

Submissions on the Home Building Regulation 2014

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Home Building Regulation 2014
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SUBJECT: Submissions on the Home Building Regulation 2014

Dear Commissioner,

A. INTRODUCTION

I refer to your letter dated 18 July 2014 inviting comment on the draft Home Building Regulation 2014 and thank you for the opportunity to provide a response.

These submissions are structured as follows:

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B. Delay In the Implementation of Strata Reforms

The impact of the erosion of the consumer protections by the Home Building reforms is made greater by the delay in implementing the Strata reforms.

The strata title reforms have now been delayed until early 2016 (based upon the ["Reform of Strata and community scheme laws"](#) publication on the Fair Trading NSW website) by a community title scheme consultation process that has only recently commenced.

While I appreciate that the Government wishes to complete a thorough consultation before the implementation of the Strata reform package, community title schemes comprise only a small fraction of the market when compared to strata title schemes as per the below **table 1.1**.

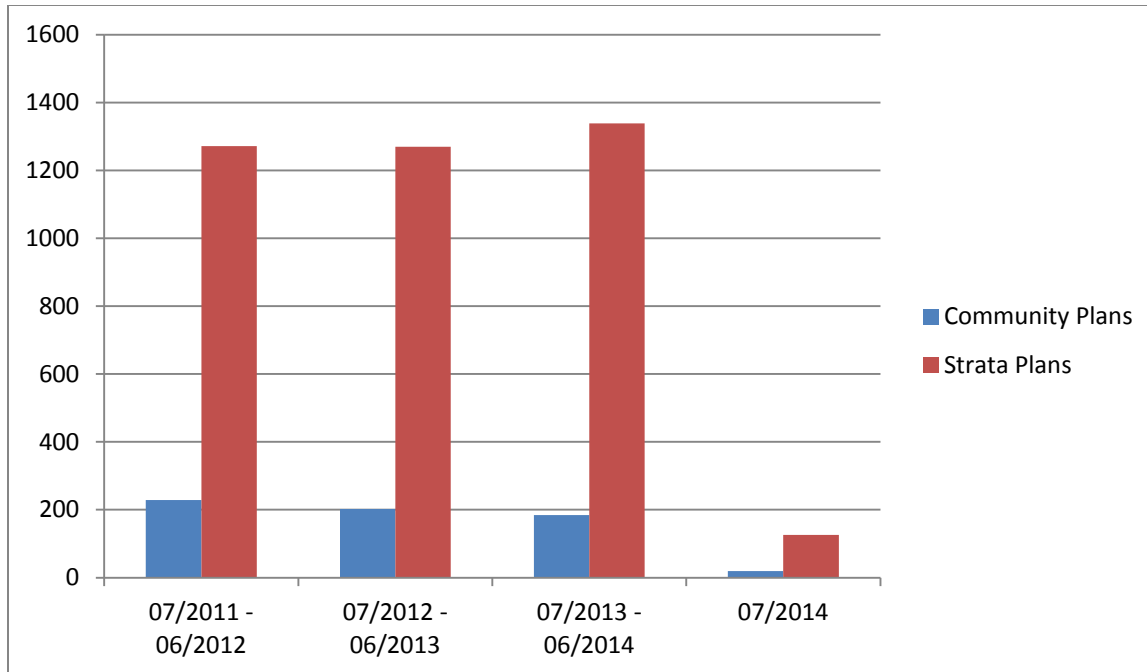


Table 1.1: Strata Plan Registrations for Financial Years 2011/2012 to 2014/2015 – Data Sourced from Land & Property Information, Plan and Dealing Statistics on 12 August 2014

If the strata reforms do indeed come into effect in early 2016 it is likely due to commercial considerations that the strata reforms will not have retrospective effect. Accordingly, it will not be until 2017/2018 that three of the key reforms will have effect, being:

1. Inclusion of defects and rectification as a compulsory agenda item for discussion at each AGM until the expiry of the statutory warranty periods under the Home Building Act;
2. Provision of an independent defects report for the owners corporation within 12 to 18 months after the building is completed;
3. Requirement that the developer of a high-rise strata building pay a bond of 2% of construction costs, which will be held in trust until an independent inspector agrees that any identified defects have been fixed; and
4. Developer not being able to vote on matters relating to building defects.

Regrettably, it is entirely possible that the property boom will have ended by this stage.

C. NSW Statutory Warranty Scheme Bottom of the Australian States Warranty Spectrum

While market conditions for builders have been poor over the past few years with a resulting impact on the liquidity and viability of many builders, the Home Building legislation reforms that

have been introduced have resulted in a statutory warranty scheme that puts NSW at the bottom end of the spectrum in terms of consumer protection when compared to other Australian States, with Victoria providing the best consumer protection in the form of 10 year statutory warranties.

D. ISSUES RAISED IN THE REGULATORY IMPACT STATEMENT PAPER

No.	Topic & Questions raised in the Regulatory Impact Statement Paper	Commentary	Recommendation	Fair Trading NSW response
1	<p><u>Date of Commencement</u></p> <p>Is 1 December 2014 an appropriate start date for the new laws?</p> <p>If not, what are the reasons, and when should the new laws start?</p>	<p>The new laws are misconceived and in our submission should not commence for the following reasons:</p> <p>(a) The strata reform which was to partly balance the position for consumers has been delayed to a point where it will probably miss the current property boom;</p> <p>(b) You will be significantly reducing the liability for private insurers for all insurance contracts not claimed on and issued after 1 July 2002 by replacing the structural defects liability with major defects liability which, will in effect mean a nil liability for the insurers and insurers who have left the marketplace, this is because it will be very rare for defects to meet the new criteria for 'major defects' because they must be so severe to cause the building to collapse or be destroyed or be unable to be used;</p> <p>(c) You will be reducing your own liability in kind to that in paragraph (b) being your liability under SICorp; and</p> <p>(d) The new strata scheme buildings completion definition will not apply to privately issued insurance policies creating</p>	<p>The new laws should not commence and should be reconsidered.</p>	

No.	Topic & Questions raised in the Regulatory Impact Statement Paper	Commentary	Recommendation	Fair Trading NSW response
		further confusion and disparity.		
2	<u>Increase the 'general works' contract threshold</u> Are there any practical issues with the drafting of this provision?	If works that are less than \$20,000 in value are not covered by statutory warranty periods there will be a loss of consumer rights for contracts going forward, however, it is unlikely that non-specialist works (such as general building work that does not involve plumbing or electric work) valued at less than \$20,000 will generally have the potential to cause costly building defects.		
3	<u>Training Requirements for Owners Builders</u> Are there any practical issues with the drafting of this provision?	Consideration needs to be given to overhauling training generally to performance-based competency assessment training. We comment generally that the training requirements are fairly undemanding. Anecdotally in the industry there are reports that applicants for a White Card training sessions are able to take part in the course without any active participation.	Review training requirements generally with consideration to a performance-based competency assessment training	
4	<u>Insurance exemption for built-in furniture and cabinetry</u> Are there any practical issues with the drafting of this provision?	Built-in cabinetry work such as kitchen cabinetry can often form part of a separate contract for construction projects. The underlying policy behind the reform to provide an insurance exemption for such stand alone contracts benefits SICorp, and without any adjustment to home owners insurance premiums there will be no benefit to either consumers or builders. While I do not support this amendment, for clarity there should be a clarification that the insurance exemption does not apply to any work contracted to be done prior to the commencement of the Home Building Amendment Act 2014.	Delete this provision. Alternatively, clarify that the exemption doesn't apply to work contracted to be done prior to commencement of the Home Building Amendment Act 2014.	

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5	<p><u>Clarify definitions for high-rise building insurance exemptions</u></p> <p>Are there any practical issues with the drafting of this provision?</p>	<p>The proposed amendment to the definition of 'storey' for the high-rise building insurance exemption will expand the number of strata schemes that qualify for the high-rise exemption.</p> <p>For example, effectively, a building with three levels plus a carparking level with more than four carparks will be classified as a four storey building under the proposed new definition.</p>	<p>Retain the existing definition of storey.</p> <p>If, however, the new definition is adopted, for clarity the new definition should only apply to residential building work after 1 December 2014.</p> <p>Accordingly, section 54(3) of the new regulation should be amended so that section 54(1) and 54(2) do not apply to residential building work contracted before 1 December 2014.</p>	
6	<p><u>Clarify definition of 'disappeared' for insurance purposes</u></p> <p>Are there any practical issues with the drafting of this provision?</p>	<p>His Honour Justice Neilson determined in <i>Wesfarmers General Insurance Limited t/as Lumley Insurance v Nestel</i> [2011] NSWDC 224 that a builder had 'disappeared' when the builder had disappeared from NSW.</p> <p>His Honour commented that if an expansive view of 'disappeared' were taken it would "<i>throw an unnecessary and extremely big burden on the consumer, the beneficiary of the policy</i>".</p>	<p>Retain the existing definition, given that the proposed amendment imposes a detrimental burden on the consumer.</p>	
7	<p><u>Insurance claims limited to works that are required to be insured</u></p> <p>Are there any practical issues with the drafting of this provision?</p>	<p>The proposal that a beneficiary will be unable to claim under a Home Owners Warranty Insurance policy that has been taken out for works that are not required to be insured is akin to an unjust enrichment of the insurer in circumstances where SICorp has obtained insurance premiums for the policies.</p>	<p>Delete the amendment.</p>	

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8 & 9	<p><u>Insurance covers only lawful deposits if no work has commenced</u></p> <p>Are there any issues with how the Regulation defines 'commencement' of work under a contract?</p> <p>Are there any other practical issues with the drafting of this provision?</p>	<p>While we recognise that the intention of the amendment is to limit the liability of SICorp prior to works commencing after excavation to the deposit, there are other losses such as design costs and holding costs that can create significant hardship.</p>	<p>Consideration be given to providing insurance cover for design costs and holding costs.</p>	
10	<p><u>Eligibility to make delayed claims against insurance if 'diligently pursued'</u></p> <p>Does the proposed Regulation appropriately define 'diligent pursuit'? If not, how should it change and why?</p>	<p>Statutory warranties are now implied into subcontracts under the new amendments to the Home Building Act and accordingly, the proposed definition of 'diligently pursued' is misconceived in circumstances where it may be difficult to quickly identify all relevant subcontractors at the time a defect is first discovered.</p> <p>In addition the extension of statutory warranties to developers warrants a broader definition for 'diligent pursuit'.</p>	<p>A broader definition of 'diligent pursuit' should be adopted given the extension of statutory warranties to subcontractors and developers.</p>	
11	<p><u>Exemptions from insurance for Government funded works</u></p> <p>Is the scope of the exemption appropriate? If not, how and why should it change?</p>	<p>The blanket exemption from insurance for Government funded works is appropriate, subject to the comments below.</p>		

No.	Topic & Questions raised in the Regulatory Impact Statement Paper	Commentary	Recommendation	Fair Trading NSW response
12	<p><u>Exemptions from insurance for Government funded works</u></p> <p>Are there any issues with the proposed arrangements for protecting consumers?</p>	<p>The wording of clause 57 should be amended to ensure that if a New South Wales Government agency or body undertakes to provide protection under a regime which provides the same level of protection to consumers as they would have under the existing home warranty insurance scheme it is clear that the 'same level of protection' will be provided not just 'substantially the same level of protection'.</p>	<p>Amend clause 57 so the 'same level of protection' will be provided not just 'substantially the same level of protection'</p>	
13	<p><u>Definition of defect and major defect</u></p> <p>Is a regulation under s18E(3) or (4) needed to clarify the definitions of major (and, by implication, minor) defect?</p> <p>Please give details, including suggested wording.</p>	<p>The amendment proposed to the statutory warranties by the Home Building Amendment Act 2014 is fundamentally flawed.</p> <p>In particular, the amendments will have retrospective operation to building contracts entered into after 1 February 2011, where proceedings are not on foot or an insurance claim has been made.</p> <p>In addition, very few of the defects discussed in the UNSW Report <i>"Governing the Compact City: The role and effectiveness of strata management"</i> (page 66, attached) will meet the definition of 'major defect' and a great many will not be detectable within two years.</p> <p>Further, this amendment is inappropriately drafted to apply to all insurance contracts issued after 1 July 2002.</p>	<p>The changes to the statutory warranties proposed by the Home Building Amendment Act 2014 should not commence.</p>	

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14	<p><u>Amend the definition of 'structural landscaping'</u></p> <p>Is the proposed scope of work for structural landscaping appropriate?</p> <p>If not, what changes should be made?</p>	No submission.		
15	<p><u>Clarify supervision requirements for some apprentices and trainees</u></p> <p>Are there any practical issues with relying on the supervision requirements in section 14(2) of the Home Building Act?</p>	No submission.		
16	<p><u>Threshold changes to fast-track key IPART recommendations</u></p> <p>Are there any practical issues with the drafting of this provision?</p>	No submission.		

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17	<p><u>Review of building categories to fast-track key IPART recommendations</u></p> <p>Are there any reasons excavation work should continue to be regulated under the Home Building Act? If so, what are the relevant risks?</p>	<p>Excavation work defects can have ramifications for the integrity of a constructed residential dwelling.</p> <p>In this regard over-excavation or under-excavation can affect the building platform height which in turn can impact upon site drainage.</p> <p>Also, problems can later be encountered with foundations if fill has not been adequately compacted in accordance with relevant Australian Standards.</p> <p>There is generally a lack of clarity as to whether excavation works attract statutory warranties and the potential impact of defective excavation works warrants clarification in the Home Building Act.</p>	<p>Review the Home Building legislation to clarify that excavation works form part of residential building work.</p>	
18	<p><u>Review of building categories to fast-track key IPART recommendations</u></p> <p>Are there any reasons wood and metal fencing should continue to be regulated under the Home Building Act? If so, what are the relevant risks?</p>	<p>No submission.</p>		

No.	Topic & Questions raised in the Regulatory Impact Statement Paper	Commentary	Recommendation	Fair Trading NSW response
19	<p><u>Review of building categories to fast-track key IPART recommendations</u></p> <p>Are there any reasons cleaning should continue to be regulated under the Home Building Act?</p> <p>If so, what are the relevant risks?</p>	<p>If brickwork cleaning is not carried out appropriately damage to the face of brickwork or mortar joints can occur. The damage can be in the form of physical damage caused by the use of inappropriate high pressure turbo heads or through 'acid burn' when hydrochloric acid is inexpertly applied to clean bricks and mortar.</p> <p>Defective cleaning can also lead to damage of external fixtures such as balustrade railings and damage to glass if adequate protection is not employed while carrying out brick-cleaning or if inappropriate cleaning products are used during the cleaning process.</p>	<p>Cleaning should not be excluded from the definition of residential works.</p>	
20	<p><u>Review of building categories to fast-track IPART recommendations</u></p> <p>Are there any issues with the changes proposed for other categories of work to reflect the above changes?</p>	<p>No submission.</p>		
21	<p><u>Review of building categories to fast-track IPART recommendations</u></p> <p>Are there any problems with the proposal to consolidate 'roof tiling' and 'roof slating'?</p>	<p>No submission.</p>		

No.	Topic & Questions raised in the Regulatory Impact Statement Paper	Commentary	Recommendation	Fair Trading NSW response
22	<p><u>Review of building categories to fast-track IPART recommendations</u></p> <p>Are the proposed transitional arrangements for 'roof tiling' and 'roof slating' appropriate?</p>	No submission.		
23	<p><u>Review of building categories to fast-track IPART recommendations</u></p> <p>Are there any problems with the proposed changes to the above categories of residential building work?</p> <p>If so, what are the risks and what changes to the proposals should be made to address them?</p>	No submission.		
24	<p><u>Changes to plumbing, gas-fitting and restricted electrical categories</u></p> <p>Is the proposed scope of work appropriate for the proposed category of 'fire protection plumbing'?</p> <p>If not, how and why should it change?</p>	We agree with the amendments to ensure that fire protection plumbing is a specialised area.		

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25	<p><u>Changes to plumbing, gas-fitting and restricted electrical categories</u></p> <p>Should people who have a licence or certificate as a 'plumber' or 'water plumber' be allowed to do some aspects of fire protection work?</p> <p>If so, what work should they be permitted to do and why?</p>	<p>We agree with the amendments to ensure that fire protection plumbing is a specialised area.</p>		
26	<p><u>Changes to plumbing, gas-fitting and restricted electrical categories</u></p> <p>Are the proposed transitional arrangements appropriate?</p>	<p>The five year transition period to obtain qualifications in a course that has a duration of approximately 864 hours (based upon the Fire Protection TAFE course details), and for which approximately 50% of the core units have already been completed in the Certificate III Plumbing course, is generous.</p> <p>While we recognise that plumbers will generally be engaged in full time work while undertaking the further required study, we query whether the transitional period should be reduced.</p>	<p>Consideration should be given to reducing the transitional period.</p>	

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27	<p><u>Changes to plumbing, gas-fitting and restricted electrical categories</u></p> <p>Are there any problems with merging 'LP Gasfitting' and 'Gasfitting' into a single category?</p> <p>If so, what are the issues?</p>	No submission.		
28	<p><u>Changes to plumbing, gas-fitting and restricted electrical categories</u></p> <p>Is the proposed scope of work appropriate for the proposed category of restricted electrical work for electro-technology trades?</p> <p>If not, how should it change and why?</p>	No submission.		
29	<p><u>Consistent processing component for renewal and restoration fees</u></p> <p>Are there any practical issues with the drafting of this provision?</p>	No submission.		

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30	<p><u>Application fee exemptions</u></p> <p>Are the terms of the fee exemption for Victorian-based plumbers appropriate?</p> <p>If not, how and why should they change?</p>	No submission.		
31	<p><u>Insurance exemption for work done for retirement village operators</u></p> <p>Is the scope of the proposed insurance exemption appropriate?</p> <p>If not, what should the scope be, and why?</p>	<p>I am concerned that the proposal to exempt contractors who do residential building work on behalf of an operator of a retirement village should be exempt from the home warranty insurance requirements in Part 6 of the <i>Home Building Act 1989</i>. This may impact upon consumers who subsequently purchase dwellings in a retirement village where that work has been performed.</p> <p>The proposed amendment will have the effect of reducing the liability of SICorp at the expense of consumers.</p>	Delete the amendment	
32	<p><u>Exemptions for employees of electricity supply authorities</u></p> <p>Is the note, and the scope of the exemption appropriate?</p> <p>If not, how should they change and why?</p>	No submission.		

No.	Topic & Questions raised in the Regulatory Impact Statement Paper	Commentary	Recommendation	Fair Trading NSW response
33	<p><u>Authority-holders may not trade while contesting a rejected restoration</u></p> <p>Should the holder of an expired licence or certificate be able to continue trading while appealing a decision to reject an application for restoration?</p>	<p>No submission to alter the proposal that licences and certificates continue to have effect for a 30 day grace period after a restoration application is rejected and for the duration of any appeal of the rejection of a restoration application.</p>		