

10 May 2022

SUBMISSION: HOME WARRANTY SCHEME REVIEW

BACKGROUND

Master Builders is Queensland's peak industry body for building and construction in Queensland and represents the interests of over 9,500 building and construction related members. Most members are licensed by the Queensland Building and Construction Commission (QBCC) and are authorised under their licence to carry out residential construction work insured by the Home Warranty Scheme (the Scheme).

Our comments relate to all six review themes relevant to the review.

THEME 1: COMPREHENSIVE, CONTEMPORARY COVERAGE

Proposal 1.1 - cover for flat pack and modular homes

Master Builders position

- a) **The cover provided by the Scheme should be extended to include modular and flat pack (prefabricated) homes that are manufactured off-site, including "tiny homes."**
- b) **Where off-site prefabrication work is defective or incomplete and a successful claim is made against the Scheme, recovery action should not be taken against the licensed builder if they were only engaged to install the home or work.**

The purpose of the Scheme is to mitigate the monetary loss experienced by homeowners in Queensland due to defective or incomplete residential construction work carried out on their homes.

For the Scheme to remain relevant and continue to protect a broad spectrum of homeowners, it needs to extend cover to emerging forms of residential construction such as modular and flat pack (prefabricated) homes that are manufactured off-site. It also needs to encompass emerging types of residential structures, such as "tiny homes."

It is acknowledged that expanding the Scheme to include cover for off-site prefabrication increases risk to the Scheme. To help mitigate the risk, it may be necessary for the QBCC to have the power to declare that specific manufacturers of, and specific types of flat pack and modular homes, cannot be used for the purposes of Queensland residential construction work. Consistent with standard legislative principles, the exercise of the power would need to be subject to appropriate review and limited to situations where it is necessary to protect a consumer or building contractor from unreasonable risk of harm.

From a collection of premium perspective, extending the Scheme's cover would not impact on licensed contractors as they are already obligated to calculate premiums based on the "insurable value of the work." Section 67WA of the QBCC Act defines "insurable value" to mean:

"... an amount representing the reasonable cost to the insurer of having the work carried out by a licensed contractor on the basis that all building and other materials are to be supplied by the contractor (whether or not the work is carried out by a licensed contractor on that basis)."¹

In any discussion about extending the Scheme's cover, it is appropriate to consider recovery actions available to the regulator, including the way they will be exercised. In this regard, it is submitted that a licensed building contractor who is engaged to merely install a prefabricated home should not be liable for recovery from the Scheme for any loss that was the fault of the off-site prefabricator. Holding building contractors liable in such a case would be both unfair and unjust. Further, administering the Scheme in a way that promotes lack of accountability by off-site prefabricators would present an increased risk to the Scheme's ongoing viability.

Proposal 1.2 - removing some types of building work from the scope of the Scheme

Master Builders position

- a) Stand-alone painting should not be covered by the Scheme.**
- b) The Scheme should not extend to cover for work that is already fully covered by other insurance.**

Given the information stated in the consultation paper that consumers are already protected by other forms of insurance, there appears little or no benefit in stand-alone painting being covered by the Scheme.

Also relevant is the operation of section 56 (*Work covered by insurance policy*) of schedule 6 of the QBCC Regulation. Under this provision, if loss is suffered in relation to residential construction work

¹ To place the matter further beyond doubt, the definition of "insurable value" in section 67WA includes the following work as an example - *"the construction, off-site, of a residence or related roofed building and transportation of the residence or building to the relevant building site"*.

fully covered by another insurance policy, the consumer is not entitled to claim assistance from the Scheme. Having regard to this provision, it is unreasonable and improper for the Scheme to take a premium for work that is already insured elsewhere and in substance can never be the subject of a claim under the Scheme.

Proposal 1.3 - higher thresholds, exemptions, or optional cover for some items

Master Builders position

- a) The threshold for insurable work should align with the value of work that an owner can carry out on their own land without a licence or permit (currently \$11,000). The threshold for insurable work should be reviewed and indexed annually.**
- b) The current opt-in provisions in the QBCC Act and its regulation should remain unchanged.**

The threshold value for building work that must be insured under the Scheme has remained unaltered (other than an adjustment for GST) for over 40 years. The reason for the lack of indexation is unknown.

Given the absence of indexation for the last 4 decades, Master Builders is of the view that the threshold value for insurable work should be increased to \$11,000. This value is consistent with the threshold value set under the QBCC Act and its regulation for landowners to personally carry out work on their land without a permit, licence, or a notation on the register of titles.

Anecdotal experience also suggests that claims made for work under \$11,000 are significantly less common and infrequent when compared to work at higher thresholds. Subject to this observation being confirmed by actuarial assessment, this raises the real question whether there is any substantive consumer benefit in requiring such low value work to be subject to the Scheme.

It is also recommended that, in future, the threshold value be reviewed annually to ensure that it remains relevant. Such an approach would appear to be consistent with best practice.

Regarding Master Builders second recommendation, there is insufficient information and data in the consultation paper to justify amending the current opt-in requirements for additional cover. In the absence of evidence demonstrating that the current arrangements are causing substantive detriment or harm to consumers, Master Builders is unwilling to support the imposition of higher premiums on the community.

THEME 2: AFFORDABLE RISK-BASED PREMIUMS

Proposal 2.1 – introduce a more flexible premium structure

Master Builders position

- a) **To ensure the Scheme remains both financially sustainable and continues to be fair and equitable, premiums should be based on risk. Specifically, higher risk work should attract a higher premium than lower risk work.**
- b) **Building contractors who do not have a proven history of breaching the QBCC Act for an extended period should be recognised and rewarded through a notation on the licensing register, discounted premiums and/or discounted licensing fees.**

As a general principle, Master Builders supports that premium be set based on risk. Further, it seems a reasonable and fair policy position that higher risk work should attract a higher premium that that applicable to lower risk work. Failure to do this results in those carrying out lower risk work cross-subsidising, from a premium perspective, those who carry out higher risk work. It also acts as a disincentive for those carrying out higher risk work to implement strategies to reduce the risk profile of their work.

Master Builders supports all legislative efforts that operate to reward licensed builders and trade contractors who consistently carry out high quality work. Legislative initiatives of this kind encourage positive accountability in the building industry and demonstrates that that the QBCC regulatory system acknowledges those industry participants who continually do the “right thing” (i.e., it is more than just a “big stick”).

Examples of positive accountability initiatives that Master Builders would welcome include:

- Notations on the register where a licensee has not had any regulatory breaches for a set period (e.g., notations could be made at the 5, 10 and 20-year mark).
- Premiums and licensing fees are discounted for licensees who have not breached the legislation or been subject to regulatory intervention for a set period (e.g., 10 years).

THEME 3: ADEQUATE AND FLEXIBLE COMPENSATION LIMITS

Proposal 3.1 – amending the maximum compensation limit under the Scheme for detached dwellings

Master Builders position: The maximum compensation limits for single dwellings should not be increased.

Master Builders supports the continuation of the long-established policy position that the Scheme should aim to ensure that 95% of claimants are fully compensated for their loss.

Given that 96% of claimants are currently fully compensated under the Scheme and consumers have the option to take out additional cover, there is no reasonable justification at this time for increasing the maximum compensation limit.

Proposal 3.2: amending the maximum compensation limits for a duplex or multi-unit dwelling

Master Builders position: Compensation limits for duplex and multiple dwellings should be adjusted as required to ensure at least 95% of claimants are fully compensated.

As stated above, Master Builders supports the QBCC's policy position that the Scheme should aim to ensure that 95% of claimants are fully compensated for their loss. To the extent that compensation limits are not achieving this target, they should be adjusted to ensure they remain relevant and provide appropriate consumer protection.

By way of a general comment, the method of calculating premium for multiple dwellings is unnecessarily complex. Master Builders would welcome simplification of the calculation method.

THEME 4: AFFORDABLE RISK-BASED PREMIUMS

Proposal 4.1 - refund premiums directly to consumers

Master Builders position

Licensed contractors should not be required to administer the refunding of premiums owed by the Scheme to consumers.

Refunding of premiums to a homeowner is an administrative task that is properly the role of the administrator of the Scheme (i.e., QBCC). It is unfair, unreasonable, and inappropriate for licensees to be delegated this task and in essence act as an unpaid agent of the regulator/insurer. Master Builders is not aware of any other insurer that administers refunds in such a way.

Proposal 4.2: Premiums to be kept separate from deposit paid to consumer

Master Builders position

- a) Statutory limitations on the maximum deposit that may be claimed by a building contractor under a regulated contract for domestic build work should exclude premiums collected by the building contractor for the Home Warranty Scheme.**
- b) The current 10 days from signing contract requirement to pay premium be repealed and instead the building contractor have the option to either:**
 - I. collect and pay the entire premium when the deposit is paid, or when work commences (whichever is earlier); or**
 - II. collect and pay part of the premium when the deposit is paid and then later collect and pay the remaining part of the premium when work commences.**

Under the QBCC Act the building contractor is required to “collect” a premium from the consumer and pay the premium to the QBCC. In substance, the building contractor is acting as an agent for the QBCC to facilitate administrative convenience in the premium collection process, including reducing the cost burden on the QBCC. The building contractor does not gain any financial or other benefit from this process and in fact endures additional administrative burden to assist the State.

Having regard to the above, it is unfair and unreasonable that the QBCC Act requires the building contractor to include the cost of the premium as part of the maximum deposit that may be paid by the consumer under a regulated domestic building contract. There appears no logical or reasonable policy position that supports a building contractor suffering financial detriment (i.e., reduced access to a deposit), simply because they are assisting the State.

As a general policy, Master Builders supports that the obligation to collect a premium should correlate with when the Scheme is placed at risk. The current legislation does not do this.

Further, the legislation does not recognise that there may be circumstances where there is significant delay between payment of deposit and commencing of work, both of which represent separate risks to the Scheme. Where this occurs, it is quite common for the contract price to be varied prior to commencement of work or in some cases the contract may be terminated. Neither circumstance is considered in the current requirements for collection of premiums.

To better align the payment of premium with commencement of risk, Master Builders proposes that the building contractor have the option to either:

- collect and pay the entire premium when the deposit is paid, or when work commences (whichever is earlier); or
- collect and pay part of the premium when the deposit is paid and then later collect and pay the remaining part of the premium when work commences.

Proposal 4.3 - increase time limits for consumers who notice a defect or who have work left incomplete

Master Builders position

- a) In the absence of more detailed research demonstrating that they are inadequate, the time limits for a claim to be lodged and the standard timeframes for the Scheme's cover should not be increased.**
- b) The timeframes for dispute resolution and directions processes under the QBCC Act should be aligned with the timeframes for making a claim under the Scheme.**

Master Builders supports the policy position that changes to legislation imposing a burden or impost on a party to a contract should always be evidence based. In the absence of detailed research or empirical data supporting that the current time frames for lodging a claim are causing substantive harm to consumers, the proposal for increasing standard time frames for lodging claims is not supported.

However, Master Builders as a general principle supports that the timeframes for dispute resolution and directions processes under the QBCC Act should be aligned with the timeframes for making a claim under the Scheme. Such consistency would reduce complexity in the legislation and promote better industry understanding as to how the Act applies.

Proposal 4.4 - introduce a 'stop the clock' or discretionary mechanism for Scheme claim timeframes

Master Builders position

- a) In the absence of more detailed research demonstrating that they are inadequate, claims should not be able to be lodged outside the prescribed timeframes.**
- b) However, if a policy position is decided that a claim can be lodged in extenuating circumstances outside the Scheme's timeframes, acceptable extenuating circumstances should be expressly stated in legislation. QBCC's decision to allow a claim to be lodged outside statutory frames should also be a reviewable decision under the QBCC Act.**

See comments under proposal 4.3.

Regarding policy position (b), Master Builders considers that all QBCC administrative decisions that adversely impact (financial or otherwise) on a licensee, or a contracting party, should be prescribed in legislation and subject to appropriate review mechanisms. This is considered essential to preserve proper accountability and fairness in regulatory decision-making.

Proposal 4.5 - prescribe the QBCC's claim recovery process in legislation

Master Builders position

- a) The legislation should be amended to obligate the QBCC to take recovery action against all entities in the contractual or supply chain that have contributed to or caused a defect leading to a successful claim. The amount claimed should be proportionate to the party's contribution to the defective or incomplete work.**
- b) A fair and reasonable claim recovery process should be developed and prescribed in legislation.**

The current QBCC practice of only holding the head contractor accountable when taking recovery action under the Scheme is unfair and unreasonable. It is a policy practice that is based on administrative convenience to the regulator and is inconsistent with ordinarily understood principles of justice.

From a broader policy perspective, the current practice also encourages reduced building standards and product quality in other parts of the contractual chain and thereby presents an increased risk to the Scheme.

Master Builders supports the policy position that the QBCC should take recovery action against all parties that contributed to the defective work that led to the claim. The responsible parties should also only be pursued for the amount that is proportionate to their contribution.

Master Builders also believes that a fair and reasonable recovery process should be developed and prescribed in legislation. Given that a QBCC recovery process may have grave consequences for the building contractor (e.g., going into liquidation or losing their livelihood), it is appropriate that there should be legislative safeguards to ensure such decisions are fair, reasonable, and consistent with the highest standards of integrity.

The current approach of allowing the QBCC to decide its own practices has proven to be an ongoing source of distrust and tension with industry.

Examples of matters that should be stated in the legislation include the process, proportionate responsibility rules, limitations, rights of review and circumstances when a recovery process can be taken against one or more of the following:

- head contractor.
- subcontractors.
- company directors.
- suppliers.
- other persons or entities that may have caused or contributed to the defective work that resulted in the claim.

THEME 5: EMPOWERED CONSUMERS

Proposal 5.1 - Provide a Product Disclosure Statement (PDS) to every consumer when they pay the Scheme premium

Master Builders position

- a) **Head contractors should not be responsible for providing consumers with a PDS on behalf of the QBCC.**
- b) **Given that a relevant offence provision already exists for providing false information to QBCC, an additional offence provision for providing false information to QBCC about a consumers address details is not warranted or supported.**

The provision of a product disclosure statement (PDS) and other information about an insurance product is ordinarily the responsibility of the insurer. Master Builders is not aware of any other insurer that delegates this responsibility to a third party.

The policy position of Master Builders is that building contractors should not be required to provide consumers with a PDS or other information as to entitlements of the consumer under the Scheme. Aside from the administrative burden of the task, building contractors are not trained or qualified to answer consumer questions about the Scheme. Further, there is arguably a conflict of interest should building contractors attempt to do this, given that they are also liable for recovery action in the event of a claim.

Master Builders does not support additional offence provisions being inserted into the QBCC to penalise builders who may provide incorrect insurance details to QBCC. There are already existing offence provisions in the QBCC Act for providing false or misleading documents or information to the QBCC (see sections 108B and 108C). Unless these provisions can be demonstrated as being inadequate, there is no reasonable policy basis to justify additional offences being inserted in to the QBCC Act for behaviour that is already covered by existing offences.

Proposal 5.2 - Review ways of publishing information about a contractor's history of building work and any disciplinary action

Master Builders position

- a) **Approved claims under the Scheme where the licensed contractor has been found not to be responsible or at fault for the defective or incomplete work should either:**
 - **not be published on the register (preferable position); or**
 - **include a notation to the effect that the licensed contractor was found not to be at fault or responsible for the defect.**

- b) Publication on the licensee register of unproven breaches of the QBCC Act by licensees, including breaches that are subject to appeal, is not supported.**
- c) Extending the current time of 5 years for information about approved claims to remain on the licensee register is not supported.**

Master Builders does not support the existing policy position in the legislation that approved claims where the building contractor was found not at fault should be noted against the builder in the licensee register. The current legislative requirement is both unfair and harmful to the innocent building contractor, misleading to the public and void of any policy merit. At very least, QBCC should be required to note on the register that the building contractor was not found at fault for the claim.

Master Builders also does not support information being included on the register regarding unproven breaches of the QBCC Act, including breaches that are subject to appeal. The concept of innocent until proven guilty is a fundamental human right in Queensland and should be preserved in the QBCC Act.

Further, Master Builders does not support extending the time for claims information to be included on the licensee register beyond the current 5 years. The current 5-year removal period is consistent with the removal periods on the register applicable to directions, convictions for offences and infringement notices. It is unclear why payment of insurance claims should be treated differently from these types of actions, or the perceived benefit associated with the proposed policy change.

THEME 6: A MODERN AND RESPONSIVE SCHEME

Proposal 6.1: Provide increased consumer protection for residential buildings over three storeys, which are not currently covered by the Scheme

Master Builders position

- a) The Scheme should be extended to include high rise residential buildings, subject to the initiative not being cost prohibitive or an unacceptable risk to the ongoing viability of the existing Scheme.**
- b) The Scheme should be extended to cover the renovation, alteration, improvement or repair of a “home” in a building that is greater than 3 storeys.**
- c) A strata-building bond and inspections scheme (a developer bond Scheme), like that successfully operating in NSW for high rise residential buildings, should be considered.**
- d) The Scheme should be administered separately from the QBCC.**

As general principal, Master Builders supports the expansion of the Scheme to include high rise residential buildings. For the Scheme to continue to remain relevant it needs to cover all forms of modern homes and not just single dwellings and those contained in medium rise buildings. However, this support is subject to any expansion of the Scheme not prejudicing the ongoing financial viability of the existing Scheme.

It is appreciated that expanding the Scheme to cover high rise construction may not be able to be achieved in the short-term due to the complex financial and actuarial matters that will need to be considered. However, it might be possible for cover under the existing Scheme to be extended to include the renovation, alteration, improvement, or repair of a “home” in a building that is greater than 3 storeys. Master Builders supports this option being explored.

Master Builders also supports the Government exploring the viability of developing a strata-building bond and inspections scheme like that successfully operating in NSW for high rise residential buildings (NSW bond scheme). The benefits of a bond scheme include a structured, proactive process that resolves building issues quickly and cost effectively, early in the life of the building.

Key features of the NSW bond scheme include:

- Developers of new residential and mixed-use strata developments (4 storeys or higher) must lodge a building bond with the secretary of the scheme before an occupation certificate is issued.
- The amount secured by the building bond is 2% of the contract price for the building work at a time just before the occupation certificate is issued (not the contract price at the start of construction).
- Mandatory proactive inspections and reports for defective building work are carried out by an independent building inspector who is a member of a strata inspector panel.
- The unused part of the bond is returned to the developer after 2 years of completion of the building work.

In reference to the last policy position stated above, the QBCC is responsible for both regulatory functions (licensing, compliance enforcement and dispute resolution) and the administration of the Home Warranty Scheme. The conflict of interest associated with the QBCC being both the industry regulator and the industry insurer continues to be an ongoing source of criticism.

To address this issue, an option worthy of policy consideration is for the Scheme to be administered separately from the QBCC. Such an approach would ensure decisions about licensing and directions to rectify building work (and the disputes that follow) have no regard to the financial impacts of those decisions on the Scheme.