board, BPB-010: Registration Policy for Building Contractors, [1.1].

II. Existing Builders' Registration System

A. The registration system

Currently only registered building contractors in the residential sector are required to be registered if they carry out prescribed building works in Tiers 1 and 2 Building Control Areas.¹¹²

In the March 2015 quarter, 85% of construction work performed in the Territory was in the civil and engineering sector and 8% in the commercial sector.¹¹³ This means that:

- at least 93% of construction contracting work undertaken in the Territory in the first quarter of 2015 is non-residential and will not have been subject to contractor registration under the existing builders' registration system. Of that seven percent of residential work, only a small percentage will be the residential builders, the majority will be tradespersons and smaller subcontractors; and
- the proportion of construction work in the Territory that is executed by registered residential builders under the present scheme is low from a whole of industry perspective.

B. Building Practitioners Board

The Building Practitioners Board (**BPB**) is a statutory body established by the *Building Act* and is responsible for:

- registering building practitioners;
- establishing and maintaining a system of performance reporting to ensure that information on practitioners' past performance is available and can be taken into account when assessing their competence;
- monitoring practitioners' compliance with registration requirements;
- monitoring practitioners' competence and professional conduct;
- conducting inquiries into practitioners' work and conduct (and, if necessary, disciplining them); and
- developing and publishing codes of practice for reference by building practitioners and for use by the BPB and the Director of Building Control (**Director**) in assessing practitioners' work and conduct.¹¹⁴

C. Who must be registered

Building Practitioners

Building practitioners who carry out 'residential building work' in the Territory must be registered.

'Building practitioners' are divided into the following categories:

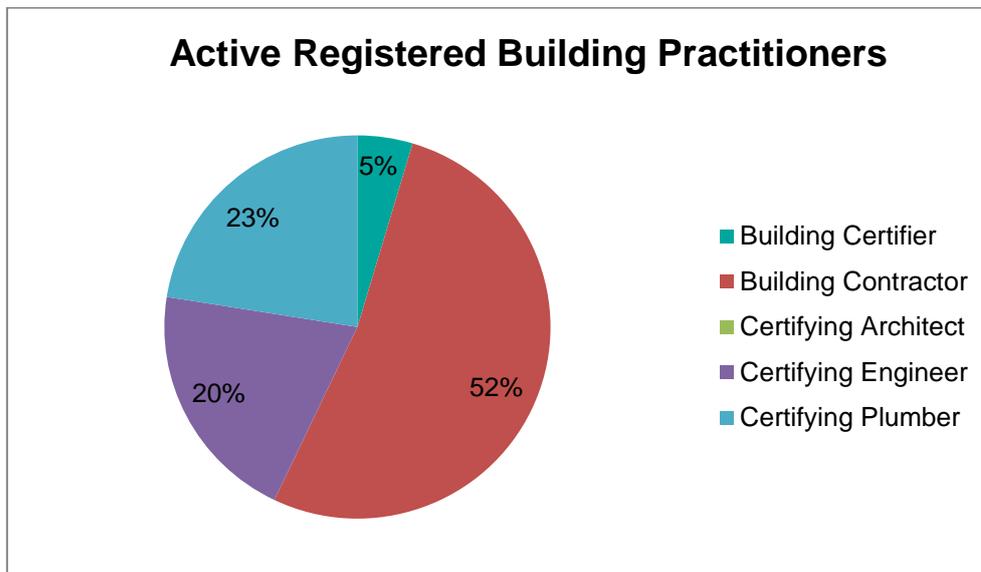
- building certifiers;
- certifying architects;
- certifying engineers;
- certifying plumbers; and
- building contractors.¹¹⁵

¹¹² Tier 1 includes Darwin, Lake Bennett and Alice Springs. Tier 2 includes Adelaide River, Batchelor, Borroloola, Brewer Estate, Elliott, Highway Control, Jabiru, Katherine, Katherine Gorge, Kings Canyon, Larrimah, Mataranka, Namarada, Pine Creek, Tennant Creek, Timber Creek, Ti Tree and Yulara.

¹¹³ See Residential Warranty Schemes part of this Report. Data available from Australian Bureau of Statistics, Cat. No: 8755: Construction Work Done, Australia (Preliminary), June 2015.

¹¹⁴ *Building Act* (NT), s. 14.

The following chart provides a snapshot of the proportion of builders registered in each category of building practitioner in the Territory as at September 2015:¹¹⁶



This chart shows that the majority of registered building practitioners are building contractors and plumbers, that is, contractors.

a. Other sub-categories of building practitioners

The *Building Regulations* prescribe sub-categories of building practitioners.¹¹⁷ The total numbers of building practitioners registered in each sub-category as at September 2015 can be summarised as follows:¹¹⁸

Sub-category of Building Practitioner	Total Active Registrants
Building Certifier (Residential)	8
Building Certifier (Unrestricted)	73
Building Contractor (Restricted)	655
Building Contractor (Unrestricted)	264
Certifying Architect	0
Certifying Engineer (Hydraulic)	42
Certifying Engineer (Mechanical)	74
Certifying Engineer (Structural)	242
Certifying Plumber and Drainer	358

¹¹⁵ *Building Act* (NT), s. 4A.

¹¹⁶ These statistics are taken from the Register of Building Practitioners published by the Building Practitioners Board, available from: <http://www.ntlis.nt.gov.au/building-practitioners/>. Accessed 10/09/2015.

¹¹⁷ *Building Regulations* (NT), r. 39A.

¹¹⁸ From the Register of Building Practitioners published by the Building Practitioners Board, available from: <http://www.ntlis.nt.gov.au/building-practitioners/>. Accessed 10/09/2015.

Sub-category of Building Practitioner	Total Active Registrants
Certifying Plumber and Drainer (Design)	36
Total Building Practitioners Registered	1752

Where the cost of the works is above \$12,000 a building practitioner must be registered to undertake the following work:¹¹⁹

- new single houses, townhouses, duplexes, and new residential units *to any height*;
- verandas, garages and carports built as part of new single dwellings and residential units;
- extensions such as living areas, bedrooms and enclosed attached garages to existing single houses and residential units; and
- retaining walls associated with the actual structure of a single house or residential unit.

These types of work are known as ‘prescribed building work’.

Work that does not require a registered building contractor includes:

- renovations or alterations to existing buildings, including renovations to bathrooms and kitchens where there is no increase in the floor area;
- free standing sheds or fences;
- retaining walls not associated with the actual single house or residential unit;
- verandas or open carports being added to existing single houses or residential units; and
- commercial or industrial buildings.¹²⁰

The definition of ‘residential building work’ in the *Building Act* is broader than the types of work that is required to be covered by the operation of the existing residential warranty scheme as operated by the MBA Fidelity Fund in the Territory.

Importantly, under the current builders’ registration system there is no requirement to be registered as a building contractor in the Territory if the contractor is undertaking any other sort of building work other than residential building work (e.g. commercial or industrial work is not caught by the defined terms).

b. Sub-categories of residential building contractors – restricted and unrestricted

Building contractors are sub-categorised into ‘building contractor residential (restricted)’ and ‘building contractor residential (unrestricted)’:¹²¹

- Building contractors in the unrestricted category may construct prescribed building works for single dwellings, townhouses, duplexes and residential units *up to any height*.
- Building contractors in the restricted category are limited to constructing prescribed building works for single dwellings, townhouses, duplexes and residential units of *not more than 2 storeys*.

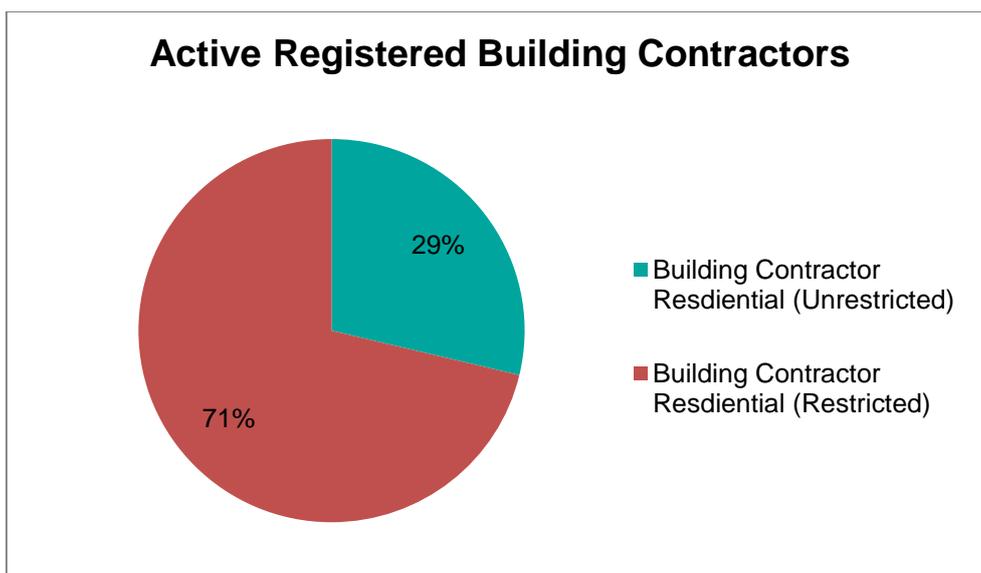
The following chart illustrates that the majority of active registered building contractors fall into the restricted category. Currently in the Territory, there are 655 active contractors in the restricted category, compared to 264 contractors operating in the unrestricted category.¹²²

¹¹⁹ <http://www.bpb.nt.gov.au/>

¹²⁰ <http://www.bpb.nt.gov.au/>

¹²¹ *Building Regulations (NT)*, r. 39A.

¹²² These statistics are taken from the Register of Building Practitioners published by the Building Practitioners Board, available from: <http://www.ntlis.nt.gov.au/building-practitioners/>. Accessed 10/09/2015.



Other Contractors

a. Electricians

The *Electrical Workers and Contractors Act* (NT) regulates electrical contractors in the Territory by establishing a licensing system overseen by the Electrical Workers and Contractors Licensing Board (the **Board**). The Board is responsible for issuing electrical licences to electrical contractors and overseeing disciplinary matters. The Board consists of members from the electrical industry including government departments, electrical engineering, apprentice training, electrical contracting and electrical workers.

b. Plumbers

Plumbers and drainers must be licensed under the *Plumbers and Drainers Licensing Act* (NT). This legislation also establishes the Plumbers and Drainers Licensing Board that oversees disciplinary matters for plumbers and drainers. Plumbers and drainers are, however, also a specific category of 'building practitioner' as 'certifying plumbers and drainers' under the *Building Act*. Plumbers and drainers are therefore also included in the coverage of building practitioners under the *Building Act* including the processes provided under the Act for registration and discipline processes.

D. Registration application and renewal elements for Residential Building Contractors

The *Building Act* requires that natural persons and corporations in the relevant category of residential building contractor must be registered. For a company registrant, a director or nominee of the company who is resident in the Territory must be registered in the same category of building contractor as the company. There are no requirements that a firm or partnership be registered. A firm or partnership can trade in a category of building contractor provided that a partner is a registered building contractor and that partner is a signatory to the building contract.

If the BPB is satisfied of the criteria discussed below it *must* grant the applicant registration and does not have discretion to refuse the application. Despite this stipulation, the BPB is not prevented from considering other information it considers relevant in deciding the application.¹²³ Furthermore, provided they are appropriate and consistent with the *Building Act*, the BPB may impose conditions as it sees fit on the grant or renewal of registration.¹²⁴

Individuals

The BPB must be satisfied that an individual applying for registration as a building contractor:

¹²³ *Building Act* (NT), s. 24FA.

¹²⁴ *Building Act* (NT), s. 24FAB.

- is a fit and proper person to be registered;
- has certain specified qualifications and experience determined by the Minister in relation to the specific category;¹²⁵ and
- holds certification from a registered accountant that the registered building contractor has net tangible assets of at least \$50,000 and will continue to hold those net financial assets for the period of registration (2 years).¹²⁶

Corporations

In order to grant registration to a corporation as a building contractor the BPB must be satisfied that:

- the corporation has at least one individual in the management or conduct of the corporation (or a nominee of the corporation) registered in that category;
- each individual concerned with the management or conduct of that corporation who is not registered in that category would be a fit and proper person had they applied personally for registration;
- the corporation holds the prescribed amount of professional indemnity insurance if applicable;¹²⁷
- the registered director or nominee of the corporation will provide adequate supervision of the building work carried out by the corporation; and
- the corporation currently holds, and during the period of registration will continue to hold, \$50,000 in net financial assets.¹²⁸

Once a company is registered:

- all contracts or engagements entered into by the company shall identify it as the practitioner;
- all work undertaken by the company shall be under the company's registration number and appropriate insurance and not under the registration number of an individual employee;
- all work shall be carried out by or at the direction of, and certified by, a natural person who is registered in the appropriate practitioner category;¹²⁹ and
- all advertisements relating to the services and functions offered by the company shall include that person's name.¹³⁰

Net Financial Asset certification

The *Building Regulations* requires that in order to prove the net financial assets criteria, the applicant must provide a net financial assets certificate to the BPB.¹³¹ An accountant must make an assessment of the financial assets of an applicant before providing a net assets certificate to that applicant.¹³² In conducting the assessment, the accountant must:

- not consider any financial information earlier than 12 months before the date of the certificate;¹³³
- only consider the applicant's share of assets held jointly with another person or corporation;¹³⁴ and
- in the case that the applicant is a director or nominee of a corporation, only consider the assets of that corporation if the builder's registration is solely for the builder to carry out the building work for the corporation and there is a written agreement between the builder and the corporation to that effect.¹³⁵

¹²⁵ *Building Act* (NT), s. 24(1).

¹²⁶ *Building Act* (NT), s. 24B(c).

¹²⁷ *Building Act* (NT) s. 24G; *Ministerial Statement: Determinations Relating to Building Practitioners* (Gazetted 28 December 2012), Schedule 2.

¹²⁸ *Building Act* (NT), s. 24B(c); *Building Regulations* (NT), r. 39B(1).

¹²⁹ *Building Act* (NT), s. 25(2)(a).

¹³⁰ *Building Act* (NT), s. 25(1)(c).

¹³¹ *Building Regulations* (NT), r. 39B(2).

¹³² *Building Regulations* (NT), r. 39C.

¹³³ *Building Regulations* (NT), r. 39C(2).

¹³⁴ *Building Regulations* (NT), r. 39B(3)-(4).

The BPB may at any time give notice to a building contractor to provide the BPB with evidence of a building contractor's compliance with the requirement to hold net financial assets.¹³⁶

Renewal of registration

Building registration remains in force for 2 years from the date it was granted or renewed.¹³⁷

A minimum of two months before the expiration of its registration,¹³⁸ and upon the payment of a fee¹³⁹ (currently \$1,057) a building practitioner may apply for a renewal of its registration.

Similar to the registration requirement, the BPB must approve a building practitioner's application for renewal if it is satisfied of certain criteria.

b. Individual

For an individual, the BPB must be satisfied that the individual:

- is a fit and proper person to be registered in that category;
- has the relevant qualifications and experience;
- has complied with the mandated continuing development requirements;
- has, during the registration period, been shown by performance reporting to have performed competently;¹⁴⁰ and
- the individual currently holds, and during the period of renewal will continue to hold, net assets of \$50,000.¹⁴¹

c. Company

In order to grant renewal of registration to a corporation as a building contractor the BPB must be satisfied that:

- the corporation has at least one individual in the management or conduct of the corporation (or a nominee of the corporation) registered in that category who has complied with the relevant development requirements during the period of registration;
- each individual concerned with the management or conduct of that corporation who is not registered in that category would be a fit and proper person had they applied personally for registration;
- the corporation has, during the registration period, been shown by performance reporting to have performed competently;¹⁴² and
- the corporation currently holds, and during the period of registration will continue to hold, \$50,000 in net financial assets.¹⁴³

Performance Reporting

Adherence to 'performance criteria' is one of the criteria to satisfy the BPB of eligibility of renewal.¹⁴⁴ Despite this, 'performance reporting' is not defined in the *Building Act* or its subordinate legislation. The

¹³⁵ *Building Regulations* (NT), r. 39B(5).

¹³⁶ *Building Act* (NT), s. 25B.

¹³⁷ *Building Act* (NT), s. 24D.

¹³⁸ *Building Regulations*, r. 40B.

¹³⁹ *Building Act* (NT), s. 24E; see *Northern Territory Building Practitioner's Board Policy BPB-013: Requirement to Register a Company as a Building Practitioner*.

¹⁴⁰ *Building Act* (NT), s. 24F(1).

¹⁴¹ *Building Act* (NT), s. 24F(2).

¹⁴² *Building Act* (NT), s. 24F(3).

¹⁴³ *Building Act* (NT), s. 24F(4).

¹⁴⁴ *Building Act* (NT), ss. 24F(1)(d), 24F(3)(c).

details of performance reporting, in particular what information is to be provided as part of a 'system of performance reporting' under the *Building Act*, has therefore been left to the BPB to determine.¹⁴⁵

The system of performance reporting is outlined by the BPB in its policy *BPB-011: Performance Reporting Systems*. This policy requires an applicant to provide the following information:

- a project list detailing the individual projects the practitioner has been involved in during the period of their registration (previous 2 years); and
- responses to various questions in the 'Past Performance Section' of the application form specifically relating to matters of professional conduct which will provide an indication of past performance relating to those building projects during the period of their registration (previous 2 years) as detailed in the applicant's project list.

In particular these questions inquire into whether the applicant in the previous 2 years:

- has been a party to a dispute concerning building work with any client or subcontractor in any court proceedings (whether in Australia or elsewhere) or through the Office of Consumer and Business Affairs or the Department of Justice Community Justice Centre;
- has been a party to rapid adjudication proceedings under the *Construction Contracts (Security of Payments) Act* (or equivalent in Australia or elsewhere);
- has received notification from the Director concerning a complaint pursuant to section 29 of the *Building Act* (or equivalent in Australia or elsewhere);
- has been the subject of an audit conducted by the Director pursuant to section 34A of the *Building Act* (or equivalent in Australia or elsewhere);
- has been the subject of an investigation or inquiry concerning building work (or equivalent in Australia or elsewhere); or
- has been subject to a claim by the HBCF (or an equivalent fund in Australia or elsewhere) or by its professional indemnity insurer.

If the fourth, fifth or sixth matters listed above are ongoing or unresolved, the Registrar will not include the details of the matter in the papers provided to the BPB for consideration of the application. They will receive a notification from the Registrar in the following form:

*"The Board noted the existence of an unresolved matter as disclosed in the application form but did not make any enquiry and made its decision without regard to the circumstance. The matter may however be taken into account in the future at the conclusion of the matter."*¹⁴⁶

Auditing

An audit is a systematic, independent and documented process to determine the compliance of a building practitioner with their obligations under the *Building Act*.

The Director may conduct an audit of a building practitioner:

- whenever the Director considers it appropriate;
- as a consequence of a complaint; or
- as requested by the BPB (in accordance with section 34U of the *Building Act*).¹⁴⁷

The precise process which the audit must take is not prescribed, however an audit will generally consider:

¹⁴⁵ Northern Territory Building Practitioner's Board Policy BPB-011: Performance Reporting System.

¹⁴⁶ Northern Territory Building Practitioner's Board Policy BPB-011: Performance Reporting System.

¹⁴⁷ *Building Act* (NT), s. 34A.

- a review, analysis and assessment of relevant documentation provided by, and associated with, the practitioner's obligations in accordance with the *Building Act* including interrelated business functions of the practitioner;
- assessment of current and/or completed building works in accordance with valid permits according to the requirements of the *Building Act*, *Building Regulations* and the Building Code of Australia; and/or
- such other functions of the practitioner as determined and notified by the Director.¹⁴⁸

Further when a practitioner is selected for an audit, prior notification will be given in writing in accordance with section 34B of the *Building Act*, including the date and time of the audit, the matters being audited and the nature or format of the audit.¹⁴⁹

There is no publicly available information as to the number of building practitioners audited in the Territory, or what the subject matter of the audits was. Consequently, this Report is unable to determine whether audits have been conducted and action on completion of audit taken for breaches of the existing registration requirements, such as failing to maintain the \$50,000 minimum amount of funds. It can be reasonably surmised however that as audits can be triggered upon:

- a complaint to the Director (discussed below);
- when the practitioner has:
 - committed an offence against the *Building Act* or the *Building Regulations*;
 - carried out work in a negligent or incompetent manner; or
 - is otherwise guilty of professional misconduct,¹⁵⁰

the majority of the no doubt limited audit resources of the Director will be bound up in audits arising from complaints about non-compliance of a contractor's works.

¹⁴⁸ <http://www.lands.nt.gov.au/building/auditing>

¹⁴⁹ <http://www.lands.nt.gov.au/building/auditing>

¹⁵⁰ *Building Act* (NT) s. 26(1).

III. Building Practitioner disciplinary processes and the suspension and termination of builders' registration under existing system

A. Overview of disciplinary mechanisms under the *Building Act*

If a consumer is not satisfied with the performance, work or conduct of a registered building practitioner, different avenues are available to pursue the builder, depending on the outcome that the consumer is seeking. As summarised in the following table, the complaints process is predominately handled by three bodies:

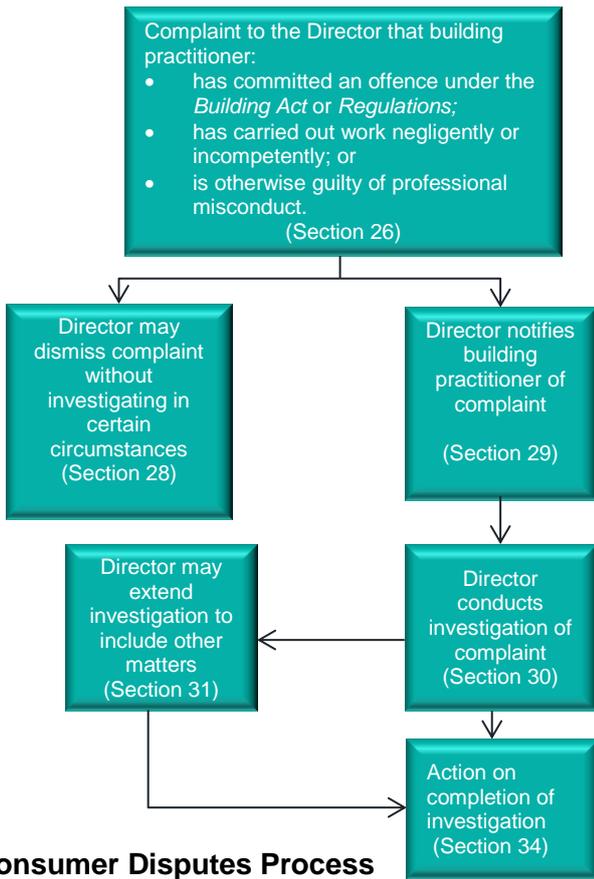
- the Director of Building Control (**Director**);
- the Building Practitioners Board (**BPB**); and
- the Commissioner of Residential Building Disputes (**Commissioner**).

Complaints can be made to the Director or the Commissioner, however disciplinary action, including the suspension or cancellation of registration, is the responsibility of the BPB.

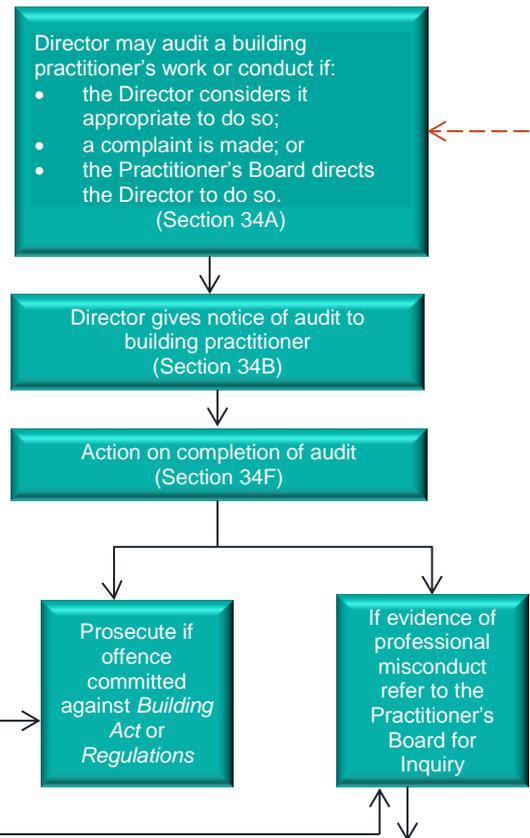
The complaints system provided for building practitioners (that includes registrable building contractors) is summarised in the table annexed as Annexure 1.

Additionally, the main elements of the existing disciplinary regime of the *Building Act* for building practitioners are depicted as follows:

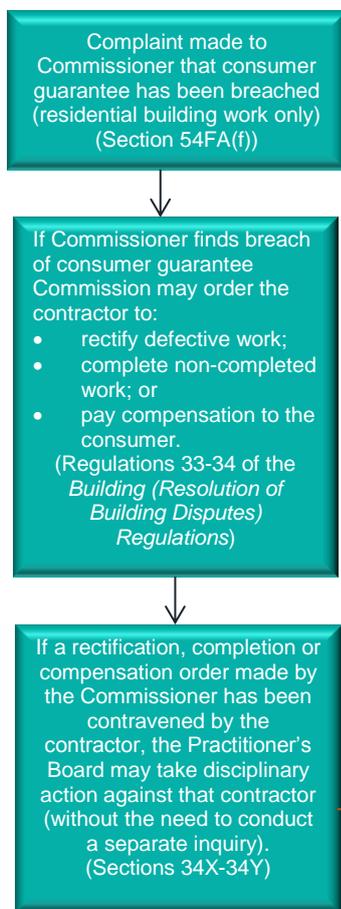
Complaints Process



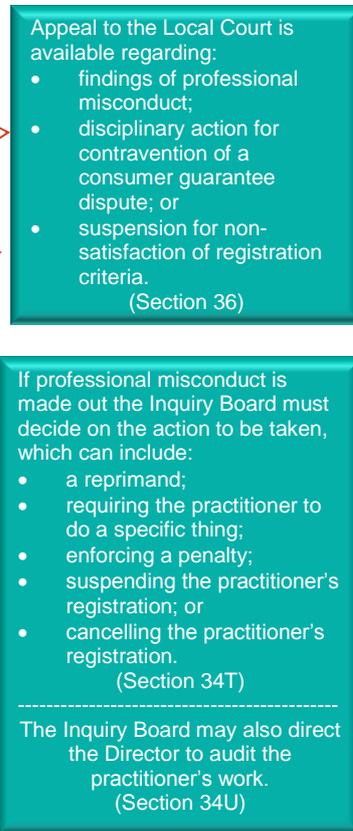
Audit Process



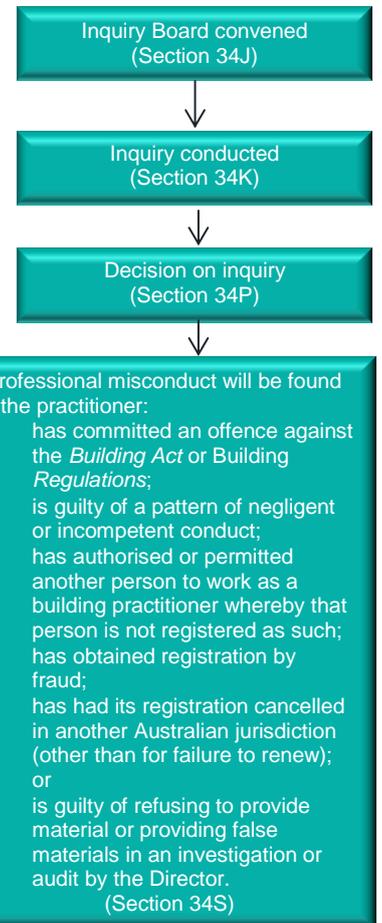
Consumer Disputes Process



Appeal Process



Disciplinary Process



The Practitioner's Board may suspend or cancel practitioner's registration if the practitioner fails to meet its registration obligations.
(Section 34VA)

B. Director of Building Control

The Director has four key statutory functions:

- maintaining a register of building permits;
- enforcement;
- investigation of complaints against registered building practitioners; and
- auditing of registered building practitioners.

A person who is seeking disciplinary action against a building practitioner may complain to the Director where it is alleged that the building practitioner:

- has committed an offence under the *Building Act* or *Building Regulations*;
- has carried out work in a negligent or incompetent manner; or
- is otherwise guilty of professional misconduct.¹⁵¹

The Director may:

- request further particulars about the complaint;¹⁵²
- dismiss the complaint if certain criteria are met;¹⁵³
- investigate the complaint;¹⁵⁴
- extend the investigation to other matters or to other building practitioners;¹⁵⁵
- require the builder to produce documents to be used in the investigation;¹⁵⁶ and
- conduct an audit into a building practitioner's work or conduct.¹⁵⁷

Upon investigation of a complaint, the Director:

- may prosecute the builder for the alleged offence (in the Local Court) if the Director finds evidence that an offence has been committed by the builder; and
- must refer the matter to the BPB if the Director finds evidence that the builder is guilty of professional misconduct.¹⁵⁸

The Director cannot:

- consider contractual disputes;
- order the return of a progress payment;
- order a practitioner to undertake rectification work;
- order compensation; or
- order unfinished work to be completed.

C. Building Practitioners Board

a. BPB may hold an inquiry

¹⁵¹ *Building Act* (NT), s. 26.

¹⁵² *Building Act* (NT), s. 27.

¹⁵³ *Building Act* (NT), s. 28.

¹⁵⁴ *Building Act* (NT), s. 30.

¹⁵⁵ *Building Act* (NT), s. 31.

¹⁵⁶ *Building Act* (NT), s. 32.

¹⁵⁷ *Building Act* (NT), s. 34A.

¹⁵⁸ *Building Act* (NT), s. 34.

The BPB may hold an inquiry into a matter that is referred to it by the Director including where:

- a building practitioner, in the course of an investigation by the Director, refuses or fails to provide information requested from the Director, or provides false or misleading information to the Director;¹⁵⁹
- the Director has found there is evidence that a building practitioner is guilty of professional misconduct;¹⁶⁰
- a building practitioner, in the course of an audit by the Director, refuses or fails to provide information requested from the auditor, or provides false or misleading information to the auditor; or¹⁶¹
- the Director has found evidence that a builder the subject of an audit is guilty of professional misconduct.¹⁶²

A list of inquiries conducted and disciplinary actions taken by the BPB is published on the BPB's website.

b. Establishment of an Inquiry Board

When the BPB conducts an inquiry, it must form an Inquiry Board.¹⁶³ On completion of an inquiry, the Inquiry Board must:

- decide whether or not a building practitioner is guilty of professional misconduct; and
- if the practitioner is found to be guilty, decide on the action to be taken.¹⁶⁴

The Inquiry Board can also direct the Director to conduct an audit.¹⁶⁵

Professional misconduct by a building practitioner includes:

- an offence under the *Building Act* or the *Building Regulations*;
- patterns of negligent or incompetent conduct or serious negligence or incompetence in carrying out particular work;
- where a building practitioner authorises or permits another person to do work on the practitioner's behalf in a category of work in which that person is not authorised;
- where registration is obtained by fraud or misrepresentation;
- if a building practitioner's registration is cancelled or suspended in a place outside the Territory; or
- if a building practitioner is otherwise guilty of professional misconduct.¹⁶⁶

c. Disciplinary Powers of the BPB

If the Inquiry Board finds a practitioner guilty of professional misconduct it may reprimand the practitioner, suspend the practitioner's registration (for a period not exceeding 3 years) or cancel the practitioner's registration.¹⁶⁷ The Inquiry Board may also require the practitioner to:

- pay some or all of the costs of the Director's inquiry;
- give an undertaking to do or not to do a specified thing; or
- pay a civil penalty not exceeding 40 penalty units (currently \$6,120).¹⁶⁸

¹⁵⁹ *Building Act* (NT), s. 33(1).

¹⁶⁰ *Building Act* (NT), s. 34(1)(b).

¹⁶¹ *Building Act* (NT), s. 34E(1).

¹⁶² *Building Act* (NT), s. 34F(2)(b) or 34F(2)(3).

¹⁶³ *Building Act* (NT), s. 34J.

¹⁶⁴ *Building Act* (NT), s. 34P.

¹⁶⁵ *Building Act* (NT), s. 34U.

¹⁶⁶ *Building Act* (NT), s. 34S.

¹⁶⁷ *Building Act* (NT), s. 34T(a),(e),(f).

¹⁶⁸ *Building Act* (NT), s. 34T(a)-(d).

Furthermore, as explained below, the BPB may take disciplinary action when a building practitioner has not complied with an order made by the Commissioner or the Northern Territory Civil and Administrative Tribunal for breach of a consumer guarantee.¹⁶⁹

Decisions of the BPB can be reviewed by the Local Court.¹⁷⁰

The BPB is not a dispute resolution body and similar to the Director does not have the power to:

- consider contractual disputes;
- order the return of a progress payment;
- order a practitioner to undertake rectification work;
- order compensation; or
- order unfinished work to be completed.

D. Commissioner of Residential Building Disputes (Consumer Affairs)

a. Applications that can be brought before the Commissioner

The Commissioner is a dispute resolution body which can consider 3 broad types of applications relating to *building contractors* (not building *practitioners*). These are:¹⁷¹

- consumer guarantee disputes (applications for a binding decision and orders about allegedly defective or incomplete work);¹⁷²
- technical inspections (appointment of a qualified person to inspect allegedly defective or incomplete work);¹⁷³ and
- mediation or conciliation (facilitation of voluntary mediation or conciliation that could result in a binding agreement, if both parties come to agreement during the conference).¹⁷⁴

The Commissioner only has the power to hear applications regarding consumer guarantee disputes and technical inspections when the dispute or inspection involves a residential builder and is for work covered under the MBA Fidelity Fund scheme. As described in the 'Residential Warranty Schemes' part of this Report, the mandatory requirement for a residential builder to take out a fidelity fund certificate for work of at least \$12,000 in value, for the construction of the following buildings:

- a new Class 1a building (which are houses, duplexes, townhouses) and an extension to a Class 1a building;
- a new Class 2 building up to three residential storeys (which are apartments, units, flats) and an extension to a Class 2 building (also only if the Class 2 building does not exceed 3 residential storeys);
- a Class 10 building (which includes garages, retaining walls, verandahs) attached to a Class 1a or 2 building (under three residential storeys), if the Class 10 building is constructed at the same time as that building;
- a Class 10 building that is a retaining wall (whenever constructed) that is not attached to a relevant building but on which the integrity of the relevant building depends; or
- building work as described above and done for Defence Housing Australia.

¹⁶⁹ *Building Act* (NT), s. 34Y, *Building (Resolution of Building Work Disputes) Regulations*, r 92-94.

¹⁷⁰ *Building Act* (NT), ss. 35-36.

¹⁷¹ Other classes of building practitioners are excluded.

¹⁷² *Building Act* (NT) ss. 54FA(1)(f); 54FC.

¹⁷³ *Building Act* (NT), ss. 54FA(1)(d); 54FB.

¹⁷⁴ *Building Act* (NT), s. 54FA(1)(e).

The mediation and conciliation function of the Commissioner is not limited to matters concerning construction covered by the MBA Fidelity Fund scheme. This function is open to *all* residential building (including Class 2 buildings higher than 3 storeys).

b. Consumer Guarantee disputes

A consumer guarantee dispute arises when a current owner alleges that a residential builder has contravened a consumer guarantee.

A current owner can only apply to the Commissioner for a decision about a consumer guarantee dispute where there is no contractual relationship between the current owner and the builder in relation to the residential building work to which the dispute relates.¹⁷⁵ This includes situations where:

- the work has been completed under the contract and the parties consider the contractual obligations fulfilled; or
- regardless of the state of the work, the parties' relationship has broken down irretrievably.¹⁷⁶

If the applicant cannot locate the respondent, the Commissioner may assist in locating the respondent.¹⁷⁷

If the Commissioner makes a decision that one or multiple consumer guarantees have been breached the Commissioner may make orders.

- Where the breach of the consumer guarantee involved the non-completion of work, the Commissioner may order the respondent to complete the work. Where such an order would be impracticable, the Commissioner may order the respondent to pay a specified amount (not exceeding \$100,000) as compensation to the applicant.¹⁷⁸
- Where the breach relates to defective work, the Commissioner may order rectification of that work. Where such an order would be impracticable, the Commissioner may order the respondent to pay a specified amount (not exceeding \$100,000) as compensation to the applicant. The Commissioner may also require the respondent to pay the costs of inspection of the rectified work.¹⁷⁹

If the building practitioner fails to comply with a rectification order, this will constitute professional misconduct¹⁸⁰ entitling the BPB to take disciplinary action including the possible suspension or cancellation of that builder's registration. The BPB may take such an action without conducting a separate inquiry.¹⁸¹

If the building practitioner fails to comply with a completion or compensation order, that building practitioner may be subject to disciplinary action, including the possible suspension or cancellation of that builder's registration. The BPB may take such an action without conducting a separate inquiry by the Inquiry Board process.¹⁸²

The application fee is currently \$115. The Commissioner has 10 business days to decide whether to accept or reject the application.

c. Technical inspection applications

A current owner of a residential building may apply to the Commissioner for a technical inspection report if that current owner alleges that the residential building work is defective. It is anticipated that technical inspection applications are used on occasions such as where there is a difference in opinion between the builder and owner about the quality of workmanship.

Technical inspections applications can be made concurrently with consumer guarantee dispute applications or may be made separately. The application fee for technical inspections is currently \$230.

¹⁷⁵ *Building (Resolution of Building Work Disputes) Regulations* (NT), r. 18(1).

¹⁷⁶ *Building (Resolution of Building Work Disputes) Regulations* (NT), r. 18(2).

¹⁷⁷ *Building Regulations* (NT), r. 22.

¹⁷⁸ *Building (Resolution of Building Work Disputes) Regulations* (NT), r. 33.

¹⁷⁹ *Building (Resolution of Building Work Disputes) Regulations* (NT), r. 34.

¹⁸⁰ *Building Act* (NT), s. 34X.

¹⁸¹ *Building Act* (NT), s. 34Y, *Building (Resolution of Building Work Disputes) Regulations* (NT), r. 92.

¹⁸² *Building Act* (NT), s. 34Y, *Building (Resolution of Building Work Disputes) Regulations* (NT), r. 93.

d. Mediation and conciliation

Either the current owner of a residential building or the residential builder may request the Commissioner to facilitate a negotiated agreement process between those parties.¹⁸³ Mediation and conciliation services through the Commissioner are voluntarily entered into by the parties and are free.

e. Appeal from a decision of the Commissioner

The Northern Territory Civil and Administrative Tribunal can review a decision of the Commissioner:

- relating to the outcome of a consumer guarantee dispute;
- to reject a mediation or conciliation application;
- to reject a technical inspection application;
- to reject a consumer guarantee dispute application; or
- to dismiss a consumer guarantee dispute application because of absence of the applicant.

E. Practical engagement of the Disciplinary Processes

a. Commissioner of Residential Building Disputes

The Commissioner has the discretion to publish decisions relating to consumer guarantee dispute applications.¹⁸⁴ These decisions are not publically available at this time.

b. Complaints to the BPB

There are seven published decisions following inquiries into professional misconduct of building practitioners since 2007 that appear on the BPB website.¹⁸⁵ Of these inquiries:

- in all 7 instances the builders were found guilty of professional misconduct;
- in 6 instances the builders were subject to a financial penalty ranging from \$500- \$1,750;¹⁸⁶
- one builder, in addition to a \$500 penalty, was subject to an undertaking to maintain a diary response system;¹⁸⁷
- one builder was suspended for 6 months, to be stayed if the builder satisfied certain conditions including completing a Certificate IV Building Course (it is not clear if this condition was ever satisfied as that builder's registration has now expired);¹⁸⁸
- one audit had been ordered by the BPB following a complaint;¹⁸⁹ and
- it does not appear that any licenses were cancelled as a result of these investigations.

With regard to the status of building contractors, information from the BPB's register of building practitioners (the **Register**) can be summarised as follows:

Registration Status	Building Contractor (Restricted)	Building Contractor (Unrestricted)	Total
Active	655	264	919
Expired	342	159	501
Cancelled	8	4	12

¹⁸³ *Building (Resolution of Residential Building Work Disputes) Regulations* (NT), r. 10.

¹⁸⁴ *Building (Resolution of Residential Building Disputes) Regulations* (NT), r. 37.

¹⁸⁵ <http://www.bpb.nt.gov.au/practitioners#discipline>

¹⁸⁶ *Director of Building Control v Building One Pty Ltd* (18993BU) (21 May 2014), *Director of Building Control v Ian Charles Izod* (18993BU) (21 May 2014); Complaint against Ian Izod (18986BU) on 22 June 2007 (no decision published), *Director of Building Control v Ian Gum* (12262CR) (4 June 2009), *Director of Building Control v Michael Baxter* (14151CR) (16 February 2010), *Director of Building Control v Ioannis Glynatsis* (15700CU) (17 May 2013), *Director of Building Control v ACT Builders (NT) Pty Ltd* (15716CU) (16 May 2014).

¹⁸⁷ Complaint made against Ian Izod (18986BU) on 22 June 2007 (no decision published).

¹⁸⁸ *Director of Building Control v Ian Gum* (12262CR) (4 June 2009).

¹⁸⁹ Ian Gum (12262CR).

Registration Status	Building Contractor (Restricted)	Building Contractor (Unrestricted)	Total
Suspended	8	8	16
Inactive	0	0	0

It is not clear why the total number of cancellations (12) and suspensions (16) of building contractors recorded by the Register far exceeds the number of published decisions relating to disciplinary action (7). Since suspension and cancellation of a building contractor's registration are only two of a number of disciplinary actions open to the BPB, it would be expected that the opposite scenario would arise (that is, more disciplinary decisions should be made or published than suspensions or cancellations of registration).

The following reasons might explain this discrepancy:

- the BPB does not publish all of its disciplinary decisions;¹⁹⁰ or
- the seven published decisions relate only to inquiries conducted by the Inquiry Board and the remainder of the 28 suspension and cancellations of registration arise from disciplinary action taken due to a failure by the building practitioner to comply with an order made by the Commissioner.

Furthermore, 36 claims against 5 contractors have been made under the MBA Fidelity Fund since its inception in 2013. It is not clear if any of the 7 contractors the subject of published disciplinary inquiries or 28 contractors whose cancellation and suspension of registration is noted on the Register were contractors whose insolvency triggered claims under the MBA Fidelity Fund. We are left to presume all five contractors whose insolvency triggered a claim under the MBA Fidelity Fund were registered at the time of the contractor failure.

c. Director of Building Control

After an investigation into a complaint made to the Director, he or she only has to make his or her reasons available to the complainant and the building practitioner.¹⁹¹ Statistical information is not readily available regarding the number and frequency of complaints made to the Director.

Similarly, a decision made by the Director in relation to an audit must only be made available to the building practitioner¹⁹² and details about those building practitioners subject to an audit by the Director do not appear to be publically available.

¹⁹⁰ There does not appear to be a requirement under the *Building Act* for the BPB or the Inquiry Board to publish its decisions in relation to investigations into disciplinary matters.

¹⁹¹ *Building Act*, s. 34(2).

¹⁹² *Building Act*, s. 34F(4).

IV. CAL

A. What is CAL?

Contractor Accreditation Ltd (**CAL**) is a non-profit company established in February 1995 by the NT Chamber of Commerce, the MBA and the NT Small Business Association to manage a contractor accreditation system.

CAL provides a process of accreditation for contractors in *all* industry sectors looking to become CAL accredited and a register of existing accredited contractors. This register is publically available.¹⁹³

The CAL Guidelines for the Accreditation of Contractors (**CAL Guidelines**) were originally established by the construction industry as a voluntary industry system of accreditation.

CAL's ostensible objectives are:

- to engender confidence in local operators in the building construction, project management, civil works and services industries; and
- to foster the various industry groups on a more professional footing by way of an industry based and managed voluntary scheme in lieu of a Government managed compulsory registration scheme.¹⁹⁴

CAL being an industry 'self-regulation' initiative is essentially voluntary in its take up by private sector principals. Practically however it is limited to the Government and its agencies (including historically the Power and Water Corporation) that have required CAL accreditation of contractors bidding for Government contracts.

CAL accreditation is broader than the current builder's registration system as the categories of contractor accreditation under CAL includes: 'trades', 'related services' and civil contractors.

CAL pre-qualification of contractors is based on a system of categories, groups, subgroups and ratings.

Essentially:

- 'categories' are the major industry sectors of building, civil works and 'trades and related services' being the major subcontract trades identified in the 'groups' ('trades' identifies the major trades and disciplines such as concreting, electrical, bricks and masonry);
- 'groups' relate to the major groupings of residential, commercial, project management etc.; and
- 'subgroups' then further break down the groups into descriptions.

Some of these CAL accreditation subgroup descriptions under the 'building' category are of similar classification as those found in the builders' registration system, e.g.:

- 'Residential New Work-Restricted up to 2 storeys'; and
- 'Residential New Work-Unrestricted',

which match the existing builders' registration system categories of 'building contractor residential (restricted)' and 'building contractor residential (unrestricted)'.

The present CAL system of classification is set out in the Appendix A of the CAL Guidelines that we set out below:

¹⁹³ <http://www.accreditation.com.au/Home.aspx>

¹⁹⁴ CAL Guidelines for Accreditation of Contractors section 2.1, page 3.

Group	Sub-group
Category: Building	
Construction, Upgrading, Repair, Maintenance and Removal of Structures	
Residential	New work – restricted up to 2 storeys
	New work – unrestricted
	Repairs and maintenance
	Renovations - existing accommodation
	Garages, carports, sheds
	Remote area
	Kitchen fitout
Commercial/industrial	Basic new work
	Complex new work
	Repairs and maintenance
	Office/shop fit-out
	Remote area
Demountable structures	Demountable structures
Demolition	Mechanical means
	Explosive means
	Asbestos removal
	Other friable material removal
Project management	Project management
Category: Trades and Related Services	
Bricks and masonry	Brick laying
	Block laying
	Stone masonry
	Paving
Cleaning & waste management	Internal cleaning
	External cleaning - low rise
	External cleaning - high rise
	Clinical and related waste
	Quarantine and related waste
Communications	Telecommunications systems
	Computer cabling - installation and repair
Component manufacture	Fibreglass and similar composites
	Plastic
	Rubber
	Upholstery
Concreting	Formwork - supply and install
	Foundations
	Reinforcing steel - placement
	Pest treatment
	Concreting
	Kerb & gutter
	Precast concrete - all types including drilling and cutting
	Pressure grouting
	Surface treatments
Directional boring	Directional drilling
	Micro tunnelling
	Tunnel boring

Group	Sub-group
Doors	Installation
	Fire doors
	Roller doors
	Partitions - operable
	Locksmith
Electrical	General electrical
	Building management systems – design
	Building management systems – install
	Data systems
	Transmission and distribution systems - infrastructure
	Transmission and distribution systems - connections
	Electrical & automatic control systems
	Uninterruptible power supply and battery banks - install
	Uninterruptible power supply and battery banks - repair
	Power generation systems - LV
	Power generation systems - HV
	Power generation systems - renewable energy -design
Power generation systems - renewable energy -install	
Essential services	Essential services officer - power water corporation
External areas	Irrigation systems
	Pest and weed control
	Paving
	Fencing
	Shade structures
	Sporting & playground equipment
	Landscaping
	Grounds maintenance
Tree lopping	
Internal areas	Pest & weed control
External cladding	Cladding
	Insulation
	External cleaning - low rise
	External cleaning - high rise
	Curtain walling
	Scaffolding
Gas	LP gas
	Medical gas
	Other gases
Heavy equipment	Mobile plant hire
	Mobile plant maintenance
	Heavy transport hire
	Heavy transport maintenance
	Lifting equipment - installation, repair and

Group	Sub-group
	maintenance
Hydraulics	Plumbing and drainage systems - domestic
	Plumbing and drainage systems - commercial
	Plumbing and drainage systems - industrial
	Water and sewer mains - construct/upgrade/repair
	Bore water and sewerage systems
	Water and sewer mains - inspection and monitoring
	Pumps
	Drilling
	Irrigation systems
	Water purification systems - potable
	Water purification systems - non potable
	Fire fighting systems
	Fuel storage and reticulation
Joinery	Carpentry, cabinetmaking and joinery
Mechanical services	Air-conditioning plant - evaporative
	Air-conditioning plant - refrigerated
	Ductwork
	Ductwork – cleaning & hygiene
	Lagging
	Lifts
	Escalators
Boilers and industrial machines	
Painting & coatings	Domestic
	Commercial
	Industrial
	Abrasive blasting
	Waterproofing - commercial
	Waterproofing - industrial
	Concrete surface treatments
Plaster	Plasterer - solid
	Plasterer - plasterboard
	Partitions - fixed
	Ceiling products & support systems
Roofing	Roofing - cottage
	Roofing - commercial/industrial
	Insulation
	Scaffolding/edge protection
	Fall protection and prevention
Safety and security	CCTV installation and monitoring
	Monitoring and alarm systems
	Fire alarm systems
	Fire prevention and control systems
	Fire extinguisher service and maintenance
	Fall prevention and protection
Structural metals	Fabrication
	Erection and cladding
	Boiler making
	Pipe welding

Group	Sub-group
	Stainless steel welding
	Aluminium welding
	Abrasive blasting
	Painting and coatings
Wall and floor coverings	Tiling - floor and wall
	Waterproofing - domestic
	Carpet and vinyl
	Impervious treatments
Wall framing	Wall frames
	Insulation
	Aluminium components - door frames, windows etc.
	Scaffolding
Windows	Glazing - new
	Glazing - repairs and maintenance
	External cleaning - low rise
	External cleaning - high rise
	Internal cleaning
	Curtain walling
	Window treatments
Project management	Project management - services
Category – Civil Works	
Civil engineering	Bridges
	Marine structures
	Pile driving
	Culverts - cast in situ
	Other civil structures
	Demolition by mechanical means
	Dredging
Earthworks and pavements	Aerodromes
	Urban roads
	Rural sealed roads
	Unsealed roads
	Stabilisation
	Precast culverts
	Bulk earthworks
	Site preparation
	Bituminous surfacing
	Street sweeping
	Roadside slashing and maintenance - including litter collection
	Chemical pest and weed control
	Landscaping in road reserves
	Fencing road reserves
	Testing - non destructive
Detailed excavation	
Traffic control and safety	Pavement marking
	Roadside signs and furniture
	Traffic management
	Traffic monitoring
	Traffic lights - installation

Group	Sub-group
	Traffic lights - maintenance
	Street lighting - installation
	Street lighting - maintenance
Hydraulics	Water and sewer mains
	Live gas main excavation
Project management	Project management - civil

'Rating' relates to monetary limits for the contract price (inclusive of GST) that the accredited contractor is prequalified to bid for and execute if successful. Unlike the residential warranty conditions that cap the total monetary volume of the activities (total number of projects permitted in a period) or total turnover for contractors needing to access the MBA Fidelity Fund Scheme, the CAL rating is set to the individual contract price of the project e.g. commercial work up to \$2 million (which is reasonable when the CAL scheme is understood to be essentially a prequalification process for tendering for Government lump sum contracts or being a subcontract).

B. Is CAL a requirement?

In effect, CAL accreditation is required for certain contracts through Procurement Direction PO4.17 made under section 11 of the *Procurement Act 1995* (NT). The CAL Guidelines also state that CAL certification is required for government contracts over \$50,000.

The CAL website states:

'The Northern Territory Government supports CAL accreditation as its method of determining whether contractors have the right financial, technical, management and procedural capacity to work on government contracts.'

The Second Reading Speech of the *Building Amendment Bill 2004* introducing the current builder's registration system foreshadowed that any common requirements of the CAL qualification process and the builders' registration system established by those amendments to the *Building Act* need not be duplicated.

However there are no provisions in the *Building Act* or its subordinate regulations which exempt a builder seeking registration under the *Building Act* from having to provide information to the Government administrator that had been previously provided to CAL.

Certainly the review and accreditation of contractors under CAL does not prequalify or permit that contractor to become registered, or to minimise or change the application and renewal processes to which the contractor is subject. Therefore, it seems the desire to avoid duplication of red tape between CAL and the existing builders registration system has not occurred in practice.

C. How does CAL operate?

To become accredited, applicants must complete a detailed application form. This form requires information concerning the applicant's:

- commitment to the industry's Codes of Practice;
- financial capacity;
- technical capacity;
- managerial capacity, including quality assurance, workers' compensation and any licenses that may be required;
- past performance; and
- local factors (which is the extent of preference given to suppliers and Territory based employees).

Financial capacity is assessed by an independent financial consultant through what is described as a strictly confidential process. CAL directors and assessment panel members are said not to have access to

or see the applicant's financial information. Once the independent financial consultant has assessed the applicant's financial information, the remainder of the application proceeds before a specially convened 'assessment sub-panel' that includes industry members.

Technical capacity is assessed by reviewing at least three projects that the applicant has undertaken 'recently'. CAL contacts the applicant's referees for each project.

Managerial capacity is assessed by reviewing the tools and processes the applicant has in place to meet its obligations in terms of quality assurance, occupational health and safety and compliance with any registration obligations. CAL questions applicants about their plant and equipment capabilities, occupational health and safety systems, labour force and training.

CAL accreditation may be granted in one or more categories, groups, sub groups and ratings to the level applied for, or to a lower level.¹⁹⁵ The accreditation process takes four to six weeks to complete and the contractor must seek a renewal annually.

It is to be noted that the contractor that seeks accreditation under the CAL system is the contracting entity, that is, the company or individual which is the contracting business who will enter into the building contract, subcontract or supply agreement that the prequalification constituted by CAL accreditation is being required for. There is no requirement for a natural person who is a director of a company contractor to also be accredited under CAL. The potential for phoenixing activities is therefore greater under the CAL accreditation system.

The fees and costs charged for the application and renewal of CAL accreditation are:

CAL accreditation fees		
Type of Fee	Fee	When/how to be paid
First Application		
Processing Fee (non-refundable)	\$412.50	to be paid at lodgement of application
Category Accreditation Fee	\$138.60	per category
Sub Group Accreditation Fee	\$69.30	per sub-category
Rating Fee	0.5%	of rating per sub-category
Renewals		
Processing Fee (non-refundable)	\$412.50	to be paid at lodgement of renewal
Accreditation Renewal	50%	of fee charged for new accreditation
Upgrades (other than on renewal)		
Requiring Financial Assessment	\$412.50	per upgrade
Not Requiring Financial Assessment	\$269.50	per upgrade

It is also important to appreciate that an application must be made for each category, group and subgroup that a contractor intends to self-perform works in. Accordingly, the list of accreditations which a contractor might need to carry under CAL can be quite extensive and relatively expensive to apply for and maintain.

CAL provides the opportunity for an accredited contractor to upgrade an accreditation or change the categories, groups or subgroups of accreditation from that accreditation initially granted.

Upon an Assessment Sub Panel being satisfied that sufficient grounds have been shown by any person or by the Registrar to suspend the accreditation of a contractor, CAL may give notice to the contractor that its accreditation has been suspended and to show cause why the accreditation should not be cancelled or downgraded. There is a process for the showing of cause by a contractor whose accreditation is suspended, and a right of review of an adverse decision to an Assessment Review Panel, which is also an internal panel that is (presumably) constituted by different members than the Assessment Sub Panel.

This system of suspension, cancellation or downgrading of a contractor's CAL accreditation is not (formally) linked to any external determination or event of default such as a disciplinary finding against the contractor

¹⁹⁵ CAL Guidelines for the Accreditation of Contractors [3.2.2].

under the *Building Act* or insolvency event. It is entirely within the scope of the Assessment Sub Panel as to what may or may not be 'sufficient grounds'.

The CAL accreditation system and its administration in the present environment of (limited) builders' registration can be criticised because:

- The actual criteria that constitute financial, technical and managerial 'capacity' are not extensively disclosed by CAL. Their respective weighting in the assessment process undertaken by members of the industry is also unexplained. This makes the application assessments potentially subjective and difficult to support as a de facto regulatory process that provides transparency and natural justice to applicants.
- There is the potential for bias or apprehended bias with industry members being involved in assessing a contractor's application for accreditation, renewal or the cancellation or downgrade of any particular classification (particularly if the decision is not supported by recommendations of the independent consultant).
- The existing builders' registration system, residential warranty scheme and CAL processes are disconnected and at times cause duplicitous red tape for contractors and inconsistency in the measures being taken by CAL and Government to attempt to reduce contractor and construction failure.
- CAL accreditation, being fundamentally voluntary in its take up by private principal contractors and consequently, focused in its operation to Government contracting, is not a consistent tool for changing financial, management and competency standards of contractors. Not only is it not applied to contractors across the board (e.g. contractors who do not wish to contract on Government projects can ignore it) but sees the practice of contractors coming in and out of accreditation over the years, as and when they wish to participate in Government projects.
- There is an additional cost to contractors having to participate in the CAL system.
- The CAL system is limited, in its practical application as a pre-qualification process, in attempting to protect the Government from potential contractor and construction failure. There is very little if any direct consumer protection of vulnerable consumers in the CAL accreditation system as presently used in the Territory.

V. Overview of the contractor registration and licensing systems of other jurisdictions

A. Introduction

A comparative review of other jurisdictions' systems of registration or licensing, and how they interact with those jurisdictions' warranty schemes and other aspects of regulation (particularly payment defaults), can be very instructive for the Territory when reviewing the viability of its own registration system and areas of potential reform.

An extensive comparison table summarising the operation of registration and licensing systems in place in major Australian jurisdictions is provided at Annexure 2.

Another extensive comparison table summarising technical qualification and experience requirements for licensing and registration systems in major Australian jurisdictions (for each class of building contractor registration/licence) is provided at Annexure 3.

B. Queensland

Legislative Framework

In Queensland, registration of construction contractors is the responsibility of the QBCC. Contractor registration known as 'licensing' in Queensland is regulated by the *Queensland Building and Construction Commission Act 1991* (QLD) (**QBCC Act**) and the *Queensland Building and Construction Commission Regulation 2003* (QLD) (**QBCC Regulation**). This legislation is separate from the *Building Act 1975* (QLD) and its associated subordinate legislation.

Requirement to be licensed

The *QBCC Act* requires a person to be licensed if they 'carry out', 'undertake' or 'cause' building work (including building work services) to be undertaken.¹⁹⁶ 'Building work services' includes management, advisory, administrative or supervisory services. These definitions are intentionally broad and are designed to require all persons involved in *building* activities, howsoever described or procured, to hold a licence. Practically, the licensing requirements extend to residential *and commercial* contractors in Queensland. Classes of building licenses in Queensland are divided into low rise, medium rise and 'open'.

There is then a reasonably extended 'carve out' of the need to be licensed to carry out some building activities in Schedule 1A of the *QBCC Act* including:

- head contractors for non-residential works where all the works are carried out by licensed contractors;¹⁹⁷
- special purpose vehicles undertaking to carry out work under a private-public partnership, or causing that work to be carried out;¹⁹⁸ and
- entities tendering, offering, or undertaking to carry out 'prescribed government projects'.¹⁹⁹

The *QBCC Regulations* also specify that civil and engineering works are excluded from the licensing requirements.²⁰⁰

¹⁹⁶ This includes licensing requirements for trade contractors (carpenters, concreters, cabinet makers etc), plumbers, drainers and fire protection services.

¹⁹⁷ *Queensland Building and Construction Commission Act 1991* (QLD), Sch. 1A, s. 8.

¹⁹⁸ *Queensland Building and Construction Commission Act 1991* (QLD), Sch. 1A, s. 10.

¹⁹⁹ *Queensland Building and Construction Commission Act 1991* (QLD), Sch. 1A, s. 11.

²⁰⁰ *Queensland Building and Construction Commission Regulations 2003* (QLD), Sch. 1AA.

Application for licence

In Queensland, an applicant for a licence must satisfy the QBCC that:

- the applicant is a fit and proper person to hold the licence;
- the applicant has the qualifications and experience required by regulation in relation to a licence of the relevant class;
- the applicant satisfies the relevant financial requirements stated in the Queensland Building and Construction Board's (**QBC Board**) policies;
- the applicant can lawfully work in Queensland;
- the applicant is not an excluded individual for a relevant event or a permanently excluded individual;
- the applicant is not a disqualified individual;
- the applicant is not a banned individual; and
- the applicant does not have an unpaid judgment debt for an amount the QBCC may recover from it.²⁰¹

Financial Requirements

Financial requirements in QLD are much more onerous compared to those under the Territory's *Building Act*. The *Queensland Building and Construction Board Policy (Policy)* prescribes minimum financial requirements. It requires that applicants and licensees:

- meet a minimum net tangible assets (**NTA**) requirement;
- does not exceed a prescribed maximum revenue amount (**Maximum Revenue**);
- maintain a current assets to current liabilities ratio (**Current Ratio**); and
- maintain minimum reporting requirements.

An applicant or licensee must maintain an NTA of at least \$0.

The Maximum Revenue is calculated based on the NTA position of the applicant or licensee. It includes the maximum total income received from the applicant or licensee, derived from *all* sources in a financial year. An individual or a company who holds NTA of \$36,000 will have a Maximum Revenue of \$600,000. Additional requirements apply for a company or individual who wishes to apply for a Maximum Revenue over \$600,000.

It is a condition of the licence that the licensee must not:

- allow its NTA to decrease by more than 30% without submitting within 30 days of the decrease a report which explains the deviation; or
- exceed its maximum revenue by more than 10% without first submitting a declaration or report which substantiates sufficient NTA to allow the increase in maximum revenue.²⁰²

It is a statutory condition of holding a licence that the licensee's financial circumstances must at all times continue to satisfy the relevant minimum financial requirements stated in the Policy. Licence suspension or cancellation may result if a licensee fails to meet such conditions.²⁰³

The Current Ratio must be at least 1:1. The assets and liabilities allowed to be included in the Current Ratio calculation will depend on the structure of an applicant or licensee. For example, a company trading as a

²⁰¹ *Queensland Building and Construction Commission Act 1991 (QLD)* s. 31.

²⁰² *Queensland Building and Construction Commission Act 1991 (QLD)*, s. 35; *Queensland Building and Construction Board Policy*, s. 3.3.

²⁰³ *Queensland Building and Construction Commission Act 1991 (QLD)*, s. 48.

stand-alone company may use only the current assets and liabilities of that company in the calculation of the Current Ratio.²⁰⁴

The licensee must prepare and maintain the following documents in quarter-yearly intervals at a minimum:

- statement of financial performance (trading profit and loss statement);
- statement of financial position (balance sheet);
- aged listings of trade debtors and creditors; and
- statement of cash flows.

Nominee

In order to obtain a licence under the QBCC regime, a company must allocate a nominee who will be responsible for the supervision of building work done by the company.

A nominee supervisor must be an employee, director or secretary of a licensed company, and must hold the same licence class as the licensed contractor. A nominee supervisor's licence may be issued for any class of licence.

A nominee supervisor's licence allows an individual who is a nominee for a licensed contractor to supervise building work carried out by the company under its licence.²⁰⁵

A nominee supervisor:

- cannot personally contract or subcontract to carry out building work but can supervise work for a licensed contractor who holds the same licence class;
- can be the nominee for a company – a company must have a nominee who holds the same licence class as the company; and
- is responsible for ensuring the building work done by the company is properly supervised. The nominee and company directors must have a system of supervision in place to ensure the company's building work complies with the plans and specifications and expected work standards.

A licensed company will have its licence suspended or cancelled if it ceases to have for more than 28 days a nominee holding a licence authorising supervision of building work of the appropriate class or classes.²⁰⁶ Therefore, if the nominee's licence is suspended, there is a 28 day 'grace period' for the company to find a new nominee.

Renewal

Licences can be granted for 1 or 3 years at the licensee's election.

Recently the QBC Board changed its policy so that at the time of renewal, there is no re-assessment by the Board of the licensee's net financial asset position. The licensees are required to alert the QBC Board if they do not meet the minimum financial requirements at the time of the renewal. This change was aimed at reducing red tape, the cost to industry in fees and the cost of forensic accounting fees to the QBC Board. An application for a renewal of a licence is made to QBCC.²⁰⁷

Penalties

Penalties apply (currently \$29,450) for a person who carries out building work when they do not hold a building contractor's licence.²⁰⁸

²⁰⁴ Queensland Building and Construction Board Policy, s. 4.3; Table 2.

²⁰⁵ Queensland Building and Construction Commission Act 1991 (QLD), s. 30A.

²⁰⁶ Queensland Building and Construction Commission Act 1991 (QLD), s. 48(e)

²⁰⁷ Queensland Building and Construction Commission Act 1991 (QLD), s. 37B

²⁰⁸ Queensland Building and Construction Commission Act 1991 (QLD), s. 42.

Additionally unlicensed contractors cannot claim payment for works they have executed. The lack of licence precludes the contractor from bringing a claim for payment at law, including by way of adjudication application.

Suspension or removal of licence

The QBCC may suspend or cancel a licence, *inter alia*, if the licensee:

- fails to comply with a condition of the licence, including the conditions to maintain the minimum financial requirements;
- owes an amount to the QBCC and fails to comply with a demand by the QBCC to discharge the debt;
- fails to comply with a written request under the *QBCC Act*; or
- is convicted of an offence under the *QBCC Act*.²⁰⁹

In these circumstances the QBCC is required to give the licensee 21 days to respond to a notice of its reasons to suspend or cancel the licence.²¹⁰

If the QBCC believes that serious financial loss or other serious harm will result to other licensees, their employees or consumers, the QBCC may suspend the licence before the 21 days' response time expires.²¹¹

The decision to suspend or cancel is reviewable by the Queensland Civil and Administrative Tribunal (**QCAT**) or through an internal review process by the QBCC.²¹²

The QCAT may also order the cancellation or suspension of a licence if a licensee fails to comply with an order of the QCAT.²¹³

Link between Queensland's Home Warranty Scheme and Licensing System

The QBCC has the power to audit a licensee to ensure that it complies with the QHWS.²¹⁴

If the licensee does not comply with an audit made by the QBCC, including in relation to a claim made under the QHWS, the licensee will have been taken to have breached a condition of the licence and the licence may be suspended or cancelled.²¹⁵

As identified above, if a claim is made under the QHWS for defective work, once the residential builder has been given a reasonable opportunity to respond, the QBCC can order another builder to rectify that work. The QBCC then pursues the defaulting contractor for the cost of the rectification works and that cost becomes a debt owing to the QBCC. In this circumstance, the non-payment of debt will also constitute grounds for the QBCC to suspend or cancel that contractor's licence.²¹⁶

Aside from this mechanism, a claim made against a builder under the QHWS, of itself, does not automatically trigger any investigations or disciplinary action for that builder.

Effectiveness of disciplinary process

The QBCC publishes weekly figures showing the licensees whose licences have been suspended or cancelled in the previous week. In the week 16-24 August 2015:

- one builder had been immediately suspended;
- two builders were excluded from holding a licence due to an insolvency event;

²⁰⁹ *Queensland Building and Construction Commission Act 1991* (QLD), s. 48.

²¹⁰ *Queensland Building and Construction Commission Act 1991* (QLD), s. 49(1).

²¹¹ *Queensland Building and Construction Commission Act 1991* (QLD), s. 49A.

²¹² *Queensland Building and Construction Commission Act 1991*(QLD), ss. 86- 86A.

²¹³ *Queensland Building and Construction Commission Act 1991*(QLD), s. 49B.

²¹⁴ *Queensland Building and Construction Commission Act 1991*(QLD), s. 50A(1)(b).

²¹⁵ *Queensland Building and Construction Commission Act 1991*(QLD), s. 50C(5).

²¹⁶ *Queensland Building and Construction Commission Act 1991*(QLD), s. 48(i).

- two builders failed to satisfy the QBCC of the financial requirements resulting in one suspension and one cancellation of licence; and
- many more builders were suspended for the non-payment for fees and for other reasons.²¹⁷

The QBCC's Quarterly Report reveals that from January to March 2015:

- the QBCC undertook 78 non-payment of debts investigations resulting in the suspension of 27 licences and the cancellation of 25 licences;²¹⁸ and
- there were 17 companies and 38 individuals excluded from holding a QBCC contractor or nominee supervisor licence for five years due to their involvement in a financial failure. Permanent exclusion was imposed on 6 individuals for their involvement in a second financial failure.²¹⁹

These figures indicate that the QBCC has been very active in disciplining contractors for material breaches and, most importantly for this Report, has been taking disciplinary steps of suspension and cancellation for contractor payment defaults.

Review of licensing decisions

The QCAT can review decisions to grant, renew, suspend, cancel, or impose a condition on a licence.²²⁰ A system of internal review also exists.²²¹ The system of internal review is at the election of the licensee affected by the decision.

C. New South Wales

Legislative Framework

In NSW, the contractor registration regime (called 'licensing') is administered by the NSW Chief Executive of Fair Trading NSW (**NSW Fair Trading**). The licensing framework is governed by the *Home Building Act 1989* (NSW) (**Home Building Act**) and its associated *Home Building Regulations 2014* (NSW).

Requirement to be licensed

A building licence is required to contract, subcontract and advertise to do residential building work in NSW where the total cost of labour and materials is more than \$5,000.

A licence is also required for specialist trades (irrespective of whether it is on residential or non-residential worksites), including:

- plumbing and drainage work, other than roof plumbing work;
- gas fitting work;
- electrical wiring work;
- refrigeration work; or
- air-conditioning work.²²²

No licensing requirements apply specifically to commercial or civil and engineering contractors.

Under the *Home Building Act*, 'residential building work' includes:

- construction of, alterations or additions to or repairing renovation, decoration or protective treatment of a dwelling;

²¹⁷ Queensland Building and Construction Commission, 'Suspended/Cancelled QBCC Licensees- Previous Week' 16-25 August 2015, available from: <https://www.qbcc.qld.gov.au/>

²¹⁸ Queensland Building and Construction Commission, 'Quarterly Report: January 2015 - March 2015', p. 19.

²¹⁹ Queensland Building and Construction Commission, 'Quarterly Report: January 2015 - March 2015', p. 19.

²²⁰ *Queensland Building and Construction Commission Act 1991* (QLD), s. 86(1).

²²¹ *Queensland Building and Construction Commission Act 1991* (QLD), s. 86A.

²²² *Home Building Act 1989* (NSW), Sch. 1.

- roof plumbing or other specialist work done in connection with a dwelling; and
- work associated with the installation of fixtures that is designed for the heating or cooling of water, food or the atmosphere, or for air ventilation or filtration of water in a swimming pool or spa.²²³

A 'dwelling' is a building or a portion of a building that is designed, constructed or adapted for use as a residence.²²⁴ This definition of dwellings includes multi-storey residential buildings.

Application for licence

Applications for a licence are made to NSW Fair Trading.

In NSW, certification of eligibility to obtain insurance under the NSW HBCF is also required to obtain a building contractors licence.²²⁵

Financial Requirements

Financial requirements, in terms of a requirement to hold minimum assets, are not prescribed by the NSW legislation.

In practice, no financial information is required to be provided by the applicant. An individual applicant must declare (or in the case of companies or partnership applicants: any director or partner of that company or partnership must declare) if, in the previous 3 years, he or she has:

- been declared bankrupt;
- been discharged from bankruptcy; or
- entered into arrangements with creditors or assigned his or her property to pay debts.

If a declaration is made under any of the above three categories, further information is required to be declared upon application for a licence.

Furthermore, if an individual (or in the case of a company or partnership: a director or partner):

- is or has been a director of a company that has experienced any insolvency issues; or
- ceased being a director of a company and within 12 months of the resignation, the company experienced any insolvency issues,

then that individual, director or partner (as the case may be) must provide additional information with the licence application.

Nominee

A company or partnership who is seeking to apply for a building contractors licence must have a nominated supervisor. A nominated supervisor can be a director of the company, a member of the partnership or an existing or proposed employee of the company or partnership.

If only one qualified supervisor is nominated, they must also hold a current endorsed individual contractor licence or qualified supervisor certificate that includes all classes of work for which the company or partnership wishes to contract. A nominated supervisor may be nominated for more than one company, however this requires approval by NSW Fair Trading.

In NSW, it is an offence (incurring 1,000 penalty a unit (currently \$110,000) fine for corporations) if a licenced company or partnership fails to notify NSW Fair Trading within 7 days of ceasing to have a nominated supervisor.²²⁶ The licenced company or partnership has 30 days to nominate a new nominated

²²³ *Home Building Act 1989* (NSW), Sch. 1. s 2(2).

²²⁴ *Home Building Act 1989* (NSW), Sch. 1. s 3(1).

²²⁵ *Home Building Act 1989* (NSW), s. 20(3)(c).

²²⁶ *Home Building Act 1989* (NSW), s. 22(5).

supervisor who is acceptable to NSW Fair Trading. Failure to do so will result in the cancellation of the company or partnership's licence.²²⁷

Renewal

All licences and certificates offer the option of a 1 or 3 year renewal.

A licence may not be granted or renewed by NSW Fair Trading due to one or more of the following reasons:²²⁸

- a failure to provide particulars requested by NSW Fair Trading;
- the licence was surrendered or cancelled before the expiry date;
- the applicant was disqualified from holding a licence;
- the applicant is a debtor under a judgment for money owed to NSW Fair Trading;
- the applicant holds a provisional licence or certificate;
- the applicant is an apprentice or trainee;
- the applicant has not complied or is unable to comply with insurance requirements;
- the applicant's licence has been suspended;
- the applicant is bankrupt or was bankrupt within 3 years prior to its application for renewal;
- the applicant is or was a director or a person concerned in the management of a company:
 - that is or was the subject of a winding up order;
 - if a controller or administrator has been appointed or
 - if a controller or administrator was appointed (within 3 years prior to your renewal application);
- the applicant is subject to an unsatisfied NSW Civil and Administrative Tribunal (**NCAT**) order;
- the applicant has had an unreasonable number of:
 - complaints;
 - penalty notices;
 - formal cautions; or
 - paid insurance claims;
- the application is made using false or misleading information;
- a close associate (who is not a fit and proper person to hold a licence) exercises a significant influence over the applicant or the applicant's business; or
- the applicant is deemed to be an unfit or improper person to hold a licence or certificate.

If the relevant person(s) to the application are a current bankrupt or the director of a company that is currently under external administration (other than external administration resulting from a members' voluntary winding up of the body corporate), NSW Fair Trading cannot renew a contractor licence in the building class.²²⁹

Suspension or removal of licence

A contractor's licence may be cancelled or suspended for a range of disciplinary reasons or if the contractor:

²²⁷ Home Building Act 1989 (NSW), s. 22(1).

²²⁸ Home Building Act 1989 (NSW), s. 33B.

²²⁹ Home Building Act 1989 (NSW), s. 40.

- becomes involved in unlawful activity;
- obtains a licence by misrepresentation or fraudulent means;
- becomes bankrupt;
- is or was a director of a company that becomes an externally-administered body corporate (other than cases of administration resulting from members' voluntary winding up); or
- experiences any change in circumstance that would have required NSW Fair Trading to refuse an application for a contractor licence if the contractor were applying.²³⁰

In addition, NSW Fair Trading is able to suspend the licence:

- for failure to comply with residential builders insurance requirements until such time as the NSW Fair Trading is satisfied that it complies with those requirements;²³¹
- where a controller or administrator is appointed to a company, if NSW Fair Trading suspects that the holder of a licence will be unable to complete building contracts (in this case, suspension can be reversed if the administration is finalised and the company is able to trade, or if an investigation concludes no further action should be taken;²³² or
- if the builder has failed to comply with an order to pay money in relation to a building claim, until such time as NSW Fair Trading is satisfied that it has been paid.²³³

Anyone can make a complaint against the licensed builder, including that the builder does not meet the standards of financial solvency required to be held for that class of licence,²³⁴ upon which NSW Fair Trading has the discretion to decide whether to take an action, such as through an investigation, or whether to take no action.²³⁵ NSW Fair Trading can also undertake an investigation of its own volition.²³⁶

Relationship between NSW HBCF and NSW licensing regime

If the Commissioner of NSW Fair Trading is of the opinion that the holder of a contractor licence has not complied or is unable to comply with any requirements to maintain residential builders warranty insurance, then the Commissioner of NSW Fair Trading may give notice to the builder that their licence will be suspended.²³⁷

Furthermore, the NSW Fair Trading website claims that greater protection is now afforded to consumers who have an insurance policy under the NSW HBCF issued after 1 July 2009, since such policies allow consumers to lodge a claim with their insurer where the licence of their builder is suspended for failure to comply with a money order of the NCAT or a court.

In the financial year 2013-14, 599 licenses were cancelled or suspended by NSW Fair Trading.²³⁸

Review of licensing decisions

An applicant aggrieved by a decision of the NCAT regarding the grant, renewal, alteration, suspension or cancellation of a licence may apply to the NCAT for administrative review of that decision.²³⁹

²³⁰ *Home Building Act 1989* (NSW), s. 22.

²³¹ *Home Building Act 1989* (NSW), s. 22A.

²³² *Home Building Act 1989* (NSW), s. 22B.

²³³ *Home Building Act 1989* (NSW), s. 42A.

²³⁴ *Home Building Act 1989* (NSW), s. 56.

²³⁵ *Home Building Act 1989* (NSW), s. 59(1).

²³⁶ *Home Building Act 1989* (NSW), s. 59(2).

²³⁷ *Home Building Act 1989* (NSW), s. 22A.

²³⁸ NSW Fair Trading, 'Year in Review 2014-14', p. 12.

²³⁹ *Home Building Act 1989* (NSW), s. 83B.

D. Western Australia

Legislative Framework

In Western Australia, the *Building Services (Registration) Act 2011 (WA)* (**Building Services Act**) and its associated regulations, the *Building Services (Registration) Regulations 2011* requires both building 'practitioners' and building 'contractors' to be registered before carrying out a 'prescribed building service'. Collectively, building practitioners and building contractors are referred to as 'building service providers.'

The legislative framework for builder registration in WA sits outside the *Building Act 2011 (WA)* and its associated subordinate legislation.

Requirement to be registered

a. Practitioner registration and Contractor registration

Practitioner registration is for individuals. It allows a person to be the nominated supervisor of a registered building contractor and to use the title 'registered building practitioner'. A practitioner may not provide building services directly to another person.

Contractor registration is for individuals, partnerships and companies that intend to trade as builders. This registration allows a business to provide services as a builder for work that requires a building permit, has a value of \$20,000 or more and is located within the area of the Building Services Board's (**Board**) jurisdiction.

b. Registration requirement for prescribed building services

The *Building Services Act* prohibits a person from carrying out 'prescribed building services' unless that person is registered in the appropriate category.²⁴⁰

'Prescribed building services' includes 'builder work', 'building surveying work' and 'painter work'.²⁴¹ Builder work includes all work which requires a building permit. The *Building Act 2011 (WA)* requires that a building permit be obtained for all building work with certain exceptions.²⁴² Some noteworthy exceptions include work to construct incidental to a building or an incidental structure that is, or is proposed to be, used in the construction, operation or maintenance of:

- road, rail, port, harbour, airport, water, sewerage, electricity, oil or gas supply infrastructure;²⁴³
- mining operations;²⁴⁴ or
- an industrial processing plant.²⁴⁵

Therefore in WA, registration is required for contractors in both residential *and commercial* industry sectors but does not extend to civil works as falling outside works requiring a Building Permit under the *Building Act 2011 (WA)*.

Application for registration

To be eligible to obtain building contractor registration an applicant:

- must provide a complete, written, application including payment of application and registration fees;
- must provide additional information relevant to the application as required by the Board;

²⁴⁰ *Building Services (Registration) Act 2011 (WA)*, ss. 7, 11.

²⁴¹ *Building Services (Registration) Regulations 2011 (WA)*, r. 4.

²⁴² These exceptions include: work carried out in remote areas, renovations, alterations, improvements and repairs in certain circumstances, temporary structures *Building Regulations 2011 (WA)* Sch. 4; also see the exceptions under ss. 69-74 of the *Building Act 2011 (WA)*.

²⁴³ Unless that infrastructure is proposed to be a residential or recreational facility or one which members of the public would normally access: *Building Act 2011 (WA)*, s. 70.

²⁴⁴ *Building Act 2011 (WA)*, s. 72.

²⁴⁵ *Building Act 2011 (WA)*, s. 74.

- on registration have at least one nominated supervisor for the class of building service contractor applied for;
- must have arrangements in place to ensure that building services to be carried out will be managed and supervised in a proficient manner;
- must not be a body of which an ineligible person is an officer of; and
- must comply with any other requirements prescribed by the regulations for registration and a building service contractor in that class which is having the financial capacity to meet debts as and when they fall due.²⁴⁶

Financial Requirements

An applicant must have the capacity to meet debts as and when they fall due.²⁴⁷ There is no prescribed amount of assets which the applicant or licensee must hold, however the amount of assets held is one factor to which the Board may have regard when assessing whether the applicant has the capacity to meet its debts as and when they fall due.²⁴⁸ Furthermore, other application requirements go towards establishing the financial bona fides of an applicant, as outlined below.

An application for registration must provide:

- a written statement of the applicant's proposed business profile; and
- a business plan.

An individual or sole trader applicant can elect to provide a written statement of intention and a personal financial statement instead of a business plan.

The applicant's proposed business profile must specify the class(es) of building work, as set out in the Building Code of Australia, which the applicant plans to undertake as a contractor. It must also specify the value of building services work expected to be performed over each of the next three years.

The purpose of this statement of intention is for the applicant to demonstrate their financial position is sufficient to meet the debts expected to be incurred in undertaking the activities proposed as advised in the statement of its proposed business profile. As part of the application process the applicant's financial position will be assessed against the level of activities the applicant proposes to undertake if registered.

Nominee

In WA, it is an offence (incurring a \$25,000 fine) for building service contractor to carry out, or undertake a building service during any period in which the contractor does not have a nominated supervisor.²⁴⁹ A nominated supervisor must be a partner, director or employee of the contractor.

The contractor must give the Board notice within 7 days of it ceasing to have a nominated supervisor (\$10,000 penalty).²⁵⁰ This will not automatically result in the building contractor losing their registration, although the commission of an offence under the *Building Services Act* is a ground for disciplinary action by the SAT.²⁵¹ Furthermore, if the registration of a building service contractor is suspended, then the SAT has discretion to order that the registration as building service practitioner of a nominated supervisor of the contractor be suspended (for a period not exceeding 2 years) or cancelled.²⁵²

²⁴⁶ WA Building Commission, *Registered Building Contractor (Individual, Partnership or Company) Application Guidelines*, p. 1.

²⁴⁷ *Building Services (Registration) Regulations 2011 (WA)*, r. 18.

²⁴⁸ *Building Services (Registration) Regulations 2011 (WA)*, r. 18(2). Other considerations include: liquid funds available to the applicant; loan or overdraft facilities available to the applicant; the applicant's equity in property or non-current assets that a loan facility may be raised against; the proposed scale of operation of the application; and any other consideration relevant to the applicant's financial capacity.

²⁴⁹ *Building Services (Registration) Act 2011 (WA)*, s. 22(2).

²⁵⁰ *Building Services (Registration) Act 2011 (WA)*, s. 22(3)-(4).

²⁵¹ *Building Services (Registration) Act 2011 (WA)*, s. 53(1)(a)(ii).

²⁵² *Building Services (Registration) Act 2011 (WA)*, s. 58(1).

Renewal

After initial registration with the Board, registered practitioners and contractors must renew their registrations every three years.²⁵³

Penalties

A penalty of \$25,000 applies to a person who carries out or undertakes to carry out a prescribed building service for any other person unless the person is a building service contractor who is licensed to undertake that work.²⁵⁴

Penalties apply if a builder fails to give the Board written notice of, *inter alia*:

- the builder's failure to meet its financial obligations;²⁵⁵
- its prosecution or conviction of a serious offence;²⁵⁶
- any changes in its eligibility to be registered;²⁵⁷ and
- a charge relating to a disciplinary action under the *Building Act* (WA) or another prescribed Act.²⁵⁸

a. Suspension or removal of registration

Disciplinary matters include the situations where the registered building service provider:

- no longer satisfies the registration requirements;
- has obtained a registration certificate because of incorrect or misleading information;
- has contravened a condition of the provider's registration;
- has been negligent or incompetent in connection with carrying out a building service;
- has failed to ensure that a building service carried out by the provider has been properly managed and supervised;
- if a nominated supervisor, has not properly managed and supervised a building service which he or she is responsible for managing and supervising;
- that the registered building service provider has failed to comply with an undertaking given by the provider to the Board or an order or direction of the Board;
- has failed to comply with an order of the Board or the State Administrative Tribunal (**SAT**) under the *Building Services Act*; or
- has engaged in conduct that is harsh, unconscionable, oppressive, misleading or deceptive in connection with carrying out a contract for a building service or carrying out that building service.²⁵⁹

The SAT can suspend the provider's licence (for no longer than 2 years) or order that the licence cancelled and the provider's name be removed from the register when the SAT is satisfied that a disciplinary matter exists in a proceeding before it.²⁶⁰

The *Building Services Act* does not contain any provision under which the Board may suspend or cancel a provider's licence for disciplinary matters. However the Board may amend, suspend or cancel the registration of a registered building service provider *upon the request of that provider*.²⁶¹

²⁵³ *Building Services (Registration) Act 2011* (WA), s. 12.

²⁵⁴ *Building Services (Registration) Act 2011* (WA), s. 7.

²⁵⁵ *Building Services (Registration) Act 2011* (WA), s. 34.

²⁵⁶ *Building Services (Registration) Act 2011* (WA), s. 35.

²⁵⁷ *Building Services (Registration) Act 2011* (WA), s. 33.

²⁵⁸ *Building Services (Registration) Act 2011* (WA), s. 36; *Building Services (Registration) Regulations 2011* (WA).

²⁵⁹ *Building Services (Registration) Act 2011* (WA), s. 53.

²⁶⁰ *Building Services (Registration) Act 2011* (WA), s. 58.

²⁶¹ *Building Services (Registration) Act 2011* (WA), s. 26.

The Board must consider complaints referred to it by the Building Commissioner.²⁶² A number of options are open to the Board upon receiving a complaint, including referral to the SAT.²⁶³ If the Board is satisfied that that complaint involves a disciplinary matter but that proceedings before the SAT are not warranted, then the Board has the discretion to, *inter alia*, amend the registration of the practitioner or caution or reprimand that practitioner.²⁶⁴

Effectiveness of disciplinary process

There were 16 complaints lodged under the *Building Services (Complaint Resolution and Administration) Act 2011* regarding disciplinary matters in the first quarter of 2014-2015 in WA.²⁶⁵

Of these complaints:

- 8 complaints received were for negligent or incompetent conduct;
- 4 were for misleading, deceptive or harsh conduct;
- 1 complaint was for failure to properly manage and supervise; and
- 5 were for other disciplinary matters, including continuing to carry out building work started by a third party, trading while insolvent, no longer fit and proper, working whilst not under general direction and control and holding out to be a registered builder.²⁶⁶

In WA, the most common outcome relating to disciplinary complaints is dismissal of the complaint by the Building Commissioner. This was the case for the first quarter of 2014/15. For this period:

- 5 disciplinary complaints were dismissed by the Building Commissioner;
- 4 were referred to the Board;
- 3 were referred back to the SAT; and
- 3 disciplinary complaints had no action taken because a breach was not detected.²⁶⁷

Unfortunately figures for complaints dealt with by the Board are not publically available, nor are licensing suspension or cancellation determinations by the SAT easily isolated.

Relationship between WA home indemnity insurance and WA registration regime

The suspension, cancellation or amendment of a licence issued under the *Building Services (Registration) Act* does not trigger a claim under the WA home indemnity insurance scheme. Similarly, a claim made against a building service provider under the (private insurance) WA home indemnity insurance scheme will not ostensibly impact or affect the provider's licence.

Review of registration decisions

The SAT can review decisions of the Board to:

- grant, renew or impose a condition upon; or
- refuse to suspend or cancel or revoke the suspension of,²⁶⁸
a building service provider's registration.

An appeal against the SAT's decision to suspend, cancel or revoke a building service provider's registration is available to the Supreme Court of Western Australia on a question of law.²⁶⁹

²⁶² *Building Services (Registration) Act 2011* (WA), s. 56.

²⁶³ *Building Services (Registration) Act 2011* (WA), s. 56 (2)(e).

²⁶⁴ *Building Services (Registration) Act 2011* (WA), s. 57.

²⁶⁵ Department of Commerce (WA) (Building Commission), 'Compliance Report First Quarter 2014/2015', p. 13.

²⁶⁶ Department of Commerce (WA) (Building Commission), 'Compliance Report First Quarter 2014/2015', p. 13.

²⁶⁷ Department of Commerce (WA) (Building Commission), 'Compliance Report First Quarter 2014/2015', p. 14.

²⁶⁸ *Building Services (Registration) Act 2011* (WA), s. 64(1).

E. Victoria

Legislative Framework

The *Building Act 1993* (VIC) and *Building Regulations 2006* (VIC) provide the framework for the builders' registration regime in Victoria.

Requirement to be registered

A building practitioner must register with the Building Practitioners Board in Victoria prior to:

- performing domestic building work where the cost exceeds \$5,000 (including labour and materials);
- carrying out re-blocking, re-stumping, demolishing, removing a home, or any building work that requires a permit, regardless of cost; or
- providing more than one type of building work, such as plastering and painting, where the cost exceeds \$5,000 (including labour and materials).

The following categories of building practitioners must be registered:

- Building Inspectors;
- Building Surveyors;
- Commercial Builders;
- Demolishers;
- Domestic Builders;
- Draftspersons;
- Engineers;
- Erectors of Temporary Structures; and
- Quantity Surveyors.

Plumbers are also required to be registered and/or licensed (governed by separate regulations).²⁷⁰

If a domestic builder's employer is a corporate entity, then one of the directors of that entity must be registered.

In summary, Victorian registration is for all building contractors in the residential *and commercial* industry sectors, but does not extend to civil contractors.

Application for registration

An application for registration must be accompanied by information regarding whether:

- the applicant has within the last 10 years as an adult or the last 5 years as a child, been convicted or found guilty of an indictable offence or an offence that, if committed in Victoria, would be an indictable offence involving fraud, dishonesty, drug trafficking or violence;
- the applicant has ever been insolvent under administration;
- any licence, permit, registration or other authority enabling the applicant to work as a building practitioner in Victoria or in an equivalent occupation in the building and construction industry in another State or Territory has ever been cancelled or suspended;

²⁶⁹ *State Administrative Tribunal Act 2004* (WA), s. 105. Review of a decision of a judicial member of the SAT is available to the Supreme Court of Appeal (WA).

²⁷⁰ See generally *Building Act 1993* (VIC), Part 12A, Division 3.

- the applicant has ever been disqualified from holding, or been refused a licence, permit, registration or other authority enabling the applicant to work as a building practitioner in Victoria or in an equivalent occupation in the building and construction industry in another State or Territory;
- the applicant has been fined, reprimanded or cautioned for any breach of an Act, regulations, rules, professional conduct or code of ethics, in relation to working as a building practitioner in Victoria or in an equivalent occupation in the building and construction industry in another State or Territory; or
- any insurer has ever declined, cancelled, or imposed special conditions in relation to the provision of professional indemnity insurance, public liability insurance, or any other indemnity insurance in respect of the applicant working as a building practitioner in Victoria or in an equivalent occupation in the building and construction industry in another State or Territory.²⁷¹

Financial Requirements

The Victorian licensing regime does not include legislative or regulatory requirements for disclosure of financial information or require applicants to meet a minimum financial assets threshold.

Nominee

In Victoria, registration as a building practitioner is only available for natural persons.²⁷² However, if a company or partnership of which a registered building practitioner is a director or partner fails to comply with the *Building Act* or the regulations in carrying out building work, that failure is taken to have been the conduct of the registered building practitioner.²⁷³ As a result, the building practitioner will be subject to disciplinary action, including, possibly suspension or cancellation of licence for a failure to comply with the *Building Act*.²⁷⁴ However, it appears that there will be no disciplinary action for the company *itself*, as it does not hold any registration that can attract such disciplinary action.

Renewal

Registration under the *Building Act 1993* (VIC) lasts until it is cancelled, however a registration fee is payable annually.²⁷⁵

Penalties

Penalties apply for, *inter alia*:

- a failure to provide information regarding a change in eligibility circumstances;²⁷⁶
- undertaking building work when not registered as a registered builder; and
- holding oneself out to be a registered builder when not licensed as a registered builder.²⁷⁷

Suspension or removal of registration

A building practitioner's registration may be suspended by the Building Practitioner's Board upon application by an insurer for a failure by the builder to comply with a reasonable direction of the insurer in respect of the completion or rectification of defective building work.²⁷⁸

The Building Practitioner's Board may of its own volition or by referral²⁷⁹ conduct an inquiry into the conduct or ability to practise of a registered building practitioner. Upon completing the inquiry the Building

²⁷¹ *Building Act 1993* (VIC), s. 169(2)(ca); *Building Regulations 2006* (VIC), r 1509.

²⁷² *Building Act 1993* (VIC), s. 169(1).

²⁷³ *Building Act 1993* (VIC), s. 179B.

²⁷⁴ *Building Act 1993* (VIC), ss. 178-179A.

²⁷⁵ *Building Act 1993* (VIC), s. 170-171.

²⁷⁶ *Building Act 1993* (VIC), s. 172A.

²⁷⁷ *Building Act 1993* (VIC), s. 176.

²⁷⁸ Or for a failure by the builder to comply with a guarantee or direction under the *House Contracts Guarantee Act 1987* (VIC): *Building Act 1993* (VIC), s. 174A.

²⁷⁹ Referrals may be made by an appointed person (under section 177), the Victorian Building Authority, the Victorian Civil and Administrative Tribunal, an insurer or by any other person: *Building Act 1993* (VIC), s. 178(1).

Practitioner's Board may take disciplinary action against that practitioner (including the possible suspension (not more than 3 years) or cancellation of that building practitioner's registration), if a finding is made that a building practitioner:²⁸⁰

- is guilty of unprofessional conduct;²⁸¹
- has failed to comply with the *Building Act 1993* (VIC) or the *Building Regulations 2006* (VIC);²⁸²
- has failed to comply with a determination of the Building Appeals Board or a direction of the Victorian Building Authority;
- is guilty of particular misconduct;²⁸³ or
- is incapable of practising.²⁸⁴

The Building Practitioners Board maintains a Practitioner Disciplinary Register which records:

- registered practitioners who have been found guilty of misconduct by the Building Practitioners Board (BPB);
- details of any penalties imposed; and
- the suburb or town in which the conduct took place.²⁸⁵

The register does not show:

- information about current inquiries or investigations; or
- any other complaints made against the practitioner, such as cases involving disputes at Victorian Civil Administrative Tribunal (**VCAT**) or reported to Consumer Affairs Victoria.

It appears that the Practitioner Disciplinary Register dates back to 2009. It appears that since then, 37 builders have had their registration suspended and 29 have had their licence suspended.²⁸⁶

Link between Victorian Domestic building insurance and Registration Regime

The Building Practitioners Board must suspend a person's registration if it becomes aware that the person has ceased to be covered under any residential builders warranty insurance.²⁸⁷

An insurer may apply to the Building Practitioners Board for the suspension of the registration of a domestic builder for:

- a failure by the builder to comply with a reasonable direction of the insurer in respect of the completion or rectification of defective building work, or any payment to be made to the insurer in respect of the completion or rectification of defective building work (in accordance with required insurance or in accordance with a guarantee under the *House Contracts Guarantee Act 1987*),²⁸⁸ or
- a failure by the builder to comply with a direction by the Victorian Managed Insurance Authority to complete rectification work or pay the amount required for rectification of the work by another builder.

Review of registration decisions

The VCAT may review a decision by the Building Practitioners Board to grant, renew, suspend, cancel or impose a condition on a licence.²⁸⁹

²⁸⁰ *Building Act 1993* (VIC), ss. 179(2), 180.

²⁸¹ *Building Act 1993* (VIC), s. 179(1)(a).

²⁸² *Building Act 1993* (VIC), s. 179(1)(b).

²⁸³ Including all those types of conduct outlined at section 179(d)(Aa) of the *Building Act 1993* (VIC).

²⁸⁴ *Building Act 1993* (VIC), s. 180.

²⁸⁵ Available from: <http://www.vba.vic.gov.au/disputes-and-resolutions/practitioner-disciplinary-register>.

²⁸⁶ Building Practitioners Board, 'Practitioner Disciplinary Register' as at 17 July 2015.

²⁸⁷ *Building Act 1993* (VIC), s. 174.

²⁸⁸ *Building Act 1993* (VIC), s. 174A.

²⁸⁹ *Building Act 1993* (VIC), s. 182A.

F. Summary of Jurisdictional review

The review of the registration and licensing schemes that are presently operating in Australian jurisdictions permits the distillation of their core elements and characteristics as including:

- The majority of registration and licensing systems extend coverage to building contractors, irrespective of whether they are working on commercial or residential works.
- Civil contractors are not caught by registration and licensing systems, as they are typically framed in, or by reference to, building activities as defined in building legislation. For example, in New South Wales, registration is required for a contractor undertaking any work for which a building permit is required to have been issued under the *Building Act* (NSW).
- The registration and licensing systems generally capture trade contractors or classes of 'specialist' trade contractors (who are typically subcontractors to a head contractor or 'builder').
- The licences and registrations are generally granted for finite periods (typically 1 to 3 years) and renewal is required to be undertaken by contractors with elements of review of contractors' performance and compliance with registration criteria.
- Often the registration and licensing of a contractor company includes a requirement that the contractor company have a natural person as a nominee who must also be personally registered or licensed. In the same categories or classes or registration as the company.
- The approval or renewal of registration and licensing is undertaken by the government regulator on criteria that typically involve varying descriptions and thresholds of contractor:
 - training/technical requirements (often linked back into national competency and vocational training and qualifications);
 - experience and 'track record';
 - financial qualifications; and/or
 - a 'fit and proper' person test.
- All registration and licensing systems incorporate disciplinary processes that typically have a contractor's registration suspended or cancelled upon adverse findings for a fairly broad spectrum of breaches and non-conformances by the contractor.
- In some jurisdictions the actionable breaches or defaults of the construction contractor that can lead to suspension or cancellation of registration or licence include where it fails to pay.
- There is a review process (sometimes linked into the state's administrative tribunal) for the refusal or reduction of the classification of contractor's application or renewal for registration, or to appeal from a revocation or suspension of licence by the regulator.

VI. Assessment of existing builders' registration system and CAL operating in the Territory

A. Does the existing builders' registration system achieve its objectives?

Following a consideration of the basic objectives of builders' registration, (ensuring consumer protection, maintaining minimum standards; and protecting public safety and amenity) as well as an exploration of the regulatory regimes operating in other jurisdictions, the performance of the existing builders' registration system and CAL accreditation scheme can be assessed.

B. Coverage of the existing registration system is inadequate

The contractor licensing or registration systems in the Territory and interstate aim to achieve their consumer protection objectives by reducing the incidence of construction failure (contractors failing to complete their works or failing to attend to defects and non-conformances in their construction) by targeting contractor failure.

Registration/licensing systems do this by providing a basic framework for both preventative and punitive policy initiatives.

Further, as this Report has already identified, most construction is substantially executed by trade contractors in a subcontracting chain or pyramid leading up to the 'head' contractor/builder.

In order to protect consumers from construction failure and to try to improve the standards of contractor workmanship the basic contractor registration system needs to try to capture as many contractors as is practicable.

The existing building registration system in the Territory, even when supplemented by the operation the industry's voluntary CAL accreditation scheme, fails to do this in a coordinated or effective manner.

Trades contractors as well as builders

The existing builders' registration system is restricted in application to building contractors that are residential builders; namely those companies and natural persons who contract directly with homeowners or purchasers of residential dwellings. 'Builder' in this context means the head contractor that deals with the principal. There is no registration requirement, and therefore no opportunity to develop appropriate packages of financial, standing (e.g. fit and proper person test), training, technical, and experience requirements for any other building industry contractors or trades (excepting the self-certifying electricians and plumbers, who have their own registration systems) even though they physically execute the majority of building work.

The consumer protection objective of the registration system is not satisfied by simply targeting the 'top tier' builder that deals with the consumer. The nature of contractor failure occurring in the contracting chain means that preventive measures contained in the registration system ought to be adopted and applied to the trade contractors actually doing the construction work down that contracting chain.

The CAL accreditation system has the benefit of capturing trade contractors as well as builders within its accreditation framework. CAL demonstrates there is no practical impediment to extending the framework of accreditation or registration down the contracting chain in the Territory. This is also demonstrably achievable by other jurisdictions generally licensing trade contractors in far greater numbers than will be required in the Territory.

CAL is however limited in its practical application to a restricted class of contractor (those wanting to tender or do Territory Government work). By its voluntary nature, CAL is generally not applicable to the very class of contractor that ought to be captured by registration.

Also, by being an industry related body, CAL does not reconcile or coordinate its approach to accreditation, with the Government's procedures and assessment criteria for registration under the builders registration system.

Further, a breach of the CAL conditions of accreditation by a contractor is not something that can be tied into the disciplinary procedures of the Government's registration system, given they are of a completely different provenance. (There are substantive natural justice issues with a cancellation of accreditation under CAL being used as a trigger event for disciplinary steps, cancellation or suspension of contractors' registration under the *Building Act*, and *vice versa*.)

RECOMMENDATION 1: Contractor Registration Systems

A reformed registration system ought to be established and used as the basis for prequalification of contractors and the Government's procurement directions (**Reformed Registration System**).

Geographic application

Similarly the geographic application of a building contractors registration system needs to be reassessed. Whilst there may be good reason (such as ensuring compliance with relevant provisions of the NCC) to divide the Territory into building control areas, there seems to be little reason to limit the application of the contractors' registration system, in so far as it seeks to regulate contractor conduct, to only some of those geographic areas.

If there are truly significant differences in the minimum financial, training, experience or technical standards of contractors needed in different areas of the Territory, or common minimum standards cannot be extended to all areas of the Territory for good reason, then those differences can be accommodated by issuing different classes of registration or licence for designated areas (e.g. a remote areas classification) rather than excluding areas from the operation of the basic registration system.

RECOMMENDATION 2: Contractor Registration Systems

The Reformed Registration System be applied universally across the Territory.

Commercial as well as residential contractors

Finally, the need to address contractor and construction failures is as compelling for the commercial construction sector as it is for the residential sector, albeit commercial principals are not always thought to be as vulnerable as residential principals. Both builders and trade contractors are often working in the residential and commercial building sectors simultaneously and the incidence of mixed residential/commercial use buildings is increasing. Additionally the need to maintain and improve contractors' standards of conduct and building performance in the building industry through the preventative and punitive (disciplinary) measures that a registration system provides ought to, from a policy perspective, be applied generally across the industry.

This Report consequently advocates a reformed registration system extending across commercial and residential contractors including trade subcontractors.

C. Deterrence is not significant

As we discuss above, a fundamental function of any registration or licensing system is to capture the industry participants that are the subject of regulation, in this case, contractors in the building industry. This basic registration scaffold can then be used to support the particular policy initiatives that Government wishes to introduce to combat construction and contracture failure.

If the coverage of the basic registration system is too restricted, then there is no practical means by which a Government can practically and cost effectively introduce effective reforms and policy initiatives.

Presently, only a small fraction of the construction industry's contractors are required to be registered as residential builders. Tradespersons and commercial contractors are not caught by the existing builders' registration system and there is no practical means to change the behaviour of wrongdoers in the majority of the industry by sanctioning them for inappropriate conduct. These wrongdoers can generally continue to trade irrespective of their payment defaults and construction failures by simply side-stepping the narrow confines of the existing registration system (and generally not wanting to receive accreditation under CAL).

Positive goals for a Reformed Registration System are to:

- capture as many contractors as can be practically incorporated into the registration system; and
- reconcile or eliminate duplicitous, 'stand-alone' systems that are not able to be integrated into a broader regulatory framework.

A basic, comprehensive registration system is the foundation for targeting and tailoring proper policy initiatives and reforms in the construction industry, both now and in the future.

D. The present system's financial threshold is arbitrary

The existing builders' registration and CAL systems attempt to provide consumer protection, by seeking to ensure that contractors participating in these schemes have the basic financial capacity so as to not commit a payment default or suffer a contractor failure.

The existing builders' registration system tries to achieve this by requiring applicants for registration or renewal of registration establish to the BPB that they hold and will continue to hold net financial assets of \$50,000.

This amount is arbitrary. It is potentially too great for some of smaller trade subcontractors and potentially insufficient to prevent contractor failure for most other trade subcontractors and builders. A net asset balance of \$50,000 will be quickly eroded, on even a moderate scale project, by the failure to receive payment of a significant progress claim.

There has been hearsay that even this basic cash reserve requirement is circumvented by the applicant temporarily borrowing money for the application or renewal period. The frequency and extent of auditing conducted to ensure that the minimum cash requirement is maintained by contractors is not known. Auditing is however an important deterrent if there is to be any prospect of the minimum capital requirement being adhered to.

E. Disciplinary system for professional building practitioners and building defects

The system of audit, complaint and review of building practitioners under the *Building Act* is necessarily required to accommodate all building practitioners and not just building contractors.

As such it is very much based on the concept of professionals conducting professional services. This is exemplified by the primary charge, if the matter is not one for which the *Building Act* prescribes a penalty, of 'unprofessional conduct'.

It is understood that the Director and the BPB have determined that failures of a building contractor to comply with requirements of the *Building Act*, such as failing to provide information that has been directed of it,²⁹⁰ or a failure to supervise subcontractors adequately led to a breach of the Building Code of Australia and consequently a breach of the *Building Regulations* and *Building Act*,²⁹¹ constitute unprofessional conduct.

This Report recognises that the disciplinary mechanisms of builders' registration are founded in the broader system of practitioner registration and are consequently framed in the language of professional duties and misconduct and have often focused on the standards of workmanship. This Report further accepts that practically, the disciplinary parts of a contractor's licensing system need to be retained within the broader

²⁹⁰ *Director of Building Control v Building One Pty Ltd and Ian Izod* Northern Territory Practitioners Board reasons for decision 3 April 2014.

²⁹¹ *The Director of Building Control v Michael Keith Baxter* Building Practitioners Board reasons for Decision 16 February 2010.

building practitioner classes, addressing building certifiers and certifying architects, plumbers and engineers. What is advocated however is that the Reformed Registration System clarify and expand those matters for disciplinary action against contractors to better capture a registered *contractor's* conduct identified as causing contractor and construction failure, such as a contractor's failure to pay a subcontractor.

F. Comparison of residential warranty schemes and contractor registration systems for building contractors in NT vs QLD

Composing a meaningful comparison of costs to contractors across different components of different jurisdictions' building regulatory regimes is difficult. However the following two tables attempt to capture the costs to contractors of:

- the MBA Fidelity Fund, CAL accreditation and residential builder registration in the Territory; and
- the QHWS and contractor registration in Queensland.

Total cost to Territory contractors under MBA Fidelity Fund and Builders' Registration System

Category of building contractor	MBA Fidelity Fund contribution	CAL		Builders Registration		Total	
		Application and registration	Rating fee	Application and registration	NTA	Total fees	Including NTA
Residential building contractor (restricted) (private contract)	\$2,200 ²⁹²	N/A	N/A	\$1,057	\$50,000	\$3,257	\$53,257.00
Residential building contractor (restricted) (government contract)	N/A	\$620.40 ²⁹³	\$1,500 ²⁹⁴	\$1,057	\$50,000	\$3,177.40	\$53,177.40
Residential building contractor (unrestricted) (private contract)	N/A	N/A	N/A	\$1,057	\$50,000	\$1,057	\$51,057.00
Residential building contractor (unrestricted) (government contract)	N/A	\$620.40 ²⁹⁵	\$1,500 ²⁹⁶	\$1,057	\$50,000	\$3,177.40	\$53,177.40
Commercial builder (private contract)	N/A	N/A	N/A	N/A	N/A	\$0	\$0

²⁹² Assuming a contract price of \$300,000.

²⁹³ Assuming that the builder is registered in "Residential" building category only and "new work-restricted up to 2 stories" subcategory only.

²⁹⁴ Based on \$300,000 rating.

²⁹⁵ Assuming that the builder is registered in "Residential" building category only and "new work-unrestricted" subcategory only.

²⁹⁶ Based on \$300,000 rating.

Category of building contractor	MBA Fidelity Fund contribution	CAL		Builders Registration		Total	
		Application and registration	Rating fee	Application and registration	NTA	Total fees	Including NTA
Commercial builder (government contract)	N/A	\$620.40 ²⁹⁷	\$10,000 ²⁹⁸	N/A	N/A	\$10,620.40	\$10,620.40
Civil and engineering construction (private contract)	N/A	N/A	N/A	N/A	N/A	\$0	\$0
Civil and engineering construction (government contract)	N/A	\$620.40 ²⁹⁹	\$10,000 ³⁰⁰	N/A	N/A	\$10,620.40	\$10,620.40

Total cost to Queensland contractors under QHWS and QLD Registration System

Category of building contractor	QHWS premium	Builders Registration		Total	
		Application and registration	NTA	Fees only	Including NTA
Residential builder – low or medium rise (private contract or government contract) (individual)	\$3,103.90 ³⁰¹	\$897.15 ³⁰²	\$156,000 ³⁰³	\$4,001.05	\$160,001.05
Residential builder – low or medium rise (company)	\$3,103.90 ³⁰⁴	\$1,620.65 ³⁰⁵	\$156,000 ³⁰⁶	\$4,724.55	\$167,168.80
'Open builder' (not completing residential building work) (individual)	N/A ³⁰⁷	\$897.15 ³⁰⁸	\$156,000 ³⁰⁹	\$5,720.75	\$161,720.75
'Open builder' (not completing residential building work) (company)	N/A ³¹⁰	\$1620.65 ³¹¹	\$156,000 ³¹²	\$6,444.25	\$162,444.25
Commercial work where the head contractor engages an appropriately licensed builder	N/A	N/A	N/A	\$0	\$0
Civil and engineering contractors	N/A	N/A	N/A	\$0	\$0

²⁹⁷ Assuming that the builder is registered in "Commercial/industrial" building category only and "complex new work" subcategory only.

²⁹⁸ Based on \$2,000,000 rating.

²⁹⁹ Assuming that the builder is registered in "Civil engineering" building category only and "other civil structures" subcategory only.

³⁰⁰ Based on \$2,000,000 rating.

³⁰¹ Assuming a contract price of \$300,000.

³⁰² Assuming a Maximum Revenue of \$3,000,000.

³⁰³ Assuming a Maximum Revenue of \$3,000,000. The financial requirements including NTA required by Prequalification System in place for government contracts in Queensland (PQC) substantially follow the NTA and Current Ratio requirements imposed by the *Minimum Financial Requirements* as issued from time to time by the QBCC: Department of Housing and Public Works (QLD) 'Capital Works Management Framework: Contractor PQC Financial Requirements Capital Works', p. 17. The NTA requirements for PQC is known as 'NTA-Govt'.

³⁰⁴ Assuming a contract price of \$300,000.

³⁰⁵ Assuming a maximum Revenue of \$3,000,000.

³⁰⁶ Assuming a Maximum Revenue of \$3,000,000.

³⁰⁷ If the builder registered as an open builder is not completing residential work below 3 storeys, QHWS will not be required.

³⁰⁸ Assuming a Maximum Revenue of \$3,000,000.

³⁰⁹ Assuming a Maximum Revenue of \$3,000,000.

³¹⁰ If the builder registered as an open builder is not completing residential work below 3 storeys, QHWS will not be required.

³¹¹ Assuming a Maximum Revenue of \$3,000,000.

³¹² Assuming a Maximum Revenue of \$3,000,000.

VII. Recommended reforms to the Builders' Registration System

A. Summary

- This Report recommends adopting an expanded registration system capturing all building contractors be adopted in the Territory.
- 'Building contractors' ought to include all builders and trades contractors that work on buildings all the way down the subcontracting chain.
- The existing registration systems for electricians and plumbers and drainers, ought to continue in coordination with the expanded system.
- The contractors' registration system ought to apply:
 - across the building industry's sectors (i.e. residential and commercial construction); and
 - in all areas of the Territory (that is, not restricted to Tier 1 and 2 Building Control Areas),

consistent with the models currently operating in the majority of jurisdictions in Australia.

- The Reformed Registration System can introduce appropriate competency standards for building contractors. It also ought to have cascading levels of registration for different classes of contractors within the industry sectors, so that these competency requirements can be properly tailored to certain types of building contractor, without making the registration system onerous for other building contractors.
- The disciplinary process ought to expressly capture an expanded class of contractor defaults, being the conduct of contractors that cause of construction failure and contractor failure including, particularly payment default.

B. Scope of Reformed Registration System

Captures all building contractors

The Reformed Registration System ought to seek to apply to all contractors that are performing building work (as currently defined in the *Building Act*) and then expressly exclude those persons who are not to be included for policy reasons.

It is anticipated that exclusions in coverage for certain classes of potential contractors could include:

- 'one off' owner builders. A temporal limit to the number of homes built by an ostensible owner builder of, say, no more than one per calendar year would assist in defining this category of exclusion;
- small 'handyman', maintenance or trade works where the value for any one contract is below a minimum threshold. The present threshold of works less than \$12,000 in contractual value could be retained if this is considered appropriate; and
- those 'specialist' certifying trade contractors already recognised and subject to existing registration or licensing regimes (presently electrical and plumbing contractors).

These definitions can be extended to include contractors providing construction management services that manage physical construction by trade contractors as well as the traditional contracting roles of builder and subcontractor.³¹³

³¹³ See the *QBCC Act* definitions of building work and building services as an example.

The definition of building work will need to identify that ‘work’ means the physical execution of a construction activity excepting for the extension for construction management described above to avoid the registration system applying to suppliers of plant or materials.

Whether civil contractors ought to be included

Whether civil contractors ought to also be included in a broad contractor registration system is a difficult question to answer.

Inclusion is consistent with the abiding principle of having a basic registration framework universal to all contractors and the civil contracting sector is a very significant portion of the construction industry overall.

Contrary arguments against civil contractors’ inclusion in the Reformed Registration System include the reality of contractors’ registration being firmly founded in building industry regulation. It will be a significant departure from all contractor registration systems presently operating in Australia to capture civil contractors. The scale of administration of such a regulation system will be significant and practically would dictate taking the Reformed Registration System out of the *Building Act* and the *Building Regulations* and creating dedicated legislation.

Finally, the element of consumer protection (that is a fundamental objective of builders registration) is generally absent from civil contractors’ works as (outside of foundations and supporting works for dwellings) civil contractors are usually engaged by other construction contractors or principals and not vulnerable home owners.

Consideration may need to be given to whether a limited extension of the registration system ought to be made to capture civil and engineering contractors undertaking works incidental to the construction of a building (such as excavating and compacting foundations) as is found in both the Tasmanian and South Australian registration systems.

The incidence of poor civil works in preparation of ground supporting a structure and its potential impact on the structure and viability of the building can be significant. This supports the need to have civil and engineering contractors who physically execute the earthworks such as site preparation, excavation and compaction works on the site brought within the ambit of the Reformed Registration System. However, it can be argued that such a step might not be necessary as the issue of a civil contractor’s performance of such work ought to be regularly inspected by other building practitioners and professionals (essentially structural engineers and building certifiers) responsible for inspecting and certifying that the construction meets the design requirements.

On balance this report recommends that civil contractors not be caught in a Reformed Registration System, excepting possibly for civil works incidental to the construction of a building, such as are included in the Tasmanian and South Australian registration systems.

In summary, the scope of the Reformed Registration System should be as broad as possible, in order for policy makers to have the greatest accessibility to industry participants. However, if the Reformed Registration System was to expand to include civil and engineering contractors (not involved in the construction of a building), then the Reformed Registration System would go beyond building regulation. It would require the creation of a completely separate registration scheme the current registration system.

RECOMMENDATION 3: Contractor Registration Systems

The Reformed Registration System ought not to include civil contractors. Consideration ought to be given whether the Reformed Registration System should extend to civil contractors executing civil works incidental to the construction of a building.

Developers of buildings (being persons who own the land on which the building is being built) are presently required to be registered under the existing builders’ registration scheme. The Reformed Registration System will retain that requirement.

RECOMMENDATION 4: Contractor Registration Systems

The Reformed Registration System ought to retain the existing requirement that residential developers be registered.

C. The classes for Registration

With the expansion of the registration system's application to a broader range of contractors, it will be necessary to expand the existing registration system's two categories of restricted and unrestricted residential builders, by introducing a reasonable, but comprehensive, set of classes or categories of registration.

A proper class or category system will enable the registration system to accommodate the practicalities of the appropriate fee and qualification criteria for the various sizes and sophistication of contractors requiring registration. It will also permit specific categories of contractor to be required to undertake further steps than other classes of registered contractor, such as residential head contractor/builders obtaining residential warranty cover.

There are a number of models for classification of contractors across the jurisdictions reviewed, and the CAL accreditation system has a comprehensive breakdown of category, group and subgroup of contractors that can be used as a guide to a contractor classification system, as it appears to have been practical enough to have operated in the Territory for a number of years.

Given the need to interact with the Recommended Warranty Scheme, it is recommended that specific residential builder categories be included, so that residential warranty requirements can be linked to the class of registration.

RECOMMENDATION 5: Contractor Registration Systems

The Reformed Registration System includes relevant classes or categories of contractor, including retaining residential builders as specific registration classes (to accommodate differences between low and high rise residential builders).

D. Registration fees and charges

The Recommended Registration Scheme will seek to charge a registration fee for applicants and a smaller fee on renewals.

The quantum of the registration fee charged should reflect the level of administration required to assess and approve the registration. For the majority of contractors (who are not residential builders whose registration will carry additional requirements), a simple, relatively small fee ought to be required for a registration in the relevant category. A small renewal fee should be payable for the prescribed renewal periods.

The registration fee for residential builders will be greater, reflecting the more costly administration processes associated with assessing the financial information required to be provided by the residential builder applicant. A similar fee structure upon renewal, is recommended.

E. The criteria for Registration

The eligibility of contractors to apply, renew and hold a registration under the reformed registration system ought to include the following reforms.

Financial criteria

This Report highlights that the imposition of various financial eligibility criteria on contractors applying for or renewing registration is a keystone to most registration systems.

This Report further identifies the shortcomings of a 'one size fits all' approach to financial eligibility by way of requiring a single net asset amount across all contractors, large or small. The Report also presents the range of alternative financial criteria that are in operation in other jurisdictions, ranging from:

- no financial criteria being prescribed;
- the regulator being able to consider (unidentified) financial requirements;
- statements, or evidence satisfying the regulator, that the contractor is solvent; to
- comprehensive minimum financial requirements that stage their minimum thresholds over different revenue classes.

The setting of financial requirements in the builder registration system's eligibility criteria is about trying to minimise the potential of future contractor failure. As discussed earlier in this Report, the challenge for such an exercise is that construction contractors are generally in the position of having ongoing project material, labour and subcontractor costs as well as the contractor's own onsite, offsite and general operating overheads, that together quickly exhaust its cash reserves if it is not paid progressively for its works by its principals.

It is difficult to identify whether raising net tangible asset thresholds for contractors has made a discernible difference to the rate of contractor failure. Information indicating such a correlation is not available and it is not likely that such a simple cause and effect will be isolated from any industry data that is being collected.

In the absence of being able to obtain any quantitative analysis of the impact of imposing financial criteria on contractors under a registration system to the rates of contractor failure this Report makes some broad assumptions in supporting its recommendations.

- First, if payment default is a leading cause of contractor failure, then reform ought to focus on improving the ability of a contractor to be paid, as this will prove more effective in reducing contractor failure than setting arbitrary levels of net tangible assets when the cash crunch caused by non-payment hits the contractor.
- Secondly, the cause of contractor failure is generally a cash crisis. A contractor that is demonstrably solvent and with a positive net asset ratio on application or renewal of its registration can still be thrown into insolvency (or at least cash insolvency) quite quickly if not paid in a timely manner for its works. Often times there is not the ability for the contractor who has to pay its subcontractors and suppliers to liquidate or to leverage against its assets quickly enough to save the situation (although there are specialist financiers that are able to secure loans against progress payments, and credit insurance is also becoming more available).
- Thirdly, to the extent that contractor failure is also caused by simple financial mismanagement and fraud on the part of the unscrupulous operators in the industry, a basic liquidity threshold, (particularly if kept in auditable construction trust accounts for the benefit of subcontractors) can help weed out those who ought to not be in business.
- Fourthly, the financial criteria are a costly and time consuming part of the registration eligibility process for contractors. If the financial assessment of contractors does not offer much protection to the industry and consumers against the incidence of payment default and contractor failure, then those costs and distraction are suffered by the contractors for no good reason. (The intrusiveness and cost of the financials demanded of contractors is likely the cause for the removal of the obligation to resubmit that information with a renewal of licence in Queensland, for example.)

This Report concludes that rather than imposing substantial financial criteria on the contractor at registration application or renewal times, the Reformed Registration System ought simply provide the regulator powers to direct identified contractors (or classes of contractors) to consistently hold a minimum,

standing balance of cash (or immediately available credit, such as an overdraft facility) in the Recommended Subcontractors' Trust.³¹⁴ This minimum prescribed can be called the "Liquidity Amount".

The intention is that the account balance across all ledgers of the Recommended Subcontractors' Trust will not dip below the Liquidity Amount except with the express approval of the regulator. This approval might require the contractor to give the regulator prior notice:

- that payments out of the construction trust account to subcontractors may cause the account to drop below the Liquidity Amount; and
- setting out the steps that the contractor will take to promptly restore the standing balance of the Recommended Subcontractors' Trust to the Liquidity Amount.

This Report recommends that empowering the regulator to direct a Liquidity Amount is a practical way to have a Reformed Registration System protect against payment default without imposing onerous financial reporting requirements on a registered contractor.

RECOMMENDATION 6: Contractor Registration Systems

The Reformed Registration System includes a power for the regulator to direct nominated contractors or classes of contractor to hold a designated minimum balance (the **Liquidity Amount**) in its construction trust account established under the Recommended Subcontractors' Trust Scheme.

The Liquidity Amount could be calculated and determined by the regulator adopting the following calculation methodology:

- The particular class of contractor provide in its application or renewal its outgoings and cash receipts for a specified proceeding period (e.g. monthly or quarterly, for the licence period for a renewal or the previous 12 months for an application).
- An average of past and projected outgoings and receipts can be established from this contractor information.
- The regulator will have determined and published a recovery period, being that period it estimates a contractor may be held out of payment on account, considering all the processes available to that contractor to receive payment.

EXAMPLE

The regulator may reasonably consider that a payment claim under a building contract must take less than 50 days³¹⁵ to be certified and paid from date of claim, and that an adjudication determination under the security of payment legislation will take up to 20 working days to be made from application, so, a period of 3 months could be directed as the requisite period for calculation of the liquidity reserve, being the period a contractor may be held out of its payment.

- The sum of the average monthly outgoings for the directed period can be quickly ascertained.
- If the discounted percentage of the average monthly receipts (to reflect the reality that a contractor with more than one job will not be unpaid by all its principals simultaneously) can be determined. Designated discount factors can be developed to be selected for the particular contracting profile of the contractor.

³¹⁴ This is the trust account is discussed in the in the Security of Payment part of this Report.

³¹⁵ *Construction Contracts (Security of Payments) Act (NT)*, s. 13.

- The amount to be maintained as a cash reserve or unimpeachable line of credit by the contractor can then be determined by the regulator running the contractor's accounting information through the following formula:

$$\text{Liquidity Amount} = \frac{\text{Average Monthly Outgoings}}{\text{Discount \%} \times \text{Average Monthly Receipts}} \times \text{Nominated Recovery Period}$$

The need for 'continuous disclosure' of nonconformity with financial conditions by a registered contractor throughout the registration period is central to the conditions of registration being effective.

The financial criteria proposed for nominated classes of registration would be less arbitrary than the present nominated net asset value as is presently incorporated in the existing registration system (and is more fully developed in the Queensland system).

By seeking to ensure a cash reserve held in the Recommended Subcontractors' Trust for the benefit of subcontractors, the contractor's registration can be used as tool to directly impact on the ability of a contractor who is hit by payment default to survive and not generate a cascade of payment defaults down the contracting chain.

RECOMMENDATION 7: Contractor Registration Systems

The regulator will have general powers to require further declarations of solvency from time to time during the period of the contractor's registration and to ask for disclosure of relevant financial information at any time.

In order to ensure the effectiveness of the recommended measures to prevent contractor failure, (except where a notice has been provided) a failure to comply with the Liquidity Amount requirement or cooperate with any investigations by the regulator into a contractor's solvency is a failure to comply with a condition of the contractor's registration and may result in the suspension or cancellation of the contractor's registration, along with equivalent action against the contractor's nominee (where the contractor is a company). The only financial information that may be needed of a contractor at time of application or renewal is the gross payments to subcontractors, so that the threshold for the contractor to operate a Recommended Subcontractors' Trust account can be assessed.

Residential Warranty Scheme Criteria

In addition to the basic financial criteria required to be satisfied by all registering building contractors, the application for residential builders' class(es) of registration will need to provide substantially greater financial and trading information to enable the residential builder's risk profile to be understood by the regulator and the Recommended Warranty Scheme Administrator. The following financial information³¹⁶ is indicative of the level of disclosure that is anticipated will be needed from residential builders:

- assessed net tangible assets;
- builder's margins and profitability;
- working capital;
- overhead expenses;
- capital and retained earnings;
- return on assets;
- creditor days;
- debtor days; and

³¹⁶ An approved insurer under the NSW HBCF must be satisfied of these criteria before granting an eligibility certificate to the applicant.

- trade credit history.

Additionally, the application for residential builders' class registration and the attendant qualification for the Recommended Warranty Scheme will need disclosure and consideration of a significant trading history including:

- trading structure and the period of trading in that structure;
- residential builder's track record with the regulator;
- any payment defaults, adverse decisions of Residential Building Disputes Commissioner, or disciplinary findings against the builder (or its nominee, if a company applicant); and
- builder's (and its nominee's, if a company applicant) levels of experience and competency qualifications.

It is anticipated that a unified, or at least closely coordinated, administration of both the Recommended Warranty Scheme and the Reformed Registration System by the Government will permit a residential building contractor's application for registration or renewal of registration to incorporate all the information required for assessment of the risk and cost of that contractor's participation in the Recommended Warranty Scheme.

RECOMMENDATION 8: Contractor Registration Systems

Contractors will supply all necessary information at the time of application or renewal of registration. Additional financial information will be needed by residential builders to enable confirmation of their ability to access the compulsory participation in the Recommended Warranty Scheme and to enable the levy to be set.

Residential Warranty Scheme contribution or levy

From this additional information required of the residential builder classification applicants for registration, the Residential Warranty Scheme Administrator may build a profile of the applicant (or renewing) residential builder and determine a levy or contribution rate to be applied to that builder in consideration of the risk and costs of its activities being covered by the Recommended Warranty Scheme during the period of the registration.

The Residential Warranty Scheme Administrator may choose to develop its own 'rack' rates to establish a levy for building contractors who fall within acceptable financial and construction risk categories (which it may wish to publish, as is done by administrators of the Queensland and Victorian systems) for ease of administration.

This approach to assessing contribution to the Recommended Warranty Scheme is simple and transparent. It does not however permit accommodation of individual risk factors (including 'rewarding' 'good' contractors, risk-wise) and the Recommended Warranty Scheme ought to include flexibility for the Residential Warranty Scheme Administrator and regulator to implement a more tailored approach to address particular risk profiles of individual residential builders and particular projects.

Payment of the residential builders' levy is contemplated as being most practical at the time of, and as condition precedent to, the contractor's commencing works on each of its residential projects in the manner of the present MBA Fidelity Fund. This accommodates a 'user pays' ethos for residential builders and enables a levy to be assessed by reference to a residential project's contract price (or estimated construction value).

This Report does not anticipate that the financial assessment of residential builders applying for registration and the levy amount will be any more burdensome on the residential contractor than the current requirements under the MBA Fidelity Fund scheme.

Expertise and experience

The Reformed Registration System would retain the concepts of the natural person who is managers a contractor company being fit and proper person to hold registration, or to be a company's nominee. This will permit circumstances where a person found guilty of an offence or being placed into bankruptcy will trigger a review and action regarding the registration of the contractor.

The Reformed Registration System will also adopt and emphasise the national competencies system as the basis for assessing the level of experience and competency of the contractor for the class of registration being applied for or renewed, as this gives objectively to the regulator's assessment of this criteria.

A major objective of contractor registration is to maintain and improve both the standards of work and the standards of contractor conduct. Both things are best achieved by ongoing training and work experience of the contractor's staff and managers. The national industry competencies scheme provides the most effective framework to objectively and impartially assess and judge levels of competency and experience in trades and general contractor conduct.

It is recognised that the existing residential builders' registration system has already gone down this road in requiring Certificate IV in Building or equivalent competency levels for the restricted (and unrestricted) building contractor. The Reformed Registration System would expand this for the new classes of registration that the introduction of trade contractors will require. The Queensland system discloses how the broader classes of registrable contractor can be tied into the national competencies modules and units.

Given the challenges of the Territory, the Reformed Registration System will include the ability of the regulator to permit conditions of registration to include that the contractor or its nominees will undertake and achieve a module or units in a national training module during the course of the registration period, rather than have to have the qualification at time of application.

Further, a general, continuous, education obligation might be considered appropriate as part of the registration obligation. Such a requirement would require careful consideration so as to be not too onerous for contractors, and will need industry associations and organisations to be available to provide the necessary educational and training modules.

We consider that the option for contractors to undertake ongoing competency training during their registration periods will encourage ongoing improvement of Territory contractors' formal competency, skills and training. Furthermore, we consider this flexibility is necessary to accommodate a limited pool of contractors operating in the Territory.

F. The period of the Registration

The present period of registration under the existing system is two years, after which a renewal is required.

There is no doubt that renewal is a red tape burden for contractors, but as the financial circumstances and solvency of construction contractors can fluctuate widely in relatively short periods, the need for resubmission of material to permit a review of eligibility of the contractor on renewal, is generally accepted in most jurisdictions as a necessary evil for a functional registration system.

The recommended registration system includes an extended period of registration (in the order of 3 years based on interstate examples) so that the cost and time burden of renewal would be reduced for contractors.

However, to improve monitoring of contractor's change of circumstances, the recommended registration system also includes regular (at least annual) reporting requirements.

A basic annual return (**return**) for the majority of contractors could simply include a statutory declaration updating the declaration of solvency given by the contractor (or nominee if a company) and whether there have been material changes in the contractor's circumstances (such as exceeding the threshold of gross outgoings to subcontractors that might trigger the Recommended Subcontractors' Trust Scheme to apply) at that time.

The return will also encourage disclosure of any significant change in circumstances that may affect the contractor's ability to conform to the registration requirements.

Some categories of registration may require greater submission of supporting documents in the return. For example, a contractor required by registration conditions or direction of the regulator to comply with liquidity requirements may be required to also submit documentary evidence of its ongoing compliance (by way of bank records and contractors' accounts) as part of its return. Similarly, if competency standards were to be achieved during the currency of the registration, the return may also be required to include evidence of the achievement of those standards.

RECOMMENDATION 9: Contractor Registration Systems

The registration period be of reasonable duration (3 years) to reduce the time and cost impacts of renewals but simple annual statements or returns, incorporating declarations of solvency, be introduced.

G. Disciplinary processes

A streamlined disciplinary process

The disciplinary processes presently found in the *Building Act* accommodate all building practitioners and not just building contractors. As such these procedures are focussed on professional misconduct that is apposite to engineers and certifiers but does not allow for the streamlined processing of reviews, audits or complaints for building contractors. Building contractors do not generally owe duties at law as professionals for construction works and what is 'professional misconduct' is practically limited to breaches of legislation, tending to be focused on the issues of their construction being non-conforming, rather than their contracting behaviour generally.

Non-compliance with the requirements and conditions of registration are not simply dealt with in the existing system; they must be re-characterised as a breaches of the *Building Act* or *Regulations* for which a penalty applies or is described to be a matter of professional misconduct.

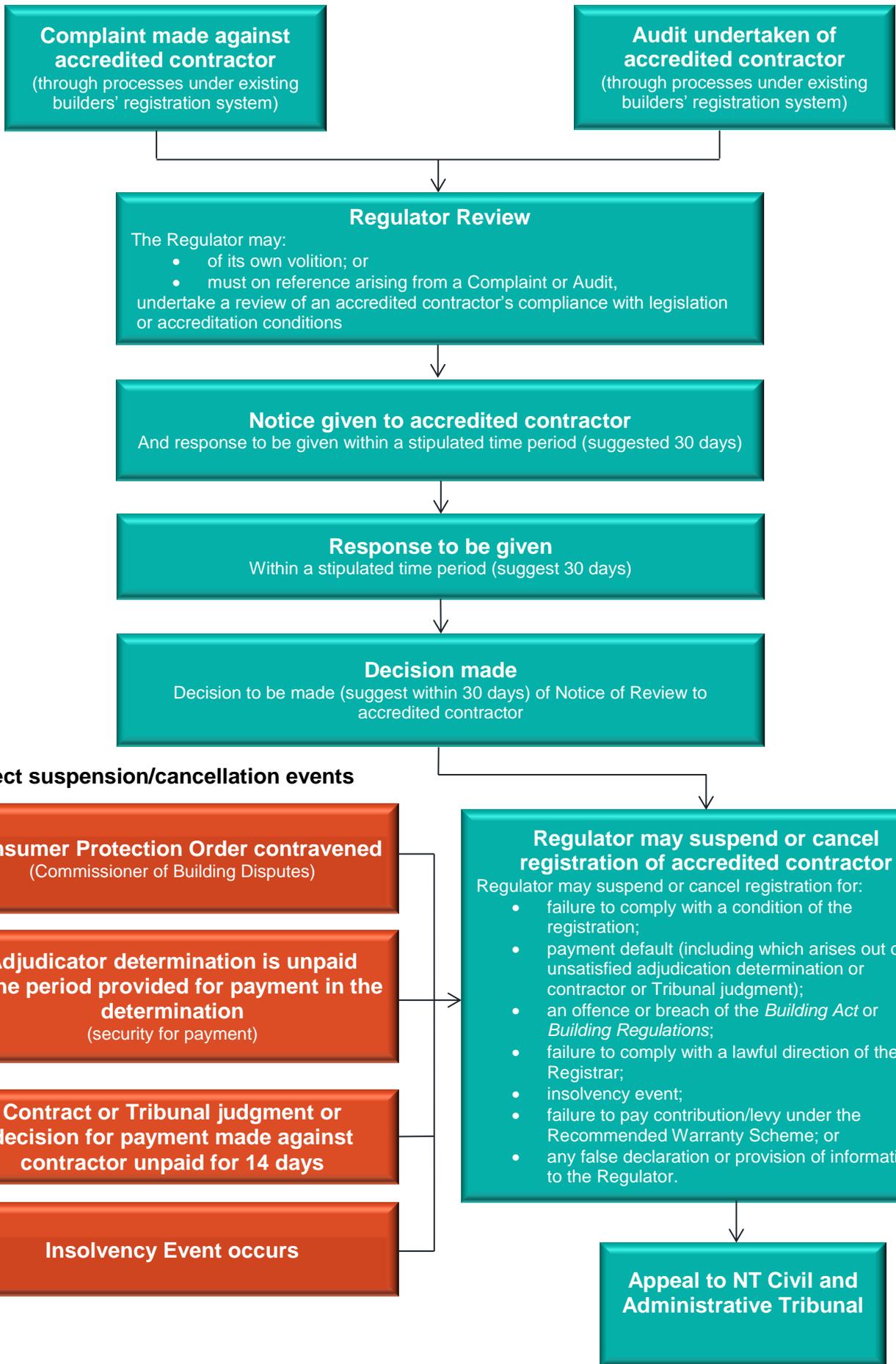
The reformed registration system seeks to improve and expedite the complaint and review processes by making them directly apply to building contractors (both individuals and companies and their respective nominees); detaching them from the more general processes applicable to all building practitioners.

Given the importance of including a failure to pay by a building contractor as a default event leading to review and disciplinary process, the Reformed Registration System's review and disciplinary system ought include mandatory periods and times in which each step of the review or disciplinary processes is to be taken or conducted, so that a determination or outcome is fairly but promptly achieved and action can be taken if that leads to suspension or cancellation of registration.

RECOMMENDATION 10: Contractor Registration Systems

The disciplinary processes leading to cancellation or suspension of registration ought to be streamlined.

We set out below a diagrammatic representation of how a process could be introduced that provides a simple review mechanism and also for other defined events to immediately trigger the right to suspend or cancel a registration. We have included a right of appeal to the Northern Territory Civil and Administrative Tribunal.



Lifting the corporate veil

As outlined above, under the existing registration system, the BPB must register a corporation in the category of building contractor if it is satisfied, *inter alia*, that at least one director, or a nominee is registered in that category of building contractor and will provide adequate supervision of the building work carried out by the corporation.³¹⁷

It has been observed that on occasion, the nominee who is registered does *not* 'adequately supervise' the building work carried out by the corporation and is not involved in the day to day running of the company. Building companies may unofficially share nominees, who have little to do with the projects being undertaken. This means that on an operational level, the company is not properly managed by its nominee.

Furthermore, on a disciplinary level, it does not appear that under the current registration system, any disciplinary action resulting in the suspension or cancellation of a nominee's registration clearly impacts upon registration of the company for which that person is a nominee, and vice versa.³¹⁸ Although in the one (published) case where disciplinary proceedings were brought against both the nominee and the company, the BPB held that an individual is liable for the actions of the corporation individually and separately.³¹⁹

The Reformed Registration System should require that in order for a company to be registered in any category of building practitioner, a director of the company should be the designated nominee (**Nominee Director**). The Nominee Director should be required to be registered in the same category in which the company is seeking registration. Furthermore, it is recommended that the any disciplinary action taken against the company be taken against the Nominee Director as the leading mind of the company's breach. These recommendations will uphold the primacy of the consumer protection objective because:

- the registered company can no longer hide behind the 'corporate veil'. The actions of the company will be directly linked to the Nominee Director and the Nominee Director is directly accountable to the company;
- the Nominee Director has an interest in actively overseeing and ensuring compliance with the *Building Act* on projects undertaken by the registered company. Coupled with the direct registration suspension and cancellation events established by the Reformed Registration System, this means that compliance with the *Building Act* and *Regulations* by Nominee Directors will be high; and
- opportunities for phoenixing are minimised, since insolvency events are a direct registration or cancellation of registration event and the reciprocal disciplinary action recommendation ensures that any Nominee Director whose licence is suspended or cancelled cannot become a Nominee Director of another company, in any incarnation, in the future.

Although these recommendations place great responsibility on prospective Nominee Directors, it is expected that they will raise the quality of nominees generally under the registration system. Furthermore, similar provisions have been in existence in areas such as the Australian Consumer Law for some time.³²⁰

RECOMMENDATION 11: Contractor Registration Systems

- A company seeking registration as a contractor under the Reformed Registration System must nominate a director registered in the class of contractor in which they seek to be registered.
- Any disciplinary action taken against the company will be applied to the nominee director.

³¹⁷ *Building Act* (NT), s.24B(2)(a).

³¹⁸ However, there is a penalty (430 units (currently \$65,790) for failure to notify the BPB within 7 days (or immediately, in some circumstances) if the nominee's licence is suspended, cancelled or not renewed: *Building Act* (NT), ss. 24B(2), 25A(2).

³¹⁹ The disciplinary action in the case of *The Director of Building Control and ACT Builders (NT) Pty Ltd (15716CU) and Ioannis Glynatsis (15700CU)* (4 April 2013); (17 May 2013) was applied evenly to both the company and the individual.

³²⁰ For example, section 248 of the Australian Consumer Law provides that 'a regulator may apply to a court for an order disqualifying a person from managing a corporation in respect of a contravention of the ACL.'

The need for Payment Default to be a disciplinary matter

The existing registration system does not expressly identify payment default as a breach of the registration requirements. The system presently compels this conduct to be characterised as 'professional misconduct'.

The historical roots of such a test of professional misconduct in issues of workmanship and client service means that it is challenging for subcontractors and other persons with contractual relations 'down' the contracting chain to be able to effectively lodge compliant and argue that payment defaults or repeated behaviour in bad faith (such as dragging out payment from the payment terms, arguing and delaying assessment of the value of claims and bringing spurious cross claims of default or breach to try to increase commercial pressure on a subcontractor) constitutes professional misconduct. The regulator making any such determination has to carefully step through the issues of what, if any, payment defaults constitute professional misconduct without assistance from the legislature, with consequent cost and delay to that disciplinary process.

The Reformed Registration System ought to include legislative description that a payment default of a registered contractor is an actionable breach of its registration conditions. Payment defaults can be defined as a failure to pay:

- a debt or an amount due to be paid (including a progress payment on account) under a construction contract or otherwise at law;
- an amount ordered under any court or tribunal order;
- an amount determined in an adjudication determination (even if subject to review);
- an amount awarded by a decision of the Commissioner; or
- the notified costs of the warranty scheme administrator where it has had to step in and address the contractor's defaults.

The expedited review and disciplinary procedures will then apply to have an outcome of suspension or cancellation of registration if there is a determination that a payment default has occurred.

RECOMMENDATION 12: Contractor Registration Systems

Payment default by a registered contractor will be clearly identified as an actionable breach of its registration conditions.

Payment Protection

I. Payment default and contractor failure in the Construction Industry

The devastation that non-payment of legitimate progress claims can cause down the contracting industry chain has been identified as a systemic weakness of the construction industry.³²¹

Three key challenges facing the industry are:

- the lack of direct contractual relationship between building practitioners and the client (principal) causing a lengthy and complex contracting chain;
- the unfair risk transfer from stronger parties to weaker parties due to principals attempting to shift risk to contractors, who feel they have no choice but to accept the extra risk, or lose work to competitors who are willing to take on such risks; and
- the high number of insolvencies in the construction industry compared to other industries.³²²

The incidence of a principal failing, causing in turn contractor failure, is relatively low compared to contractor failure. The sovereign risk of government not paying what is due to be paid under a head building contract is low. Similarly, private commercial and multi-storey residential projects typically involve bank finance which acts as a check on the viability of projects. Various financing instruments, such as tripartite agreements, permit a bank to 'step in' where there is a default by the principal. This permits banks to pay a head contractor to finish the works and protect the bank's exposure to half-finished projects. Similarly smaller residential works typically involve some form of home finance, enabling the homeowner to evidence their financial capacity to pay the home builder. Whilst a residential homeowner may struggle to pay for variations, the financing requirements of getting a loan approved for a home build generally enables the home-owner to be able to pay the original contract price under the residential building contract.

Reviews and reform initiatives relating to construction industry non-payment and contractor failure are consequently concentrated on contractors and subcontractors and particularly consider how subcontractors can still have rights of recovery or security of payment when contractors above it in the contracting chain fail.

A. Subcontracting

In Australia, subcontractors are responsible for between 80 and 85% of all construction work, which is the highest proportion of subcontractor involvement of any construction industry around the world.³²³

Since the 1950's the practice of subcontracting has progressively overtaken self-performing builders. The following reasons have been suggested for this development:

- a firm who relies on its own labour force is geographically restricted;
- an intermittent workload causes difficulty maintaining a permanent workforce;
- it is not viable to maintain a workforce containing a variety of specialists that might only be required from time to time; and
- a contract with a small permanent workforce can concentrate on management and requires less working capital.³²⁴

³²¹ See the 'Introduction' part of the Report, section II.

³²² Evans, Phil, *Review of Construction Contracts Act 2004: Consultation Discussion Paper* (October 2014), p. 13.

³²³ Submission 18 to the *Senate Inquiry in the Australian Construction Industry: Subcontractors' Alliance*, p. 2; Final Report: Inquiry into Construction Industry Insolvency in NSW (November 2012), p. 167.

³²⁴ Industry Commission *Construction Costs of Major Projects* (Report No 8 ,1991), p. 23.

A substantial inequality of bargaining power between head contractors and subcontractors often operates to the detriment of subcontractors. Subcontractors interviewed for the purposes of conducting the *Small Business Commissioner Construction Subcontractor Investigation* said that this inequality of power persists due to:

- subcontractors' hesitation to damage the business relationship with the head contractor;
- subcontractors' reluctance to damage their reputations amongst other head contractors;
- inequality and ineffectiveness of dispute resolution;
- high costs involved in resolving disputes; and
- the likelihood that larger building companies are better able to protect their interests.³²⁵

For these reasons subcontractors are considered to be in a particularly vulnerable position to address and protect themselves from payment defaults.

B. Recourse in the event of contractor failure: insolvency laws

This Report does not undertake a detailed review of insolvency law and how its operation impacts on the construction industry, but it is important to recognise that in the event of a head contractor's insolvency, subcontractors generally rank as unsecured creditors and do not have the ability to receive any priority of payment. Subcontractors will have a right to submit a proof of debt to the liquidator or administrator of the insolvent head contractor along with all of its other creditors.

In the event of a liquidation (of a company) or bankruptcy (of an individual) the subcontractor receives a distribution proportionate to the quantum of its debt with other unsecured creditors. Any such distribution comes after any secured creditor (such as a bank) and the costs of the external administration have been paid.

Subcontractors can in certain circumstances be required by liquidators to disgorge progress payments they received from an insolvent contractor before the appointment of the external administrator, if those payments are found to be 'preferential', in that they were paid to the subcontractor in preference to other creditors. This can be a particularly bitter blow to a struggling subcontractor. It also makes the task of a subcontractor facing a non-payment scenario challenging if that non-payment is accompanied by tell-tail signs that the head contractor is struggling and possibly insolvent. Huge pressure is exerted on subcontractors to compromise and not to take steps that may crystallise a contractor's insolvency. Unfortunately the very acts of compromise that subcontractors typically agree to, such as deferral of payment, payment on instalment when the contractor receives money from a principal, or getting others to pay the subcontractor from money they owe to the struggling contractor, are all steps that can be used to evidence the preferential nature of payments that might be received.

As identified earlier in this Report, the practice of subcontractors getting some form of personal security, such as directors' guarantees is fiercely resisted at the contractor level of the industry, although it is reasonably common as a trading term of suppliers who are extending 'credit' for supply of materials, plant and equipment.

Therefore, aside from particular circumstances where there may be further rights of action against other persons (such as a director or financier of a head contractor who may have made misleading and deceptive statements about the financial viability of that company that were relied upon by the subcontractor)³²⁶ there is little a subcontractor can often do under the insolvency laws or by way of third party security such as directors guarantees, to secure payment when the contractor above it becomes insolvent. The subcontractor proves in the administration of the insolvent head contractor, and awaits the distribution of any proceeds from the liquidation of that contractor's estate, typically occurring months or years after the payment default.

³²⁵ *Small Business Development Corporation, Final Report: Construction Subcontractor Investigation* (March 2013), p. 61.

³²⁶ Section 18 of the *Australian Consumer Law*, Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

Whilst the development of the voluntary administration process under the *Corporations Act 2001*³²⁷ has given increased opportunity for companies to survive and trade on under deeds of company arrangement, and the advent of industry focused, specialist, financiers has improved the support that can be accessed by distressed contractors (in a way the retail banks have not generally offered), it cannot be said that the insolvency laws and their operation have significantly reduced the wave of insolvency caused by payment default and contractor failure in the construction industry.

Absent the ability of the Territory to meaningfully implement unilateral changes to Federal insolvency law, and given the ongoing Senate Inquiry in this area this Report advocates that Territory reform initiatives ought to remain focussed on strategies to avoid contractors having to trigger formal insolvency processes in the first place.

Those strategies are generally focused on getting contractors and subcontractors progressively paid what is due to them under construction contracts and getting prompt resolution of payment disputes.

The range of strategies that are considered in this part of this Report involve statutory:

- intervention in construction contracts to change the parties' agreement where needed to improve timely and proper payment;
- rights to claim and recover progress payments on account under construction contracts (security of payment);
- procedures by which contractors can secure their rights to payment against the land on which they worked (liens) and against other payments coming down the contracting chain above the paying contractor (charges);
- retention trusts, where an amount is held in security for the contractor's due performance of its obligations under the contract and including for a period after completion for security of attending to defects; and
- subcontractor trusts, to hold payments received from principals or contractors in trust for the benefit of the subcontractor who are to be paid by that contractor.

³²⁷ Part 5.3A of the *Corporations Act 2001* (Cth).

II. Intervention into Contract terms

Both the *Building Act* and the *Construction Contracts (Security of Payments) Act* intervene in parties' construction contracts by prohibiting certain terms, modifying certain other terms that might be present, and implying yet other terms where the written contract does not traverse a particular issue. The rationale behind this statutory intervention includes:

- addressing inequalities in bargaining power between contracting parties; and
- speeding up the timing of payment down the contracting chain.

A. *Building Act*

The *Building Act* prescribes that for residential building work,³²⁸ a residential contractor must enter into a contract with the owner of the land which contains certain provisions.³²⁹ For example, the contract must specify:

- the extent of and the total contract price for the work;³³⁰
- the deposit payable (if any) (which is no more than 5% of the contract price),³³¹ and
- the percentage of the total contracted price payable to the contractor after completion of a stage of work in accordance with the standard progress payments.³³²

The *Building Act* also prescribes the amount of and manner in which standard progress payments must be made under residential building contracts.³³³ Any progress payment agreement must be in a required form and contain specified provisions itself.³³⁴

The *Building Act* prohibits certain clauses in building contracts. For example a clause which restricts a party's right to access dispute resolution processes in the Territory or requires disputes to be subject to a final and binding decision of a third party will be void.³³⁵

Lastly, as discussed above,³³⁶ in order to protect consumers, the *Building Act* also:

- implies consumer guarantees into residential building work contracts;³³⁷ and
- requires that residential builders undertaking residential building work on buildings less than 3 storeys take out Residential Building Cover.³³⁸

B. *Construction Contracts (Security of Payments) Act*

The *Construction Contracts (Security of Payments) Act* prohibits the following types of clauses from a construction contract:

- 'pay if paid' and 'pay when paid' provisions;³³⁹ and
- provisions which purport to require a payment to be made more than 50 days after the claimant is to be claimed.³⁴⁰

³²⁸ As described in regulation 41G of the *Building Regulations* (NT).

³²⁹ *Building Act* (NT), s. 41B.

³³⁰ *Building Regulations* (NT), r. 41H(d).

³³¹ *Building Regulations* (NT), rr. 41H(e), 41HE(1).

³³² *Building Regulations* (NT), r. 41H(f).

³³³ *Building Regulations* (NT), r. 41HA.

³³⁴ *Building Regulations* (NT), r. 41HB.

³³⁵ *Building Regulations* (NT), rr. 41HC-HD.

³³⁶ In the Residential Warranty Schemes part of this Report.

³³⁷ *Building Act*, s. 54B.

³³⁸ *Building Act*, s. 54AC.

³³⁹ *Construction Contracts (Security of Payments) Act* (NT), s.12.

³⁴⁰ *Construction Contracts (Security of Payments) Act* (NT), s.13.

Furthermore, any provision which purports to exclude, modify or restrict the operation of the *Construction Contracts (Security of Payments) Act* is of no effect.³⁴¹

The *Construction Contracts (Security of Payments) Act* implies certain provisions into construction contracts, where there are no written provisions regarding:

- variations of the contractor's obligations under the contract;³⁴²
- the amount, or way of determining the amount that the contractor is entitled to be paid for the obligations the contractor performs;³⁴³
- whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations under the contract that the contractor has performed;³⁴⁴
- how a party must make a claim to another party for payment;³⁴⁵
- when and how a party must respond to a payment claim or by when a payment claim must be made;³⁴⁶
- how interest is to be paid on any payment that is not made at the time required by the contract;³⁴⁷
- when the ownership of goods passes from the contractor for goods that are related to construction work and supplied to the site of the construction work by the contractor under its obligations under the contract;³⁴⁸ and
- the status of any retention sums.³⁴⁹

C. Recommendations for further intervention

This Report does not advocate further intervention into parties' privity of contract without it being absolutely necessary.

Other recommendations made in this Report do however necessitate some limited statutory intervention into construction contracts' terms to ensure there are contractual mechanisms to effect or recognise the reforms. A non-exhaustive list of possible contractual conditions that will be required, if recommendations in this Report are adopted include:

- If the Reformed Warranty Scheme is adopted and the Scheme Administrator is given the recommended step-in powers to take over and complete projects from a defaulting residential builder, residential building contracts may need to be deemed to include an obligation on the residential builder to ensure all its subcontracts have, in turn, an obligation to consent to an assignment and novation of the subcontract to the Scheme Administrator (in circumstances of the builder's default and triggering of the Reformed Warranty Scheme). There may be need to also look to developing the 'standard form' residential building contract and accompanying subcontract given the extent of amendment to and intervention in those contracts required by both the existing legislation and proposed reforms.
- If the recommendation for the establishment of a Recommended Subcontractors' Trust Scheme is adopted, construction contracts for registered contractors ought to include contractual payment terms that align with the existence of the subcontractor's construction trust account and how and when subcontractors and builders are paid out of the account.
- If the recommendation for the Recommended Retention Trust Scheme is adopted, then residential builder contracts need to have security provisions in their building contract recognising the existence of

³⁴¹ *Construction Contracts (Security of Payments) Act* (NT), s.10.

³⁴² *Construction Contracts (Security of Payments) Act* (NT), s.16; Schedule Div. 1.

³⁴³ *Construction Contracts (Security of Payments) Act* (NT), s.17; Schedule Div. 2.

³⁴⁴ *Construction Contracts (Security of Payments) Act* (NT), s.18; Schedule Div. 3.

³⁴⁵ *Construction Contracts (Security of Payments) Act* (NT), s.19; Schedule Div. 4.

³⁴⁶ *Construction Contracts (Security of Payments) Act* (NT), s.20; Schedule Div. 5.

³⁴⁷ *Construction Contracts (Security of Payments) Act* (NT), s.21; Schedule Div. 6.

³⁴⁸ *Construction Contracts (Security of Payments) Act* (NT), s.22; Schedule Div. 7. Provisions in Div. 8 are implied regarding these types of goods if the principal or the person for whom the principal is performing construction work, becomes insolvent.

³⁴⁹ *Construction Contracts (Security of Payments) Act* (NT), s.24; Schedule Div. 24.

the retention trust, and which do not conflict or require further security from the residential contractor, on top of the statutory retention trust scheme.

III. Historical operation of Security of Payment legislation in Australia

A. Overview of the operation of security of payments legislation in Australia

Security of payments legislation has been enacted in every jurisdiction in Australia.³⁵⁰

For some time, construction industry stakeholders have been advocating for uniform security of payment legislation across all Australian jurisdictions.³⁵¹ In 2003 the Final Report of the Royal Commission in to the Building and Construction Industry (**Cole Report**) proposed federal uniform code for security of payment across the country (*Building and Construction Industry Security of Payment Bill 2003*). Unity in security of payment legislation was not achieved.

Broadly, security of payments legislation facilitates timely payment between contracting parties by establishing a statutory system for rapidly resolving payment disputes called adjudication.

Despite its name, there is no 'security' of payment provided in the legislation.

Security of payment legislation as enacted in Australia does not for example:

- provide an express security interest for payment elevating the unpaid contractor's entitlement to secured creditor status;
- provide a right to garnishee the defaulting contractor's bank accounts; or
- permit the unpaid contractor to claim payment from another entity, such as the defaulting contractor's principal.

East vs West

Security of payments legislation was introduced into Australia in the late 1990's and early 2000's (for most jurisdictions) following the enactment of similar legislation in the United Kingdom. It can be broadly grouped into two categories:

- the 'East Coast Model'; and
- the 'West Coast Model'.

The 'East Coast Model' refers to the basic model of security of payment legislative regime found in New South Wales, Victoria, Queensland, Australian Capital Territory, South Australia and Tasmania. The East Coast Model is also referred to as a 'default system'³⁵² because its impact arises from those higher up the contractual chain missing payment deadlines. It is essential focused on a subcontractor's claims against the contractor above it.

Shortly after the release of the Cole Report Western Australia and the Territory diverged from the legislative approach taken by the Eastern States and unveiled a 'West Coast' model. Due to the discretion given to an adjudicator under this model to evaluate the merits of a dispute (rather than being limited by documents as

³⁵⁰ *Building and Construction Industry (Security of Payment) Act 2009 (ACT)*, *Construction Contracts (Security of Payments) Act 2004 (NT)*, *Building and Construction Industry Security of Payment Act 1999 (NSW)*, *Building and Construction Industry Security of Payments Act 2004 (QLD)*, *Building and Construction Industry Security of Payment Act 2009 (SA)*, *Building and Construction Industry Security of Payment Act 2009 (TAS)*, *Building and Construction Industry Security of Payment Act 2002 (VIC)*, *Construction Contracts Act 2004 (WA)*.

³⁵¹ See, for instance Society of Construction Law Australia – Australian Legislation Reform Sub-Committee, *Report on Security of Payment and Adjudication in the Australian Construction Industry* (June 2014), pp. 20-22.

³⁵² Society of Construction Law Australia – Australian Legislation Reform Sub-Committee, *Report on Security of Payment and Adjudication in the Australian Construction Industry* (June 2014), p. 14.

is the case under the East Coast Model), this model is characterised as an ‘evaluative’ approach.³⁵³ The West Coast model recognises payment disputes both up and down the contracting chain.

Historical operation of legislation prior to security of payment

Prior to the enactment of the security of payment legislation across Australia, several States and Territories had different legislation and mechanisms seeking to address the rights of subcontractors.

Sometimes this legislation gave contractors powers to register liens, elevating the contractor to secured creditor status, and permitting charges to be made against money otherwise payable to a defaulting contractor by its principal.³⁵⁴ In Queensland and South Australia these rights subsist and operate in parallel to those States’ respective security of payment legislation.³⁵⁵

A historical and current overview of the operation of security of payment legislation across Australian jurisdictions is summarised as follows:

State/Territory	Current Security of Payment Legislation	Other(former) Legislation
SA	<i>Building and Construction Industry Security of Payment Act 2009</i>	<i>Worker’s Liens Act 1893</i> (current)
NT	<i>Construction Contracts (Security of Payments) Act 2004</i>	<i>Workmens Liens Act 1893</i> (repealed)
NSW	<i>Building and Construction Industry Security of Payment Act 1999</i>	<i>Contractors Debts Act 1997</i> (current)
QLD	<i>Building and Construction Industry Security of Payments Act 2004</i>	<i>Subcontractors’ Charges Act 1974</i> (current) <i>Queensland Building and Construction Commission Act 1991</i> (current)
TAS	<i>Building and Construction Industry Security of Payment Act 2009</i>	<i>Contractor’s Debts Act 1939</i> (repealed)
WA	<i>Construction Contracts Act 2004</i>	<i>Workmen’s Wages Act 1898</i> (repealed)
ACT	<i>Building and Construction Industry (Security of Payment) Act 2009</i>	<i>Contractors’ Debts Act 1897</i> (repealed)
VIC	<i>Building and Construction Industry Security of Payment Act 2002</i>	-

³⁵³ Society of Construction Law Australia – Australian Legislation Reform Sub-Committee, *Report on Security of Payment and Adjudication in the Australian Construction Industry* (June 2014), p. 15.

³⁵⁴ *Contractors’ Debts Act 1897* (ACT); *Workmen’s Liens Act* (NT); *Contractors Debts Act 1997* (NSW); *Subcontractors’ Charges Act 1974* (QLD); *Worker’s Liens Act 1893* (SA).

³⁵⁵ *Subcontractors’ Charges Act 1974* (QLD), *Worker’s Liens Act 1893* (SA).

Worker's Liens Act 1893 (SA) (as received in the Territory)

The *Workmens Liens Act* (whose name was later changed to the *Workers Liens Act* in South Australia as a part of a number of amendments that did not flow into the received law of the Territory) operated in the Territory until its repeal by the *Construction Contracts (Security of Payments) Act* (NT). The *Worker's Liens Act 1893* (SA) still currently operates in South Australia.

The *Worker's Liens Act* in South Australia:

- allows a contractor to register a lien that acts as a caveat on the estate and interest of the land upon which the contractor's works have been executed to secure an amount accrued due and payable to that contractor under a construction contract. The lien prevents transactions over the owner's title and interest in the land upon which the construction work was performed. The lien must be enforced through a court process. The lien will rank the contractor's claim behind any other registered security (typically a mortgage to the bank) but does elevate the contractor's contractual claim to secured status above the 'ruck' of competing unsecured creditors.³⁵⁶; and
- creates a subcontractor's 'charge', which by notice attaches to money otherwise payable by a principal to a head contractor and diverts any unpaid amount from the contractor to the unpaid subcontractor's account.

Whatever the merits of the substance of the *Worker's Liens Act* and the Territory's unamended *Workmen's Liens Act*, the drafting of the legislation was archaic, vague and subject of trenchant criticism from the courts. There is no doubt that contractors were disenfranchised from their proper entitlements on many occasions due to the byzantine processes that had to be followed to crystallise and enforce a registrable lien. Any suggestion that liens or charges provided to contractor by this legislation be reintroduced in the Territory will need to be conducted with a substantial review of the drafting of the legislation.

b. Liens

The right to register a lien arose where:

- the work is done, with the express or implied assent of the owner or occupier to the land or to any fixture on the land; or
- the materials are, with the express or implied assent of the owner or occupier, used or intended to be used for work done, or intended to be done, to the land or to any fixture on the land.

For a worker, the lien was limited to 4 weeks' wages and to a sum not exceeding \$200.³⁵⁷ For contractors and subcontractors the lien must not exceed the value of the contract price which was unpaid at the time where the principal first receives notice of the registration of the lien.³⁵⁸

The worker, contractor or subcontractor must give notice to the owner or occupier demanding the amount owing to him. The worker, contractor or subcontractor must commence an action to enforce the lien within 14 days of his or her right to that lien arising. A lien was available only if it is registered within 28 days after the wages or contract price have become due.³⁵⁹

A lien was subject to every dealing, assurance, mortgage, encumbrance, or charge on the estate or interest in the land of the owner or occupier, or on goods the subject of the lien, registered before the registration of the lien. However a lien took priority over any unregistered dealing, assurance, mortgage, encumbrance or charge.³⁶⁰

c. Charges

³⁵⁶ Sometimes this can be a significant advantage, as the principal must compromise with the contractor to get a lien lifted, before it is able to transact on its property. Developers needing to settle under contracts are particularly vulnerable to the commercial impact of the worker's lien. Workmen's liens have also been used effectively to secure Territory contractors substantial returns in insolvency situations, where normally they would not have received much at all, in the administration as unsecured creditors.

³⁵⁷ *Worker's Liens Act 1893* (SA), s. 4.

³⁵⁸ *Worker's Liens Act 1893* (SA), s. 6.

³⁵⁹ *Worker's Liens Act 1893* (SA), s. 10.

³⁶⁰ *Worker's Liens Act 1893* (SA), s. 9.

A worker was entitled to a charge on any money payable to his or her contractor or subcontractor for his or her wages in respect of work done under the relevant contract.³⁶¹

A subcontractor was also entitled to a charge on any money payable to the contractor or subcontractor above it in the contracting chain for that portion of the contract price payable to the subcontractor in respect of work done or materials furnished or manufactured under the relevant contract.³⁶²

A charge only attached to money payable under the relevant contract for the purposes for which the work or materials have been done, supplied, or manufactured. The charge lapsed unless an action was brought to enforce the charge within 28 days after the wages or contract price becomes due.³⁶³

A charge of a worker was limited to up to four weeks' wages, to a maximum of \$200.³⁶⁴

d. Discharging lien or charge

To discharge a lien or charge the owner or occupier must make payment to the court or the Registrar-General of the amount claimed.³⁶⁵

A person entitled to a lien or charge may enforce the lien or charge in any court in which the wages or contract price in respect of the lien or charge could have been recovered against the person primarily liable.³⁶⁶

Contractors Debts Act 1997 (NSW)

The *Contractors Debts Act* allows a subcontractor who is owed money by a defaulting contractor to obtain payment of the sum owing to that defaulting contractor by the principal through a right of assignment.³⁶⁷

The right to the assignment only arises where:

- an unpaid subcontractor is owed money for work carried out for or materials supplied to the defaulting contractor;
- there is money that is payable or will become payable to the defaulting contractor by the principal for work or materials that the defaulting contractor was engaged to carry out or supply under a contract; and
- the work carried out or materials supplied by the unpaid person are, or are part of or incidental to, the work or materials that the principal engaged the defaulting contractor to carry out or supply.³⁶⁸

A court or arbitrator must give a judgment in favour of the unpaid person in order for the right of assignment to arise. Once a judgment has been received, the unpaid person must obtain a debt certificate for the amount owed. The unpaid person can apply to a court for a debt certificate.³⁶⁹

Although the *Contractor's Debts Act* cannot be contracted out of, it is rarely used.³⁷⁰ This may be due to the time and effort that it takes a subcontractor to obtain a judgement debt. The low usage of the *Contractor's Debts Act* might also be attributed to the fact that once the debt certificate is obtained, the principal may no longer owe the defaulting contractor any of the money the subject of the assignment. Despite this, the *Contractor's Debts Act* has been amended to allow a court to issue a debt certificate based on an adjudication certificate issued under the *Building and Construction Industry Security of Payment Act 1999* (NSW).³⁷¹

³⁶¹ *Worker's Liens Act 1893* (SA), s. 7(1).

³⁶² *Worker's Liens Act 1893* (SA), s. 7(2).

³⁶³ *Worker's Liens Act 1893* (SA), s. 7(3).

³⁶⁴ *Worker's Liens Act 1893* (SA), s. 7(4).

³⁶⁵ *Worker's Liens Act 1893* (SA), s. 26.

³⁶⁶ *Worker's Liens Act 1893* (SA), s. 21.

³⁶⁷ *Contractors Debts Act 1997* (NSW) s. 5(1).

³⁶⁸ *Contractors Debts Act 1997* (NSW) s. 5(2).

³⁶⁹ *Contractors Debts Act 1997* (NSW) s. 7.

³⁷⁰ Minter Ellison, *Construction Law Made Easy*. Available from: <http://www.constructionlawmadeeasy.com/SecurityofPaymentNSW>

³⁷¹ *Contractors Debts Act 1997* (NSW) s. 7(2).

Subcontractors' Charges Act 1974 (QLD)

The *Subcontractors' Charges Act 1974* (QLD) operates alongside the security of payment legislation currently in force in Queensland. There is a choice for the subcontractor, if a notice of a charge is given under the *Subcontractors' Charges Act*, no adjudication or court proceeding may be commenced under the *Building and Construction Industry Payments Act 2004* (QLD).³⁷²

The *Subcontractors' Charges Act* allows a subcontractor to claim a charge on money payable or any security given under a contract between a principal and a contractor where the subcontractor has a contract for the performance of work on land with that contractor. The charge can secure payment of money that is payable to the subcontractor for work performed by it under the subcontract.³⁷³

The subcontractor must lodge a:

- notice of intention to claim a charge (with the principal); and
- notice of claim to charge being given (with the contractor).

These notices oblige the principal to retain the amount of the charge due from any money owing to the principal to the contractor.³⁷⁴ To discharge its liability, the principal may pay to the court the amount of the charge³⁷⁵ but if they fail to retain the amount charged, the principal is personally liable to pay the subcontractor the amount of the charge.³⁷⁶

The subcontractor can enforce the charge by commencing proceedings against both the principal and contractor. The proceedings must be commenced within one month, unless the claim is for retention money only.³⁷⁷

Queensland Building and Construction Commission Act 1991 (QLD)

The *QBCC Act* operates in parallel to the *Building and Construction Industry Payments Act 2004* (QLD) for the sub category of construction work defined as 'building work'.

In terms of 'security for payment' the following aspects of the *QBCC Act* function to offer some payment protection to subcontractors:

- there is a statutory right to suspend the works in circumstances where the principal has failed to comply with an order of a court or tribunal, or the principal has failed to pay an amount required to be paid under the contract,³⁷⁸
- a penalty rate of interest is payable on progress payments not made by their due dates,³⁷⁹
- a clause in a subcontract, management trade contract or commercial building contract that provides for payment of progress payments more than 25 business days or 15 business days respectively is void,³⁸⁰
- limits are placed on the amount of security that can be required to be given under a building contract;³⁸¹ and
- notice is required to be given before security can be called for amounts owing under the contract.³⁸²

³⁷² *Building and Construction Industry Payments Act 2004* (QLD), s. 4(2).

³⁷³ *Subcontractors' Charges Act 1974* (QLD), s. 5.

³⁷⁴ *Subcontractors' Charges Act 1974* (QLD), s. 11(1).

³⁷⁵ *Subcontractors' Charges Act 1974* (QLD), s. 11 (5)-(6).

³⁷⁶ *Subcontractors' Charges Act 1974* (QLD), s. 11(2).

³⁷⁷ *Subcontractors' Charges Act 1974* (QLD), s. 15.

³⁷⁸ *Queensland Building and Construction Commission Act 1991* (QLD), s. 67O(2)(b)).

³⁷⁹ *Queensland Building and Construction Commission Act 1991* (QLD), s. 67P.

³⁸⁰ *Queensland Building and Construction Commission Act 1991* (QLD), s. 67U.

³⁸¹ *Queensland Building and Construction Commission Act 1991* (QLD), s. 67K.

³⁸² *Queensland Building and Construction Commission Act 1991* (QLD), s. 67J(1).

Contractor's Debts Act 1939 (TAS)

In Tasmania, the *Contractor's Debts Act* allowed a court to grant an attachment notice in the circumstances where plaintiff who, any time after filing an action for debt, in relation to a contract made by the defendant with the plaintiff, filed an affidavit showing:

- any wages for work performed or goods or materials supplied by the plaintiff to the defendant is owing in relation to that contract; and
- there is reasonable doubt that the plaintiff will be able to enforce a judgment for that claim except by attaching such money or portion thereof or there are 'other sufficient reasons' for the attachment of such money.³⁸³

Service of the attachment notice on the employer had the effect of 'binding the employer's hands all money then due or accruing due from the employer to the defendant in respect of the contract mentioned in the notice.'³⁸⁴

Workman's Wages Act 1898 (WA)

The *Workman's Wages Act 1898* (WA) gave a workman a first charge for unpaid wages upon the money due by the owner to the head-contractor in respect of the contract, work or undertaking.³⁸⁵ This limited a claim to \$20 and was in disuse for a long period before the introduction of the *Construction Contracts Act 2004* (WA).³⁸⁶

³⁸³ *Contractors' Debts Act 1939* (TAS), s. 3.

³⁸⁴ *Contractors' Debts Act 1939* (TAS) s. 4.

³⁸⁵ *Workmen's Wages Act 1898* (WA), s. 4(1).

³⁸⁶ *Workmen's Wages Act 1898* (WA), s. 4(2).

IV. Security of Payment in the Territory

A. Overview

Western Australia led the Territory in the introduction of its security of payment legislation. The Territory's *Construction Contracts (Security of Payments) Act (NT Act)* was modelled on the *Construction Contracts Act 2004 (WA) (WA Act)* in all its essential aspects.

The NT Act and accompanying regulations came into force on 1 July 2005. The NT Act has been recently amended, but those amendments simply refine several issues arising from experience with the operation of the NT Act, rather than undertaking any great revolution in the security for payment scheme.

As discussed above, the NT Act repealed the antiquated *Workmen's Liens Act 1893 (SA)*³⁸⁷ that was part of the received law in the Territory. In doing so it got rid of the 'security' of lien and subcontractor charge that was afforded unpaid contractors and subcontractors under that regime.

The Second Reading Speech of the *Construction Contracts (Security of Payments) Bill 2004* declared that the NT Act would:

- 'promote good payment practices in the building and construction industry' by making void certain provisions of a construction contract that 'slow, or halt the movement, of funds through the contracting chain',³⁸⁸ and
- 'speed up the movement of funds by providing a rapid, and cost-effective adjudication press, for payment disputes.'³⁸⁹

As outlined above,³⁹⁰ the NT Act also:

- varies certain provisions of construction contracts; and
- supplements contractual provisions by implying in certain contractual terms where the parties' contract does not include those terms in writing.

B. Declared objectives

The stated objective of the NT Act is to 'promote security of payments under construction contractors' by:

- 'facilitating timely payments between parties to the construction contracts;
- providing for the rapid resolution of payment disputes arising under construction contracts; and
- providing mechanisms for the rapid recovery of payments under construction contracts.'³⁹¹

The stated objective of the adjudication of a payment dispute is to 'determine the dispute fairly and as rapidly, informally and inexpensively as possible.'³⁹²

C. Mechanical operation of the NT Act

The implied and prohibited contract provisions of the NT Act are outlined above.

The adjudication process operates under the NT Act as follows:

- The NT Act applies to construction contracts for construction work carried out on a site in the Territory,³⁹³ regardless of whether the contract is oral or written. Its operation extends to contracts for the supply of materials and services associated with the relevant construction work.³⁹⁴

³⁸⁷ *Construction Contracts (Security of Payments) Act (NT)*, s. 66.

³⁸⁸ Dr Toyne, Northern Territory Second Reading Speeches, *Construction Contracts (Security of Payments) Bill) 2004*.

³⁸⁹ Dr Toyne, Northern Territory Second Reading Speeches, *Construction Contracts (Security of Payments) Bill) 2004*.

³⁹⁰ In section I of this part of the Report.

³⁹¹ *Construction Contracts (Security of Payments) Act (NT)*, s. 3.

³⁹² *Construction Contracts (Security of Payments) Act (NT)*, s. 26.

- When a payment dispute occurs between the parties, the NT Act provides that a party to the contract can apply to an independent adjudicator, who is registered and appointed by a prescribed appointor body, for a determination of the payment claim.
- A payment dispute will occur when a payment claim has been made under the contract and:
 - the claim has been rejected wholly or partially disputed;
 - the amount claimed or retained by a party is due to be paid and has not been paid in full; or
 - a security is due to be returned under the contract has not yet been returned.³⁹⁵
- Where a payment dispute arises under a construction contract either party (the ‘applicant’) may make an application for adjudication within 90 days of the payment dispute arising.³⁹⁶ This application must:
 - be in writing;³⁹⁷
 - fulfil the formal requirements including contain relevant information and attachments;³⁹⁸
 - be served on the other party to the contract;³⁹⁹
 - be served on the adjudicator or the prescribed appointer,⁴⁰⁰ and
 - be accompanied by the fee or security required by the adjudicator or appointer.⁴⁰¹
- The party to the contract on whom the adjudication application was served (the ‘respondent’) must serve a response to the adjudication application on the applicant and the adjudicator or the appointor, (as the case may be) within 10 working days of being served with the application.⁴⁰²
- The adjudicator is required to determine the payment dispute within 10 working days after the date of the service of the response.⁴⁰³
- The adjudicator must dismiss the application without proceeding to making a determination on the merits in certain circumstances.⁴⁰⁴
- If an application is dismissed without consideration of the merits or if a determination is made by the adjudicator, he or she must provide written reasons for the decision.⁴⁰⁵ An adjudicator’s determination on the payment dispute is final.⁴⁰⁶
- Whatever the outcome, parties will bear their own costs of the payment dispute unless the adjudicator makes a determination to the contrary (which is an extraordinary decision reflecting that the application or response was spurious).⁴⁰⁷

³⁹³ *Construction Contracts (Security of Payments) Act* (NT), s. 6.

³⁹⁴ *Construction Contracts (Security of Payments) Act* (NT), s. 9.

³⁹⁵ *Construction Contracts (Security of Payments) Act* (NT), s. 8.

³⁹⁶ *Construction Contracts (Security of Payments) Act 2004* (NT), s. 28(1).

³⁹⁷ *Construction Contracts (Security of Payments) Act* (NT), s. 28(1)(a).

³⁹⁸ *Construction Contracts (Security of Payments) Act* (NT), s. 28(2); *Construction Contracts (Security of Payments) Regulations* (NT), r. 6.

³⁹⁹ *Construction Contracts (Security of Payments) Act* (NT), s. 28(1)(b).

⁴⁰⁰ As the case may be: *Construction Contracts (Security of Payments) Act* (NT), s. 28(1)(c).

⁴⁰¹ As the case may be: *Construction Contracts (Security of Payments) Act* (NT), ss. 28(1)(d); 46(7)-(8).

⁴⁰² *Construction Contracts (Security of Payments) Act* (NT), s. 29(1). The response must also meet the formal requirements prescribed in s. 29(2) and r. 7 of the *Construction Contracts (Security of Payments) Regulations* (NT).

⁴⁰³ Or if there was no response, 10 working days after the last date on which the response was required to be served: *Construction Contracts (Security of Payments) Act* (NT), s. 33(3). The adjudicator can also request a time extension: s. 33(3)(a).

⁴⁰⁴ Pursuant to s. 33(1)(a) of the *Construction Contracts (Security of Payments) Act* (NT) if: the contract is not a construction contract; the application has not been prepared and served correctly; an arbitrator, court or other body dealing with a matter under the contract makes an order, judgement or other finding about the dispute that is the subject of the application or the adjudicator is satisfied it is no possible to make a determination because of the complexity of the matter or because the prescribed time or any extension of it is not sufficient for another reason.

⁴⁰⁵ *Construction Contracts (Security of Payments) Act* (NT), ss. 38-39.

⁴⁰⁶ *Construction Contracts (Security of Payments) Act* (NT), s. 43.

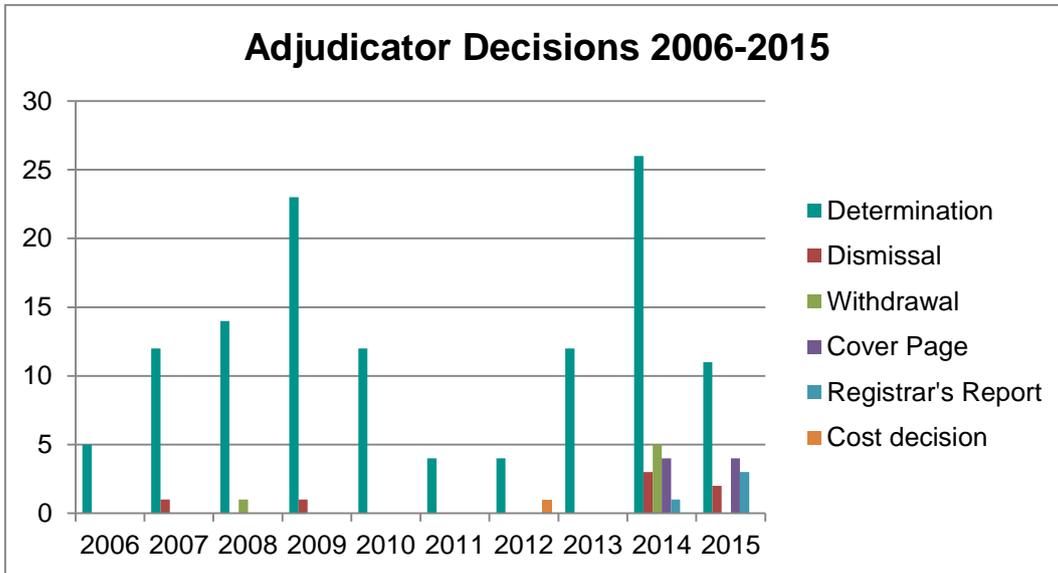
⁴⁰⁷ *Construction Contracts (Security of Payments) Act* (NT), s. 36. In some circumstances the adjudicator may determine that one of the parties determine more than an equal share of the costs due to that party caused the other party to incur costs because of the party’s frivolous or vexatious conduct.

- A determination may be enforced as a judgement of the court of appropriate jurisdiction.⁴⁰⁸ Additionally, a contractor with an unpaid adjudication determination can give notice and suspend its works until the determination is satisfied.
- A decision of the adjudicator to dismiss an application without consideration of the merits can be appealed to the Local Court.⁴⁰⁹

D. Observations on operation of Security of Payments legislation in the Territory

a. Statistics

The Department of the Attorney General and Justice publishes determinations made under the NT Act on its website.⁴¹⁰ Using the published determinations only, it is deduced that since the inception of the NT Act and up to the date of this Report, 150 published decisions have been made by 25 adjudicators. The breakdown of decisions made is as follows.⁴¹¹

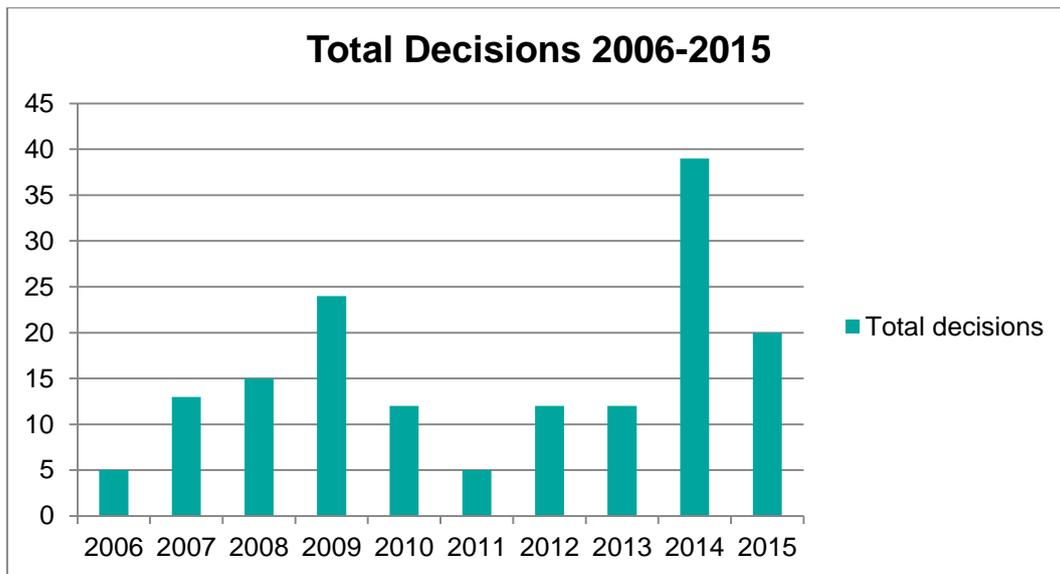


⁴⁰⁸ *Construction Contracts (Security of Payments) Act (NT)*, s. 45.

⁴⁰⁹ *Construction Contracts (Security of Payments) Act (NT)*, s. 48.

⁴¹⁰ <http://www.nt.gov.au/justice/policycoord/construction/determinations.shtml>. (Accessed 5/10/2015).

⁴¹¹ From data available from <http://www.nt.gov.au/justice/policycoord/construction/determinations.shtml>. (Accessed 5/10/2015). 'Registrar's Reports' do not identify the parties involved or the quantum awarded and do not publish the reasons for the decision. 'Cover Page' decisions reveal the amount awarded but not the confidentiality of information contained within the decision. 'Cost Decisions' allocate costs to the parties based from on previous determinations. Dismissals are those decisions which do not consider the merits of the application.



This use of the adjudication mechanism, given the prevalence of payment default in the construction industry, is surprising low. This is likely caused by a number of factors, including a lack of understanding of the adjudication process in the construction industry and amongst contractors' legal and claims advisers. Some of the other possible causes of a relatively low use of the processes introduced to improve payment of contractors are found in the criticisms of the adjudication processes that are set out below.

b. Standards of adjudicators and efficacy of prescribed appointor and private adjudicator process

One criticism commonly cast of the adjudication process is that adjudicators do not meet the consistency and correctness expected in their determinations.

To be eligible for registration as an adjudicator in the Territory, a person must:

- hold one of the following qualifications:
 - a degree from a tertiary institution in architecture, building, building surveying, construction, engineering, law, project management or quantity surveying; or
 - be eligible for membership of a number of professional bodies; or
 - be registered under the *Building Act* in the category of building contractor; and
- have at least 5 years' experience in:
 - administering construction contracts; or
 - dispute resolution relating to construction contracts.⁴¹²

Concerns of parties and their lawyers regarding the quality of adjudicators and the correctness of their determinations may have been the cause of the relatively high number of applications for judicial reviews of adjudicators' determinations in the Territory. A summary estimate from review of the available reasons for decision discloses 12 jurisdictional challenges to determinations. In particular, these decisions consider the question whether the adjudicator was properly able to proceed to make a determination.⁴¹³

⁴¹² *Construction Contracts (Security of Payments) Regulations 2004*, r. 11.

⁴¹³ *GRD Building Pty Ltd v Total Development Supplies Pty Ltd* [2007] (unreported Local Court decision); *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12; *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* [2008] NTSC 42; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46; *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd & Anor* [2009] NTSC 48 and *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009]; *GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd* [2010] NTSC 34; *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1; *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor* [2012] NTSC 22; *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20; *Axis Plumbing N.T. Pty Ltd v Option Group (NT) Pty Ltd and Anor* [2014] NTSC 22; *M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor* [2014] NTSC 25; *Gwelo Developments Pty Ltd v Brierty Limited* [2014] NTSC 44 and *Brierty Limited v Gwelo Developments Pty Ltd* [2014]

The limited right of appeal of decisions not to proceed to determination provided by the NT Act is rarely used. This is possibly due to a lack of confidence that the Local Court is an appropriate, properly resourced, forum to take on an expedited assessment of whether an adjudicator has correctly decided on the matter. The WA Act provides for review to be undertaken by the State Administrative Tribunal. The Territory did not have an equivalent tribunal in existence at the time of the commencement of the NT Act. The Territory now has the Northern Territory Civil and Administrative Appeals Tribunal. This Tribunal might be a more appropriate forum for review of adjudication determinations than the Local Court, if it is appropriately resourced and able to undertake review of determinations in a timely manner (which is critical if the objectives of adjudication as an expedited process for resolution of payment disputes under construction contracts, is to be achieved).

c. Complexity of adjudication process

At its inception, the stated aim of the rapid adjudication process established under the NT Act was to ‘keep money flowing down the contracting chain by forcing timely payment and sidelining protracted or complex disputes.’⁴¹⁴

Despite this aim, some in the construction industry feel that the adjudication process is not accessible, and is still too costly and complex. The issues surrounding the entitlement of an adjudicator to proceed to make a determination on the merits (sometimes described as the jurisdictional issues for an adjudicator) has attracted a substantial body of case law. Industry participants may find this aspect of the NT Act and its requirements quite difficult to navigate without specialist legal advice.

Also, the range of payment disputes that are referred to adjudication is enormous, from less than \$10,000 to over a \$100 million. Whilst adjudicators can decide not to proceed to a determination where the payment dispute is too complex for adjudication, they universally do not exercise that discretion. Accordingly payment disputes referred to adjudication can range from the simple disputes for modest payment claim amounts, to disputes with a substantive range of contractual and technical issues relating to entitlement to be paid (and the extent to which a principal’s cross claims must be considered) worth tens and occasionally hundreds of millions of dollars.

Furthermore, one study has shown that the technical nature of the security of payment legislation causes lawyers to find it confusing.⁴¹⁵ Alternative opinion is that legal adjudicators and practitioners find security of payment more confusing than adjudicators in other professions, because adjudicators with legal backgrounds are more readily seeing the pitfalls of the legislation.⁴¹⁶

Western Australia

As discussed earlier in this Report, the NT Act essentially adopted all of the substantive provisions of the WA Act. There are however some differences between the NT Act and the WA Act that are summarised below:

Subject	WA Act	NT Act
Objects of Act	The WA Act does not expressly identify a general object of the legislation. Section 30 of the Act states the object of adjudication is to determine the dispute fairly and as quickly, informally and inexpensively as possible.	The NT Act expressly sets out in section 3 its object; to promote security of payments under construction contracts, and how they are achieved being by: <ul style="list-style-type: none"> • facilitating timely payments between the parties to

NTCA 7; *Lend Lease Building Contractors Pty Ltd t/as Sitzler Boulderstone Joint Venture v Honeywell Limited t/as Honeywell Building Solutions & Anor* [2015] NTSC 10.

⁴¹⁴ Dr Toyne, Northern Territory Second Reading Speeches, *Construction Contracts (Security of Payments) Bill 2004*.

⁴¹⁵ NAN Ameer Ali and Associate Professor Dr S Wilkinson, ‘Statutory Adjudication Under Nine Commonwealth Jurisdictions – A Users Perspective on Legislative Drafting Style’, Presented at the 2009 CALC Conference, as quoted by Society of Construction Law Australia – Australian Legislation Reform Sub-Committee, ‘Report on Security of Payment and Adjudication in the Australian Construction Industry’ (June 2014), p. 29.

⁴¹⁶ Society of Construction Law Australia – Australian Legislation Reform Sub-Committee, ‘Report on Security of Payment and Adjudication in the Australian Construction Industry’ (June 2014), p. 29.

Subject	WA Act	NT Act
		<ul style="list-style-type: none"> • construction contracts; • providing for the rapid resolution of payment disputes arising under construction contracts; and • providing mechanisms for the rapid recovery of payments under construction contracts. <p>This broad statement of object and how it is achieved is of assistance when interpreting the NT Act.</p>
Interpretation	The WA Act only has time limits in days, which is taken to mean calendar days.	The NT Act includes time limits in days, which is taken to mean calendar days, but 'working days' is also specifically defined in section 4 of the NT Act to mean days other than Saturdays, Sundays and public holidays as defined in the <i>Public Holidays Act</i> (NT).
Scope of construction work caught by the Act (mining exclusion)	The WA Act in section 4(3)(c) includes an exclusion from construction work including constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance;	The NT Act does not include the exclusion of mining or petroleum plant construction from the application of the Act.
Timeframe to apply for adjudication	Section 26: An applicant must apply for adjudication within 28 days of the payment dispute arising.	Section 28: An applicant must apply for adjudication within 90 days of the payment dispute arising.
Timeframe to respond to an adjudication application	Section 27: A respondent has 14 days to respond to the application.	Section 29: A respondent has 10 working days to respond to the application.
Timeframe for payments to be made	Section 10: A contract requiring a payment to be made more than 50 days after the payment is claimed is deemed amended to require the payment to be made within 50 days.	Section 13: A contract requiring a payment to be made more than 50 days after the payment is claimed is deemed amended to require the payment to be made within 28 days.
Officers established pursuant to the Acts	Building Commissioner.	Construction Contracts Registrar (in the Department of Justice).
Withdrawing adjudication applications	The WA Act does not establish a procedure to withdraw an adjudication application.	Section 28A: The NT Act provides a procedure for applicants to withdraw an adjudication application.
Extending time for making a determination	Section 32(3)(a): An adjudicator may extend the time for making a determination with the consent of the parties.	Section 34(3)(a): An adjudicator may extend the time for making a determination with the Construction Contracts Registrar's consent.(It is important that this occur before the expiry

Subject	WA Act	NT Act
		of the original period).
Reviewing decisions to dismiss without making determination	<p>Section 46: Parties seeking to review decision of Adjudicator to dismiss under section 31(2) may apply for review to the State Administrative Tribunal.</p> <p>If on review the decision is set aside and referred back to the adjudicator, the adjudicator must make a determination within 14 days after the date on which the decision is set aside or any extension of that time agreed on by the parties</p>	<p>Section 48: Parties seeking to review either the decision to dismiss (or not to dismiss) under Section 33(2) may apply for review to the Local Court.</p> <p>If on review the decision is set aside and referred back to the adjudicator, the adjudicator must make a determination within 10 working days after the date on which the decision is set aside or any extension of that time agreed on by the parties</p>
When does a payment dispute arise?	A payment dispute will arise when a principal rejects a payment claim, even if the date for payment has not arrived ⁴¹⁷ .	Historically a payment dispute can only arise if the date for payment arrives, even if the principal rejects or disputes a claim before this date. ⁴¹⁸ However, recent amendments to section 8 of the NT Act that commenced November 2014 provides that the NT Act will now be interpreted in the same way as the WA Act.
What constitutes a payment claim?	Failure to comply with a contractual precondition of a payment claim does not prevent a claim being made for the purposes of the WA Act. ⁴¹⁹	A payment claim should satisfy contractual preconditions in order to constitute a valid payment claim for the purposes of the NT Act. ⁴²⁰

E. Evaluation of operation of Security of Payments Legislation in Australia- East and West Coast Models

In June 2014 the 'Report on Security of Payment and Adjudication in the Construction Industry' was delivered by the Society of Construction Law Australia (**SLC Report**). The SLC Report found that that the West Coast model did not have the same 'toxic disadvantages' as present in the East Coast model and recommended that a single system should operate in Australia based on the West Coast model.⁴²¹ The SLC Report reflected the broad view across the industry in Australia that the West Coast Model operates in a superior fashion to the East Coast Model.⁴²²

This 'superiority' arises for the following reasons:

- The East Coast Model attempts to provide a claimant with statutory rights, whereas the West Coast Model largely operates by reference to the parties' own contractual arrangements. There is not two alternative, mutually exclusive, avenues for seeking payment under the West Coast Model.

⁴¹⁷ See *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237.

⁴¹⁸ See *Northern Territory v Urban and Rural Contracting* [2012] NTSC 22.

⁴¹⁹ See *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133, at [67].

⁴²⁰ See *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Another* (2001) 163 NTR 17, at [236].

⁴²¹ Society of Construction Law Australia – Australian Legislation Reform Sub-Committee, 'Report on Security of Payment and Adjudication in the Australian Construction Industry' (June 2014), p. 12.

⁴²² Society of Construction Law Australia – Australian Legislation Reform Sub-Committee, 'Report on Security of Payment and Adjudication in the Australian Construction Industry' (June 2014), p. 59.

- The East Coast Model only permits for statutory payment claims to be made up the contractual chain, which means that only a subcontractor can make a claim against a head contractor. The West Coast Model allows for payment claims to be made up and down the contractual chain.
- Adjudicators under the West Coast Model are less restricted than their East Coast counterparts in terms of adjudicator appointment, submissions which the adjudicators can consider and the way the adjudicator must arrive at his or her decision.

F. Future of response to insolvency in Australia – a national approach

Agenda for nationally unified Security of Payments legislation

Support for uniform national security of payments legislation amongst industry appears to be widespread and ongoing. The Society of Construction Law as recently as 2014 commented that: *'a matter upon which there is more or less universal support is that there should be a single set of rules for adjudication in the construction industry across the whole of Australia.'*⁴²³

Some commentators have gone as far as to say,

*'it is a truth universally acknowledged that the current level of inconsistency across State borders is a matter which ought to be addressed on an urgent basis.'*⁴²⁴

Ongoing widespread support from practitioners and commentators for national cohesion has been expressed in a number of academic works.⁴²⁵ For example, Bell and Vella have stated:

*'..the growing realisation that differences between the Acts are multiplying rather than being reduced has led many commentators to call for national uniformity as a matter of urgency in order to avoid the national tendency of inconsistency to lead to inefficiency.'*⁴²⁶

This broad support arises because:

- presently, compliance costs for businesses operating in different jurisdictions are high. For this reason the disparate security of payments regime across Australian States and Territories has been described as a 'builder's minefield but a lawyer's delight.'⁴²⁷ It is anticipated that uniform national security of payments legislation will achieve greater commercial certainty;
- as with any proposal of national legislative cohesion, it is proposed that uniformity would reduce duplication costs in and result in savings in educating industry participants in eight different security of payment schemes in place around the country,⁴²⁸
- there will be more consistency in the price of engaging a subcontractor across States and Territories as subcontractors will no longer have to price the risk of not being paid into their quotes,⁴²⁹ and

⁴²³ Society of Construction Law Australia – Australian Legislation Reform Sub-Committee, 'Report on Security of Payment and Adjudication in the Australian Construction Industry' (June 2014), p. 20.

⁴²⁴ Bell, M and Vella, D, 'From motley patchwork to security blanket: The challenge of national uniformity in Australian "security of payment" legislation', *Australian Law Journal*, 84(8), 2010, p.11.

⁴²⁵ See, for example: Zhang, Teena 'Why national legislation is required for the effective operation of the security of payment scheme', 25 *Building and Construction Law*, (2009), 376; Bell, M and Vella, D, 'From motley patchwork to security blanket: the Challenge of national uniformity in Australian "security of payment" legislation', 84 *Australian Law Journal*, (2010), 565; Davenport P, "Security of payment now Australia wide" (2010) 131 *Australian Construction Law Newsletter* 36; Hon. Justice Peter Vickery, 'Security of Payment Legislation in Australia, Differences between the States – Vive la Différence?', Building Dispute Practitioners Society 12 October 2011.

⁴²⁶ Bell, M and Vella, D, 'From motley patchwork to security blanket: the Challenge of national uniformity in Australian "security of payment" legislation', 84 *Australian Law Journal*, (2010), 565, 566.

⁴²⁷ Kirby M, "Building, Disputes and the Law" *Building Dispute Practitioners' Society Newsletter*, September 1983, p. 2.

⁴²⁸ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, 'Final Report of the Royal Commission into the Building and Construction Industry', February 2003, p. 255; see also Coggins, Jeremy; Elliott, Robert Fenwick and Bell, Matthew, 'Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia,' *The Australasian Journal of Construction Economics and Building*, Vol. 10, No. 3, 2010: [14]-35.

⁴²⁹ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, 'Final Report of the Royal Commission into the Building and Construction Industry', February 2003, p. 255.

- the Commonwealth has the power to comprehensively legislate on insolvency reform in a meaningful way. As we discussed earlier in this Report, insolvency is the key driver of contractor failure, causing payment failure down the contracting chain which security of payment legislation seeks to address.

In 2002, the Australian Procurement and Construction Council attempted to harmonise the variance of jurisdictional approaches in the interests of national consistency. The Cole Report advocated for national unity and even drafted a national *Building and Construction Industry Security of Payment Bill 2003*.

Senate Inquiry into Insolvency in the Australian Construction Industry

The terms of the Senate Inquiry due to be released at the end of this year include:

- the causes and effects of industry insolvencies;
- the amount of money lost by creditors and other stakeholders in the industry;
- the impact of insolvency in the industry on its productivity;
- the adequacy of the current law and regulation to reduce insolvencies in the industry;
- the incidence and nature of misconduct related to insolvencies in the industry, including ‘phoenix’ companies and unlawful debt collecting and related activities.⁴³⁰

⁴³⁰ See http://www.apc.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Terms_of_Reference

V. Recommendations for Security of Payment and other forms of historical legislative security (liens and charges)

This Report has identified a number of practical issues with the security of payment legislation operating in the Territory.

There are also a number of limitations for contractors inherent with security of payment legislation, particularly that it does not actually provide security to contractors in circumstances of contractor insolvency.

There are some creatures of legislative invention that do provide greater security, namely the workmens' liens and subcontractor charges that previously existed in the Territory and which continues to co-exist with 'modern' security of payment legislation elsewhere.

However this Report does not recommend that the Territory, at this time, embark upon a substantial reform of the NT Act and 'West Coast model' as presently operating in the Territory. The rationale for a consistent, national approach to security of payment legislation and adjudication practices remains as compelling now as it was at the time of the Cole Report. There is presently a growing support amongst commentators and practitioners in the area to adopt the West Coast model pioneered by Western Australia and the Territory as a national template for reform.⁴³¹ It would be destructive of that initiative if the Territory significantly changed the NT Act without consultation with other State Governments (and particularly Western Australia) and thereby substantially erode the West Coast model at a time when some traction is being gained for its use nationally.

Any reforms of practical matters that may be raised from internal reviews of the security of payment legislation and system generally, such as is conducted by the Construction Registrar from time to time, ought to be done in consultation with the relevant industry bodies and prescribed appointers under the NT Act. Those recommendations ought to be passed through the filter of not so changing the NT Act that it undermines the West Coast model.

RECOMMENDATION 1: Payment Protection

In anticipation of advocating a national system of security of payment based on the West Coast model, the Government not consider substantially reforming the *Construction Contract (Security of Payments) Act* (NT) at this time.

It is also very tempting to look to the historical forms of contractor's security, such as the statutory liens and charges that operated in the Territory and that still operate in some other jurisdictions alongside the modern form of security of payment, as a way to improve an unpaid contractor's ability to recover payment, particularly in circumstances of insolvency.

There are however significant issues (see below) that would need to be carefully considered before the true benefit of restoring older forms of security can be truly understood:

- The old processes and procedures for notify and registering a contractor's lien, notifying a subcontractor's charge and then enforcing this in Court were complex, costly, and uncertain in their results. There is a basic level of complexity to these processes. The complexity inherent in processes that claim rights over interests in land or other peoples' payments might be improved by proper drafting of legislation, but these cannot be completely eliminated. This complexity further militates against

⁴³¹ See, for example Coggins, Jeremy; Elliott, Robert Fenwick and Bell, Matthew, 'Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia,' *The Australasian Journal of Construction Economics and Building*, Vol. 10, No. 3, 2010: [14]-35.

effective use of the rights to lien and charge by contractors and their advisers and is a potentially important reason why co-existing legislation providing for such things interstate is not widely used.

- The elevation of an unpaid contractor to secured creditor status by registration of a contractor's lien did get that unpaid contractor above the 'ruck' of other unsecured creditors, and the attention of the property owner, but the lien was subject to prior registered interests. Often times a bank exercised its rights under a prior registered mortgage and took all the proceeds, leaving nothing for lower ranked, secured creditors such as lien holders. The unpaid contractor's recovery was not improved by the lien process in these cases, and it had to incur substantial costs of notifying, registering and enforcing the lien.
- Similarly the notification and enforcement of a subcontractor's charge was a leap into the void for the unpaid subcontractor, as it was dependent on the charge attaching to a payment from the principal down to the defaulting contractor. If there was no payment due in that relationship to which the subcontractor is not privy, the charge could not attach and the unpaid contractor remained unpaid. Often the original subcontractor had to seek to try to compromise the costs of its unsuccessful enforcement action with the principal and the defaulting contractor.

On balance, this Report recommends that rather than revisiting the older forms of security and trying to work through the structural issues that this would raise, that the Territory consider the recommendations of this Report regarding the adoption and use of construction trusts.

RECOMMENDATION 2: Payment Protection

The Territory not re-introduce older forms of contractor security such as contractors' liens or subcontractors' charges but instead adopt the recommendation to introduce a construction trust scheme.

VI. Other initiatives and tools for securing payment in the Construction Industry

A. Introduction

It has been observed that reform proposals for improving payment to contractors tend to fall into two groups:⁴³²

- The first group of proposals targets the financial performance of businesses in the industry in order to reduce the risk of financial problems that lead to a failure to pay subcontractors. Such strategies include prequalification and attempting to impose financial standards through licensing and registration conditions. In this regard, a number of recommendations in the 'Contractor Registration' part of this Report have been made.
- The second group of proposals involve schemes aimed at improving the mechanisms for contractors to recover payments that are owed to them, or to provide protection against the risk of insolvency of those parties higher up the contractual chain. These measures include:
 - trying to improve the unpaid contractor's position contractually by intervening in the construction contract's terms and prohibiting offending terms (such as paid when paid clauses);
 - modifying, introducing or implying terms (such as the implied terms included in the West Coast Model of Security of Payment legislation) and implanting trust accounts for subcontract payments inside a contract's contractual terms; and
 - shifting risk of payment default to other persons who are prepared to indemnify the contractor its lost payments, typically by way of insurance or 'bonding'.

This Report addresses four particular strategies in addition to the present security of payment legislation and the various charge and lien mechanisms historically employed:

- credit insurance;
- statutory construction trusts;
- retention trusts; and
- payment bonding.

B. Trade credit insurance

Trade credit insurance is available to subcontractors for insuring against the risk of non-payment by contractors.

Use of trade credit insurance in Australia is rising. In the 2011/12 financial year, the construction industry had the highest proportion of assets in trade credit of any industry in Australia.⁴³³ Typically larger businesses used trade credit to a greater extent than small businesses.⁴³⁴

It has been said that the Australia is '*still very still infant in [the] trade credit insurance [industry]*'⁴³⁵ and that '*Australia could benefit from moving in the direction of the US and Europe, where trade credit insurance is more advanced and far more common.*'⁴³⁶

⁴³² The Honourable Terence Rhoderic Hudson Cole RFD QC, 'Final Report of the Royal Commission into the Building and Construction Industry', February 2003, p. 245.

⁴³³ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, 'Final Report of the Royal Commission into the Building and Construction Industry', February 2003, p. 245.

⁴³⁴ Fitzpatrick, A and Lien, B, 'The Use of Trade Credit by Businesses' ABS Bulletin, September 2013, p. 40.

⁴³⁴ Fitzpatrick, A and Lien, B, 'The Use of Trade Credit by Businesses' ABS Bulletin, September 2013, p. 41.

⁴³⁵ <http://www.insurancebusinessonline.com.au/tv/bright-spot-trade-credit-insurance-shines-amid-gloom-129803.aspx>

The lack of availability and information regarding trade credit insurance could be owing to its complex nature as a 'specialty product' which requires a specialty broker.⁴³⁷ Trade credit insurance is presently identified as available through the following providers:

- QBE;
- National Credit Insurance;
- IMC Newbury Trade Credit Solutions;
- Atradius; and
- Coverforce Smart Insurance Solutions.

Use of trade credit insurance

The Final Report of the Inquiry into Construction Industry Insolvency in NSW (**Collins Inquiry Report**) noted that its Discussion and Issues Paper 2012: '*highlighted the availability of trade credit insurance and its usefulness in managing the risks associated with payment default and debts arising from the insolvency of debtors*'.

Despite this, the Collins Inquiry Report stated that there were no 'substantive responses' to this subject from industry. The Collins Inquiry Report found that,

*'a mandatory insurance scheme which operates to secure payments to sub-contractors does not... [provide an] incentive to avoid behaviour that could bring about insolvency or financial stress.'*⁴³⁸

Furthermore, the WA Law Reform Commission (**WALRC**) in its 'Report on Financial Protection in the Building and Construction Industry' (**WALRC Report**) did not recommend the introduction of a compulsory credit insurance scheme for subcontractors.

Noting that credit insurance was too expensive (approximately 3% of the subcontract price), the WALRC cited two further major reasons for recommending against such a scheme:

- subcontractors should not be compelled to obtain insurance which they could obtain voluntarily; and
- a 'monumental' capacity for fraud would ensue because 'it would be open to the parties to negotiate contracts incapable of being performed [since] that performance [would] be underwritten by a massive statutory insurance scheme.'⁴³⁹

The WALRC also noted the brief existence of a HIA-operated credit indemnity scheme offering 'insurance type protection' for its subcontractor members, but that the scheme broke down shortly after its establishment.⁴⁴⁰ The WALRC attributed the lack of interest shown by subcontractors in the scheme to shorter payment terms for subcontractors in the residential industry.⁴⁴¹

The issues preventing contractor credit insurance being adopted as a broad based policy initiative to address payment default for Territory contractors appear to be:

- the relative lack of suppliers (underwriters and brokers) experienced and able to apply the insurance products;
- the possible instability of private (insurer or industry) schemes (with insurers or industry providers exiting the market in the same way that has occurred across the country in the residential warranty schemes);

⁴³⁶ <http://historic.coverforce.com.au/insurance-news/news/trade-credit-insurance-and-australian-business-solvency/800504491/>

⁴³⁷ <http://www.insurancebusinessonline.com.au/tv/bright-spot-trade-credit-insurance-shines-amid-gloom-129803.aspx>

⁴³⁸ Collins, Bruce QC, Final Report: Inquiry into Construction Industry Insolvency in NSW (November 2012), p. 45.

⁴³⁹ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 97.

⁴⁴⁰ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 47.

⁴⁴¹ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 96.

- the relative cost of the insurance being prohibitive for contractors (as it cannot be expressly passed up the contracting chain to the end consumer, unlike the residential warranty insurance);
- the relative inability of such insurance to respond adequately to the shorter payment cycles of some industry sectors; and
- a fundamental objection as to the ‘moral hazard’ of not addressing the non-payment at its roots and relying on a compulsory indemnity scheme to compensate for that non-payment. For example, the Collins Inquiry Report stated in that regard:

‘The Inquiry firmly believes however, that any mandatory insurance scheme that operates to secure payments to subcontractors does not directly address the issues at hand. Insurance provides little or no incentive to avoid behaviour that could bring about insolvency or financial stress and could in fact provide a perverse incentive for some subcontractors to take disproportionate risks, knowing that should their businesses fail, they will not bear personal responsibility for the repayment of their debts. Insurance company picks up the tab and the construction industry pays the price.’⁴⁴²

A summary review of the credit insurance market, its operation in Australia and a consideration of the findings of other inquiries into compulsory credit insurance reveal that credit insurance is a tool that can assist some contractors off-set their risks of payment default. However it is not universally accessible nor affordable for contractors. This Report does not identify it to be a useful platform for implementing a general, industry-wide policy initiative and a statutory scheme of subcontractor payment insurance ought not to be contemplated.

RECOMMENDATION 3: Payment Protection

A statutory scheme of credit insurance covering contractors for contractor default not be implemented.

C. Statutory construction trusts

Introduction to construction trusts

The introduction of statutory trusts in Australia has been endorsed by a number of reports and inquiries over the last twenty years.⁴⁴³ Statutory trust systems have been place in a number of North American jurisdictions for some decades. However, despite being recommended by a number of inquiries, statutory construction trusts have not been introduced in any Australian jurisdictions to date.

Elements of a statutory construction trust include:

- the trustee is the party who receives the monies (for example, the head contractor receiving payment from a principal);
- the trust property is the money paid for work done and/or materials furnished on the construction work;
- the trust beneficiaries are the parties (subcontractors) who did the work or furnished the materials; and
- the purpose of the trust is to identify the money that is to be paid down the contacting chain by the contractor to its subcontractors and to keep it separate from the contractor’s other money, for benefit of the trust beneficiaries (the subcontractors).

Construction trust schemes have been used in some recent Territory government contracts⁴⁴⁴ and from experience to date, appear to be functional for the contractor and the principal.

⁴⁴² Collins, Bruce QC, Final Report: Inquiry into Construction Industry Insolvency in NSW (November 2012), p. 45.

⁴⁴³ See the WARLC Report, Collins Inquiry Report and Cole Report (discussed below).

⁴⁴⁴ There are trust mechanisms included in the terms of the Managing Contractor Contracts for the Tiger Brennan Drive Duplication and Palmerston Hospital Projects. It is anticipated these will be quite effective given a managing contractor typically identifies, as the build cost, the amounts it considers to be due to subcontractors in the monthly payment claims, and separately identifies its management fee.

The need for statutory construction trusts

a. Statutory Construction trusts are needed to protect subcontractors

Statutory construction trusts are intended to afford a greater degree of payment protection to subcontractors down the contracting chain. Statutory construction trusts are said to be remedial devices in cases where a head contractor becomes insolvent, and ensures that a subcontractor is paid out of a pool of funds, separately identified (and attachable) from the insolvent contractor's other funds, in its general accounts.

In this way the statutory construction trust balances a head contractor's 'cash flow' issues against the right for a subcontractor to be paid for services rendered.

b. Statutory construction trusts may also benefit principals

The statutory construction trust has also been recommended because it also protects the principal from the insolvency of the head contractor because:

- the principal does not have to pay the amount owing to the subcontractor twice (once to the head contractor, and later to keep the subcontractor working on the job); and
- it will ensure a smoother transition from the insolvent head contractor to another contractor.⁴⁴⁵

Inquiries and reports considering the introduction of statutory construction trusts in Australia

The use of a statutory construction trust has been considered by a number of inquiries and reports in Australia.⁴⁴⁶ Some noteworthy publications include:

- the Cole Report, which neither recommended for or against the adoption of a statutory construction trust due to widespread industry opposition.⁴⁴⁷
- the WALRC Report which recommended the adoption of a statutory trust scheme; and
- the Collins Inquiry Report which expressed unequivocal support for the introduction of a statutory construction trust scheme in NSW, stating:

'There is no question that the statutory construction trust is fully effective in protecting subcontractors against the loss of progress claims paid by the owner to the head contractor and lost in the event of the head contractor's insolvency.'

Furthermore, the Collins Inquiry Report referred to the WARLC Report as: *'one of the most scholarly and convincing analyses of the statutory construction trust.'*⁴⁴⁸

The introduction of a statutory construction trust scheme was contemplated by the Northern Territory Department of Justice in its 2002 Discussion Paper regarding 'Reform of Law Concerning Payments Due to Contractors.' At that time, the use of statutory construction trusts was not considered to be justified because of the 'detailed legal, commercial and administration burdens and obligations to which it would give rise.'⁴⁴⁹ These types of concerns were addressed at length in the Collins Inquiry Report and have been canvassed below. As passing observation, the legal and administrative burdens of a construction trust system are minimal compared to the legal and administrative costs of trying to pursue recovery against an insolvent contractor.

⁴⁴⁵ Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012), p. 144.

⁴⁴⁶ For a full list of the inquiries undertaken and reports conducted in various Australian and international jurisdictions prior to 2012, see pages 431-434 of the 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012).

⁴⁴⁷ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, 'Final Report of the Royal Commission into the Building and Construction Industry', February 2003, p. 245.

⁴⁴⁸ Collins, Bruce QC, Final Report: Inquiry into Construction Industry Insolvency in NSW (November 2012), p. 214.

⁴⁴⁹ Northern Territory Department of Justice, 'Reform of Law Concerning Payments due to contractors: Review of the Operation of the Workmen's Liens Act – How to better protect payments due to subcontractors in the Northern Territory,' [11.1.8].

Administration of trust schemes

Statutory construction trusts schemes can be administered in different ways.

- A statute may prescribe that all sums (or a percentage of the sums) received by a head contractor or subcontractor (the trustee) on account of its contract price are trust funds in its hands for the benefit of its subcontractors, workers and suppliers.⁴⁵⁰
 - Usually this will occur when the contract moneys are received by the head contractor or subcontractor, but it can arise where moneys are owing to the contractor on account of the contract price even though they have not been paid to the contractor.
 - In the case where moneys owing to a contractor for the project are paid into court, the moneys are deemed to be impressed with the trust and must be held for the beneficiaries.
 - In the case of the insolvency of the contractor, any money received from the owner is subject to a statutory trust and is not caught in the external administration. The beneficiaries will be paid first, rather than the money being distributed amongst the trustee's creditors.⁴⁵¹
- Alternatively, the statute may provide that money in the hands of the owner for the purpose of the project is trust moneys. Where sums payable to the contractor by an owner become payable on the certificate of a person named in the contract, upon the issuance of the certificate, the amount equal to the sum certified which is held by the owner or will become held by the owner shall be a trust for the benefit of that contractor.⁴⁵²

Who becomes the trustee?

There are two options for the administration of trust money under a statutory trust system:

- a government body becomes the trustee; or
- a participant in the construction project becomes the trustee.

A government body trustee might be funded from interest earned on the money in the trust. If left to a participant in the project, the interest earned on the trust could be attributed towards the costs of administering the trust.

An advantage of having a government trustee is that it is less likely that funds will be misappropriated. On the other hand, using a government trustee might introduce an inefficient, bureaucratic step into payment protection.

If a participant becomes the trustee, different approaches exist regarding exactly how many participants should become trustees. For example there may be a single trustee for the project or each participant who is under an obligation to pay another participant may become a trustee.

- The first alternative is that the head contractor (or owner, as the case may be) is the trustee who holds the trust all monies received from the owner, or in respect of the contract, for the work completed for the subcontractors.⁴⁵³ This is despite there not being any privity of contract between, for example, the owner and the subcontractors, or the head contractor and the sub-subcontractors.
- The second alternative is that each participant in a construction project who holds or receives a payment and who is under an obligation to pay another participant (e.g. has a subcontractor below it in the contracting chain) holds those moneys as a trustee. This second alternative has been supported for its simpler operation⁴⁵⁴ and is used in several Canadian provinces.⁴⁵⁵

⁴⁵⁰ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 50.

⁴⁵¹ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 50.

⁴⁵² WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 50.

⁴⁵³ Business and Consumer Affairs Agency Issues Paper on Financial Protection for Building Subcontractors (1991), para. 9.9.

⁴⁵⁴ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 60.

Within the second alternative, two further alternatives exist.

- Some jurisdictions have employed a ‘privity of trust’ approach whereby the trustee is required to hold funds in trust only for those with which it has contracted directly (e.g. its immediate subcontractors).⁴⁵⁶
- Other jurisdictions use a system whereby each trustee is required to hold funds for all those below it in the contracting chain.⁴⁵⁷

The WALRC recommended that this second alternative as it afforded greater protection down the contractual chain.⁴⁵⁸ The Collins Inquiry Report recommended the first alternative, as providing simplicity of approach.⁴⁵⁹

Any statutory construction trust scheme would be a significant change for the industry. Accordingly this Report advocates the simpler approach, whereby the trust is restricted to the benefit of those subcontractors whom have a contractual relationship with the contractor. This does not preclude the lower tier subcontractors from the benefit of the construction trust however. Lower tier subcontractors get the benefit of a trust being formed with the contractor immediately above it in the contracting chain, and that contractor in turn has a trust created with its immediate contractor and so on. This is aptly described as ‘cascading’ trusts created at each link in the contracting chain.

Operation of trust schemes in other jurisdictions

a. North America – statutory construction trust legislation

According to the Collins Inquiry Report,⁴⁶⁰ the following provinces and states of Canada and the United States had statutory construction trusts operating as at November 2012.

Province/State	Legislation
Canada	
Alberta	Builders' Lien Act R.S.A. 2000, c. B-7, section 22
British Columbia	Builders' Lien Act S.B.C. 1997, c. 45, sections 10 to 14
Manitoba	The Builders' Liens Act R.S.M. 1987, c. B91, sections 4 to 9
New Brunswick	Mechanics' Lien Act R.S.N.B. 1973, c. M-6, section 3
Nova Scotia	Builders' Lien Act R.S.N.S. 1989, c. 277, sections 44A to 44G
Ontario	Construction Lien Act R.S.O. 1990, c. C.30, sections 7 to 13
Saskatchewan	Builders' Lien Act S.S. 1984-85-86, c. B-7, sections 6 to 21
United States of America	
Arizona	Ariz. Rev. Stat. section 33-1005
Colorado	Colo. Rev. Stat. Ann. Section 38-22-127
Delaware	Del. Code Ann. Tit. 6, section 3502
Illinois	770 ILL. Comp. Stat. 60/21.02
Maryland	Real Prop. Sections 9-201 <i>et seq</i>
Michigan	Com. Laws. ss 570, 151 <i>et seq.</i> (1961)

⁴⁵⁵ For example in Alberta the *Builders' Lien Act* R.S.A. 2000, in British Columbia the *Builders' Lien Act* S.B.C. 1997, in Manitoba the *The Builders' Liens Act* R.S.M 1987 and in Ontario the *Construction Lien Act* R.S.O. 1990.

⁴⁵⁶ This approach has been used in Alberta, Manitoba, Saskatchewan and Ontario.

⁴⁵⁷ This approach is used in British Columbia and New Brunswick.

⁴⁵⁸ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 62.

⁴⁵⁹ Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012) pp. 167-169.

⁴⁶⁰ This table is reproduced from that table at page 134 of the 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012).

Province/State	Legislation
Minnesota	Minn. Stat. Ann. section 514.02 (2003)
New Jersey	N.J. Stat. Ann. section 2A:44-148 (West 2004) (applies to public works) N.J. Stat. Ann. sections 2A:29A <i>et seq</i> (governs private parties who have forwarded money toward the purchase of a dwelling house.)
New York	Lien Law sections 70-79-a
Oklahoma	Stat. tit. 42, sections 152 and 153 (2004).
South Dakota	Codified Laws section 44-9-13 (2004)
Texas	Tex. Prop. Code Chapter 162
Vermont	Stat. Ann. tit. 9, section 4003 (applies to contractors and subcontractors)
Washington	Rev. Code section 60.28.010 (2004)
Wisconsin	Stat. section 779.02(5) (2003) (applies to private projects) Stat. section 779.16 (2003) (applies to public projects)

The Collins Inquiry Report especially considered the construction trust legislation operating in Maryland in the United States and British Columbia and Ontario in Canada⁴⁶¹ (highlighted in the above table) and ultimately found that the Maryland model was the preferred model upon which it based its recommended statutory trust model.

Maryland

The Maryland legislation provides:

'Moneys held in trust

(b)(1) Any moneys paid under a contract by an owner to a contractor, or by the owner or contractor to a subcontractor for work done or materials furnished, or both, for or about a building by any subcontractor, shall be held in trust by the contractor or subcontractor, as trustee, for those subcontractors who did work or furnished materials, or both, for or about the building, for purposes of paying those subcontractors.

(2) An officer, director, or managing agent of a contractor or subcontractor who has direction over or control of money held in trust by a contractor or subcontractor under paragraph (1) of this subsection is a trustee for the purpose of paying the money to the subcontractors who are entitled to it.⁴⁶²

In Maryland, the trust nature of the funds extends to the benefit of lower tiers of subcontractors. The law applies to private projects and to those under the *Little Miller Act*,⁴⁶³ but not to federal projects within the state or single home residential contracts.

Officers, directors and employees of contractors or subcontractors who, with intention to defraud, retains or sues money held in such a trust are personally liable to any person damaged by the action.⁴⁶⁴

Ontario

⁴⁶¹ Collins, Bruce QC, Final Report: Inquiry into Construction Industry Insolvency in NSW (November 2012), pp. 153-156.

⁴⁶² Md. Code Ann. Real Prop. Section 9-201(2012) – Title 9: Statutory Liens on Real Property; Subtitle 2: Trust Relationships in the Construction Industry.

⁴⁶³ *The Little Miller Act* is state based legislation in the US (based on the Federal version) which requires head contractors on government construction projects to post bonds guarantying the performance of their contractual duties and/or the payment of their subcontractors and material suppliers.

⁴⁶⁴ Md. Code Ann. Real Prop. Section 9-202(2012) – Title 9: Statutory Liens on Real Property; Subtitle 2: Trust Relationships in the Construction Industry.

In Ontario, the statutory construction trust regime operates as a further protection to builder's liens which are also created under the *Ontario Construction Lien Act* R.S.O. 1990 (**Ontario Act**).⁴⁶⁵

The *Ontario Act* creates three separate trusts.

- The owners' trust ensures that those who have added value to a mortgagee's security get the benefit of the value created by their supply of services and materials. There are three different types of owner's trusts.⁴⁶⁶
 - All monies received by an owner for financing the project are trust funds for the benefit of the contractor.
 - Where there is a payment certifier, once amounts are certified as owing, the amount in the owner's hands or received by the owner are trust funds for the benefit of the contractor until paid to the contractor.
 - A trust will also be created for the value of the unpaid price of substantially performed portion of the contract that is in the owner's hands or received by the owner.
- The contractors' and subcontractors' trust makes all amounts received by or owing to a contractor or subcontractor, (whether or not due or payable) on account of the contract or subcontract price a trust fund for those who supplied services or materials to the improvement and are owed amounts by the contractor or subcontractor.⁴⁶⁷ This contractors' and subcontractors' trust is therefore a 'cascading' trust where each subcontractor holds funds down the line on trust for the person with whom they have a contractual relationship (i.e. it employs the 'privity of trust' approach).
- The vendors' trust prevents the avoidance of trust claims by sale of the property. Where the owner's interest in the premises is sold by the owner, an amount equal to the net consideration received by the owner (less the amount to discharge any mortgage on the property) constitutes a trust fund for the benefit of the contractor.

The fact that a trust attaches to funds 'in the owner's hands' means that even if the owner is not borrowing funds for the project but instead using its own funds, the funds 'in the owner's hands' will become trust funds.

Other features of the *Ontario Act* include:

- the requirement (for example in the case of trust money held by a head contractor for subcontractors) that the head contractor will not be permitted to draw from the trust until all subcontractors down the line have been paid what is due and owing to them;⁴⁶⁸
- the provision that every director or officer of a corporation or person who has effective control of a corporation or its activities who assents to or acquiesces in conduct which they ought reasonably know amounts to breach of trust by the corporation, is liable for the breach of trust;⁴⁶⁹ and
- the allowance for a trustee to draw from the trust without being in breach:
 - to reimburse the trustee if the trustee has paid a contractor or supplier with moneys other than trust moneys;⁴⁷⁰
 - to discharge a loan where the trustee used borrowed funds to pay a contractor or supplier who are beneficiaries under that trust;⁴⁷¹ or

⁴⁶⁵ *Ontario Construction Lien Act* R.S.O. 1990, c.30, Part III.

⁴⁶⁶ *Ontario Construction Lien Act* R.S.O. 1990, c.30, ss. 7(1)-7(2).

⁴⁶⁷ *Ontario Construction Lien Act* R.S.O. 1990, c.30, s. 8(1).

⁴⁶⁸ *Ontario Construction Lien Act* R.S.O. 1990, c.30, s. 8(2).

⁴⁶⁹ *Ontario Construction Lien Act* R.S.O. 1990, c.30, s. 13(1).

⁴⁷⁰ *Ontario Construction Lien Act* R.S.O. 1990, c.30, s. 11(1).

⁴⁷¹ *Ontario Construction Lien Act* R.S.O. 1990, c.30, s. 11(2).

- an amount equal to all outstanding debts, claims or damages owed by the beneficiary to the trustee.⁴⁷²

In February 2015 the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure retained counsel to review the *Ontario Act*. With regard to construction trusts, one aspect of this ongoing review is to investigate whether a requirement to hold trust moneys in separate accounts should be introduced to reduce the instance of the mixing of trust moneys.⁴⁷³

To illustrate the practical operation of the *Ontario Act*, we reproduce⁴⁷⁴ some common law principles that have developed in relation to construction trusts:

- “(a) *Trust funds must be held by a recipient until it has paid all claims relating to the project, and not merely those outstanding at the time it receives the money. The recipient cannot divert monies simply because it has received more money at that point in time than it has obligations to then pay;*⁴⁷⁵
- (b) *Once the plaintiff establishes the existence of the trust, the defendant must show that it has paid all the money in accordance with Act. The recipient is accountable for and must justify all expenditures from the fund. The trust takes priority over the recipient paying itself;*⁴⁷⁶
- (c) *If the recipient intermingles funds from more than one job in an account, then in any tracing exercise in relation to those funds the recipient must justify what it did with the funds it received on the project on which each claimant was engaged;*⁴⁷⁷
- (d) *The recipient cannot escape its trust fund obligations simply by showing that it paid out more than it received. Rather, it must trace the received monies into valid payments to valid recipients;*⁴⁷⁸
- (e) *The recipient can only seek credit for payments on the basis that they were made from non-trust funds if it can affirmatively prove that its subsequent payments were not out of trust funds. If it cannot, then it cannot take a credit for those payments on the supposed basis that they came from non-trust funds;*⁴⁷⁹
- (f) *The recipient cannot deduct its overhead out of trust funds;*⁴⁸⁰
- (g) *A recipient does not satisfy its trust fund obligation simply by creating a separate bank account into which all the trust funds are deposited. It still has to show that all monies were paid into or out of that account in accordance with its trust fund obligations.*^{481”}

British Columbia

Where money is received by a contractor or subcontractor on account of the price of the contract or subcontract for an improvement, the *Builders' Lien Act S.B.C. 1997 (British Columbia Act)* establishes a trust for the benefit of subcontractors and suppliers engaged in connection with the improvement.⁴⁸²

The trustee must not appropriate any part of the fund until all of the beneficiaries are paid. Similar to the *Ontario Act*, financial and criminal penalties will apply for persons, corporations or directors of corporations who knowingly acquiesce to a breach of trust.

⁴⁷² *Ontario Construction Lien Act* R.S.O. 1990, c.30, s. 12.

⁴⁷³ http://www.constructionlienactreview.com/information-package/#_Toc423355814

⁴⁷⁴ Accessed from: <http://www.constructionlawcanada.com/construction-and-builders-liens/442/>

⁴⁷⁵ *Andrea Schmidt Construction Ltd. v. Gatt* (1979), 25 O.R. (2d) 567

⁴⁷⁶ *Firenze Exteriors Inc. v. Westwing Construction Group Inc.*, 2005 CanLII 5880 (ON S.C.)

⁴⁷⁷ *Forest Trim & Doors v. Azor Woodworking Ltd* 2005 CanLII 364 (ONSC); *DST Consulting Engineers Inc. V. Towanda Timber Limited* 2007 CanLII 38565

⁴⁷⁸ *St. Mary's Cement Corp v. Construc Ltd* 1997 CanLII 12114 (ONSC); *802798 Ontario Ltd v. McConnery* 2003 CanLII 49340 (ONSC)

⁴⁷⁹ *802798 Ontario Ltd. v. McConnery*, 2003 CanLII 49340 (ON S.C.)

⁴⁸⁰ *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd.*, 1999 CanLII 2757 (ON C.A.); *Rudco Insulation Ltd. v. Toronto Sanitary Inc.*, 1998 CanLII 5529 (ON C.A.)

⁴⁸¹ *Glenko Enterprises Ltd. v. Keller*, 2008 MBCA 24; *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805; *Merritt v. Klijn*, 2002 ABQB 729 (CanLII)

⁴⁸² *Builders' Lien Act S.B.C. 1997*, s. 10(1).

In the case of insolvency, the trust created by the British Columbia Act ensures that money which becomes available in respect of a particular construction project is available exclusively to creditors of the insolvent person whose claims arise out of that project.

Similar allowances to the *Ontario Act* apply to trustees caught by the British Columbia Act in relation to their entitlement to draw on trust funds.⁴⁸³

In British Columbia, an action by a beneficiary against a trustee must be brought within one year after the completion, abandonment or termination of the head contract, or the improvement.

b. United Kingdom – Project Bank Account

Although not strictly a ‘trust’, Project Bank Accounts (**PBAs**) have been used recently in the United Kingdom to afford payment project to subcontractors.

A PBA is a ‘ring-fenced’ bank account where payments can be paid to beneficiaries (the head contractor, and supply chain members) on contractually agreed dates. A PBA is established by a side-deed rather than prescribed by statute. One party, usually the contractor, nominates a bank to act as PBA host.

The PBA is funded in advance of the works taking place (1 – 2 months). The parties to the PBA submit payment applications every month. Once payment entitlements are agreed upon by the parties, the bank is instructed to remit payment of the certified sum from the PBA due to the subcontractors.

In the United Kingdom, the NEC3 Engineering and Construction Contract have been amended to include a new ‘Option Z’ clause which provides for the setting up of a PBA. Furthermore, PBA’s have become standard in public sector procurement in the UK.⁴⁸⁴

The following advantages and disadvantages of PBA’s can be summarised as follows:

Advantages	Disadvantages
<ul style="list-style-type: none"> • Security of payment: in the event of insolvency in the contractual chain payments will still be made to members of the PBA • Speed of payment: payment is made directly to subcontractors from the PBA, so subcontractors do not have to wait for money to flow down the contracting chain to them. • Cash flow management: the delay in payments which typically extends payment periods down the contracting chain is not experienced. Smaller contractors are less likely to have to trade on credit. • Possible costs savings due to lower administration costs (of chasing payments) and reduced reliance on credit (lower interest payments) to cover extended payment periods. 	<ul style="list-style-type: none"> • Set-up costs (such as training) may be incurred in the establishment of initial operation of PBA’s. • PBA’s may allocate funds away from control of a bank or other funder. A mechanism should be set up for the case of defective work by a contractor requiring that contractor to make a greater contribution to the PBA to cover the cost of defective work.

⁴⁸³ *Builders’ Lien Act* S.B.C. 1997, s, 11(4).

⁴⁸⁴ Fenwick Elliot, *Insight*, ‘Project Bank Accounts – the way forward?’ (July 2012).

c. Recommendations for statutory construction trust schemes arising from inquiries conducted in other Australian jurisdictions

Collins Inquiry Report

The Collins Inquiry Report recommended that a chapter be added to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**NSW Act**) which established a statutory construction trust for all projects over \$1m. The essential key features of the statutory trust were summarised in the Collins Inquiry Report as follows:

- The payments from the head contractor to the subcontractor and suppliers cascading downward should be paid into and retained in a separate bank account.
- The principal is to be required to pay the moneys agreed to be due and payable to the head contractor within 15 days of the receipt of a progress payment in the proper form.
- The head contractor is to pay to the subcontractor or subcontractors as the case may be, the amounts not in dispute and properly set out in the progress payment.
- If there is a dispute as to what is due and payable either to the head contractor by the principal or by the head contractor to one or more of the subcontractors, then such dispute is to be dealt with in accordance with the provisions of the NSW Act.
- Once the principal, the head contractor or the subcontractor have paid moneys into the relevant respective construction trust account, then each beneficiary claiming to be entitled to the payment of moneys out of that account is entitled to call upon the trustee to provide up-to-date details of trust account details in the form of copies of the current account balances.
- After payment by the principal into the original trust account, the contractor shall be entitled to deposit the progress payment into an account with any one or more of the authorised investments set out in the *Trustee Act 1925* (NSW) and if the trustee elects to do so it must ensure that the account to which the funds are transferred continues to be described as a trust account for payment to subcontractors and suppliers in respect of the particular project name.
- Upon payment of all moneys found or agreed to be due and payable to the subcontractors, sub-subcontractors and suppliers, the contractor shall be entitled to retain the income earned upon the investment of the trust fund described above, for the period from the receipt of those funds from the principal, head contractor or subcontractor as the case may be, to the time and date of payment to the head contractor, subcontractors, sub-contractors, sub-subcontractors or suppliers as the case may be.⁴⁸⁵

The recommendations of the Collins Inquiry Report relating to the introduction of a statutory construction trust scheme in NSW have not been adopted.

WALRC Report

The recommendations of the WALRC regarding the implementation of statutory construction trusts in Western Australia were as follows:

- The responsibility of being the trustee should not be given to a government body but the trustee should be permitted to be one of the participants in the construction project.⁴⁸⁶
- To provide maximum protection for the head contractor and others involved with a project, where the owner provides its own capital, moneys in the hands of the owner to pay or funds received by the owner or earmarked by the owner to pay for the improvements should be held in trust for the benefit of the head contractor.⁴⁸⁷

⁴⁸⁵ Collins, Bruce QC, Final Report: Inquiry into Construction Industry Insolvency in NSW (November 2012), pp.158-159.

⁴⁸⁶ Recommendation 3.

⁴⁸⁷ Recommendation 4.

- All amounts received by the owner or advanced by a financier that are to be used in financing the improvement, should be held in trust for the benefit of the head contractor, that is, a trust should arise in relation to the funds at the time the financier is required to advance the funds to enable the owner to meet a progress payment or final payment to the head contractor.⁴⁸⁸
- An owner building his own home should be subject to a fiduciary duty to hold moneys on account of the contract for the benefit of the head contractor.⁴⁸⁹
- Each participant in the construction project who holds or receives a payment on account of the contract and is under an obligation to pay another participant should hold those moneys as a trustee. Each trustee should be required to hold funds for all those down the chain from it. Moneys received by one subcontractor should not be held in trust for those in the chain below another subcontractor.⁴⁹⁰
- A trustee's obligations to the beneficiaries should be fully discharged when the trustee has paid in full the parties with whom it contracted.⁴⁹¹
- Trustees (whether an owner building his or her own home, a contractor or a subcontractor) should be required to open a separate trust account for each project. However, trustees should have the option of using a single consolidated trust account with the approval of the Builders' Registration Board if they can demonstrate that they can maintain books of account of all trust moneys received, deposited or disbursed in such a manner as to disclose the true position as regards those moneys in relation to particular projects and to enable the books to be readily and conveniently audited. If this option is taken, the account should be audited annually.⁴⁹²
- A trustee who is a head contractor or a subcontractor should be able to withdraw the balance of trust funds when the project is completed, so long as all obligations to its beneficiaries have been met. A trustee should be able to withdraw money from a trust fund *before* a project is completed so long as there is sufficient money left in the fund to pay the beneficiaries the moneys owing to them in full.⁴⁹³
- Where a trustee pays for materials, service, labour or rented equipment for the project out of its own funds, the trustee should be allowed to withdrawal from the trust fund of an amount equal to the sum paid. Such a withdrawal should not constitute a breach of trust so long as the fund is not insolvent or rendered insolvent as a result of the withdrawal. A trustee should be able to withdraw moneys from a trust fund to discharge a loan to the extent that the lender's money was used by the trustee to pay in whole or part for work done or materials incorporated into an improvement.⁴⁹⁴
- Where a beneficiary is liable to pay the trustee for outstanding debts, claims or damages, the trustee should be a beneficiary of the trust for any set-off or counterclaim relating to the performance of the contract with the same ranking as other beneficiaries of the trust.⁴⁹⁵
- Where a trust fund is solvent, the trustee should be allowed to make payments to beneficiaries of the trust as they fall due. Where the trust fund is insolvent so that there are insufficient funds to satisfy the claims of all the beneficiaries of the trust, the trust funds should be distributed amongst the trust's beneficiaries on a pro rata basis.⁴⁹⁶
- Where money owing to a contractor on account of the contract price for a project would, if paid to the contractor, be subject to a trust, the money should not be subject to attachment. The attachment order

⁴⁸⁸ Recommendation 5.

⁴⁸⁹ Recommendation 6.

⁴⁹⁰ Recommendations 8-10.

⁴⁹¹ Recommendation 11.

⁴⁹² Recommendation 12.

⁴⁹³ Recommendations 13-14.

⁴⁹⁴ Recommendations 15-16.

⁴⁹⁵ Recommendation 17.

⁴⁹⁶ Recommendations 18-19.

should instead apply to the money the trustee is entitled to receive from the trust once its obligations to beneficiaries of the trust have been satisfied.⁴⁹⁷

- Failure to comply with a trust scheme should be a ground for disciplinary action against a builder. To ensure that individuals cannot hide behind the veil of a partnership, company or other body corporate, if the registration of a partnership or a company or other body corporate is revoked, a finding should be made as to which individuals associated with the partnership or corporate body were responsible for the failure to comply with the trust scheme.⁴⁹⁸

The recommendations of the WALRC Report have not been adopted in WA.

D. Practical implementation of a construction trust scheme

Keeping a trust account separate from a general account

A statutory trust system should require that trust funds be kept separate from the trustee's general account.⁴⁹⁹ This practice reduces the risk of money becoming mixed, for example if a bank debits (trust money from a bank account for moneys due and owing to it. It may also discourage the trustee from paying past accounts or financing new projects with payments from a current project.⁵⁰⁰

Option to keep a separate trust account for each project

The WALRC suggested that a trustee should be required to open a separate trust account for each project. However the WALRC was of the opinion that when the trustee can prove to a regulator (such as the BPB) that they can maintain books of account of all trust moneys received, disputed or disbursed in such a manner that they can be easily reviewed and audited, then the trustee should have the option of using a single consolidated trust account.⁵⁰¹

The Collins Inquiry Report advocated for a single trust account for multiple projects, using a ledger system to separate projects (similar to that used in law firms).⁵⁰²

Withdrawing money from the trust fund

It has been recommended that the trustee should be able to withdraw money from the trust only in certain circumstances, including:

- for materials, service, labour or rented equipment for the project;
- where a trustee borrowed money to pay the beneficiaries the amounts due and owing to them, the trustee should be able to withdraw moneys from the trust fund to discharge the loan;
- where the beneficiary is liable to pay the trustee money for outstanding debts, claims or damages.⁵⁰³

These are substantially the same circumstances upon which trustees subject to the Canadian legislation are permitted to withdraw trust moneys.

a. Payment to beneficiaries

The trustee's obligations will only be discharged when they have paid the beneficiaries to the trust in full for all work associated with the project. A trustee's accounting records will be used to show that payment has been made to beneficiaries under the trust.

b. Payment of suppliers

⁴⁹⁷ Recommendation 20.

⁴⁹⁸ Recommendation 24.

⁴⁹⁹ Collins, Bruce QC, Final Report: Inquiry into Construction Industry Insolvency in NSW (November 2012), pp. 168,171-174.

⁵⁰⁰ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 64; Final Report: Inquiry into Construction Industry Insolvency in NSW (November 2012), pp. 168,172-173.

⁵⁰¹ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 65.

⁵⁰² Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012), pp. 134, 343.

⁵⁰³ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), pp. 66-68.

By way of illustration, in Ontario, the ability of suppliers to recover under trust funds has become firmly entrenched.⁵⁰⁴ In order for the supplier to establish it is the beneficiary of a trust created in its favour under the *Ontario Act* it must show that:

- the alleged trustee is a contractor or subcontractor;
- the supplier supplied material to projects on which the alleged trustee was a contractor or subcontractor;
- the alleged trustee received or was owed monies on account of its contract price for those projects; and
- the alleged trustee owed the supplier for those materials.⁵⁰⁵

Under the *Ontario Act*, once a supplier has discharged the onus of establishing the existence of the trust, the potential for a trust claim arises. Then the burden passes to the contractor or subcontractor to explain what it did with the money it received from the contractor or owner and to show that none of the trust money was diverted from the trust. This encourages a practice of good records and account keeping.

c. Timing of payment

It has been suggested that under a statutory trust scheme, the payment of beneficiaries should be made as the payments fall due.⁵⁰⁶ The suggestion is that the trustee should not be required to pay the beneficiaries with an 'even hand.' The trustee will have discharged its obligations if it has paid out the full amount of the trust fund, even where some beneficiaries may not have been paid in full.

In the case where the trust fund is insolvent, it has been recommended that the funds be distributed among the beneficiaries on a pro-rata basis.⁵⁰⁷

d. Priority between trust beneficiaries and a judgment creditor

If money owing to a contractor on account of the contract price would, if paid to the contractor, be subject to a trust, the money should not be subject to an attachment order from a creditor of that contractor.⁵⁰⁸

It has been recommended that the practice of a contractor assigning past or future accounts as security for a loan or line of credit be altered under the trust account scheme so that a contractor or beneficiary could instead assign to a creditor its right to a share in the trust fund and its rights of enforcement.⁵⁰⁹

Obligations of banks and other authorised deposit taking institutions

In Canada, banks as 'strangers to a trust', have been held to be breach a statutory construction trust for knowing receipt of trust funds. It has been held that banks are in breach of trust if they use moneys (of which they have constructive knowledge are trust moneys) to satisfy debts of its customers (the trustees).⁵¹⁰

It has been held that in that in some jurisdictions where trust claims are otherwise subject to time limits upon which a plaintiff must act after first becoming aware of a breach of the trust, that claims for knowing receipt are not barred by such time periods.⁵¹¹

Advantages of a statutory trust system

The following benefits arising from a statutory trust system have been promulgated:⁵¹²

⁵⁰⁴ *Sunview Doors Limited v Pappas* 2010 ONCA 198; *St Mary' Cement Corporation v Construct Ltd* (1997) 32 OR (3d) 595 (Gen. Div.).

⁵⁰⁵ *Sunview Doors Limited v Pappas* 2010 ONCA 198, at 23.

⁵⁰⁶ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 70.

⁵⁰⁷ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 81.

⁵⁰⁸ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 72.

⁵⁰⁹ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 73.

⁵¹⁰ *Provincial Drywall Ltd v. Toronto-Dominion Bank et. al.*, 2001 MBCA 38.

⁵¹¹ *Builders' Lien Act* C.C.S.M c. B91 1997, s 8(1); *Glenko Enterprises v Keller* 2008 MBCA 24, at 33.

⁵¹² WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 52.

- They provide a means of ensuring that a head contractor and subcontractors are paid for their services and for materials supplied while keeping contract moneys within the control of the parties to the project.
- They impose ethical standards on the payment of participants in the industry for work done or materials supplied in an industry which has failed to use self-regulation to control the use of various unfair or unscrupulous practices.
- They reinforce a good practice in the distribution of funds for a project to the participants in the project and consistently with the concept of cooperative contracting, which is seen as way of improving the efficiency of the industry.
- Since the moneys are held in trust, they cannot be seized or frozen by a receiver or liquidator of the trustee or the trustee of the estate of a bankrupt trustee. This means that the position of a person further down the chain can be secured and the payment of funds downward can still take place because the project funds held in trust will not form part of property distributed in the bankruptcy or winding up of the trustee.
- A wider range of remedies is available for a breach or possible breach of trust than for a breach of contract.

The use of statutory trusts may result in a speedier resolution of disputes between, for example, a head contractor and a subcontractor, because generally the head contractor cannot withdraw money from the trust fund until all the claims of the fund's beneficiaries have been met. It removes the incentive for those holding funds to create artificial disputes and resolve them through applying commercial pressure. This may result in the result in more timely payment of subcontractors.

Disadvantages of a statutory trust system

The Cole Report did not recommend the adoption of a trust model, but did not 'recommend against' that model. One of the considerations in not recommending a trust model cited by the Cole Report was the entrenched industry opposition to it.⁵¹³

The Collins Inquiry Report stated that 'opposition to the introduction of the construction trust is born out of misunderstanding.'⁵¹⁴ Namely, the Collins Inquiry Report asserted that a lack of understanding of the trust mechanism amongst construction industry participants has led to the industry's distrust of and opposition to the introduction of a statutory construction trust scheme.⁵¹⁵

a. Costs to Industry

Statutory trust systems have been criticised on the basis that they incur 'substantial additional costs' of administration, including accounting costs.

However, the counter-arguments to the costs criticism can be summarised as follows:

- a statutory construction trust following the 'cascading' trust model advocated would merely superimpose a fiduciary duty on a contractual relationship – which is already established by some standard building contracts in relation to retention funds;
- additional accounting requirements would be limited to requiring each trustee to keep a trust account for project funds for each project, separate from its general banking account;
- complying with accounting and administration requirements would not necessarily require any more stringent book keeping than is required for the running of a business or complying with tax law;

⁵¹³ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, 'Final Report of the Royal Commission into the Building and Construction Industry', February 2003, p. 245.

⁵¹⁴ Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012), p. 309.

⁵¹⁵ Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012), p. 309.

- due to the more secure payment system, any increase in costs (for example due to the procurement of extra accounting services) is likely to be offset against a reduced need to build into the contract price a contingency sum to cover defaults or delays in payment; and
- due to the more secure payment system being implemented, those with credit indemnity insurance should experience lower premium rates, or a reduction in the sum insured with a consequent reduction in premiums.⁵¹⁶

One submission to the Collins Inquiry summarily dismissed the increased costs argument against a statutory construction trust scheme, calling the touted 'administrative difficulties, burdens and costs' criticism a 'red herring.'⁵¹⁷ Further, the Collins Inquiry Report concluded that such criticisms were not supported and ought to be rejected.⁵¹⁸

b. The effectiveness of a trust system is limited by trust property available

Statutory trust schemes have also been criticised because they are only effective to the extent that trust property is available to meet the claims of beneficiaries. That is, in the circumstance where:

- a head contractor has underbid a job;
- the right of set-off arises because of an incomplete or defective job; or
- the head contractor otherwise does not receive the full amount of money owing under the contract,

the head contractor will be taken to have discharged its obligation if it pays all the money it receives to the subcontractor, even where that amount is not the full amount owing to the subcontractor.

Some counter-arguments that can be advanced in response to the suggestion that a statutory trust scheme is vulnerable to underbidding or underquoting are as follows:

- using trust funds for one project to satisfy debts on another project would be a breach of trust. This is a disincentive for a contractor to underquote on one job to obtain cash flow to meet obligations on another project;
- if there are insufficient funds available to pay all beneficiaries, the trust funds would have to be distributed on a pro-rata basis to beneficiaries. As the contractor has no entitlement to access the trust funds, they would have no incentive to underquote a job; and
- contractors can cover themselves for any shortfall between the amounts received and the amounts owing to subcontractors through taking out credit indemnity insurance.⁵¹⁹

It has been argued that the risk to a reduction in trust funds by a set-off counterclaim is limited because only a party to a project should be entitled to set-off and that party should be a beneficiary of the trust to the extent of the sum the debtor is entitled to receive from the fund. In the case where a fund is insolvent, the trust funds are distributed on a pro-rata basis to the beneficiaries, satisfying the contractor's trust obligations. The right to commence an action to recover any outstanding sum under the contract still remains under the contract.⁵²⁰

It is argued that this approach allocates risk to the party best placed to assess it and take steps against the financial loss (e.g. through insurance).

c. Evading the trust scheme is possible

Another criticism of the trust scheme is that head contractors and contractors may attempt to evade the scheme by adopting a residence or domicile or by obtaining finance outside of the State or Territory in which the scheme operates.

⁵¹⁶ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 53.

⁵¹⁷ Submission by Bruce Reynolds (19 November 2012) to the Collins Inquiry.

⁵¹⁸ Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012), p. 317.

⁵¹⁹ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 54.

⁵²⁰ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 54.

Whilst there are some constitutional limitations for extra-territorial application of Territory legislation, the operation of the security of payment legislation to apply to construction contracts in respect of works located in the Territory is a good model demonstrating that the territorial application of legislation can be practically applied to construction contracts and construction works in the Territory.

d. Contractors may be unable to divert money from project to project

Industry may be concerned that a trust scheme reduces the scope for contractors to divert money received for one project to meet the payments of another project.

In response to this criticism it has been suggested that a trust scheme would not completely deny a builder the opportunity of using funds owing and due to him or her on one project to secure funds on another because the trustee will still be able to withdraw funds from the trust where, for example, the trust account balance exceeds the moneys owing to the beneficiaries.⁵²¹

However, the very strength of the trust scheme model is that it ensures that adequate funding is available for a project without access to 'free capital' supplied by contractors lower down the contracting chain.

Furthermore, if a 'buffer system'⁵²² whereby payments made by the principal to the head contractor become due on a shorter payment terms than for which payments are due from the head contractor to its subcontractors is adopted, then the incentive for a head contractor trustee to use the payment received on one project to satisfy debts on another project is further diminished.

e. Involvement of third parties

As the law of trusts allows trust funds to be as traced, concerns arise for third parties such as banks, who receive trust moneys. It has been contended that this concern does not hold great weight in Australia, because it is only bona fide purchasers for value without notice of breach of a trust whose trust funds cannot be traced. Banks that receive payments from trust funds must confirm that these payments are in accordance with the trust. If the bank ensures that beneficiaries have been paid before receiving payments from their (contractor) customer, the bank will be free from tracing actions by the beneficiaries.⁵²³

f. Interference with the application of insolvency laws

It is alleged that the operation of a trust scheme interferes with the priority system of insolvency. This is because trust funds payable to participants in a project do not form part of the debtor's estate for distribution to the debtor's creditors, but beneficiaries of the trust would have to be paid out under the trust under a separate fiduciary obligation owed by the contractor to the beneficiaries.

This disruption has been defended because otherwise, creditors (other than those participants in the project) would obtain a benefit from the work and materials supplied by the participants that they have not paid for.

Whilst the interrelationship of Federal insolvency laws and the operation of the statutory construction trust might be conceptually uneasy, it is anticipated that proper drafting and consideration of the principles of personal and company insolvency can be rationalised with the operation of a cascading, construction trust.

Furthermore, if the insolvent debtor is the owner of the building, the building can be sold to satisfy the claims of the other creditors. Where the debtor is a participant in the project, any trust money paid to the debtor which it is entitled to retain for work done or materials supplied will become an asset of its estate which can be used to satisfy the claims of its creditors.⁵²⁴

g. Extending payment terms in an industry where 'cash flow is king'

It has been suggested that the use of a statutory construction trust scheme might, in actual operation, stall the flow of cash down the construction chain.

⁵²¹ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 55.

⁵²² Discussed below at paragraph 'g'.

⁵²³ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 56.

⁵²⁴ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 57.

Two features of a construction trust scheme may abrogate these concerns.

- Firstly, as mentioned above, construction trusts may act as a disincentive for a contractor to underquote on one job to obtain cash flow to meet obligations on another project.
- Secondly, if a 'buffer' system was incorporated into the payment cycle, head contractors would not be in a precarious position during the time period between receiving money from the principal and discharging its obligations as a trustee to pay out the money due and owing to its subcontractors and suppliers. This 'buffer' system was suggested by the Collins Inquiry Report, which recommended that payment terms as between the principal and contractor be statutorily prescribed at 15 days from the date of receiving the progress claim. The statutorily prescribed date for the contractor to pay the subcontractor would be 28 days.⁵²⁵ The buffer system would also assist head contractors to comply with their trust obligations to refrain from using moneys received on one project to satisfy subcontractors' claims on another.

Conclusions and recommendations on statutory construction trusts

This Report considers the best protection to lower tier subcontractors will be provided by a legislated, cascading, construction trust scheme (the **Recommended Subcontractors' Trust Scheme**) similar to the statutory trust schemes recommended by the WALRC Report and the Collins Inquiry Report.

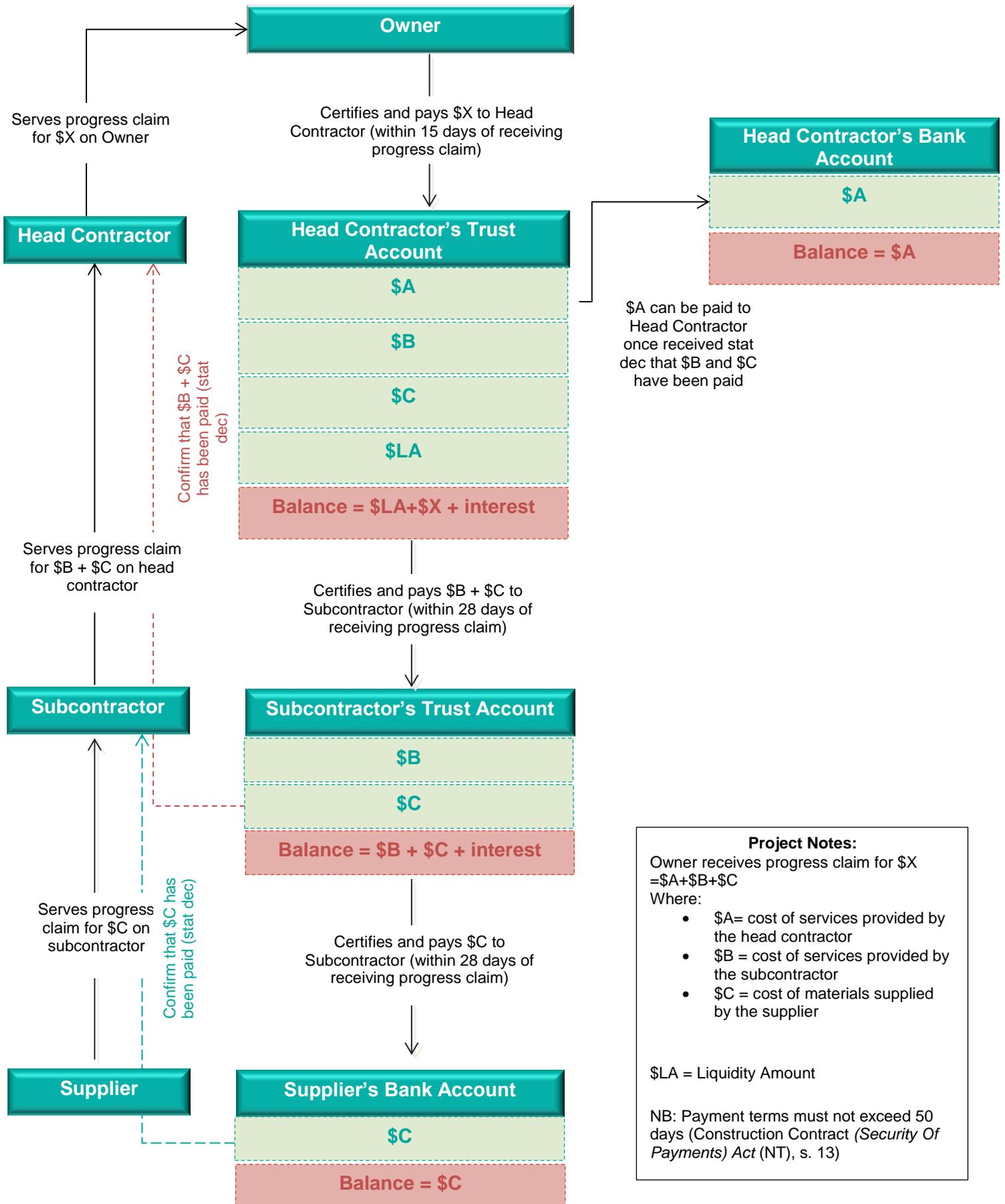
RECOMMENDATION 4: Payment Protection

That the Territory implement a legislated, cascading, construction trust scheme (**Recommended Subcontractors' Trust Scheme**).

The operation of the Recommended Subcontractors' Trust Scheme can be illustrated by the following examples:

⁵²⁵ Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012), p. 366.

Operation of Recommended Subcontractors' Construction Trust – commercial contract



Under the Recommended Subcontractors' Trust Scheme, the trustee must not divert funds held in trust for their own use (such as to divert to payment of a subcontractor on another project, or to pay the contractor's internal costs or other creditors).

It is suggested that the method of payment out of the trust account could be that recommended in the Collins Inquiry Report, that is, the trustee can only access the trust funds once all the amounts due to the beneficiaries have been paid to those beneficiaries. However, it is not a breach of trust under the Recommended Subcontractors' Trust if the trustee, under an adjudication determination, pays an amount out of the trust to a beneficiary and it is later found on appeal or by another dispute mechanism procedure that the trustee ought to have paid more or less to that beneficiary.

The Collins Inquiry Report recommended that the subcontractor's construction trust scheme ought to be compulsory for use in projects of \$1 million and greater value.

This Report recognises that the costs of running a separate trust account with a bank (recognising there will only be one trust account needed to be opened, with separate project ledgers, adopting the Collins Inquiry Report recommendation), and the administration and accounting costs the trust scheme necessitates, are such that it may be thought impractical to introduce the scheme for small contractors.

It is the recommendation of this Report that a threshold be set for the mandatory operation of the subcontractors' construction trust. Rather than tie that threshold amount to a project's size however (as it is not the intention to limit the construction trust to any one project of a contractor) the recommendation of this Report is to set a threshold by reference to the gross revenue, or better gross outgoings to subcontractors and suppliers, of a contractor.

This is because once a:

- contractor exceeds a threshold of business activity, the risk of a payment default significantly impacting subcontractors down the contracting chain becomes greater, and the costs of the Recommended Subcontractors' Trust Scheme for that contractor becomes warranted; and
- Recommended Subcontractors' Trust account is opened by a contractor to comply with the scheme, the contractor will have the ongoing costs of maintaining it, so it might as well use it for all projects rather than have two methodologies for payment of subcontractors running concurrently (even if the contractor's next project is smaller than its last project).

It is suggested that the Reformed Registration System could ensure that all registration applications, renewals and periodic (annual is recommended) returns require the relevant financial information that would be necessary for the regulator of the Reformed Registration System to assess whether the contractor is under the threshold amount to operate a Recommended Subcontractors' Trust.

Given the smaller scale of many contractors and projects in the Territory, but also contemplating the adverse impact on smaller subcontractors where relatively small amounts remain unpaid, it is recommended that the threshold for the operation of the Recommended Subcontractors' Trust be set quite low. An arbitrary figure would be where a contractor has paid \$500,000 or more in gross outgoings to subcontractors and suppliers in a year.

RECOMMENDATION 5: Payment Protection

There be a minimum threshold of \$500,000 and greater of a registered contractor's gross outgoings to subcontractors, for the contractor's compulsory use of the Recommended Subcontractors' Trust Scheme.

The Recommended Subcontractors' Trust obligations ought to be tied by the legislation to the Reformed Registration System so that breaches of a contractor's obligations as trustee of the Subcontractors' Trust are breaches of the registration leading to immediate disciplinary action.

RECOMMENDATION 6: Payment Protection

The Recommended Subcontractors' Trust Scheme ought to be tied to the Reformed Registration System, so that a breach of a trust obligation by a contractor is an actionable breach of that contractor's registration conditions.

E. Retention trusts

Existing use of retention mechanisms

The holding of security is common practice within the commercial building sector. The rationale behind permitting a principal or contractor to withhold part of the contract price from a contractor or a subcontractor is to provide that principal or contractor with some measure of protection against a failure by the contractor or subcontractor to complete its works or attend to defects. It is said that this is an incentive to ensure the due and proper performance of the contract.⁵²⁶

Often construction contracts will provide for a cash retention by retaining 10% of each progress payment until 5% of the total contract price is reached.

Support for use of retention trusts

A major problem with the practice of holding retention money is that subcontractors experience great difficulty and incur time and cost in retrieving retention money from recalcitrant contractors.⁵²⁷ The extent of this issue has resulted in the return of retention and security being addressed in security of payment legislation as a payment claim, so that adjudicators can make determinations on the return of security.

To address this concern, the Collins Inquiry Report recommended that retention sums between principals and head contractors, and head contractors and subcontractors, should be held in a statutory construction trust recommended by the Collins Inquiry Report in a separate ledger account.⁵²⁸

More recently⁵²⁹ provisions in the *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015* have come into effect requiring all head contractors for non-residential work in NSW valued over \$20 million to hold retention money with an authorised deposit taking institution (eg. a bank under the *Banking Act*) on trust for its subcontractors. Separate trusts may be held for each contractor or one trust for retention money for a given project may be held if the portions allocated to each subcontractor are easily identifiable.⁵³⁰ Penalties of up to \$22,000 apply for a breach of these Regulations.

Recommended Retention Trust Scheme

The construction industry has long been acquainted with construction contracts incorporating the concept of retention or security being given by the contractor to the principal, and by subcontractors to contractors, in the amount of 5% of the contract price.

This Report recommends the establishment of a statutory retention trust scheme, but contemplating the benefits of this for the principal.

This Report consequently recommends that a statutory retention money trust scheme be established (**Recommended Retention Trust Scheme**) that operates for residential builders (only).

It is recommended that a relevant Government agency (possibly the regulator of the registration system) be the trustee of the Recommended Retention Trust. If there is a government trustee, the interest earned on the money held in trust can be applied to defray the costs of administering the Recommended Retention Trust Scheme and to support funding of the Recommended Warranty Scheme.

⁵²⁶ Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012), p. 106.

⁵²⁷ Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012), p. 116.

⁵²⁸ Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012), p. 117.

⁵²⁹ These changes took effect from 1 May 2015.

⁵³⁰ *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015*, r. 6(2).

Under the Recommended Retention Trust Scheme, 5% of the contract price of residential construction contracts (including multi-storey residential construction) entered into by residential builders (who are registered in the relevant class under the Reformed Registration System) will be held in a statutory trust account. Where the residential builder is a developer and there is no separate construction contract in place for the construction of the residential building, the Government trustee will assess and deem the value of the construction works and require the developer to place 5% of that amount into trust.

Stakeholders can access the Recommended Retention Trust in the following circumstances:

- the residential builder, when it is contractually entitled to the return of the retention under the terms of the construction contract;
- the principal, when the principal is entitled to call upon the retention under the terms of the construction contract (as the contractor is in default of its obligations to complete works or rectify defects); and
- the Recommended Warranty Scheme Administrator, if the Recommended Warranty Scheme has been triggered by a compensable event under that scheme (typically a construction failure because of the death, disappearance or insolvency of the contractor, or other compensation event that is identified in this Report .

If the construction contract permits the giving of security by unconditional bank guarantee or insurance bond, then the guarantee or bond will be issued to, and in the name of the principal (in the normal course of the present practice) and the name of the Recommended Warranty Scheme Administrator.

As is typical in commercial contracting arrangements, the 5% retained amount can be apportioned as follows:

- 2½% to be held on trust until the issue of an occupancy permit under the *Building Act* for the building; and
- the remaining 2½% to be held on trust for a 12 month defects liability period from the issue of the occupancy permit. (This is the equivalent period for the non-structural consumer guarantee currently provided under the *Building Act*),

whereupon it be immediately released to the residential builder.

This means that if a trigger event occurs and the Recommended Warranty Scheme Administrator has to step in and engage other contractors to complete the contract works or rectify defects, the Recommended Retention Trust amount can be drawn down (or the bank guarantee called upon and applied) as contribution to the costs of the Recommended Warranty Scheme. The Recommended Retention Trust Scheme can be used to defray the extra cost risks for the Recommended Warranty Scheme extending coverage to multi-storey residential construction (see Recommendation 3 in the Residential Warranty Scheme part of this Report which expands the Recommended Warranty Scheme to cover multi-storey residential construction contracts).

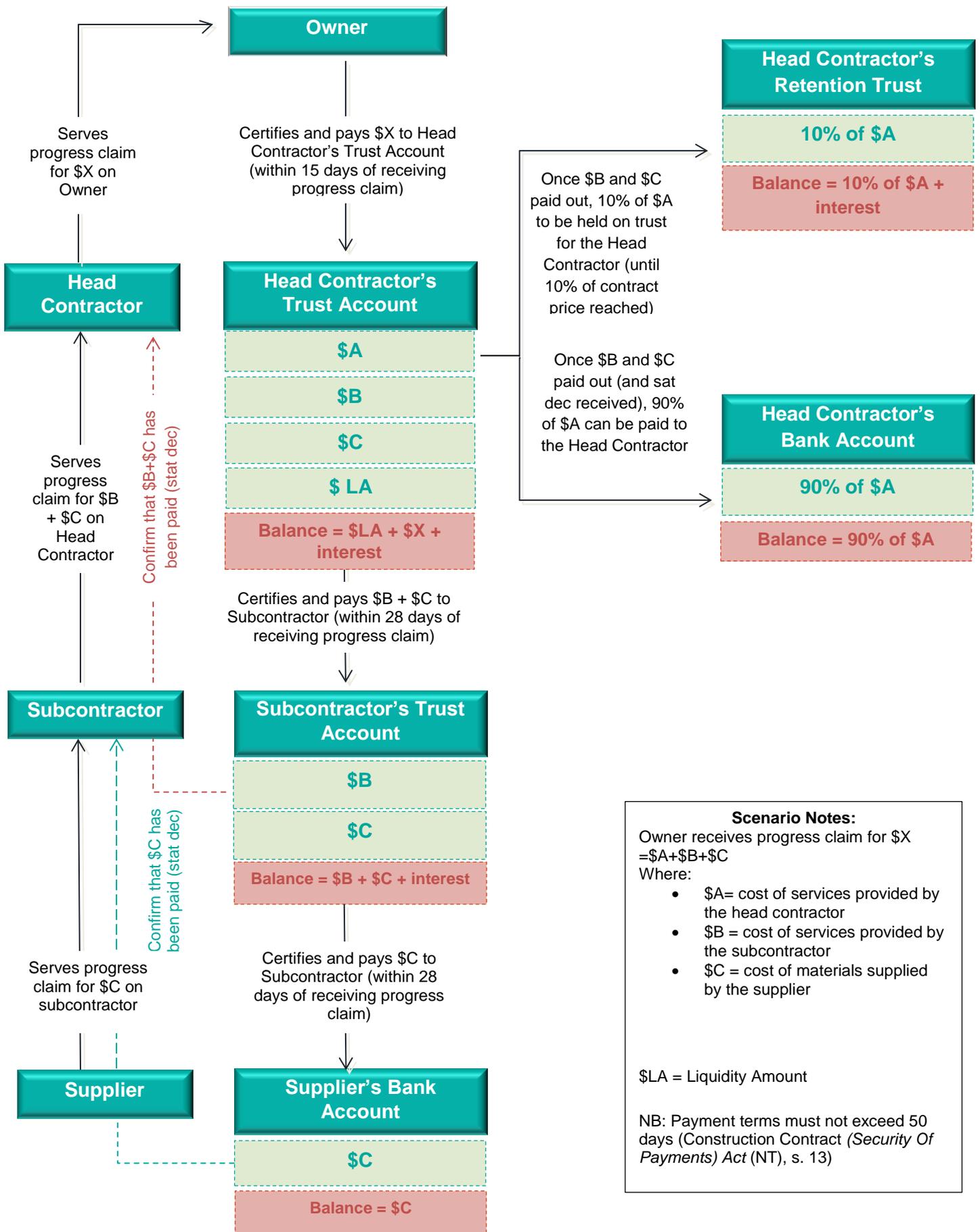
RECOMMENDATION 7: Payment Protection

A retention trust scheme ought to be established (the **Recommended Retention Trust Scheme**) for residential builders only.

- Under the Recommended Retention Trust Scheme 5% retention of the contract price (or estimated contract construction value, if there is no lump sum price) for each residential construction project is held in a statutory trust account for the consumer (being the home owners and the bodies corporate for unit constructions) and the Recommended Warranty Scheme Administrator as beneficiaries.
- 2½% of the retained amount will be returned to the builder on issue of an occupancy permit for the works under the *Building Act*.
- The remaining 2½% of the retained amount will be returned to the builder at the end of a statutory defects period, which is recommended to be one year from the issue of an occupancy permit under the *Building Act*. (This period accords with the consumer guarantee period for non-structural defects under the *Building Act*.)
- If there is a call on the Recommended Warranty Scheme, then the Recommended Warranty Scheme Administrator can draw upon the security as a beneficiary of the retention trust and apply it to managing the construction failure, thereby defraying the costs of the Recommended Warranty Scheme.

The operation of both the Recommended Subcontractors' Trust and the Recommended Retention Trust Scheme for one payment claim cycle can be illustrated as follows:

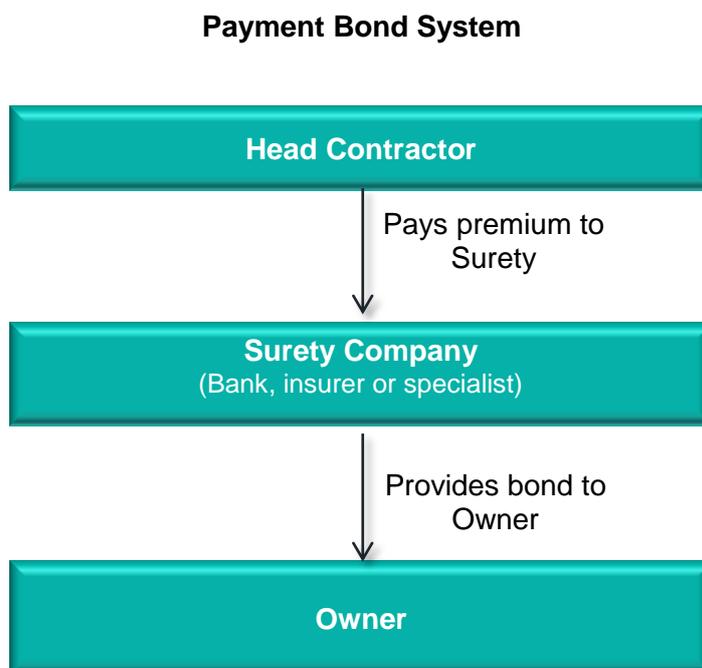
Operation of Recommended Subcontractors' Construction Trust and Recommended Retention Trust for one payment cycle (Residential Building Contract only)



F. Payment bonds

a. Nature of payment bonds

A payment bond is a type of surety bond which involves an owner or a head contractor obtaining a bond from an insurance company, bank or specialist surety company which guarantees the payment of the contractor and all subcontractors and employees for work and materials supplied on a given project. It is a legislated system in the United States and can be illustrated as follows:



All Federal and many State government projects in the United States require the head contractor to take out performance bond to ensure performance to the principal is made and a payment bond to ensure that payment is made to subcontractors. This is legislated at both State (*Little Miller Act*) and Federal (*The Miller Act*) levels.⁵³¹

Commonly, payment bonds used for public projects are indemnity bonds, which means that the surety's sole obligation is to reimburse the obligee for its damages in the event of a contractor default. In private projects, payment bonds are used so that the project is free from the possibility of a subcontractor or supplier asserting a mechanic's lien (roughly equivalent to the Territory's former workmen's liens discussed earlier in this Report) over the project.⁵³²

Commonly, it is a condition of a payment bond that if the head contractor fully performs the stated obligation (paying the subcontractors and suppliers down the construction chain), then the bond is void. Until this time, the bond otherwise remains in full force and effect. That is, the guarantee which arises under a payment bond will lapse when all the subcontractors and suppliers are paid.

If the head contractor fails to pay the subcontractors or suppliers, they may collect from the head contractor or surety under the payment bond up to the penal sum of the bond. Payments under the bond will deplete the penal sum. The penal sum in a payment bond is often less than the total amount of the total project contract amount and is intended to cover anticipated subcontractor and supplier costs.

The Miller Act

The Miller Act sets out the terms and contains governing bonds for Federal projects in the USA.

⁵³¹ Collins, Bruce QC, 'Final Report: Inquiry into Construction Industry Insolvency in NSW' (November 2012), p. 108.

⁵³² Management, Procurement and Law, 'Security of payment for Hong Kong Construction Industry' 163 Issue MPI, p. 20.

If the subcontractor or supplier provides an affidavit that the claimant has supplied labour or materials for such work and payment has not been paid to that subcontractor or supplier under a federal construction project, subcontractors and suppliers have the right to obtain a certified copy of the bond which secured that project. The subcontractor or supplier can recover the full value of the labour or materials furnished for the construction project.

Remote suppliers cannot recover under *The Miller Act*. That is, the right to make a claim is limited to those suppliers and subcontractors who deal directly with the head contractor and to those suppliers who, absent any contractual relationship with the head contractor, have a direct contractual relationship with the subcontractor. Suppliers that only have a contractual relationship with the subcontractor must give to the subcontractor a notice within 90 days of the last supply under the contract in order to be entitled to recover under the payment bond.

b. To whom should a payment bond system apply?

It has been suggested that a payment bond system might not be applicable to residential building contracts where owners are building a home, since typically in these cases (unlike in tendered projects) finance is secured before the project proceeds.⁵³³

Where head contractors are building a home, the head contractor and the subcontractor will suffer information asymmetry, in the sense that those parties do not know whether a project has obtained financial approval.

For this reason it has been recommended that payment bonds be used as an alternative to a statutory trust scheme in the circumstance where the owner or contractor obtains a payment bond to guarantee the payment of all its contractors, employees or suppliers of materials and services for a project.⁵³⁴

c. Evaluation of payment bonds

Advantages of payment bond systems are that they:

- can be simple to administer; and
- do not interfere with the organisational structure or cash flow of the building project.⁵³⁵

Payment bonds can be expensive because:

- the premium may be substantial (between 1-2% of the project sum),⁵³⁶ and
- the insurance company may demand an indemnity from the owner or head contractor secured by a charge over its assets.

The surety typically pre-qualifies the head contractor based on the experience and financial strength of that contractor. This means that the premium is essentially a fee for prequalification.⁵³⁷

This expense may deter smaller builders from undertaking projects who cannot afford the up-front premium.

Furthermore, under a payment bond system, sureties have the difficult task to forecast the risk arising from a number of contractors down the chain which have no contractual privity with the head contractor.

It has been proposed by the WALRC that small builders should not be obliged to obtain performance bonds, as a statutory trust scheme might be better suited to such entities. It has been claimed that this would eliminate the disadvantages associated with payment bonds.⁵³⁸

d. Practical implementation of a payment bond system

⁵³³ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 78.

⁵³⁴ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 78.

⁵³⁵ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 78.

⁵³⁶ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 79.

⁵³⁷ Fullerton, James, 'Construction Bonds on Public Projects', *Construction Law Survival Manual*, p. 610.

⁵³⁸ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 78.

It has been suggested that in order to circumvent the difficulty which arises if a contractor or subcontractor defaults on its insurance policy, that an insurance company be required to notify those covered by the bond of a default on the bond or make this information publically available.⁵³⁹

It has also been recommended that where the distributions of a performance bond do not satisfy all claims made on it, that the proceeds of the bond should be distributed on a pro-rata basis.⁵⁴⁰

Conclusions and recommendations for payment bonds

Whilst the payment bond system does afford payment protection down the contracting chain and has many interesting attributes, in reality that system is dependent upon a critical mass of mature and sophisticated surety providers who compete to work closely with the contractors. Such surety providers also:

- have the capacity to undertake pre-qualification assessments of the contractor's technical and financial capacity to do the works;
- have the financial backing and credit rating to be able to extend to the contracting government agency a surety of the contractor's performance that can be called upon, on demand, by government; and
- take a step-in role on behalf of the contractor in the event the contact defaults or may default in its obligations to the government principal under the construction contract.

The Collins Inquiry Report found that performance bonds are rarely used in Australia and that there was not a market or appetite for performance bonds in NSW.

If this is the case for NSW, it follows that it must be is particularly so for the Territory, considering its considerably smaller market size. Unfortunately this precludes any serious consideration of a payment bonding system as an isolated Territory reform.

RECOMMENDATION 8: Payment Protection

The Territory should not introduce a payment bond system because the small size of the Territory market cannot support such a scheme.

⁵³⁹ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 80.

⁵⁴⁰ WA Law Reform Commission, 'Financial Protection in the Building and Construction Industry' (March 1998), p. 81.

Glossary

builders' registration system	the current system in place in the Territory for the registration of building practitioners.
civil and engineering construction	the construction of the physical and naturally built environment, including for works such as roads, bridges, canals, dams, and buildings.
commercial construction	the construction of buildings primarily intended for purposes other than long term residential purposes noting that on occasion, one or more dwelling units may be created through non-residential building activity. This is also referred to as 'non-residential' construction.
Commissioner	the Commissioner of Residential Building Disputes established under the <i>Building Act</i> (NT).
compensable construction failure	a type of contractor failure not necessarily conditioned on the death, disappearance, insolvency or loss of licence of a residential builder, including a failure by that residential builder to conform with the NCC or a failure to rectify defects.
construction contractors	the collective term for residential, commercial and civil and engineering construction contractors, regardless of where they lie in the contracting chain.
construction failure	the failure of a construction contractor to properly execute and substantially complete its works or, post construction, to properly and adequately attend to and rectify any defects that may become manifest in its works.
contractor failure	the ceasing of a construction contractor as an operable entity, typically by insolvency or by more informally ceasing to trade and disappearing from the market or jurisdiction.
Director	the Director of Building Control established by the <i>Building Act</i> (NT).
fidelity fund	a type of residential warranty scheme such as is currently in place in the Northern Territory and the ACT.
Government	the government of the Northern Territory of Australia.
HBCF Scheme	the Home Building Certification Scheme established in 1993 as part of legislative reform to privatise the Territory building industry.
industry sectors	the collective term for each of the residential, commercial (non-residential) and engineering and civil construction sectors.
insurance scheme	a type of residential warranty scheme where indemnity cover is usually provided by private insurers and funded by the payment of a premium to that private insurer.

Liquidity Amount	the minimum balance required to be held in a contractor's construction trust account established under the Recommended Subcontractors' Trust Scheme.
MBA Fidelity Fund	the fund established under the Territory's Residential Insurance Cover Package, operating since 1 January 2013.
multi-storey residential construction	the construction of buildings greater than 3 storeys used primarily for long term residential use and typically comprised of flats, units or apartments.
NCC	National Construction Code.
non-residential construction	see 'commercial construction', above.
Recommended Retention Trust Scheme	the retention trust scheme recommended by this Report.
Recommended Subcontractors' Trust Scheme	the statutory construction trust scheme recommended by this Report.
Recommended Warranty Scheme	the residential warranty scheme recommended by this Report.
Recommended Warranty Scheme Administrator	the administrator of the Recommended Warranty Scheme.
Reformed Registration System	the expanded builders' registration system recommended by this Report which includes registration requirements for contractors in the commercial and civil and engineering sectors.
Report	this report prepared by Squire Patton Boggs (AU).
residential builder	the head contractor in the residential construction contracting chain.
residential construction	the construction of buildings used primarily for long term residential use including houses, granny flats, bungalows, row or terrace houses or townhouses and flats, units or apartments in a building of one or two storeys.
residential warranty scheme or 'schemes'	the collective name for the systems of compulsory residential indemnity cover in place in all jurisdictions in Australia (besides Tasmania).
Territory	the Northern Territory of Australia.

Annexure 1: Complaints System diagram

Feature of complaints handling body	Residential Building Complaints Handling Bodies		
	Director of Building Control	Building Practitioners Board	Commissioner of Residential Building Disputes
Person who brings compliant	Consumer.	By referral from Director; or due to failure to comply with rectification or compensation order by the Commissioner.	Consumer.
Subject of complaint	Any building practitioner.	Any building practitioner.	Residential building contractors only.
Types of complaints heard	<p>Hears allegations that a building practitioner:</p> <ul style="list-style-type: none"> • has committed an offence under the <i>Building Act</i> or <i>Regulations</i>; • has carried out work negligently or incompetently; or • is otherwise guilty of professional misconduct. 	<p>Conducts inquiries into the conduct of a building practitioner when it receives the referrals from the Director regarding:</p> <ul style="list-style-type: none"> • A failure to provide information during an investigation or audit by the Director; and • Evidence of professional misconduct found during an inquiry or audit by the Director. 	<p>(In the case of a consumer guarantee dispute) for breach of a consumer guarantee, which includes guarantees that the residential building contractor will:</p> <ul style="list-style-type: none"> • carry the work out in a proper workmanlike manner accordance with the plans and specifications; • use new (unless specified otherwise) and good quality suitable materials; • carry out the work in accordance with law; and • complete the work within a reasonable period.
Investigative powers/process	<ul style="list-style-type: none"> • Investigates complaints; or • Conducts an audit of its own initiative or as consequence of a complaint. 	Inquiry Board established must investigate the allegations of professional misconduct.	The Commissioner can make a finding whether a consumer guarantee has been contravened.
Outcomes	<ul style="list-style-type: none"> • Prosecution for breach of <i>Building Act</i> or <i>Regulations</i>; or • Referral to BPB if there is evidence of professional misconduct. 	<p>If professional misconduct is made out the Inquiry Board must decide on the action to be taken, which can include:</p> <ul style="list-style-type: none"> • a reprimand; • requiring the practitioner to do a 	<p>The Commissioner has the power to made orders for:</p> <ul style="list-style-type: none"> • the reification of defective work or completion of non-completed work (up to \$100,000); or • compensation to be paid to the

Feature of complaints handling body	Residential Building Complaints Handling Bodies		
	Director of Building Control	Building Practitioners Board	Commissioner of Residential Building Disputes
		<p>specific thing;</p> <ul style="list-style-type: none"> enforcing a penalty suspending the practitioner's registration; or cancelling the practitioner's registration. <p>The Inquiry Board may also direct the Director to audit the practitioner's work.</p> <p>If a rectification, completion or compensation order made by the Commissioner has been contravened by the builder, the BPB may take this same disciplinary action against that builder.</p>	<p>consumer.</p> <p>The Commissioner must refer compensation orders assessed to be above \$100,000 to the NT Civil and Administrative Tribunal.</p>

Annexure 2: Builders' licensing and registration systems in Australian jurisdictions

State or Territory	Regulatory body responsible for registration application and relevant legislation	Persons required to be registered/licenced	Does an assets test/ financial threshold apply?	Registration/ licensing fee	Renewal period	Circumstances of suspension or revocation of registration/licence
NT	Building Practitioner's Board <ul style="list-style-type: none"> • <i>Building Act</i> (NT); and • <i>Building Regulations</i> (NT). 	Residential builders only. (Electricians and plumbers are regulated under separate legislation)	Yes – net tangible asset requirement of \$50,000 to be maintained for 2 year registration period.	2 stage process: <ul style="list-style-type: none"> • \$264 application fee (initial); and • \$793 approval fee (once approval is granted). 	2 years.	<ul style="list-style-type: none"> • Upon a finding of professional misconduct against the contractor. • Where a builder has failed to comply with a rectification, completion or compensation order made following the finding of a breach of a consumer guarantee.
QLD	Queensland Building Construction Commission <ul style="list-style-type: none"> • <i>Queensland Building and Construction Commission Act 1991</i> (QLD); and • <i>Queensland Building and Construction Commission Regulation 2003</i> (QLD). 	Residential and commercial builders ⁱ , trade contractors (including plumbers and fire protection services).	Yes – depending on allowable annual turnover, including: <ul style="list-style-type: none"> • net assets requirements; • prescribed maximum turnover; and • current ratio maintenance. To be maintained for the duration of the licence period.	Depending on allowable annual turnover, ranging from: <ul style="list-style-type: none"> • \$330 - \$708 (individuals); or • \$1,055 - \$2,313 (companies). 	1 or 3 years (at licensee's discretion).	The QBCC may suspend or cancel a licence, <i>inter alia</i> : <ul style="list-style-type: none"> • due to a failure to comply with a condition of the license, including the conditions to maintain the minimum financial requirements; • if the licensee owes an amount to the QBCC and fails to comply with a demand by the QBCC to discharge the debt; • if the licensee is convicted of an offence under the <i>QBCC Act</i>; or • due to a failure to comply with a written request under the <i>QBCC Act</i>.
NSW	Chief Executive of Fair Trading NSW <ul style="list-style-type: none"> • <i>Home Building Act 1989</i> (NSW); and • <i>Home Building Regulations 2014</i> (NSW). 	Residential builders and 'specialist' (including plumbing, gas, electrical, air-conditioning and refrigeration).	No requirement to hold minimum assets.	Depending on the category of licence applied for and duration of license, ranging from: <ul style="list-style-type: none"> • \$646 - \$1,210 (individuals); • \$1,075 - \$1,647 (partnerships); or • \$1,290 - \$2,064 	1 or 3 years (at licensee's discretion).	A licensee's licence may be cancelled or suspended <i>inter alia</i> , when the licensee: <ul style="list-style-type: none"> • becomes involved in unlawful activity; • obtains a licence by misrepresentation or fraudulent means; • becomes bankrupt; • is or was a director of a company

State or Territory	Regulatory body responsible for registration application and relevant legislation	Persons required to be registered/licenced	Does an assets test/ financial threshold apply?	Registration/ licensing fee	Renewal period	Circumstances of suspension or revocation of registration/licence
				(corporations).		<p>that becomes an externally-administered body corporate (other than cases of administration resulting from members' voluntary winding up); or</p> <ul style="list-style-type: none"> experiences any change in circumstance that would have required NSW Fair Trading to refuse an application for a contractor licence if the contract were applying.
WA	<p>Building Services Board</p> <ul style="list-style-type: none"> <i>Building Services (Registration) Act 2011</i> (WA); and <i>Building Services (Registration) Regulations 2011</i> (WA). 	Residential and commercial builders, painters and surveyors.	No requirement to hold minimum assets, although the net assets held by the applicant may be one factor to which the Board has regard when assessing an application.	<p>2 stage process:</p> <p>Application fees (initial) practitioner or contractor:</p> <ul style="list-style-type: none"> \$200 (individual); or \$328 (partnership or company). <p>Registration fee (once approval is granted) depending on the duration of the registration period:</p> <ul style="list-style-type: none"> \$287.50- \$575 (practitioner); \$192 - \$384 (contractor, individual); \$645 - \$1,290 (contractor, 	18 months or 3 years.	<p>A building service provider's registration may be cancelled or suspended when the building service provider:</p> <ul style="list-style-type: none"> no longer satisfies the registration requirements; has obtained a registration certificate because of incorrect or misleading information; has contravened a condition of the provider's registration; has been negligent or incompetent in connection with carrying out a building service; has failed to ensure that a building service carried out by the provider has been properly managed and supervised; if a nominated supervisor, has not properly managed and supervised a building service which he or she is responsible for managing and

State or Territory	Regulatory body responsible for registration application and relevant legislation	Persons required to be registered/licenced	Does an assets test/ financial threshold apply?	Registration/ licensing fee	Renewal period	Circumstances of suspension or revocation of registration/licence
				partnership); or <ul style="list-style-type: none"> \$1,468 - \$2,936 (contractor, company). Different fees apply for painters and surveyors		supervising; <ul style="list-style-type: none"> that the registered building service provider has failed to comply with an undertaking given by the provider to the Board or an order or direction of the Board; that the registered building service provider has failed to comply with an order of the Board or the State Administrative Tribunal under the <i>Building Services (Registration) Act</i>, or the registered building service provider has engaged in conduct that is harsh, unconscionable, oppressive, misleading or deceptive in connection with carrying out a contract for a building service or carrying out that building service.
VIC	Building Practitioners Board <ul style="list-style-type: none"> <i>Building Act 1993</i> (VIC); and <i>Building Regulations 2006</i> (VIC). 	Residential and commercial builders. Also building inspectors, surveyors, demolishers, drafts persons, engineers, erectors of temporary structures, quantity surveyors and plumbers.	No requirement to hold minimum assets.	Depending on the type of registration sought and whether the contractor already is registered with the Building Practitioner's Board in another category : <ul style="list-style-type: none"> \$386 – \$905 (Domestic Builders) \$55.50 - \$120.20 (all other categories) 	Registration does not have to be renewed, but a registration fee must be paid annually.	A building practitioner's registration may be cancelled or suspended if the building practitioner: <ul style="list-style-type: none"> is guilty of unprofessional conduct; has failed to comply with the <i>Building Act 1993</i> (VIC) or the <i>Building Regulations 2006</i> (VIC); has failed to comply with a determination of the Building Appeals Board or a direction of the Victorian Building Authority; is guilty of particular misconduct;

State or Territory	Regulatory body responsible for registration application and relevant legislation	Persons required to be registered/licenced	Does an assets test/ financial threshold apply?	Registration/ licensing fee	Renewal period	Circumstances of suspension or revocation of registration/licence
						<ul style="list-style-type: none"> is incapable of practicing. <p>Registration may also be suspended where the practitioner fails to comply with a direction of an insurer to rectify work.</p>
SA	<p>Commissioner for Consumer and Business Affairs</p> <ul style="list-style-type: none"> <i>Building Work Contractors Act 1995</i> (SA); and <i>Building Work Contractors Regulations 2011</i> (SA) 	Residential commercial and civil builders, plumbers, gas fitters and electricians.	<p>For 'specified building work' (trade work or similar):</p> <ul style="list-style-type: none"> \$10,000 net tangible assets (individuals); or (for companies only) the applicant can provide a letter from a Chartered Accountant, Certified Practising Accountant or IPA Public Accountant certifying that: the accountant has examined the financial position of the company, the company is solvent and has an ongoing (minimum 12 months) source of finance in place sufficient to meet its business needs. <p>Residential building work (major residential building work that requires</p>	<p>2 stage process:</p> <p>Application fees including first years' registration (initial):</p> <ul style="list-style-type: none"> Specified Building work: \$664 (corporations); \$407 (individuals) General Building Work: \$1107 (corporations); \$609 (individuals) <p>Yearly licence fee:</p> <ul style="list-style-type: none"> Specified building work: \$470 (corporations); \$213 (individuals) General building work: \$913 (corporations); \$415 (individuals) 	Registration does not have to be renewed, but a registration fee must be paid annually	<p>The Commissioner may suspend or cancel registration if:</p> <ul style="list-style-type: none"> Circumstances exist where the building practitioner would be entitled to be so licensed if the person were to apply for the licence; or Grounds for disciplinary action may exist and there is a danger that someone will incur significant harm unless urgent action is taken. <p>The District Court may take disciplinary action (including the cancellation or suspension of a contractor's licence if:</p> <ul style="list-style-type: none"> licensing of the contractor was improperly obtained; the contractor has acted contrary to an assurance accepted by the Commissioner under the <i>Fair Trading Act 1987</i>; the contractor or another person has acted contrary to this Act or otherwise unlawfully, or improperly, negligently or unfairly, in the course of conducting, or being employed or otherwise engaged in, the business of the contractor;

State or Territory	Regulatory body responsible for registration application and relevant legislation	Persons required to be registered/licenced	Does an assets test/ financial threshold apply?	Registration/ licensing fee	Renewal period	Circumstances of suspension or revocation of registration/licence
			<p>Building Indemnity Insurance):</p> <ul style="list-style-type: none"> • Provide a letter of eligibility for Building Indemnity Insurance; or • Provide a letter from a Chartered Accountant, Certified Practising Accountant or IPA Public Accountant certifying that the applicant has at least \$100,000 in net tangible assets or is solvent. <p>For commercial and civil builders (major non-residential building work): provide a declaration that the applicant is solvent and have access to sufficient financial resources to carry on its type of business</p>			<ul style="list-style-type: none"> • the contractor has failed to comply with an order made by a court under Part 5; or • events have occurred such that the contractor would not be entitled to be licensed as a building work contractor if the contractor were to apply for a licence.
TAS	<p>Director of Building Control</p> <ul style="list-style-type: none"> • <i>Building Act 2000</i> (TAS); and • <i>Building Regulation 2014</i> (TAS). 	<p>Residential and commercial contractors, including the following categories of registration:</p> <ul style="list-style-type: none"> • Construction Manager; 	<p>\$50,000 net tangible asset requirement (to be maintained for the duration of registration).</p>	<p>2 stage process:</p> <ul style="list-style-type: none"> • \$177.60 application fee (initial); and • \$355.20 annual accreditation/renewal fee (upon accreditation/renew 	<p>Annually.</p>	<p>If, following an investigation the Director of Building Control finds that a practitioner is guilty of professional, the Director may take disciplinary action including the cancellation or suspension of that practitioner's registration.</p>

State or Territory	Regulatory body responsible for registration application and relevant legislation	Persons required to be registered/licenced	Does an assets test/ financial threshold apply?	Registration/ licensing fee	Renewal period	Circumstances of suspension or revocation of registration/licence
		<ul style="list-style-type: none"> • Fire Protection Services Builder; • Demolisher; • Building Surveyor; • Architect; • Building Services Designer; • Building Designer; • Engineer; and • Civil Designer. 		al)		
ACT	<p>Australian Capital Territory Construction Occupations Registrar</p> <ul style="list-style-type: none"> • <i>Construction Occupations (Licensing) Act 2004</i> (ACT); • <i>Construction Occupations (Licensing) Regulation 2004</i> (ACT); and • <i>ACT Civil and Administrative Tribunal Act 2008</i> (ACT). 	<p>Residential and commercial including the following licence categories:</p> <ul style="list-style-type: none"> • Building Surveyor; • Building Assessor; • Electrician; • Plumber; • Gasfitter; • Drainer; • Plumbing Plan Certifier; or 	<p>No net financial assets requirement, the applicant must provide “evidence of financial resources sufficient to complete works performed under licence applied for.”</p>	<p>2 stage process:</p> <ul style="list-style-type: none"> • \$214 application fee (initial); and • \$222 (1 year) or \$500 (3 years) approval fee (once approval is granted). 	<p>1 or 3 years (at licensee’s discretion)</p>	<p>The Registrar may issue of disqualification for a contractor who accumulates 15 demerit points.</p> <p>The Registrar deals with minor disciplinary matters under the <i>Construction Occupations (Licensing) Act 2004 (COLA)</i> and refers more serious matters to the ACT Civil and Administrative Tribunal (ACAT). The ACAT has the power to suspend or cancel a contractor’s licence if one of the following grounds for occupational discipline arise:</p> <ul style="list-style-type: none"> • contravention of COLA or an operational Act; • giving false or misleading information in relation to a

State or Territory	Regulatory body responsible for registration application and relevant legislation	Persons required to be registered/licenced	Does an assets test/ financial threshold apply?	Registration/ licensing fee	Renewal period	Circumstances of suspension or revocation of registration/licence
		<ul style="list-style-type: none"> Works Assessor. 				<p>construction service;</p> <ul style="list-style-type: none"> the licensee or a director, partner or nominee of the licensee, being found guilty of an offence involving fraud, dishonesty or violence that is punishable by imprisonment for at least one year; if the licensee is an individual, the licensee has compounded with creditors or made an assignment of remuneration for their benefit; if the licensee is a corporation the licensee enters into a scheme of arrangement, or a receiver, manager, receiver and manager or administrator is appointed over the licensee or any of its assets; a licensee that is a corporation or partnership operating without a nominee; or the licensee's licence has been automatically suspended and the cause of the suspension still exists.

Annexure 3: Builders' experience and qualification requirements in Australia

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
Northern Territory				
<p>Building Contractor Residential (Restricted).</p> <p>Applicants can apply as either a(n):</p> <ul style="list-style-type: none"> • Individual; or • Company. 	<p>Where the value of works is above \$12,000:</p> <ul style="list-style-type: none"> • a Class 1a detached house • a Class 1a attached dwelling or Class 2 building of one or two storeys • a Class 10 building attached to a Class 1a or Class 2 building referred to in paragraph (a) or (b) if it is constructed at the same time as the Class 1a or Class 2 building • a retaining wall (whenever constructed) that is not attached to a Class 1a or Class 2 building referred to in paragraph (a) or (b) but on which the integrity of such a building depends. 	<p>Original Net tangible asset certificate certifying that the applicant holds \$50,000 of net tangible assets. This is to be maintained for 2 year registration period. This is a requirement for individuals and companies.</p> <p>Satisfaction of 'fit and proper' test including details about bankruptcy, criminal offences, disqualifications from holding licences for the particular individual. For companies, all directors must satisfy the 'fit and proper' test.</p> <p>Identification (individuals) or current (28 days or newer) ASIC search (corporations).</p>	<p>For individuals or individual director/nominee of a corporation, one of 4 (equivalent) qualifications, a copy of which should be provided with the application:</p> <p>(1) Certificate IV in Building including successful completion in 15 units;²</p> <p>(2) Successful completion of 12 units³ for a BCG40106 Certificate IV in Building and Construction (Building) – Low Rise and 3 elective units from the BCG03 General Construction Training Package;</p> <p>(3) Successful completion of a course, or units of a course which, in the opinion of the BPB is at least equivalent to either (1) or (2) qualifications; or</p> <p>(4) A statement of attainment of competency equivalent in either of the qualifications (1) or (2) issued by a registered training organisation (as defined in the Northern Territory Employment and Training Act).</p>	<p>For individuals, or the individual director or nominee of a corporation, a resume/project list outlining work experience and addressing the experience criteria for Building Contractor Residential (Restricted) registration, being:</p> <ul style="list-style-type: none"> • Evidence of at least 3 years practical experience in carrying out building work associated with the construction of new or extensions to the habitable floor area of Class 1a houses and townhouses and/or Class 2 units up to and including a height of 2 storeys. • At least three current written references from registered building practitioners, including a Building Certifier, Structural Engineer, Architect, Building Designer or Building Contractor (preferably registered in the Northern Territory) who must provide evidence that confirms the applicant's recent experience in the

Summary of registration/licensing requirements for building contractors across Australian jurisdictions				
Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
				Building Contractor Residential (Restricted) category.
<p>Building Contractor Residential (Unrestricted).</p> <p>Applicants can apply as either a(n):</p> <ul style="list-style-type: none"> • Individual; or • Company. 	<p>The same as Building Contractor Residential (Restricted) except for that construction of a Class 1a attached dwelling or Class 2 building of any height is allowed.</p>	<p>Original Net tangible asset certificate certifying that the applicant holds \$50,000 of net tangible assets. This is to be maintained for 2 year registration period.</p> <p>No additional 'fit and proper' criteria to that required under restricted registration although current (restricted) registration of an individual or nominee/director of a company is required.</p> <p>Identification (individuals) or current (28 days or newer) ASIC search (corporations).</p>	<p>For individuals applying for a new Building Contractor Residential (Unrestricted) registration the same evidence of 1 of 4 (equivalent) qualifications as required to be provided for restricted registration.</p> <p>For an individual applying to upgrade from a Building Contractor Residential (Restricted) registration to an unrestricted registration no additional technical requirements are required, although current (restricted) registration is a prerequisite.</p>	<p>For individuals applying for a new Building Contractor Residential (Unrestricted) registration the same resume/project list requirements for experience and references as for restricted registration instead that it should be for Class 2 units more than 2 storeys in height.</p> <p>For individuals applying to upgrade from a Building Contractor Residential (Restricted) registration to an unrestricted registration:</p> <ul style="list-style-type: none"> • Evidence of substantial personal involvement in, and responsibility for the design and construction of at least one building that involved carrying out relevant (unrestricted) building work (i.e. flats or units 3 storeys or greater in height); and for which an occupancy permit has been granted. • Minimum 3 independent written references from, the Building Certifier, Structural Engineer, Architect, Building

Summary of registration/licensing requirements for building contractors across Australian jurisdictions				
Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
				<p>Designer or Building Contractor who were directly involved in the construction phase of the project.</p> <ul style="list-style-type: none"> Demonstration of the applicant's working knowledge and understanding of the regulatory and technical issues associated with the construction of buildings of more than 2 storeys, including the relevant requirements of the Building Code of Australia.
Queensland				
<p>Builder – Low Rise</p> <p>Applicants can apply for this licence class as a:</p> <ul style="list-style-type: none"> Builder – full builder licence; Site Supervisor – only required to meet the technical qualification; Nominee Supervisor – supervising building work on behalf of a company. 	<ul style="list-style-type: none"> Building work on a class 1 or class 10 building. Building work on classes 2 to 9 buildings with a gross floor area not exceeding 2000m², but not including Type A or Type B construction. Prepare plans and specifications if the plans and specifications are: <ul style="list-style-type: none"> for the licensee's personal use, or for use in building work to be performed by the licensee personally. 	<p>For Builders (Individuals):</p> <ul style="list-style-type: none"> with a maximum revenue up to \$600,000 net financial assets of \$36,000 to be maintained over period of licence; with over \$600,000, a Minimum Financial Requirements (MFR) report is to be provided and net financial asset requirements will vary. <p>For Builders (Corporations):</p> <ul style="list-style-type: none"> with a maximum revenue up to 	<p>Contractor or nominee supervisor licence- Any one of the following:</p> <ul style="list-style-type: none"> successful completion of Certificate IV in Building and Construction (Building) CPC40110; successful completion of a course the QBCC considers is at least equivalent to the course above; recognition certificate as a builder qualified to carry out the scope of work for the licence class; a qualification or statement of attainment of 	<p>For those qualified in bricklaying/block laying or carpentry, two years' experience in:</p> <ul style="list-style-type: none"> the licence class scope of work, or other work the QBCC is satisfied is at least equivalent to experience in the scope of work for the class. <p>For all other applicants, four years' experience in:</p> <ul style="list-style-type: none"> the licence class scope of work, or other work the QBCC is satisfied is at least

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
		<p>\$600,000 net financial assets of \$36,000 to be maintained over period of licence;</p> <ul style="list-style-type: none"> with a maximum revenue between \$600,001 to \$12 million, MFR report is to be provided and net financial asset requirements will vary; with a maximum revenue over \$12 million, different MFR requirements and net financial asset requirements. 	<p>required competency for the class of licence. Site supervisor licence- any one of the following:</p> <ul style="list-style-type: none"> the technical qualifications for a contractor licence (as above); successful completion of the 10 units of competency;⁴ successful completion of a course or units of competency of a course the QBCC considers is at least equivalent. 	<p>equivalent to experience in the scope of work for the class.</p>
<p>Builder – Medium Rise</p> <p>Applicants can apply for this licence class as a:</p> <ul style="list-style-type: none"> Builder – full builder licence; Site Supervisor – only required to meet the technical qualification; Nominee Supervisor – supervising building work on behalf of a company. 	<ul style="list-style-type: none"> Building work on a class 1 or class 10 building Building work to a maximum of 3 storeys, but not including Type A construction on classes 4 to 9 buildings Prepare plans and specifications if the plans and specifications are: <ul style="list-style-type: none"> for the licensee’s personal use, or for use in building work to be performed by the licensee personally. 	<p>As above for Builder – full builder licence.</p>	<p>Contractor or nominee supervisor licence- any one of the following:</p> <ul style="list-style-type: none"> successful completion of the Diploma of Building and Construction (Building) CPC50210 successful completion of a course the QBCC considers is at least equivalent to the course above; recognition certificate as a builder qualified to carry out the scope of work for the licence class a qualification or statement of attainment of required competency for the class of licence. 	<p>Qualified in bricklaying/block laying or carpentry -two years’ experience in:</p> <ul style="list-style-type: none"> the licence class scope of work, or other work the QBCC is satisfied is at least equivalent to experience in the scope of work for the class. <p>All other applicants - four years’ experience in:</p> <ul style="list-style-type: none"> the licence class scope of work, or other work the QBCC is satisfied is at least equivalent to experience in the scope of work for the class.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			Site supervisor licence - any one of the following: <ul style="list-style-type: none"> • the technical qualifications for a contractor licence (as above) • successful completion of seven units of competency;⁵ • successful completion of a course or units of competencies of a course the QBCC considers is at least equivalent. 	
Builder – Open	<ul style="list-style-type: none"> • Building work on all classes of buildings • Prepare plans and specifications if the plans and specifications are: <ul style="list-style-type: none"> ○ for the licensee’s personal use, or ○ for use in building work to be performed by the licensee personally. 	As above for Builder – full builder licence.	Contractor or nominee supervisor licence - any one of the following: <ul style="list-style-type: none"> • successful completion of the Advanced Diploma of Building and Construction (Management) CPC60208 • successful completion of a course the QBCC considers is at least equivalent to the course above • recognition certificate as a builder qualified to carry out the scope of work for the licence class • a qualification or statement of attainment of required competency for the class of licence. Site supervisor licence - any one of the following: <ul style="list-style-type: none"> • the technical qualifications 	Qualified in bricklaying/block laying or carpentry - two years’ experience in: <ul style="list-style-type: none"> • the licence class scope of work, or • other work the QBCC is satisfied is at least equivalent to experience in the scope of work for the class. All other applicants - four years’ experience in: <ul style="list-style-type: none"> • the licence class scope of work, or • other work the QBCC is satisfied is at least equivalent to experience in the scope of work for the class.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			for a contractor licence (as above); <ul style="list-style-type: none"> • successful completion of the 4 units of competency;⁶ • successful completion of a course or units of competency of a course the QBCC considers is at least equivalent. 	
Builder Project Management Services Applicants can apply for this licence as a Builder- full licence.	<ul style="list-style-type: none"> • Provide any of the following for a consumer or a principal, for all classes of building work: <ul style="list-style-type: none"> ○ administration services ○ advisory services ○ management services, other than coordinating the scheduling of building work by building contractors, including as agent for another person. • If appointed as a superintendent under the contract, you can perform the following functions: <ul style="list-style-type: none"> ○ administer the contract on behalf of a principal for the contract ○ certify timing, quality and cost matters under the contract. 	As above for Builder – full builder licence.	Any one of the following: <ul style="list-style-type: none"> • successful completion of Advanced Diploma of Building and Construction (Management) CPC60208 • successful completion of a course the QBCC considers is at least equivalent to the course above • recognition certificate as a builder qualified to carry out the scope of work for the licence class • a qualification or statement of attainment of required competency for the class of licence • successful completion of a degree in architecture, construction management, engineering or quantity surveying, or • successful completion of a course the QBCC considers at least equivalent to those listed 	Four years' experience in: <ul style="list-style-type: none"> • the licence class scope of work, or • other work the QBCC is satisfied is at least equivalent to experience in the scope of work for the class.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			immediately above.	
<p>Builder Restricted to Kitchen Bathroom and Laundry</p> <p>Applicants can apply for this licence class as a:</p> <ul style="list-style-type: none"> • Builder – full builder licence; • Site Supervisor – only required to meet the technical qualification; • Nominee Supervisor – supervising building work on behalf of a company. 	<ul style="list-style-type: none"> • Install, refurbish, restore and repair a kitchen, bathroom or laundry on-site in: <ul style="list-style-type: none"> ○ class 1 or class 10 building ○ classes 2 to 9 buildings if the gross floor area of the kitchen, bathroom or laundry is not more than 50m². • Prepare plans and specifications if the plans and specifications are: <ul style="list-style-type: none"> ○ for the licensee’s personal use, or ○ for use in building work to be performed by the licensee personally 	<p>As above for Builder – full builder licence.</p>	<p>Contractor or nominee supervisor licence - any one of the following:</p> <ul style="list-style-type: none"> • successful completion of 7 competencies from Certificate IV Building and Construction (Building) CPC40110;⁷ • successful completion of a course or units of competencies of a course the commission considers is at least equivalent to the course above • a recognition certificate as a builder qualified to carry out the scope of work for the licence class • a qualification or statement of attainment of required competency issued by an approved authority for the class of licence. <p>Site supervisor licence - any one of the following:</p> <ul style="list-style-type: none"> • successful completion of 6 competencies;⁸ • successful completion of a course or units of competencies of a course the commission considers is at least equivalent to 	<p>For those qualified in certain areas ⁹ two years’ experience, and for all other applicants four years’ experience in:</p> <ul style="list-style-type: none"> • the licence class scope of work, or • other work the commission is satisfied is at least equivalent to experience in the scope of work for the class.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			the course above.	
<p>Builder Restricted to Shopfitting</p> <p>Applicants can apply for this licence class as a:</p> <ul style="list-style-type: none"> • Builder – full builder licence; • Site Supervisor – only required to meet the technical qualification; • Nominee Supervisor – supervising building work on behalf of a company. 	<ul style="list-style-type: none"> • Building work associated with the internal fitout of a shop or office, including shopfronts, but not including Type A or Type B construction • Prepare plans and specifications if the plans and specifications are: <ul style="list-style-type: none"> ○ for the licensee’s personal use, or ○ for use in building work to be performed by the licensee personally. 	<p>As above for Builder – full builder licence.</p>	<p>Contractor or nominee supervisor licence - any one of the following:</p> <ul style="list-style-type: none"> • successful completion of the 9 units of competency from Certificate IV in Building and Construction (Building) CPC40110;¹⁰ • successful completion of a course or competencies of a course the commission considers is at least equivalent • a recognition certificate as a builder qualified to carry out the scope of work for the licence class • a qualification or statement of attainment of required competency issued by an approved authority for the class of licence. <p>Site supervisor licence- any one of the following:</p> <ul style="list-style-type: none"> • successful completion of 6 competencies;¹¹ • successful completion of a course or units of competencies of a course the commission considers is at least equivalent. 	<p>For those qualified in certain areas ¹² two years’ experience and for all other applicants four years’ experience in:</p> <ul style="list-style-type: none"> • the licence class scope of work, or • other work the commission is satisfied is at least equivalent to experience in the scope of work for the class.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
<p>Builder Restricted to Structural Landscaping</p> <p>Applicants can apply for this licence class as a:</p> <ul style="list-style-type: none"> • Builder – full builder licence; • Site Supervisor – only required to meet the technical qualification; • Nominee Supervisor – supervising building work on behalf of a company. 	<ul style="list-style-type: none"> • Prepare, fabricate and erect carports, decking, fences, gate, gazebos, ornamental structures, pergolas, ponds and water features, prefabricated sheds including associated concrete slabs, with a maximum floor area of 10m², and retaining walls and structures • Construct artificial landform structures requiring a fabricated internal structure • Prepare site, excavate, lay paving or concrete associated with landscaping works • Install irrigation for landscaping works • Install, erect and construct playground equipment • Prepare plans and specifications if the plans and specifications are: <ul style="list-style-type: none"> ○ for the licensee’s personal use, or ○ for use in building work to be performed by the licensee personally. 	<p>As above for Builder – full builder licence.</p>	<p>Contractor or nominee supervisor licence - any one of the following:</p> <ul style="list-style-type: none"> • successful completion of the 6 units of competency from Certificate IV in Building and Construction (Building) CPC40110:CPCCBC4002 A – Manage occupational health and safety in the building and construction workplace;¹³ • successful completion of a Diploma of Horticulture RTF50409, including in 9 competencies;¹⁴ • successful completion of a course or units of competency of a course the commission considers is at least equivalent to a course above • a recognition certificate as a builder qualified to carry out the scope of work for the licence class • a qualification or statement of attainment of required competency issued by an approved authority for the class of licence. <p>Site supervisor licence - any one of the following:</p> <ul style="list-style-type: none"> • successful completion of 5 competencies;¹⁵ 	<p>For those qualified in certain areas¹⁶ two years’ experience and for all other applicants four years’ experience in:</p> <ul style="list-style-type: none"> • the licence class scope of work, or • other work the commission is satisfied is at least equivalent to experience in the scope of work for the class.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			<ul style="list-style-type: none"> successful completion of a course or units of competencies of a course the commission considers is at least equivalent to the above. 	
<p>Builder Restricted to Swimming Pool Construction</p> <p>Applicants can apply for this licence class as a:</p> <ul style="list-style-type: none"> Builder – full builder licence; Site Supervisor – only required to meet the technical qualification; Nominee Supervisor – supervising building work on behalf of a company. 	<ul style="list-style-type: none"> Earthworks and drainage for swimming pool and spa installation and construction Place and fix reinforcement for concrete for swimming pool and spa construction Install formwork to define a swimming pool or spa shape or form Place and finish concrete or other materials to provide a shape or form for a swimming pool or spa, including packing, filling and levelling of prefabricated pool and spa units Install prefabricated swimming pools and spas Ancillary pipework including general filtration, sanitation, water chemistry, solar heating and basic hydraulics Landscaping works associated with the construction of a swimming pool or spa including pool fencing Carry out ceramic tiling, painting, paving and plastering associated with the construction of a swimming pool or spa Prepare plans and specifications if the plans and specifications are: <ul style="list-style-type: none"> for the licensee’s personal use, or for use in building work to be 	<p>As above for Builder – full builder licence.</p>	<p>Contractor or nominee supervisor licence - any one of the following:</p> <ul style="list-style-type: none"> successful completion of 7 units of competency from Certificate IV in Building and Construction (Building) CPC40108;¹⁷ successful completion of a course or competencies of a course the commission considers is at least equivalent to the above a recognition certificate as a builder qualified to carry out the scope of work for the licence class; or a qualification or statement of attainment of required units of competency issued by an approved authority for the class of licence. <p>Site supervisor licence - any one of the following:</p> <ul style="list-style-type: none"> successful completion of 5 units of competency;¹⁸ or successful completion of a course or units of competencies of a course 	<p>For those qualified in certain areas¹⁹ two years’ experience and for all other applicants four years’ experience in:</p> <ul style="list-style-type: none"> the licence class scope of work, or other work the commission is satisfied is at least equivalent to experience in the scope of work for the class.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
	performed by the licensee personally		the commission considers is at least equivalent to the above.	
<p>Builder Restricted to Special Structures</p> <ul style="list-style-type: none"> • Builder – full builder licence; • Site Supervisor – only required to meet the technical qualification; • Nominee Supervisor – supervising building work on behalf of a company. 	<p>Builder Restricted to Special Structures (shade sails)</p> <ul style="list-style-type: none"> • Construction, installation, maintenance or repair of membrane shade structures including metal brackets, cables and structural members for the structures • Concreting work for footings for the structures, and • Prepare plans and specifications for membrane shade structures if the plans and specifications are: <ul style="list-style-type: none"> ○ for the licensee's personal use, or ○ for use in building work to be performed by the licensee personally. <p>Builder Restricted to Special Structures (signs)</p> <ul style="list-style-type: none"> • Construction, installation, maintenance or repair of signs and supporting structures for signs, and • Concreting work for footings for supporting structures for signs, and • Prepare plans and specifications for signs and supporting structures for signs if the plans and specifications are: <ul style="list-style-type: none"> ○ for the licensee's personal use, or ○ for use in building work to be performed by the licensee personally. 	As above for Builder – full builder licence.	<p>Builder Restricted to Special Structures (shade sails)</p> <ul style="list-style-type: none"> • Successful completion of any one of the following: <ul style="list-style-type: none"> ○ an apprenticeship in textile fabrication or carpentry, or ○ LMT30407 Certificate III in Textile Fabrication, or ○ CPC30208 Certificate III in Carpentry, or ○ successful completion of a course the commission considers at least equivalent to a course above, or ○ a recognition certificate as a qualified canvas and sail maker tradesperson or a qualified carpentry tradesperson, and • successful completion of 7 units of competency from Certificate IV in Building and Construction (Building) CPC40110.²⁰ <p>Builder Restricted to Special Structures (signs)</p>	<p>For those qualified in certain areas²³ two years' experience and for all other applicants four years' experience in:</p> <ul style="list-style-type: none"> • the licence class scope of work, or • other work the commission is satisfied is at least equivalent to experience in the scope of work for the class.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			<ul style="list-style-type: none"> • Successful completion of any one of the following: <ul style="list-style-type: none"> ○ an apprenticeship in sign manufacture, sign writing or carpentry, or ○ CPC32108 Certificate III in Signage, or ○ CPC30208 Certificate III in Carpentry, or ○ successful completion of a course the commission considers at least equivalent to a course above, or ○ a recognition certificate as a qualified signwriter or a qualified carpentry tradesperson, and • successful completion of 7 units of competency from Certificate IV in Building and Construction (Building) CPC40110.²¹ <p>Site supervisor licence - any one of the following:</p> <ul style="list-style-type: none"> • successful completion of 5 units of competency,²² or • successful completion of a course or units of competency of a course the commission considers is at least equivalent to 	

Summary of registration/licensing requirements for building contractors across Australian jurisdictions				
Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			the above.	
New South Wales				
Contractor Licence: Building Work (Individuals, Companies and Partnerships)	<p>All residential building work where the reasonable market cost of the labour and materials is more than \$5,000 (including GST). Residential building work includes any work which involves construction of a dwelling, or alterations or additions to a dwelling. It also includes repairing, renovating, decorating or applying protective treatment to a dwelling.</p> <p>For licensing purposes, works considered to fall within the class of building include, but are not necessarily limited to:</p> <ul style="list-style-type: none"> • garage, carport and shed construction/erection (including kits) • bathroom, kitchen or laundry renovations • swimming pool building and structural landscaping • screened, glass or pool enclosures • atriums, conservatories • house lifting (i.e. permanently raising the height of an existing structure) • removal and resiting of dwellings • saunas and steam rooms 	<p>No financial requirements, although financial and criminal history must be declared.</p> <p>Proof of identification requirements for individuals. Companies must provide a current ASIC search.</p> <p>Supervising nominees for companies must satisfy the individual technical and training criteria and hold an individual licence in the relevant category.</p> <p>Applicants who wish to undertake building work of a value of greater than \$20,000 must submit a certificate of eligibility for the NSW HBCF with their licensing application.</p>	<p>Any one of the following qualifications:</p> <ul style="list-style-type: none"> • Certificate IV in Building and Construction (BCG40106 or CPC40108 Building or CPC40110 Building) or (BCG40206 or CPC40208 Contract Administration) or (BCG40306 or CPC40308 Estimating) or (BCG40506 or CPC40508 Site Management) including 15 particular units²⁴ and any of the following <ul style="list-style-type: none"> ○ a current Carpentry or Bricklaying contractor licence or supervisor certificate, or an approved qualification that would allow the issue of such a licence (for details of approved qualifications, see Carpentry or Bricklaying) ○ Diploma of Building and Construction (Building) BCG50206 or CPC50208 	<ul style="list-style-type: none"> • Applicants must show at least 2 years relevant industry experience in a wide range of building construction work where the majority of the experience was obtained within 10 years of the date on which the application is made. • “Experience” means experience gained by the applicant as: <ul style="list-style-type: none"> ○ an employee of, or ○ a holder of a supervisor certificate and as a nominated supervisor for the contractor licence held by, or ○ a holder of an endorsed contractor licence contracted to, or ○ a holder of a supervisor certificate in the capacity of a nominated supervisor for a contractor licence held by an individual,

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			<ul style="list-style-type: none"> ○ Diploma of Building and Construction (Building) CPC50210 including 4 units²⁵; or ○ Bachelor of Housing from an Australian University or a Degree in Civil Engineering, Structural Engineering, Architecture, Housing, Construction, Construction Management, Construction Economics, Applied Science (Building), Quantity Surveying from an Australian University; or ● Degree²⁶ in Building, Construction, Construction Management, Construction Economics, Applied Science (Building), or Quantity Surveying from an Australian University which requires the applicant to undertake the equivalent of 4 years' full time study and a mandatory work placement; or ● If the applicant has 	<p>partnership or corporation contracted to, the holder of a contractor licence authorising the holder to do the class of residential building work in which the experience was gained ("the Work"), where the applicant, during the relevant period, was:</p> <ul style="list-style-type: none"> ○ supervised and directed in the doing of the Work by the holder of an endorsed contractor licence or supervisor certificate authorising its holder to supervise the Work, and ○ remunerated with money in accordance with law for the Work which the applicant carried out. <p>Applicants can attach a referee statement to satisfy the experience criteria.</p>

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			<p>previously held a licence in the prescribed class of 'building' and applies for a new licence within 2 years of the former licence's expiry, the applicant's previous licence will be accepted in lieu of the current qualification requirements.</p>	
<p>Contractor Licence: Erection of prefabricated metal framed home additions and structures</p> <p>(Individuals, Companies and Partnerships)</p>	<p>Work involved in the erection of pre-fabricated metal-framed home additions and structures comprising decks, patios, gazebos, awnings, porches, verandahs, pergolas, screened or glass enclosures, modular rooms, carports, garages, workshops, sheds and other similar additions and structures, including any residential building work incidental to the erection of such additions or structures.</p> <p>A contract for the erection of prefabricated metal framed home additions and structures can include any specialist work that is integral to the overall work, but such work must be carried out by the holder of an endorsed contractor licence or qualified supervisor certificate in the relevant category of specialist work.</p>	As above	<p>Completion of</p> <ul style="list-style-type: none"> • 18 construction units;²⁷ or • 19 Units of competency.²⁸ 	As above
<p>Contractor Licence: Kitchen bathroom and laundry renovation</p> <p>(Individuals,</p>	<p>Work involved in the installation, refurbishment, restoration and on-site repairs of or to a kitchen, bathroom or laundry, other than work affecting any internal or external load bearing component of the building that is</p>	As above	<p>Applicants must hold one qualification from group A and one from group B.</p> <p>Group A</p> <ul style="list-style-type: none"> • Existing trade contractor 	As above

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
Companies and Partnerships)	<p>essential to the stability of the building or any part of it, including things such as foundations, floors, walls, roofs, columns and beams.</p> <p>A contract for kitchen, bathroom or laundry renovations can include any specialist work that is integral to the overall work, but such work must be carried out by the holder of an endorsed contractor licence or qualified supervisor certificate in the relevant category of specialist work.</p>		<p>licence in one of the following classes:</p> <ul style="list-style-type: none"> ○ Carpentry ○ Joinery ○ Plumbing ○ Wall & Floor Tiling; or <ul style="list-style-type: none"> ● Completion of one of 19 qualifications²⁹, <p>Group B</p> <ul style="list-style-type: none"> ● Completion of 9 units of competency;³⁰ or ● Five modules from the TAFE Certificate IV in Plumbing Technology (8081) and units of competency³¹ or ● Six units of competency from MSF40213 Certificate IV in Furniture Design and Technology or LMF40202 Certificate IV in Furnishing Technology and LMF30302 / MSF30213 Certificate III in Furniture Making³²; or ● Eight modules from Course 3477 Certificate IV in Building;³³ or ● Eight modules from the TAFE Certificate IV in Building Studies (1261);³⁴ or ● Completion of 4 modules from the TAFE Certificate IV in Plumbing 	

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			Technology (8081) and course 3477 Certificate IV in Building or TAFE Certificate IV in Building Studies (1261) ³⁵	
Contractor Licence: Structural landscaping (Individuals, Companies and Partnerships)	<p>Work involved in the construction of external landscape features, and non-habitable structures including the following:</p> <ul style="list-style-type: none"> • retaining walls of any material that do not form part of a habitable building, • fencing irrespective of the construction material, driveways, paths and other paving of any material, • cabanas, pergolas, decks and non-habitable shelters, • ornamental ponds, water features and other structural ornamentation. <p>A contract for structural landscaping can include any specialist work that is integral to the overall work, but such work must be carried out by the holder of an endorsed contractor licence or qualified supervisor certificate in the relevant category of specialist work.</p>	As above	<ul style="list-style-type: none"> • Completion of AHC30910 Certificate III in Landscape Construction; or • Completion of any of the following qualifications: <ul style="list-style-type: none"> ○ RTF30403 Certificate III in Horticulture (Landscape) ○ RUH30498 Certificate III in Horticulture (Landscape), TAFE course #0672 ○ Certificate III in Landscaping, TAFE course #1581. 	As above
Contractor Licence: Swimming pool building	The class of swimming pool building refers to all work involved in the construction, renovation, alteration, repair, extension, maintenance, decorative or protective treatment of a swimming pool. It includes all other works directly associated with a swimming pool installation such as landscaping, safety fencing, pool water filtration and heating. Any other works not directly associated	As above	Completion of CPC40808 Certificate IV In Swimming Pool and Spa Building	As above

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
	<p>with the correct and safe installation and functioning of a swimming pool are excluded.</p> <p>This class also includes all work referred to in the class of swimming pool repairs and servicing.</p> <p>A swimming pool is defined under the Swimming Pools Act 1992 as an excavation, structure or vessel:</p> <ul style="list-style-type: none"> • that is capable of being filled with water to a depth greater than 300 millimetres, and • that is solely or principally used, or that is designed, manufactured or adapted to be solely or principally used, for the purpose of swimming, wading, paddling or any other human aquatic activity, <p>and includes a spa pool, but does not include a spa bath, anything that is situated within a bathroom or anything declared by the regulations not to be a swimming pool for the purposes of the Swimming Pools Act 1992.</p> <p>A contract for swimming pool building can include any specialist work that is integral to the overall work, but such work must be carried out by the holder of an endorsed contractor licence or qualified supervisor certificate in the relevant category of specialist work.</p>			

Western Australia

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
Building practitioner registration (individuals)	<p>For non-trading individuals, allowing them to be a nominated supervisor of a registered building contractor.</p> <p>For the purposes of registration, building work refers to one or more of the following activities:</p> <ul style="list-style-type: none"> the construction, erection, assembly or placement of a building or an incidental structure and related siteworks; the renovation, alteration, extension, improvement or repair of a building or an incidental structure and related site works; and the assembly, reassembly or securing of a relocated building or an incidental structure and related site works. 	Proof of identity Fitness and proprietary questionnaire National police clearance	<p>Qualification for building practitioner is provided in different 'sets':</p> <p>Set 1: For people with a Diploma in Building and Construction (Building) and site experience in the building industry. Required to have completed 7 units which form part of CPC50210.³⁶</p> <p>Set 2: For people registered under the <i>Architects Act 2004</i> or who have qualifications acceptable for membership of:</p> <ul style="list-style-type: none"> the Royal Australian Institute of Architects (AIA); or the Institution of Engineers, Australia (EA); or the Australian Institute of Mining and Metallurgy (AusIMM). <p>Evidence of membership is required.³⁷</p> <p>Set 3: For Members of the Australian Institute of Building.</p> <p>Set 4: Applicants must have "sufficient knowledge and skills equivalent to those possessed by a person who has successfully completed a qualification in set 1." This can</p>	<p>Experience necessary also relates to the relevant 'set':</p> <p>Set 1: A record of at least 7 years' full time experience in carrying out or supervising building work.</p> <p>Set 2: at least 5 years' full time experience in supervising building construction.</p> <p>Set 3: At least 5 years full time experience in carrying out, supervising or managing building construction.</p> <p>Set 4: At least 5 years full time experience in supervising or managing building construction and sufficient experience to gain knowledge and skills equivalent to those possessed by the person who has successfully completed the Diploma of Building and Construction as referred to in Set 1.</p> <p>Set 5: seven years' full time experience outside the area of the Board's jurisdiction and sufficient experience to gain knowledge and skills equivalent to those possessed by the person who has successfully completed the Diploma of Building and</p>

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			be evidenced by a 60% pass in several examinations. ³⁸ Set 5: Applicants must have “sufficient knowledge and skills equivalent to those possessed by a person who has successfully completed a qualification in set 1.” This can be evidenced by a 60% pass in several examinations. ³⁹	Construction as referred to in Set 1.
Building contractor registration (Individuals, Partnerships, companies)	For individuals, partnerships and companies which intend to trade as a building contractor.	Fitness and propriety test questionnaire. Proof of identity (individuals); ASIC search (company) <ul style="list-style-type: none"> • Proposed business profile; and • A business plan. (An individual or sole trader applicant can elect to provide a written statement of intention and a personal financial statement instead of a business plan.)	Existing registration as building practitioner and satisfaction of those technical requirements (individual), or a nominated supervisor who is a building practitioner (companies/partnerships).	The individual (or nominated supervisor in the case of a company/partnership) must satisfy the experience requirements for the set of building practitioner registration.

Victoria

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
Commercial Builder (Limited)	<ul style="list-style-type: none"> • Blinds and awnings: Erecting external blinds and awnings. • Damp-proofing: Repairing buildings damaged by damp, including replacing rotten timber. • Fitout – non-structural: Includes internal partitions, counters (freestanding), and suspended ceilings. Replacing non-load bearing structures. • Fitout – structural: Alterations to shop fronts, internal works, load-bearing structures and fixtures. • Greenhouse Erecting commercial greenhouses. • Low rise: Construction work up to 15 metres. Excavations up to 3 metres and cellars and basements to 2.5 metres. All building work including non-structural. • Re-stumping: Re-stumping, re-blocking, repairs to flooring, plaster and roof material damaged by re-blocking. • Shade structures: Includes erecting shade structures, advising clients on building materials, specifications, and construction methods. Complying with all planning, building legislation and preparation of permit applications. • Sign erection: Signs attached to buildings or freestanding signs on a building site. Lighting poles over 8 metres. • Steel erection: Steel frames, piers, 	<ul style="list-style-type: none"> • Photographic ID, • Character references • National police check • No minimum asset requirements. 	<p>Qualifications: No formal qualification required. Applicant will need to demonstrate in an examination or assessment that it has adequate knowledge and experience relevant to the class being sought.</p> <p>Knowledge:</p> <ul style="list-style-type: none"> • Current Victorian building legislation including the Building Act1993, Building Regulations 2006, National Construction Code of Australia and relevant Australian and International Standards • Standard types of commercial building contracts and how to administer them • Building materials, methods and technology used in commercial construction • Building permits process. • Protection work requirements under the Building Act 1993 Project budgeting — • Standard types of insurance for the building project, for employees and for hire of sub-contractors • Responsibilities of 	<p>Relevant practical experience to the satisfaction of the Board which includes:</p> <ul style="list-style-type: none"> • Managing deep or bulk excavations - precautions required, construction techniques and retaining methods • Tilt-slab construction, from site delivery to completion • Building steel structures in all styles using a range of connections • Preparing detailed tender documents and work schedules for building contracts • Administering commercial building contracts and resolving any disputes legally and efficiently • Delegating site responsibilities to project managers, forepersons, sub-contractors and tradespersons — and monitoring their performance.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
	<p>foundations and external cladding.</p> <ul style="list-style-type: none"> • Structural landscaping: Fences, pergolas, gazebos, retaining walls, ornamental structures, site preparation and landscape paving. Landform structures requiring fabricated internal support. • Underpinning: Underpinning existing structures and associated works. • Waterproofing: The use of waterproofing membranes to the interior, exterior, belowground and remedial areas of a building. 		<p>employees and employers under the Occupational Health & Safety Act 2004</p> <ul style="list-style-type: none"> • Council building requirements/ codes of practice • Standards and tolerances in relation to construction methods • Applying financial management principles to monitor business performance and meet tax requirements <p>The Board may test these requirements through an interview, examination or by requiring the tabling of documentation such as a site plan.</p>	
Commercial Builder (Unlimited)	May conduct any commercial building work.	As above	<p>Qualifications:</p> <ul style="list-style-type: none"> • Degree, Diploma or Associate Diploma in Building from a University or TAFE College; or • A course in builder registration (BPB) from a recognised learning provider <p>Knowledge: As above</p>	<p>Three years of practical experience to the satisfaction of the Board, as described above, plus experience in in:</p> <ul style="list-style-type: none"> • Contract and construction law • Developing a business plan for a building or construction enterprise • Marketing and customer relations activities • Energy conservation and management processes • Estimating costs for labour

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
				and materials <ul style="list-style-type: none"> • Site induction process.
Domestic Builder (Limited)	<p>'Builder's (as defined in the Domestic Building Contracts Act 1995); undertaking to carry out domestic building work where the cost of the work exceeds \$5,000 (including labour and materials); or</p> <p>Who are engaged in the business of re-blocking, restumping, demolishing or removing a home (regardless of the value or the cost) must be registered.</p> <p>A 'builder' is defined under the Domestic Building Contracts Act 1995 as a person who:</p> <ul style="list-style-type: none"> • carries out domestic building work; • manages or arranges the carrying out of domestic building work; or • intends to carry out or to manage or arrange the carrying out of domestic building work. <p>Classes:</p> <ul style="list-style-type: none"> • General concreting • Carpenter • Site works involved in relocating a dwelling • Garage and carport • Door and window 	As above, plus letter of eligibility for domestic building insurance	A certificate issued by the Board, after examination of the applicant, certifying that the applicant has adequate knowledge and experience to carry out, manage or arrange to carry out the components of domestic building work specified in the certificate.	The examination by the Board traverses the following matters: <ul style="list-style-type: none"> • Business management; • Building work management (operational); • Building work management (supervision); • Building technology; • Legislation.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
	<ul style="list-style-type: none"> replacement/installation • Gates and fences • Brickwork • External cladding to a dwelling/house • Sub-floor works • Improvements to roof • Bathroom, kitchen or laundry renovations • Earthworks/Excavations • Cabinet-making and joinery • Floor slabs, footings • Retaining walls • Sundry works and site works • Swimming pools • Multi-storey residential buildings • Structural landscaping • Shade structures • Waterproofing. <p>Domestic builders registered in the DB-L class may carry out, manage or arrange to carry out only the components of domestic building work specified in their Certificate of Registration.</p>			
Domestic Builder (Unlimited)	Domestic builders registered as unlimited may personally carry out, or manage or arrange for sub-contractors to carry out, all components of domestic building work.	As above, plus letter of eligibility for domestic building insurance	Qualifications <ul style="list-style-type: none"> • A degree, diploma or associate diploma of building from a university or TAFE College and three years of practical experience to the satisfaction of the Building Practitioners Board (Board); or • Successful completion of 	3 years' experience to the satisfaction of the Board.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			<p>a Course in Builder Registration (BPB) accredited under the Victorian Qualifications Authority Act 2000.⁴⁰</p> <ul style="list-style-type: none"> • A certificate issued by the Board, after examination of the applicant, certifying that the applicant has adequate knowledge and experience to carry out, manage or arrange to carry out all components of domestic building work. 	
Domestic Builder (Manager)	Domestic builders registered in the DB-M class may manage or arrange for domestic builders registered in another class to carry out components of domestic building work specified in their Certificate of Registration.	As above, plus letter of eligibility for domestic building insurance	A certificate issued by the Board, after examination of the applicant, certifying that the applicant has adequate knowledge and experience (including financial management knowledge and experience) to manage or arrange the carrying out by a builder registered, in another class of domestic builder of the components of domestic building work specified in the certificate.	

South Australia

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
<p>Contractor's Licence</p> <p>(Individual, Partnership, Company)</p>	<p>A person must be licensed as a building work contractor if they carry on the business of performing building work for others or performing building work with a view to the sale or letting of land or buildings improved by that work.</p> <p>Subcontractors who perform building work for others must also be registered.</p> <p>Licensees who hold a building work contractor's licence MUST also hold a building work supervisors registration OR employ an approved building work supervisor whose registration covers the scope of work of that person's contractor licence.</p>	<p>Fit and proper test; Police clearance;</p> <p>For 'specified building work' (trade work or similar):</p> <ul style="list-style-type: none"> • \$10,000 net tangible assets (individuals); or • (for companies only) the applicant can provide a letter from a Chartered Accountant, Certified Practising Accountant or IPA Public Accountant certifying that: the accountant has examined the financial position of the company, the company is solvent and has an ongoing (minimum 12 months) source of finance in place sufficient to meet its business needs. <p>Residential building work (major residential building work that requires Building Indemnity Insurance):</p> <ul style="list-style-type: none"> • Provide a letter of eligibility for Building Indemnity Insurance; or • Provide a letter from a Chartered Accountant, Certified Practising Accountant or IPA Public Accountant certifying that 	<p>Business Qualifications (to be held by the individual, or in the case of a company, by at least one Director):</p> <ul style="list-style-type: none"> • Currently hold a contractor licence under the <i>Building Work Contractors Act 1995, Plumbers, Gas Fitters and Electricians Act 1995</i> or <i>Security and Investigation Industry Act 1995</i>, which authorises the applicant to carry on business as a sole trader or as a sole director; or hold a current equivalent interstate occupational licence in the same jurisdiction as the South Australian licence. • Successful completion in one unit from category (A) and one from category (B) issued by a Registered Training Organisation;⁴¹ • Successful completion of one of two units issued by a Registered Training Organisation;⁴² • Successful completion of a business, economics or accounting related degree or diploma from Australia or New Zealand. (Certificate IV's are not accepted); or • Successful completion of 	<p>Displayed competence in:</p> <ul style="list-style-type: none"> • Business management;⁴⁵ and • Building work management.⁴⁶

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
		<p>the applicant has at least \$100,000 in net tangible assets or is solvent.</p> <p>For commercial and civil builders (major non-residential building work): provide a declaration that the applicant is solvent and have access to sufficient financial resources to carry on its type of business</p>	<p>four modules from the Certificate IV in Small Business Management;⁴³</p> <ul style="list-style-type: none"> The applicant is a company listed on the Australian Stock Exchange or a subsidiary of a listed company; or <p>For builders, plumbers, gasfitters and electricians only:</p> <ul style="list-style-type: none"> One of four approved qualifications;⁴⁴ or Successful completion of a Bachelor of Construction Management & Economics degree (UniSA). 	
Supervisor Registration	<p>Supervisors cannot contract or subcontract for building work. A Supervisor Registration allows that person to supervise building works for a contractor who holds a contractor licence. A registered supervisor can be the nominated building work supervisor of either an individual contractor or a company.</p>			<p>Displayed competence in:</p> <ul style="list-style-type: none"> Building work management;⁴⁷ Building Technology⁴⁸ Legislative requirements.⁴⁹ <p>Detailed work history required, including 2 written work references from licenced builders for whom the applicant has worked for recently.</p> <p>An applicant may be required to attend and interview to assess their competency.</p>

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
Tasmania				
Builder (low rise, medium rise or open) (Individuals, Partnerships or Companies)	Low rise: <ul style="list-style-type: none"> • Building work on a Class 1 and Class 10 building, and • Building work on Classes 2 to 9 buildings of Type C construction with a gross floor area not exceeding 2,000 m2. Medium rise: <ul style="list-style-type: none"> • Building work on a Class 1 and Class 10 building, and • Building work to a maximum of 3 storeys, but not including Type A construction on classes 5 to 9 buildings. Open: <ul style="list-style-type: none"> • Building work on all classes of buildings. Where 'building work' means work conducted in relation to the construction, demolition, alteration, addition, relocation or repair of any building.	Net tangible asset statement signed by applicant's accountant, or the applicant's employer's accountant or tax agent, if seeking to rely on the applicant's employer's assets showing \$50,000 in net tangible assets. Proof of identity requirements. Proof of contract works and public liability insurance. ⁵⁰	The individual, a director of a corporation, or partner in a partnership must hold: <ul style="list-style-type: none"> • Low rise - Cert IV Building and Construction (Building) • Medium rise - Diploma Building and Construction • Open - Advanced Diploma or Degree Building and Construction 	Statement of building trade experience (the following is the minimum experience required): <ul style="list-style-type: none"> • Low rise - 2 years • Medium rise - 2 years with a building trade qualification; 4 years without a building trade qualification • Open - 3 years with a building trade qualification; 6 years without a building trade qualification Statement of experience or a curriculum vitae (CV) which should include, in summary form: <ul style="list-style-type: none"> • a list of projects the applicant has worked on; • dates; • project size in square metres; • number of storeys; and • applicant's role and a third party's contact details for verification. Two detailed references from accredited past employers (practitioners or industry professionals)

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
<p>Builder (construction manager) (low rise, medium rise or open)</p>	<p>As above, except in relation to 'managing' building work.</p> <p>A Manger is responsible for managing building work conducted on a building site (or on a building to be later placed on site)</p>	<p>No minimum financial asset requirements.</p> <p>Proof of identity.</p> <p>Proof of professional indemnity insurance.</p>	<p>The applicant must hold:</p> <ul style="list-style-type: none"> • Low Rise - Certificate IV in Building and Construction (Building) • Medium Rise - Diploma of Building and Construction (Building) • Open – <ul style="list-style-type: none"> ○ Advanced Diploma of Building and Construction Management; or ○ Building Degree; or ○ Construction Management Degree 	<p>Low and medium rise</p> <ul style="list-style-type: none"> • 2 years in the scope of work for those applicants with a building trade qualification (carpentry, bricklaying etc.) • 4 years in the scope of work for those applicants without a trade qualification. <p>Open:</p> <ul style="list-style-type: none"> • 3 years in the scope of work for those applicants with a building trade qualification (carpentry, bricklaying etc.) • 6 years in the scope of work for those applicants without a trade qualification.
<p>Builder (fire protection services) (low rise, medium rise or open)</p>	<p>As above, except in relation to fire protection services building work, which means work conducted in relation to the installation, alternation, addition, relocation or repair of any fire protection services in a building.</p>	<p>No minimum financial asset requirements.</p> <p>Proof of identity.</p> <p>Proof of Contract Works and Public Liability insurance.</p>	<p>The applicant must hold:</p> <ul style="list-style-type: none"> • Low Rise - Certificate IV – (Building Fire Protection Services) • Medium Rise - Diploma (Building Fire Protection Services) • Open – Advanced Diploma (Building Fire Protection Services) 	<p>Low and medium rise</p> <ul style="list-style-type: none"> • 2 years in the scope of work for those applicants with a building trade qualification (plumbing, electrical, sprinkler fitter etc.) • 4 years in the scope of work for those applicants without a trade qualification. <p>Open:</p> <ul style="list-style-type: none"> • 3 years in the scope of

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
				work for those applicants with a building trade qualification (plumbing, electrical, sprinkler fitter etc. • 6 years in the scope of work for those applicants without a trade qualification.
Demolisher (low rise, medium rise or open)	Low rise: <ul style="list-style-type: none"> Demolition work on a Class 1 and Class 10 building, and Demolition work on Classes 2 to 9 buildings of Type C construction (with no limits on gross floor area) Medium rise: <ul style="list-style-type: none"> Demolition work on a Class 1 and Class 10 building, and Demolition work on Classes 2 to 9 buildings to a maximum of 3 storeys Open: <ul style="list-style-type: none"> Demolition work on all classes of buildings. Where 'demolition work' means work conducted in relation to the demolition or removal of any building.	No minimum financial asset requirements. Proof of identity. Proof of Public Liability Insurance.	<ul style="list-style-type: none"> No formal qualifications are required however extensive evidence of competency to work within the designated Scope of Work, must be provided for each category of low rise, medium rise and open. 	<ul style="list-style-type: none"> 2 years in the scope of work for those applicants with a building trade qualification (carpentry, bricklaying etc.) 4 years in the scope of work for those applicants without a trade qualification.
Australian Capital Territory				
Class A Builder (unlimited)	Building work other than specialist building work or handling asbestos. This licence permits building work of	Company: company extract Partnership: partnership agreement	The applicant (individual or the nominee in the case of corporation or partnership) holds a tertiary qualification in	The applicant has undertaken and documented not less than 2 years full time building work experience where 1 year full

Summary of registration/licensing requirements for building contractors across Australian jurisdictions

Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
	unlimited height on any Building Code of Australia (BCA) class of work.	<p>For company or partnership: nominee information (who is a director of company or partner or partnership)</p> <p>Fitness and propriety test questionnaire.</p> <p>No net financial assets requirement, the applicant must provide “evidence of financial resources sufficient to complete works performed under licence applied for.”</p>	building, civil engineering or structural engineering that the Australian Qualifications Framework Advisory Board has determined is a bachelor degree, graduate certificate, graduate diploma, masters degree or doctoral degree in the Australian Qualifications Framework System.	<p>time building work experience was undertaken post the date the qualification was issued.</p> <p>Standards of competency⁵¹ to be demonstrated in relation to building projects that are greater than 3 storeys in height and are class 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 and include type A construction under the Building Code of Australia, excluding basic building work; and specialist building work.</p>
Class B Builder (medium rise)	<ul style="list-style-type: none"> • Building work (other than specialist building work or handling asbestos) in relation to a building that is three storeys or lower; and • Basic building work. 	As above	<p>The applicant holds:</p> <ul style="list-style-type: none"> • a qualification in building, architecture, civil engineering or structural engineering that is a diploma or an advanced diploma in the Australian Qualification Framework system; or • a tertiary qualification in building, civil engineering or structural engineering that the Australian Qualifications Framework Advisory Board has determined is a bachelor degree, graduate certificate, graduate diploma, masters degree or doctoral degree in the Australian Qualifications 	<p>The applicant has undertaken and documented not less than 2 years full time building work experience where 1 year full time building work experience was undertaken post the date the qualification was issued.</p> <p>Standards of Competency (the same as for Class A) to be demonstrated in relation to building projects that are greater than 2 storeys and up to three storeys in height and are class 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 under the Building Code of Australia. Excluding basic building work; and specialist building work</p>

Summary of registration/licensing requirements for building contractors across Australian jurisdictions				
Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			Framework System.	
Class C Builder (low rise - residential)	<ul style="list-style-type: none"> Building work (other than specialist building work or handling asbestos) in relation to a building that is two storeys or lower and is a class 1, 2 or 10a building; and building work (other than specialist building work or handling asbestos) in relation to a building that is a class 10b structure (other than a swimming pool or swimming pool fence) and is ancillary to a building mentioned in paragraph (a); and basic building work. 	As above	<p>The applicant holds:</p> <ul style="list-style-type: none"> a qualification in building that the Australian Qualifications Framework Advisory Board has determined is a certificate IV in the Australian Qualification Framework system; or a qualification in building, architecture, civil engineering or structural engineering that the Australian Qualifications Framework Advisory Board has determined is a diploma or an advanced diploma in the Australian Qualification Framework system; or a tertiary qualification in building, civil engineering or structural engineering that the Australian Qualifications Framework Advisory Board has determined is a bachelor degree, graduate certificate, graduate 	Not less than 2 years full time building work experience where 1 year full time building work experience was undertaken post the date the qualification was issued. Standards of Competency (the same as for Class A) to be demonstrated in relation to building projects that are 2 storeys or lower and are class 1, 2, 10 under the Building Code of Australia. Excluding basic building work; and specialist building work.

Summary of registration/licensing requirements for building contractors across Australian jurisdictions				
Category of building contractor	Scope of works allowed to be undertaken	Financial & other requirements	Training/technical requirements	Experience requirements
			diploma, masters degree or doctoral degree in the Australian Qualifications Framework System.	
Class D Builder	<ul style="list-style-type: none"> Non-structural basic building work, other than specialist building work or handling asbestos. 	As above	No formal qualifications required.	The applicant has undertaken and documented 3 years full time building work experience. Standards of Competency (the same as Class A) to be demonstrated in relation to basic building work. Excluding specialist building work.

² The following units:

- ABC001 – Construction 1
- ABC002 – Construction 2
- ABC005 – Materials 1
- ABC061 – Builders Working Drawings 1
- ABC064 – Building Computer Applications
- ABC069 – Cost Control and Planning 1
- ABC076 – Building Quantities and Estimating 1
- ABC077 – Building Quantities and Estimating 2
- ABC082 – Building Site Supervision
- ABC083 – Building Site Surveying and Set Out 1
- ABC086 – Structures 1
- ABC091 – Business Management for Building 1A
- ABC092 – Business Management for Building 1B
- ABC102 – Residential Site Safety
- ABC105 – Timber Framing Code.

³ The following units:

- BCGBC4001A – Apply building codes and standards to the construction process for low-rise building projects
- BCGBC4002A – Manage occupational health and safety in the building and construction workplace
- BCGBC4003A – Select and prepare a construction contract
- BCGBC4004A – Identify and produce estimated costs for building and construction projects
- BCGBC4005A – Produce labour and material schedules for ordering
- BCGBC4006A – Select, procure and store construction materials for low-rise projects
- BCGBC4007A – Plan building or construction work

- BCGBC4008A – Conduct on-site supervision of the building and construction project
- BCGBC4009A – Apply legal requirements to building and construction projects
- BCGBC4010A – Apply structural principles to residential low rise constructions
- BCGBC4011A – Apply structural principles to commercial low rise constructions
- BSBSBM406A – Manage finances.

⁴ The following units:

- CPCCBC4001A – Apply building codes and standards to the construction process for low-rise building projects
- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4007A – Plan building or construction work
- CPCCBC4008A – Conduct on-site supervision of the building and construction project
- CPCCBC4009A – Apply legal requirements to building and construction projects
- CPCCBC4010A – Apply structural principles to residential low-rise constructions
- CPCCBC4011A – Apply structural principles to commercial low-rise constructions
- CPCCBC4012A – Read and interpret plans and specifications
- CPCCBC4018A – Apply site surveys and set out procedures to building and construction projects
- BSBWOR402A – Promote team effectiveness

⁵ The following units:

- CPCCBC5001B – Apply building codes and standards to the construction process for medium-rise building projects
- CPCCBC5004A – Supervise and apply quality standards to the selection of building and construction materials
- CPCCBC5005A – Select and manage building and construction contractors
- CPCCBC5006A – Apply site surveys and set out procedures to medium-rise building projects
- CPCCBC5018A – Apply structural principles to the construction of medium-rise buildings
- CPCCBC5009A – Identify services layout and connection methods to medium-rise construction projects
- CPCCBC5010A – Manage construction work

⁶ The following units:

- CPCCBC6001A – Apply building codes and standards to the construction process for large building projects
- CPCCBC6004A – Manage process for legal obligations of a building or construction contract
- CPCCBC6014A – Apply structural principles to the construction of large, high rise and complex buildings
- CPCCBC6016A – Assess construction faults in large building projects

⁷ The following units:

- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4003A – Select and prepare a construction contract
- CPCCBC4004A – Identify and produce estimated costs for building and construction projects
- CPCCBC4006A – Select, procure and store construction materials for low rise projects
- CPCCBC4008A – Conduct on-site supervision of building work and construction projects
- CPCCBC4009A – Apply legal requirements to building and construction projects
- BSBSMB406A – Manage small business finances.

⁸ The following units:

- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4004A – Identify and produce estimated costs for building and construction projects
- CPCCBC4006A – Select, procure and store construction materials for low rise projects
- CPCCBC4008A – Conduct on-site supervision of the building and construction project
- CPCCBC4009A – Apply legal requirements to building and construction projects
- CPCCBC4010A – Apply structural principles to residential low-rise constructions.

⁹ Including the following:

- Bricklaying and Block laying
- Carpentry
- Cabinetmaking

-
- Floor Finishing and Covering (hard sector)
 - Glass, Glazing and Aluminium
 - Joinery
 - Painting and Decorating
 - Plastering Drywall
 - Plastering Solid
 - Plumbing and Drainage
 - Roof & Wall Cladding
 - Roof Tiling
 - Shopfitting (Trade)
 - Structural Landscaping (Trade)
 - Structural Metal Fabrication and Erection
 - Wall and Floor Tiling

¹⁰ The following units

- CPCCBC4001A – Apply building codes and standards to the construction process for low-rise building projects
- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4003A – Select and prepare a construction contract
- CPCCBC4004A – Identify and produce estimated costs for building and construction projects
- CPCCBC4006A – Select, procure and store construction materials for low rise projects
- CPCCBC4008A – Conduct on-site supervision of the building and construction project
- CPCCBC4009A – Apply legal requirements to building and construction projects
- CPCCBC4011A – Apply structural principles to commercial low-rise constructions
- BSBSMB406A – Manage small business finances.

¹¹ The following units:

- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4004A – Identify and produce estimated costs for building or construction projects
- CPCCBC4006A – Select, procure and store construction materials for low rise projects
- CPCCBC4008A – Conduct on-site supervision of building and construction projects
- CPCCBC4009A – Apply legal requirements to building and construction projects
- CPCCBC4011A – Apply structural principles to commercial low-rise constructions.

¹² The following areas:

- Bricklaying and Blocklaying
- Carpentry
- Cabinetmaking
- Floor Finishing and Covering (hard sector)
- Glass, Glazing and Aluminium
- Joinery
- Painting and Decorating
- Plastering Drywall
- Plastering Solid
- Plumbing and Drainage
- Roof & Wall Cladding
- Roof Tiling
- Shopfitting (Trade)
- Structural Landscaping (Trade)
- Structural Metal Fabrication and Erection
- Wall and Floor Tiling.

¹³ The following units

-
- CPCCBC4003A – Select and prepare a construction contract
 - CPCCBC4004A – Identify and produce estimated costs for building and construction projects
 - CPCCBC4006A – Select, procure and store construction materials for low rise projects
 - CPCCBC4008A – Conduct on-site supervision of the building and construction project
 - CPCCBC4009A – Apply legal requirements to building and construction projects
 - BSBSMB406A – Manage small business finances

¹⁴ The following competencies:

- RTC 4911A – Operate within a budget framework
- RTC 4905A – Cost a project
- RTC 5701A – Establish and maintain the enterprise OHS program
- RTC 5908A – Prepare estimates, quotes and tenders
- RTE 5920A – Negotiate and monitor contracts/commercial agreements
- BSBMGT 503A – Monitor and manage business operations
- RTE 5906A – Monitor and review business performance
- RTF 5004A – Manage landscape projects
- RTF 5010A – Prepare a landscape project design.

¹⁵ The following competencies:

- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4004A – Identify and produce estimated costs for building and construction projects
- CPCCBC4006A – Select, procure and store construction materials for low rise projects
- CPCCBC4008A – Conduct on-site supervision of the building and construction project
- CPCCBC4009A – Apply legal requirements to building and construction projects.

¹⁶ The following areas:

- Bricklaying and Blocklaying
- Carpentry
- Cabinetmaking
- Floor Finishing and Covering (hard sector)
- Glass, Glazing and Aluminium
- Joinery
- Painting and Decorating
- Plastering Drywall
- Plastering Solid
- Plumbing and Drainage
- Roof & Wall Cladding
- Roof Tiling
- Shopfitting (Trade)
- Structural Landscaping (Trade)
- Structural Metal Fabrication and Erection
- Wall and Floor Tiling.

¹⁷ The following units:

- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4003A – Select and prepare a construction contract
- CPCCBC4004A – Identify and produce estimated costs for building and construction projects
- CPCCBC4006A – Select, procure and store construction materials for low rise projects
- CPCCBC4008A – Conduct on-site supervision of the building and construction project
- CPCCBC4009A – Apply legal requirements to building and construction projects
- BSBSMB406A – Manage small business finances.

¹⁸ The following units:

- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4004A – Identify and produce estimated costs for building and construction projects
- CBPCCBC4006A – Select, procure and store construction materials for low rise projects
- CPCCBC4008A – Conduct on-site supervision of the building and construction project
- CPCCBC4009A – Apply legal requirements to building and construction projects.

¹⁹ The following areas:

- Bricklaying and Blocklaying
- Carpentry
- Cabinetmaking
- Floor Finishing and Covering (hard sector)
- Glass, Glazing and Aluminium
- Joinery
- Painting and Decorating
- Plastering Drywall
- Plastering Solid
- Plumbing and Drainage
- Roof & Wall Cladding
- Roof Tiling
- Shopfitting (Trade)
- Structural Landscaping (Trade)
- Structural Metal Fabrication and Erection
- Wall and Floor Tiling.

²⁰ The following units:

- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4003A – Select and prepare a construction contract
- CPCCBC4004A – Identify and produce estimated costs for building and construction projects
- CPCCBC4006A – Select, procure and store construction materials for low rise projects
- CPCCBC4008A – Conduct on-site supervision of the building and construction project
- CPCCBC4009A – Apply legal requirements to building and construction projects
- BSBSMB406A – Manage small business finances.

²¹ The following units:

- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4003A – Select and prepare a construction contract
- CPCCBC4004A – Identify and produce estimated costs for building and construction projects
- CPCCBC4006A – Select, procure and store construction materials for low rise projects
- CPCCBC4008A – Conduct on-site supervision of the building and construction project
- CPCCBC4009A – Apply legal requirements to building and construction projects
- BSBSMB406A – Manage small business finances.

²² The following units:

- CPCCBC4002A – Manage occupational health and safety in the building and construction workplace
- CPCCBC4004A – Identify and produce estimated costs for building and construction projects
- CBPCCBC4006A – Select, procure and store construction materials for low rise projects
- CPCCBC4008A – Conduct on-site supervision of the building and construction project
- CPCCBC4009A – Apply legal requirements to building and construction projects

²³ The following areas:

- Bricklaying and Blocklaying
- Carpentry
- Cabinetmaking
- Floor Finishing and Covering (hard sector)
- Glass, Glazing and Aluminium
- Joinery
- Painting and Decorating
- Plastering Drywall
- Plastering Solid
- Plumbing and Drainage
- Roof & Wall Cladding
- Roof Tiling
- Shopfitting (Trade)
- Structural Landscaping (Trade)
- Structural Metal Fabrication and Erection
- Wall and Floor Tiling.

²⁴ The following units:

- BCGBC4001A or CPCCBC4001A Apply building codes and standards to the construction process for low rise building projects
- BCGBC4002A or CPCCBC4002A Manage occupational health and safety in the building and construction workplace
- BCGBC4003A or CPCCBC4003A Select and prepare a construction contract
- BCGBC4004A or CPCCBC4004A Identify and produce estimated costs for building and construction projects
- BCGBC4005A or CPCCBC4005A Produce labour and material schedules for ordering
- BCGBC4006A or CPCCBC4006A or CPCCBC4006B Select, procure and store construction materials for low rise projects
- BCGBC4007A or CPCCBC4007A Plan building or construction work
- BCGBC4008A or CPCCBC4008A or CPCCBC4008B Conduct on-site supervision of the building and construction project
- BCGBC4009A or CPCCBC4009A or CPCCBC4009B Apply legal requirements to building and construction projects
- BCGBC4010A or CPCCBC4010A or CPCCBC4010B Apply structural principles to residential low-rise constructions
- BCGBC4011A or CPCCBC4011A or CPCCBC4011B Apply structural principles to commercial low-rise constructions
- BSBSBM406A Manage small business finances
- BCGBC4012A or CPCCBC4012A or CPCCBC4012B Read and interpret plans and specifications
- BCGBC4018A or CPCCBC4018A Apply site surveys and set out procedures to building and construction projects
- BCGBC4024A or CPCCBC4024A Resolve business disputes.

²⁵ The following units:

- CPCCBC5004A Supervise and apply quality standards to the selection of building and construction materials
- CPCCBC5005A Select and manage building and construction contractors
- CPCCBC5007A or CPCCBC5007B Administer the legal obligations of a building and construction contract
- CPCCBC5009A Identify services layout and connection methods in medium rise construction projects.

²⁶ A “degree” excludes an associate’s degree or an honorary degree.

²⁷ The following units:

- CPCCOHS1001A / CPCCOHS1001A Work safely in the construction industry
- CPCCCM1012A / CPCCCM1002A Work effectively and sustainably in the construction industry
- CPCCCM1013A / CPCCCM1003A Plan and organise work
- CPCCCM1014A / CPCCCM1004A Conduct workplace communication

- CPCCCM1015A / CPCCCM1005A Carry out measurements and calculations
- CPCCCM2001A Read and interpret plans and specifications
- CPCPRF3023A / CPCPRF3013A / CPCPRF3003A Fabricate and install external flashings
- CPCCCM1011A / CPCCCM1001A Undertake basic estimation and costing
- CPCCPCM3011A / CPCCPCM3001A Flash penetrations through roofs and walls
- either
 - (i) CPCCCM2005A or B Use construction tools and equipment ;or
 - (ii) MEM18001C – Hand Tools PLUS MEM18002B – Use power tools/hand held operations PLUS MEM05005B – Carry out mechanical cutting
- CPCCBC4008A / CPCCBC4008A Conduct on-site supervision of the building and construction projects
- either (i) BSBCMN209A Provide information to clients or (ii) BSBCUS201A or B Deliver a service to customers
- CPCCCA3002A Carry out setting out
- CPCPCM2048A / CPCPCM2028A / CPCPCM2008A Cut and join sheet metal
- CPCPRF2022A / CPCPRF2012A / CPCPRF2002A Select and install roof sheeting and wall cladding
- CPCCCO2013A / CPCCCO2003A Carry out concreting to simple forms
- CPCCCA3010A Install and replace windows and doors
- BSBSBM405A / BSBSMB405B Monitor and manage business operations or BSBSMB406A Manage small business finances.

²⁸ The following units:

- BCGCM1001B Follow OH&S policies and procedures
- BCGCM1002B Work effectively in the general construction industry
- BCGCM1003B Plan and organise work
- BCGCM1004B Conduct workplace communication
- BCGCM1005B Carry out measurements and calculations
- BCGCM2001B Read and interpret plans and specifications
- BCPRF3003A Fabricate and install external flashings
- BCGVE1004B Undertake basic estimation and costing
- BCPCM3001A Flash penetrations through roofs and walls
- BCGCM2005B Use construction tools
- either
 - (i) BCGBC4008A Conduct on-site supervision of the building and construction project ;or
 - (ii) ABC082 Building Site Supervision
- BSBCMN209A Provide information to clients
- BCGCA3002B Carry out setting out
- BCGVE2001B Produce construction drawings
- BCPCM2008A Cut and join sheet metal
- BCPRF2002A Select and install roof sheeting and wall cladding
- BCGCO2003B Carry out concreting to simple forms
- BCGCA3010B Install and replace windows and doors
- BSBSBM405A Monitor and manage business operations.

²⁹ One of the following qualifications:

- CPC30211 Certificate III in Carpentry
- CPC31311 Certificate III in Wall and Floor Tiling

- CPC31911 Certificate III in Joinery
- CPC32011 Certificate III in Carpentry and Joinery
- CPC31811 / CPC31812 Certificate III in Shopfitting
- CPC30208 Certificate III in Carpentry
- CPC31308 Certificate III in Wall and Floor Tiling
- CPC30908 Certificate III in Joinery
- CPC32008 Certificate III in Carpentry and Joinery
- CPC31808 Certificate III in Shopfitting
- LMF32109 Certificate III in Cabinet Making (Kitchens and Bathrooms)
- LMF32109 / MSF31113 Certificate III in Cabinet Making (Furniture)
- BCG30203 Certificate III in Carpentry
- BCF30100 Certificate III in Off Site Construction (Shopfitting)
- LMF30302 / MSF30213 Certificate III in Furniture Making
- LMF30402 Certificate III in Furniture Making (Cabinet Making)
- LMF30502 Certificate III in Furniture Making (Wood Machinery)
- MEM30603 or MEM30705 Certificate III in Marine Craft Construction
- BCG31303 Certificate III in Wall and Floor Tiling.

³⁰ All of the following units:

- BCGBC4001A/CPCCBC4001A Apply building codes and standards to the construction process for low-rise building projects
- BCGBC4002A/CPCCBC4002A Manage occupational health and safety in the building and construction workplace
- BCGBC4003A/CPCCBC4003A Select and prepare a construction contract
- BCGBC4004A/CPCCBC4004A Identify and produce estimated costs for building and construction projects
- BCGBC4005A/CPCCBC4005A Produce labour and material schedules for ordering
- BCGBC4006A/CPCCBC4006A or B Select, procure and store construction materials for low-rise projects
- BCGBC4007A/CPCCBC4007A Plan building or construction work
- BCGBC4008A/CPCCBC4008A or B Conduct on-site supervision of the building and construction project
- BCGBC4009A/CPCCBC4009A or B Apply legal requirements to building and construction projects.

³¹ The following modules:

- 1496A Plumbing contracting principles and
- BCGBC4001A/CPCCBC4001A Apply building codes and standards to the construction process for low-rise building projects and
- BCGBC4004A/CPCCBC4004A Identify and produce estimated costs for building and construction projects and
- BCGBC4006A/CPCCBC4006A or B Select, procure and store construction materials for low-rise projects and
- BCGBC4007A/CPCCBC4007A Plan building or construction work.

³² The following units of competency:

- LMFFT4001A or B / MSFFT4001 Co-ordinate on site installation of furnishing products and
- LMFFT4009A or B / MSFFT4009A Match furnishing style/materials to customer requirements and
- LMFGN3002A or B / MSFGN3002 Estimate & cost job and
- LMFFM3013A or B / MSFFM3011 Measure & draw site layout for manufactured furniture products and
- LMFFM3005A or B / MSFFM3005 Fabricate custom furniture and
- LMFFM3006A or B / MSFFM3006 Install furniture products.

³⁹ The following examinations:

- Building Construction examination
- Building Quantities and Estimating examination
- Financial, contractual and legislative issues examination.

⁴⁰ NB in Victoria, Certificate IV in Building and Construction (Building) is not a prescribed qualification under the *Building Regulations*.

⁴¹ Category A

- BSBSBM401A Establish business & legal requirements; or
- BSBSMB401A Establish legal and risk management requirements of small business; or

Additional options for Builders, Plumbers, Gas Fitters and Electricians ONLY:

- BCGBC4009A Apply legal requirements to building and construction projects; or
- CPCCBC4009A Apply legal requirements to building and construction projects; or.
- CPCCBC4009B Apply legal requirements to building and construction projects.

Category B:

- BSBSBM402A Undertake financial planning; or
- BSBSMB402A Plan small business finances; or
- BSBSBM406A Manage finances; or
- BSBSMB406A Manage small business finances; or
- BSBSBM404A Undertake small business planning.

⁴² The following units:

- PRSSM507A Develop and implement a business plan; or
- BSBMGT617A Develop and implement a business plan.

⁴³ These four modules:

- Cost Profit Breakeven;
- Business Finance;
- Ownership Structures; and
- Business Law.

⁴⁴ One of the following approved qualifications:

- Contractors Management Program Certificate IV
- Diploma in Building - (with academic record)
- Certificate IV in Building - (with academic record)
- Business Management for Building 1 (AQF 4) & Business Management for Building 2 (AQF 5) (with academic record).

⁴⁵ 1.1 Applying the principles of economics, finance and management of a business organisation.

Criteria:

1.1.1 Prepare and apply a business plan.

1.1.2 Prepare a cash flow budget.

1.1.3 Implement financial strategies.

1.1.4 Apply basic accounting principles to financial transactions.

1.1.5 Understand and prepare—

(a) journals and ledgers;

(b) balance sheets and revenue statements.

1.1.6 Assess earning capacity and financial stability.

1.1.7 Prepare income and expenditure projections.

1.1.8 Identify and use sources of costing information.

1.1.9 Monitor financial performance.

1.2 Applying appropriate legislation to address the administrative and legal requirements of a business organisation.

Criteria:

- 1.2.1 Understand the legal structures of a business.
 - 1.2.2 Understand the significant features of the law relating to employment, dispute resolution procedures and professional liability.
 - 1.2.3 Demonstrate a working knowledge of the law relating to occupational health and safety and workers compensation.
 - 1.2.4 Demonstrate a working knowledge of the law relating to conservation of the environment.
 - 1.2.5 Demonstrate a knowledge of the law relating to independent contractors.
 - 1.2.6 Understand recording and maintenance of wage and employment records.
 - 1.2.7 Demonstrate a working knowledge of mandatory taxes and insurances.
 - 1.2.8 Understand basic contract administration.
 - 1.2.9 Understand accident, injury and dangerous occurrence reports and obligations.
- 1.3 Planning, directing and controlling tasks, people and resources in a business organisation.

Criteria:

- 1.3.1 Determine and implement objectives and priorities of a business.
 - 1.3.2 Determine and implement operational strategies and methods.
 - 1.3.3 Prepare estimates of time, resource and cost implications.
 - 1.3.4 Implement work strategies.
 - 1.3.5 Organise work groups for specific tasks.
 - 1.3.6 Monitor operational performance.
 - 1.3.7 Apply occupational health and safety standards within a business.
 - 1.3.8 Apply mechanisms for effective employer/employee relationships.
- 1.4 Addressing customer requirements.
- 1.4.1 Identify customer requirements.
 - 1.4.2 Apply principles of business management to meet customer needs.

⁴⁶ 2.1 Applying the law relating to building work practice.

Criteria:

- 2.1.1 Demonstrate a working knowledge of contract law relevant to the building industry.
- 2.1.2 Understand the issues involved in the licensing and registration of builders.
- 2.1.3 Apply the statutory requirements for the regulation of building work.
- 2.1.4 Demonstrate a knowledge of the application of Australian Standards relating to building work.
- 2.1.5 Interpret building specifications requirements.

2.2 Preparing and evaluating tenders.

Criteria:

- 2.2.1 Estimate costs.
 - 2.2.2 Evaluate risks.
 - 2.2.3 Prepare tender documentation.
- 2.3 Determining required strategies, resources and operational requirements for construction.
- 2.3.1 Determine resources that need to be hired, leased or purchased.
 - 2.3.2 Determine the best course of action from various options for obtaining and using resources.
 - 2.3.3 Determine the requirements for temporary structures and facilities.
 - 2.3.4 Prepare schedules for building work.
 - 2.3.5 Update progress schedules.
 - 2.3.6 Assess the need for and select measures to overcome delays.
- 2.4 Establishing and operating costing systems.
- 2.4.1 Identify and classify costs.
 - 2.4.2 Prepare a cost control system.
 - 2.4.3 Prepare a project budget.
 - 2.4.4 Plan the sequencing of trades.
- 2.5 Applying Contract Management
- 2.5.1 Select and apply the various standard forms of building contract in common use.
 - 2.5.2 Determine the requirements of the contract.

2.5.3 Demonstrate a knowledge of progress payments, contract claims and variations.

⁴⁷ 1.1 Planning and organising on-site building work.

Criteria:

1.1.1 Translate building designs and specifications into operational requirements.

1.1.2 Develop strategies for implementing building operations.

1.1.3 Determine appropriate resources required including personnel, materials and equipment.

1.2 Determining the need for coordination and installation of temporary structures and facilities for building work.

Criteria:

1.2.1 Determine the requirements for temporary structures and facilities.

1.2.2 Demonstrate a working knowledge of the most appropriate methods for provision of site facilities and preparation of detailed site layouts.

1.2.3 Coordinate the on-site approvals of temporary structures.

1.2.4 Arrange for and supervise the supply, erection, maintenance and removal of temporary structures and facilities.

1.3 Preparing project schedules

Criteria:

1.3.1 Prepare schedules for building work.

1.3.2 Update schedules.

1.3.3 Prepare reports on current status.

1.3.4 Assess the need for and select measures to overcome delays.

1.4 Managing on-site building work

Criteria:

1.4.1 Supervise on-site operations.

1.4.2 Administer subcontracts.

1.4.3 Administer progress claims.

1.4.4 Organise the supply and installation of materials and equipment.

1.4.5 Manage appropriate operational systems including occupational health and safety, accident and injury

1.4.6 reporting, and industrial relations.

1.4.7 Plan, develop and oversee safe working systems for all site work.

1.4.8 Communicate effectively with personnel on and off the site.

⁴⁸ 2.1 Applying the principles of building work practice.

Criteria:

2.1.1 Select and apply building principles and methods including-

- appraisal of site conditions
- erection and construction techniques
- sequencing of trades
- control of plant and equipment

2.1.2 Demonstrate a working knowledge of-

- the use of basic measuring techniques;
- the setting up and use on instruments to determine heights and levels;
- demolition methods;
- formwork design.

2.1.3 Interpret plans and specifications.

2.1.4 Produce simple working drawings suitable for on-site application.

2.1.5 Identify and select suitable materials.

2.1.6 Control the movement of materials on-site and their safe handling and storage.

2.1.7 Apply a basic understanding of-

- properties and behaviours of structural materials;
- sectional properties of structural elements;
- structural load calculations;

- performance of beams, columns and bracing;
- utilisation of roof truss systems.

2.1.8 Apply the basic principles of estimating and demonstrate a working knowledge of take-off quantities for-

- site works;
- structure;
- fit-out and finish.

2.1.9 Demonstrate a general knowledge of the process of the coordination of specialist services on-site.

⁴⁹ 3.1 Applying the requirements of legislation, standards and codes relevant to on-site building work

Criteria:

31.1. Identify the range of legislation applying to building work.

3.1.2 Apply the requirements of legislation and relevant standards and codes to the coordination and supervision of on-site building work.

3.1.3 Understand the requirements of relevant legislation, standards and codes to the performance of residential, commercial and industrial building work.

⁵⁰ As prescribed by Ministerial Insurance Order – *Required Insurance for Accredited Building Practitioner's 2008* and as amended by orders of 10 November 2008 and 11 May 2008.

⁵¹ The following standards:

1. Apply legal requirements, building codes and standards to the construction process

2. Construction Management including:

- Identify and produce estimated costs for building and construction projects
- Produce labour and material schedules for ordering
- Plan building or construction work
- Select and manage building and construction contractors
- Establish, maintain and review contract administration procedures and frameworks
- Manage the procurement and acquisition of resources for building or construction projects

3. Structural principles

4. Building Technology

a. For Building Technology for Classes A-C, the applicant must demonstrate experience in more than 20 of the following areas: Measure and calculate; Establish and implement site set-out; Excavate land; Levelling operations; Concreting works; Place and fix reinforcement materials; Erect and dismantle formwork for footings and slabs; Erect and dismantle formwork/false work for stairs, ramps, suspended slabs, columns, beams and walls

Construct bulkheads; Install timber/concrete stumps; Construct sub-floor and second floor framing;

Install timber/manufactured flooring such as tongue and groove, sheet and parquetry; Construct wall and ceiling frames including pre-fabricated systems; Construct/install pitched, flat, cathedral style timber roofs; Erect roof trusses and roof battens; Construct eaves, fascias and barges; Construct and install timber external and internal stairs, steps, landings, handrails and balustrades; Install exterior claddings such as weatherboards, manufactured boards, sheeting and eaves lining; Install interior claddings/linings such as timber, plywood, manufactured sheets ; Assemble partitions; Install underlay sheeting for tiles; Install architraves, skirting boards, moulding, trims and the like; Set out and install/replace/assemble windows and doors ; Install reflective foil to walls and roofs/vapour barriers under slab membranes; Install flooring systems; Frame and fit wet area fixtures; Install trench support; mix, test, place, finish and cure concrete; Repair, rectify and resurface concrete; Construct tilt panels; Place and fix reinforcement materials and apply reinforcements schedule; Establish datum for levelling; Prepare masonry walls for damp proof course; Install damp proof courses; Lay all types of brickwork including cutting, pointing and tuck pointing; Carry out masonry veneer and cavity brick construction; Construct masonry stairs, steps and arches; Lay masonry walls and corners; Lay multi-thickness walls and piers; Install flashing and damp proof courses; Install fire-rated masonry construction.

b. for Class D, the applicant must demonstrate experience in 8 or more of the following areas: read and interpret plans and specifications; Measure and calculate; Establish and implement site set-out; Excavate land; Levelling operations; Concreting works; Place and fix reinforcement materials; Install timber/concrete stumps; Carry out joinery works e.g. decks, pergolas and the like; Install exterior claddings such as weatherboards, manufactured boards, sheeting and eaves lining; Install interior claddings/linings such as timber, plywood, manufactured sheets; Assemble partitions; Install underlay sheeting for tiles; Install architraves, skirting boards, moulding, trims and the like.

5. Read and interpret plans and specifications

6. Develop, plan and implement an appropriate building or construction planning process

7. Quality assurance processes and verification of building or construction work

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