Master Builders ACT
Submission to the ACT
Building Regulatory Review
February 2016

Contact Details:

Michael Hopkins
Deputy Executive Director
0418 984 594
mhopkins@mba.org.au

Contents

About the Master Builders Association (ACT)

Master Builders ACT was formed in 1925 and represents the interests of around 1,200 commercial builders, residential builders, civil contractors, suppliers/subcontractors and professionals. The MBA ACT is also a Registered Training Organisation and a Group Training Organisation.

We would like to acknowledge our five Sector Councils and all of our members that have contributed to this submission.

1. INTRODUCTION

Reform of the ACT building regulatory system is long over-due.

Over the last two decades the building industry has become more complex and more sophisticated. This has resulted in industry participants needing more specialised skills and working in much larger project teams, even for domestic housing projects. The industry is embracing new technology at a rapid rate, not just in computer aided design, but in construction methods including pre-fabrication and 3D printing.

The ACT requires a modern building regulatory system which, not only, catches up with recent innovation in the industry, but also keeps up with new and emerging trends.

The MBA ACT has been a long-term campaigner for increasing building standards for the local building industry. As the peak body representing local builders, contractors, and professionals, we recognise that the industry is changing and regulation needs to respond. Failure by government to reform building regulation will lead to greater occurrences of poor building quality, more consumer complaints, and ultimately a loss of public confidence in this proud local industry.

The MBA ACT outlined reforms to the building regulatory system in 2015 with the release of its "Master Builders ACT's Building Quality Policy Document". The key policy objectives of this document are:

1. *Advocate to the ACT Government for the establishment of the Building Regulatory Advisory Committee.*
2. *Implement targeted professional development training for MBA members and the industry. Support the implementation of mandatory professional development training for all construction industry licensed practitioners.*
3. *Advocate to the ACT Government for the establishment of a peer review of Class 2 buildings greater than two storeys.*
4. *Implement two-day annual training seminars delivered by industry professionals for members and industry practitioners.*
5. *Develop proforma checklists for MBA members using a technology based document management system for recording critical hold point inspection stages on projects.*
6. *Advocate to the ACT Government for establishing a review of the current building certification and inspection system.*

The MBA policy objectives, as with the recommendations in the government's Discussion Paper, set a broad policy direction. Further detail is required to expand each of the MBA policy objectives and proposals in the Discussion Paper, into workable and specific actions for implementation. We urge government to consult further with the MBA and other industry bodies regarding the detailed and specific implementation actions, and their priority for implementation. We also request that government consult extensively with the Building Regulation Advisory Committee (BRAC) regarding recommended reforms, priorities and draft legislation.

Finally, we would like to highlight the need for building regulation to be, to the greatest extent possible, consistent with other jurisdictions. The increased complexity of modern building projects and project teams means that many participants in the building industry work in multiple jurisdictions on a daily basis. This factor is more prevalent in the ACT because of our proximity to New South Wales. Nationally consistent building regulation is an important driver of productivity in the building industry.

We consider that now is an ideal time to move towards nationally consistent building laws with the Northern Territory and Victoria currently undertaking reviews similar to the ACT. Queensland has recently reviewed its building system. Further, the recent Federal Economics Reference Committee inquiry into insolvency in the Australian construction industry has recommended nationally consistent security of payment laws be introduced.

To assist in the review of our submission, we have adopted the structure of the government's Discussion Paper in making our submission.

2. PRIORITIES FOR ACTION

MBA welcomes the ACT government's commitment to reforming the building regulatory system. Such a reform is a vital part of improving building quality, giving community confidence in the local building industry, and in turn, protecting the many reputable operators in our proud local construction industry.

This is a wide ranging and in-depth review of the building industry. Such a substantial review of building regulation has not been implemented since the *Building Act 2004* was enacted. As such, it is important that the government strive for fundamental reform that stands the test of time for the next generation of Territorians, and not race for Band-Aid solutions that suit election timeframes.

The review's recommendations should be considered carefully and further discussion with the ACT community and the local building industry should occur, as well as through formal structures such as the Building Regulatory Advisory Council, before new legislation is introduced.

MBA's priorities for action focus on 5 key reforms:

1. **Get builders licensing right from the beginning**
   - Invest in more rigorous assessment of new license applications at the start of a builder's career, including an assessment a builder's financial capacity.

2. **Maintain standards**
   - Introduce a system of continuing professional development training for the construction industry.
   - Audit registered training organisations for quality training outcomes.
   - Introduce new measures at the time of license renewal to ensure skills and qualifications are being maintained.

3. **Accountability is key**
   - Introduce greater accountability for corporate builders to avoid phoenix activity.
   - Investigate additional license classes for building supervisors and key trade contractors.
   - Hold licensed contractors accountable throughout the statutory warranty period.

4. **Establish a fair, fast and low-cost dispute resolution process**
   - Increase the capacity of ACAT to deal with building disputes.
   - Reform security of payment legislation to ensure subcontractors and builders are paid on time.

5. **Make best building practice, normal building practice**
   - Introduce peer review of complex building projects at DA stage.
   - Increase the level of design documentation.
   - Support additional mandatory stage inspections.

3. DESIGN AND DOCUMENTATION

Minimum design documentation

Appropriately detailed and accurate drawings which form part of the building approval are the basis for quality building. The existing rules, which require minimum documentation for Class 1 and 10 buildings, have proved insufficient for the following reasons:

- Building certifiers have discretion to approve building applications without certain documentation. A system which allows discretion will inevitably result in some building certifiers taking a more risky approach in a drive to save time and money for their clients.
- There is currently no requirement for minimum documentation requirements for Class 2 to 9 buildings. This allows building certifiers to issue approvals, in some cases for substantial buildings, with no minimum legal requirement to document important building details or provide appropriately specified drawings to the builder.
- The minimum documentation required for Class 1 and 10 buildings is, in some cases, inadequate in that it doesn't require waterproofing detail, stormwater layouts, truss layouts, window details, expansion joints, external applied finishes and anti-corrosion measures.
- There is no safeguard to ensure drawings are prepared by registered architects or certified building designers.
- Minimum design documentation can currently be satisfied by providing 'typical' drawings which can be significantly different from the 'actual' building design. This is exacerbated by the Building Code of Australia (BCA) also including less 'typical' drawings to assist builders.

The MBA supports the government's intention to increase the minimum documentation required in building approvals, however we recommend these changes be implemented through expanding the current minimum document requirements, rather than discretionary guidelines. Higher quality documents and details will assist builders in applying appropriate methods during the project construction.

Specifically, we recommend that:

- The Minimum Documentation Requirements for Building Approval be expanded to include additional documents such as waterproofing detail, stormwater layouts, truss layouts, window details, expansion joints, external applied finishes and anti-corrosion measures.
- The "Required Information" as identified in the Minimum Documentation Requirements be expanded to call for specific plans, specifications and details of the actual construction method, as opposed to a typical construction method.
- New mandatory Minimum Documentation Requirements for Building Approval for Class 2 to 9 buildings be prepared.
- Design certificates for Class 2 to 9 buildings be required by the building designer(s) and sent to the building certifier prior to the building approval being issued.
- An Engineer's Certificate be required to certify the structural efficiency of Class 2 to 9 buildings against Part B of Volume 1 of the BCA. Liability for failure of the engineering design rest with the certifying engineer, rather than the building certifier.
- The Minimum Documentation Requirements (Approved Form AF2013-38) not allow building certifiers to exercise discretion by indicating documents are not required.
- Changes and new Minimum Documentation Requirements be prepared in consultation with the BRAC prior to being mandated.

Review of applications and approvals

Peer review of complex building design can be an effective method of resolving design conflicts at an early stage in the building design process, and can minimise the occurrence of design changes during the construction process. In some cases, building designers utilise peer review as part of their standard design process.

MBA is concerned about mandating a parallel peer review process in addition to the existing process of building design, approval and construction. Two parallel processes could create confusion about roles and responsibilities of everyone involved in the design process. A separate peer review process will also add unnecessary cost and potentially time delays to the building design process.

As an alternative, we support involving members of the ACT government's building team in the development assessment (DA) process for projects requiring a DA. The established process of pre-application meetings and DA assessment could easily be expanded to add a building professional to the team. The building professional would provide a preliminary assessment of projects for compliance with the BCA, provide an early assessment of alternative solutions, and identify specific minimum documentation requirements.

Recommendation:

- The proposed government peer review panel not be introduced as a parallel approval process in the form described in the Discussion Paper.
- A building professional (part of the ACT Government) be added to the DA assessment team to review the DA plans for compliance with the BCA and to identify high risk elements of the building which could be flagged on the DA conditions or result in additional Minimum Documentation Requirements.

4. STAGE INSPECTION AND ON-SITE SUPERVISION

Critical stages of work

To maintain quality standards at critical stages of work, the MBA supports the introduction of a checklist of critical construction items, similar to the stages of construction inspection requirements required by Building Certifiers. The checklist would be utilised on building sites to aid on-site operatives of the critical quality stages of construction that will be required to be certified.

To address this issue, we suggest recommendation 5 of the MBA Building Quality Policy be implemented, as follows:

- ***Develop proforma checklists for MBA members using a technology based document management system for recording critical hold-point inspection stages on projects.***
  The objective of this checklist is that this critical hold-point checklist is completed by the person doing the work and signed off by the next person in the onsite management structure. The checklist is project-specific in that it reflects the particular quality issues on the job and is changed on the job to include new quality problems as they are identified, e.g. the floor tiling cannot be completed until the waterproofing system has been inspected and signed off as compliant.

Mandatory stage inspections

In addition to guidelines for hold points at critical stages of work, we support the additional mandatory stage inspections:

- For Class 1 and 10 buildings – implement an additional mandatory inspection for water proofing (internal and external)
- For Class 2 and 3 buildings – the existing mandatory inspections that apply to class 1 and 10 buildings apply, plus the additional inspection for water proofing (internal and external).
- For Class 2 to 9 buildings – additional mandatory inspections be considered for pre-sheet, passive fire protection and water proofing (internal and external) to march Class 1 and 10 buildings.
- For all buildings – 'as built' drawings be required for stormwater as inspected by the appointed certifier.

Government auditing and inspections

As acknowledged in the Discussion Paper, ACT government building inspectors may audit and inspect building work at any time. In fact, government has a responsibility to the ACT community to ensure building laws and regulations are being complied with. An effective auditing regime would focus limited government resources towards the highest risk cases, by targeting building inspector's efforts as follows:

- In the design phase of projects (such as reviewing DA projects recommended above), and during construction, rather than focusing on responding to complaints after construction is completed.
- On building certifiers and builders with a history of complaints and offences, rather than auditing quality builders with a clear building record.
- Random audits in the first 2 years of a new licensee's career.
- Audits of all building projects for a limited period in response to a trend of complaints about a particular building issue, for example balcony design on apartment buildings.

Building audits should have an overall focus on improving building quality and educating builders where non-compliances are identified. Where audits are undertaken in response to a trend of complaints, audit campaigns should be run in conjunction with a communication campaign to provide builders an opportunity address issues of non-compliance.

Further, to assist government building inspectors, building certifiers should electronically forward mandatory inspection records to government within 2 days, rather than all at the completion of the project.

Designated Inspectors

The Discussion Paper proposes a number of measures aimed at improving building quality, in particular the quality of apartment buildings (Class 2 buildings). MBA believes the most effective way to improve building quality is through a combination of these measures, in particular improved training, greater assessment of new license applications and a more effective dispute resolution process.

The introduction of an additional layer of designated inspectors, while attempting to address an acknowledged problem, risks introducing a layer of complexity and additional red-tape which is not warranted if alternative measures are introduced.

The introduction of designated inspectors into the existing contractual and approval regime risks confusing roles, responsibilities and accountability. It could create greater uncertainty and disputes between multiple parties could in fact increase as a result of introducing designated inspectors.

MBA believes the *Civil Law (Property) Act 2006* provides sufficient existing protection to owners that purchase apartments off-the-plan. If these owners encounter problems with building defects, the developer or building regulator will have right to enforce rectification of the building defects under the building contract (between the developer and builder), or using statutory warranties provided by law. Other recommendations in this submission will provide addition protection if the building company 'phoenixes' within the statutory warranty period.

5. BUILDERS AND BUILDING SURVEYORS LICENSING

Introduction

In its common meaning, the granting of a *license* to a person (or company) authorises or permits the person (or company) to do something. The issue of a license implies that the person (or company) is suitably qualified, experienced and skilled to perform the task. The ACT public should be able to rely on the issue of a building license as proof that a builder can perform building work to the minimum standard. The issuance of a license by the government to a person (or company) is also important because it establishes a system whereby license holders can be held accountable when problems occur.

In the case of building works, the current ACT builders licensing regime doesn't meet this objective. The current licensing system has the following failings:

- Many building practitioners (most notably key trade contractors) can perform work without a license.
- Many building licenses have been historically issued to people who do not have the necessary skills, experience and knowledge to undertake the work permitted by the license.
- There are insufficient safe-guards in place to ensure that a licensee's skills and knowledge continues to meet the minimum standard over their career.
- The license application process does not require any demonstration of financial capacity to complete building works.
- The license application process does not require any demonstration that the applicant possess experience in business management or knowledge of dispute resolution processes.
- Regulatory tools which hold licensees accountable when problems occur either don't exist, or existing tools are not used.

Builders Licensing

Formal Qualifications

MBA agrees with the proposal in the Discussion Paper that formal qualifications for builders' licenses be limited to qualification that includes a majority of content and competencies in building or construction management. This would necessitate civil engineering, structural engineering and architectural qualifications being removed from the qualification requirements for Class A, B or C licenses in Schedule 1 of the *Construction Occupations (Licensing) Regulation 2004*.

Holders of architectural or engineering qualifications would not be disadvantaged from applying for a builders license if these changes were made, because people holding these qualifications could enrol in a building qualification and be assessed using a Recognised Prior Learning (RPL) method should they wish to change fields.

Changes made in August 2015 to require at least one year (of the two year minimum) building experience to be post-qualification are supported as a small step towards a more effective ACT licensing regime, however much more is required to ensure public confidence in the system.

Building experience

Schedule 2 (Mandatory building work experience requirements) of the *Construction Occupations (Licensing) Regulation 2004 Mandatory Qualifications Schedule* currently identifies the standard of competency for each license class. This schedule sets out a board range of competencies for each building class. MBA believes this schedule is sufficient to ensure applicants have necessary experience associated with each license Class.

In relation to question 3 on page 10 of the submission survey, applicants should be required to demonstrate a broad range of experience (as is currently the case), associated with the particular license class being applied for, however if this was to cover "all critical stages", these stages would need to be defined. For this to be considered further, government should define the "critical project stages" and further develop the method for verifying building experience.

MBA does not believe demonstrating experience across a range of project stages is as important as demonstrating building experience associated with the particular license class (as currently exists). In other words, it is more important that an applicant for a Class A license demonstrate they have building experience associated with structural principles associated with Class 1 to 10 buildings, rather than demonstrating experience across a range of project stages which may be on Class 1 buildings.

Use of Restricted Licences

Applying restrictions (either permanently or temporarily) are an effective way of managing new licensees, or licensees that don't fully meet minimum building experience requirements, or as a penalty for licensees that repeatedly commit an offence.

For new Class C license applications, consideration should be given to restricting the licensee to a maximum allowable turnover for a period of time. For example, a turnover limit of $1,000,000 for the first year, or a limit of 3 residential projects, would be an appropriate restriction for new entrants to the industry.

In relation to question 2 on page 10 of the submission survey, where applicants for new Class A or B licenses don't meet the building experience requirements, ideally those applicants should be given a lower class of license. For example, an individual that meets the minimum qualification requirements for a Class B license, but only has building experience on new housing construction, should be given a Class C license, not a restricted Class B license. When the applicant achieves 2 years of building experience in relevant to the Class B license, then an application to upgrade the Class C license, to a Class B license could be made.

Verification of experience

It goes without saying that claims of building experience on building license applications should be accurate, and should be verified by the building regulator. As with any legal document, an application for a building license must not contain false or misleading statements or give false or misleading information[1]. Where the building regulator has doubts about the accuracy or legitimacy of a claim of building experience, they can rightfully verify claims made by the applicant.

As part of the assessment of a license application, the building regulator should verify building experience claims through the following means:

- Phone calls to references and past employers (listed on the license application form).
- Review of documentation signed by past employers outlining the relevant experience.
- Use of license review panels to interview applicants to test the applicant's relevant knowledge and experience.

Further consideration could also be given to developing a log book to record building experience. This would assist apprentices and new entrants to the industry record and have verified relevant experience progressively, rather than attempt to document 2 years of experience at the time of making a license application.

[1] *Criminal Code 2002* (ACT) states that it is an offence to make false or misleading statements or to give false or misleading information – refer sections 337 and 338.

Pre-license assessment

Pre-license assessment has emerged as a potential method of validating the quality of license applications due to the large variation in the quality of ACT based training providers. MBA Group Training has grown to become one of the largest, most successful, and highly regarding local providers of construction industry training. While we believe our focus on quality training will serve the long term interests of our industry, not all training organisations follow the same approach. Our focus on quality has translated into apprentice retention rates (first year apprentices that complete their training with the MBA) of more than 90%. This impressive statistic is a benchmark other training organisations across Australia can only aspire to.

Unfortunately, there are other ACT based training providers that mass-produce building graduates with a 12 week training course. In the eyes of the ACT government graduates from the 12 week course are seen equal to a graduate of a 4 year MBA building apprenticeship - which includes training, mentoring, on-site building experience supervised by local industry leaders, and 2 years of practical experience.

The MBA is supportive of any effort by the ACT government to improve the quality of training providers and their graduates. A pre-license assessment through a combination of panel interview and exam would highlight those training organisations that produce quality graduates, and those training organisation's graduates who fall short.

Alternatively, the ACT government could work with the Australian Skills Quality Authority (ASQA) to deal with rouge training providers. Specifically, the ACT government could advocate for training quality to be included in audits carried out by ASQA.

An approach which focuses on improving training quality would allow government to better utilise its finite resources to assess license holders (either pre-application or for license renewals) based on a risk approach. Applicants who have demonstrated a history of poor building practice, who fall short on relevant building experience, or who are applying for licenses under the mutual recognition program, could be the focus on assessment.

The pre-license assessment should be structured as follows (questions 6, 7 and 8 of the Discussion Paper submission survey):

- Cover building licensee's obligations, building standards, quality management and supervision, and legislative requirements.
- Comprise a combination of subjective assessment (through a panel interview of industry experts – if required) and objective (through a written assessment).
- Written assessment should be conducted by the government as an impartial regulator. Panel interviews should be coordinated by the government and comprise industry leaders (either current or retired builders with recent and broad industry experience).

Corporation and Partnership licenses, Nominees and Supervisors licenses

MBA supports the continued operation of company and partnership licenses. We also support the continued requirement to appoint a nominee for each company or partnership license.

To provide greater accountability for company and partnership licensees, the MBA supports measures which provide a greater connection between the nominee supervisor and the company, such as requiring a nominee to be a partner, director or officer of the company.

We also support additional assessment criteria being considered when granting new company or partnership licenses. As a potential model to identify additional requirements for company or

partnership licenses, consideration should be given to applying criteria similar to those already considered for pre-qualification for ACT government works. These criteria currently consider:

- Identification of company structure and organisation structure,
- Identification of any other pre-qualifications held in other jurisdictions,
- A detailed financial assessment,
- Confirmation of company insurances, including public liability,
- Demonstration of past experience of the company and past experience and qualifications of directors and/or key staff, and
- Demonstration of workplace, health and safety (WH&S) management systems and business management systems.

The assessment of a company or partnership license would result in an approval to complete building projects up to a maximum project limit, based on the detailed financial assessment. These licenses should be reviewed annually to allow financial information to be reviewed on a regular basis.

In addition to company and partnership licenses (with expanded assessment criteria) and nominee licenses, we also suggest further investigation be undertaken into the benefits of a new license class for building supervisors. Supervisors manage the day-to-day operations of the building site, and are critical to building quality. This new license class should include minimum experience and qualifications, and be renewed annually. A potential model for further investigation is the supervisor license class currently operating in Queensland.

Recommendation:

- That company or partnership licenses be retained with additional assessment criteria, including financial assessment, experience and qualifications of directors and/key staff, demonstration of WH&S and business management systems.
- That the nominee supervisor be a single person (not multiple people who collectively meet the minimum qualification and building experience requirements).
- That the nominee supervisor be an officer, director or partner of the company.
- Investigation be undertaken into the benefits of introducing a new license class for building supervisor, including identifying minimum qualification and experience requirements, with the licensed supervisor to be subject to the same disciplinary action as the related company or partnership license.

Trade Contractor Licensing

As stated earlier, it is important that all participants in the construction industry can be held accountable for work in the ACT. This principle applies to developers, builders, architects and building designers, engineers and building surveyors.

In the ACT the main omission from the building licensing system is key trade contractors. With limited exceptions, trade contractors do not currently require a license to undertake work. This is out of step with some other Australian jurisdictions such as New South Wales and Queensland (which require trade contractor licenses for an extensive list of residential and commercial trades). Recently the Northern Territory government has sought to introduce licensing for all builders and trade contractors performing work over $12,000. There have been similar calls for licensing of trade contractors in Victoria. Some trade contractors operating in the ACT also hold contractors licenses in New South Wales.

It is important that trade contractors be licensed and held accountable for the quality of their building work, because the nature of modern day construction relies heavily on work that is carried out by trade contractors, under supervision from a builder. As the construction industry becomes more

complex and more specialised fields emerge, this trend would be expected to increase. Two issues will emerge from this trend:

- Firstly, the importance of builders to hold skills in business management, project management and supervision will increase. MBA has previously advocated for greater on-site supervision training for builders. The Senate Inquiry into Insolvency in the Construction Industry has recommended more business management training be completed by builders.
- Secondly, trade contractors will perform an increasing amount of building work. This will lead to disputes, building defects, non-payment issues which increasingly result from the actions of trade contractors, rather than builders. An effective means of resolving disputes involving trade contractors must be implemented.

Recommendations:

- That further investigation be conducted into the benefits of requiring key trade contractor licenses (for companies and individuals) be required for trade contractors undertaking work more than $12,000, and that minimum experience, qualification and license application processes be implemented similar to those in place for licensed builders.
- That a new license class be created for building supervisor (residential and commercial), with minimum qualification and experience requirements associated with supervision.

Renewals and ongoing eligibility

The MBA has long-supported greater scrutiny of license renewals to ensure license holders are maintaining the minimum skills that are tested at the initial license application stage through minimum qualification and building experience requirements. In addition to confirming that licensees have maintained relevant experience and qualifications, license renewals should require a higher level of assessment at renewal stage, if:

- The licensee has had a long period of inactivity,
- The license has demonstrated a track record of breaches of the Building Act or Regulation, or
- A significant change in the licenses financial capacity.

In addition to this review at license renewal time, the MBA recommends the introduction of a continuing professional development (CPD) scheme. CPD schemes currently operate in other jurisdictions and for other industries as a method of ensuring license holders maintain minimum knowledge requirements. The CPD scheme would require licensees to undertake regular quality training, provided by registered training organisations, and aimed at recognised deficiencies in current building practices, for example internal and external waterproofing, business management, or supervision.

Builders licensing - other considerations

The Senate Economics Reference Committee report into Insolvency in the Australian construction industry has made a number of recommendations which should be considered by the ACT government as part of this review of the building regulatory system.

While the Senate committee's focus was on insolvency in the construction industry, and the majority of recommendations are aimed at reducing insolvency, a number of recommendations highlight sensible improvements to builders licensing.

In particular, the Senate committee recommended the following in relation to licensing:

Recommendation 33
11.38 The committee recommends that each state and territory licensing regime contain three key requirements:

- *that licence holders demonstrate that they hold adequate financial backing for the scale of their intended project. This capital backing requirement should be graduated, with increased levels of proof required for more significant projects;*
- *that on registration, licence holders provide evidence they have completed an agreed level of financial and business training program(s), including principles of commercial contract law, developed in consultation with industry bodies; and*
- *that licence holders demonstrate that they are a fit and proper person to hold a licence.*

The committee made a number of other recommendations which, if implemented in the ACT, would improve the builder licensing system, building quality and provide greater consumer protection. The recommendations of the Senate Inquiry should be considered in conjunction with the submissions to the ACT Discussion Paper.

Building surveyors licences

The focus on building surveyors licenses is an important component of improving building quality. As the Discussion Paper states, building surveyors acting as certifiers must understand ACT-specific building and planning legislation.

An additional ACT-specific training course for surveyors from other jurisdictions intending to work on ACT projects is supported. The course should be sufficient to ensure surveyors are fully trained in ACT-specific building and planning legislation so that surveyors trained in other jurisdictions are equally skilled to ACT trained surveyors. The training should be rigorous enough to remove any incentive for ACT-based surveyors to short-cut the training requirements by obtaining necessary qualifications in other jurisdictions and then completing the proposed ACT training course.

Professional indemnity insurance

It is important to consider whether the proposal to require mandatory professional indemnity (PI) insurance for builders is intended to cover builder's professional advice, or also cover against defective building work. Many builders, particularly commercial builders, hold PI insurance because they are involved in design and construction projects. This PI insurance would protect the builder's input into the design process, but not against defective work. PI insurance to cover defective work, while available through a limited number of insurance providers, would add a substantial cost to building companies.

MBA considers that existing regulatory tools, with the addition of improvements recommended in this submission, provide government sufficient regulatory power to hold builders accountable for defective work, without the need for mandatory PI insurance. We support the continued use of PI insurance by some builders on a voluntary basis.

Owner builder licensing

MBA also suggests that a review of licensing rules for owner builders be carried out. Presently owners can undertake building work on Class 1 and 10 buildings with very limited training or accountability. We recommend the government investigate removing owner building licenses for Class 1 buildings, and restrict this form of licensing to Class 10 only.

6. CONTRACTS FOR RESIDENTIAL BUILDINGS AND BUILDING WORK

Standard contract provisions

Adding some more rigour to the legislative framework controlling residential building contracts is supported. Greater consistency, definition of common terms, and improved consumer protections will benefit all stakeholders involved in the building process.

Stages of Work

MBA is supportive of adopting common definitions for stages of work. Definitions for the following stages are suggested:

- Base Stage
- Frame Stage
- Lock-up Stage
- Fixing Stage
- Painting Stage
- Practical Completion

Stages of work are also important for builders because they represent hold points for payment. The nature of the building process means that builders carry the cost of supplying materials and providing labour at their cost until a payment stage is reached. For complex projects the time periods between stage payments can be many months. Between payment stages, builders would typically have to make multiple payments to suppliers and subcontractors. For complex projects, MBA is supportive of allowing contracts to vary the standard progress payment approach. For example, payments may be scheduled monthly, or additional payments stages may be added. It is important that this flexibility be retained.

Changes to the buildings or materials

Changes to the building or changes in building materials are items which should be specified in detail and form part of the contract of sale between the developer and owner. A dispute resolution process for these contractual disputes is required, and the suggestion to refer them to an alternative dispute resolution process, prior to expensive litigation, is supported.

Agency – residential owners

MBA is supportive of measures to help consumers understand the role of certifiers and their relationship with the builder. As the Discussion Paper states, the MBA has elected to remove the clause which would allow the client to authorise the builder to appoint the certifier from our standard domestic building contract. However, we remain supportive of an owner appointing a builder to make this appointment of their behalf.

To address this issue, we are supportive of legislation remaining unchanged, except for the addition of a contract warning statement or contract information statement[2] informing owners of their legal right to appoint a certifier of their choice.

Statutory warranties for residential building work

MBA is supportive of clarifying the applicability of statutory warranties for apartment buildings over 3 storeys, where there is currently doubt arising from the recent High Court decision (Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288). The existing statutory warranty provisions should apply to apartment buildings as proposed in the Discussion Paper.

[2] See example: http://www.qbcc.qld.gov.au/sites/default/files/Construction%20Management%20Contracts.pdf

In making this clarification, the MBA recommends the existing statutory warranty periods (2 years for defects in non-structural elements of the building and six years for defects in structure elements) remain unchanged.

Further, we support the retention of the existing home warranty insurance provisions, and recommend these not be increased beyond the current $85,000 limit, nor should they be increased to apply to residential buildings for medium-high rise buildings.

Maximum progress payments

The MBA is not supportive of capping progress payments to $85,000. For a common house contract of ~$400,000 there is typically payment of a deposit, 4 progress payments and a final payment. Payments at enclosed stage and fixing stage combined can often comprise 50-60% of the total contract price (more than $100,000 for each stage of a $400,000 contract). Many building contracts involve contract values far in excess of $400,000, and sometimes more than $1 million.

Capping progress payments at $85,000 would result in many more progress payments being required over the contract period, resulting in additional administrative costs for builders and for banks (who typically authorise each progress payment).

During the 13 year operation of the MBA Fidelity Fund, claims resulting in a maximum payment of $85,000 are rare. This indicates the benefits of aligning maximum progress payments with the maximum insurance limit would only apply to a very small number of claims.

MBA is aware of a limited number of disputes where an owner has paid for work yet to be completed. Where these disputes involve the insolvency of the builder, the owner may have an exposure of more than $85,000. To address these cases, we support further investigation of introducing greater protections in the Building Act to prevent builders invoicing for work not yet completed. If a builder was restricted from invoicing for work not yet completed, in the event of an insurance claim, the maximum exposure for the home owner and insurer would be for the work completed since the last progress payment.

Accountability for contractors

This section of the Discussion Paper deals with an important issue concerning the 'phoenixing' of companies to avoid accountability to owners of apartments, subcontractors, or to avoid disciplinary action from the building regulator. This is a national issue which has specific impact in the ACT in relation to apartment buildings.

MBA supports measures which would operate to act against the fraudulent 'phoenixing' of companies. Our national policy on phoenix company activity was communicated to the Federal Government at the time of the release of the Cole Royal Commission Report into the Building and Construction Industry[3].

At the time, Master Builders Australia supported a number of the recommendations that were made by the Royal Commissioner. Recommendation 106, in particular, related to the need for greater scrutiny of ASIC registers and better enforcement of the current law. The issue and recommendation is as follows:

> *There is evidence of persons associated with fraudulent phoenix company activity in the building and construction industry being appointed as directors of companies operating in the*

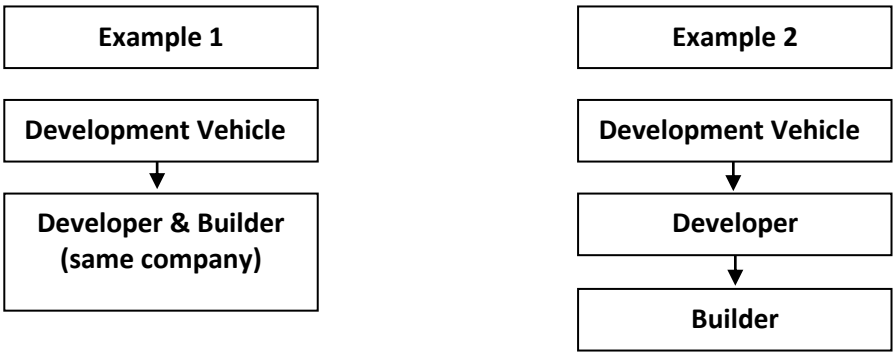
[3] Final report of the Royal Commission into the building and construction industry February 2003 http://www.royalcombci.gov.au/hearings/reports.asp

building and construction industry, although they are bankrupt and disqualified to act as directors, without being detected by the regulatory authorities.

The measures developed by the Australian Securities and Investments Commission to check all new company officers against the national Personal Insolvency Index and to check that current directors have not been declared bankrupt appear to address this issue and should be implemented without further delay[4]*.*

A number of recommendations, if implemented, from the Cole Royal Commission and the more recent Senate committee report on insolvency in the construction industry would help address this issue. Such measures include introduction of simple safeguards around identification of company director, underpinned by an identification process along the lines of the 100 point identity check required to establish a bank account, would enable the monitoring of director registration (including the detection of disqualified or fraudulent directors), the collection of data regarding director appointments over time (to establish patterns of director involvement in repeat business failures), and detection of possible fraudulent and phoenix activity by the Inter-agency Phoenix Forum and investors.

Further measures could be established by the ACT government to specifically address problems with the construction of apartment buildings, and the enforcement of statutory warranties after a building is completed and occupied. To explain these measures it is first important to understand that apartment buildings are generally developed and built using one of two company structures, as illustrated below:



Problems occur when the development company (in example 1) or builder (in example 2) voluntarily close within the statutory warranty period. In this case, body corporates or individual unit owners have limited opportunities to enforce the statutory warranties because the licensed entity no longer exists.

In order to avoid this problem, MBA is supportive of imposing a requirement on the licensed builder to pay a bond to cover potential building rectification if the licensed entity is voluntarily closed within the 6 year statutory warranty period.

[4] Final report of the Royal Commission into the building and construction industry February 2003 http://www.royalcombci.gov.au/hearings/reports.asp (Vol 8 Chapter 12 at 165)

7. PROJECT FUNDING, PAYMENT CLAIMS AND RETENTIONS

Section 5 of the Discussion Paper addresses the inter-related issues of project funding, payment claims and retentions. These issues have also recently been considered by the Federal Senate Economics Reference Committee's inquiry into insolvency in the Australian Construction industry. MBA ACT, MBA Victoria and Master Builders Australia made submissions to the Senate Inquiry. The inquiry also considered a 2012 Submission from MBA NSW to the "Inquiry into Construction Industry Insolvency in NSW" which also considered project funding and payment claims.

These submissions have consistently acknowledged that payment claims are an important, yet complex, problem that requires addressing.

Prompt payment is a critical issue for the construction industry, as delays in payment and non-payment can have a dramatic impact on the viability of the industry, especially on some of the smaller operators who are not in a financial position to sustain extended periods of non-payment.

The nature of the industry is such that payments lag behind work-in-progress. When a builder, owner, principal contractor, subcontractor or developer has financial problems and accounts go unpaid, these lags increase. Subcontractors and suppliers who continue to service a project, despite non-payment, can carry a large exposure to their clients. This has a flow-on domino effect as subcontractors also have debts to suppliers and their own workforce.

While subcontractors vary considerably in size and resources, the majority are small entities, and as with most other building industry participants, many subcontractors work on low margins. Consequently they do not have the resources, training or experience to absorb large debts or a series of losses.

Security of payments – progress payment claims

In 2015, MBA ACT conducted a survey of our members to better understand the potential problems that confront our industry. The results of this survey are summarised below.

The survey respondents were from various sectors of the industry and were both head contractors and subcontractors, as summarised below.

Question 1: What industry sector do you belong to?

Answer choices	Responses (%)	No.
Residential	36.84%	21
Commercial	40.35%	23
Civil	8.77%	5
Professional/Consultant	3.51%	2
Supplier	5.26%	3
Other	5.26%	3

Question 2: Are you predominately a:

Answer choices	Responses (%)	No.
Head contractor	40.35%	23
Subcontractor	56.14%	32
Other	3.51%	2

Question 3 asked *"How often have you experienced payment issues (non-payment, delayed payment or disputed payment) in the construction industry?"*

Around half (54%) of respondents reported non-payment, delayed payment or disputed payments were an issue for less than 25% of projects, or never. While around half (46%) of respondents reported they experienced payment issues on more than 25% of projects. While non-payment or delayed payment does not always lead to an insolvency event, and insolvency is not always caused by non-payment or delayed payment, there is obviously a connection between timely payment and solvency. Based on the results of this survey and consultation with members, payment issues in general are a significant issue for the whole of the construction industry.

Question 4 asked respondents *"Have you ever pursued legal action through the ACT's Security of Payment Act for a payment dispute?"*

Only 12% of respondents answered Yes, and only one respondent reported the legislation was effective in resolving the payment dispute. Around two-thirds of respondents either had no experience using the Security of Payment Act, or believed it would be ineffective, unreasonable and/or too complicated.

Question 5 asked *"Of the payment disputes you have been involved in, what was (in your opinion) the underlying source of the dispute?" (Respondents could indicate more than one reason)*

Respondents reported a wide range of reasons why payments were not made or delayed, including (note respondents could indicate more than one response):

- Late payments from head contractors (49.09%)
- Unreasonable or low valuations against the contact works (23.64%)
- Non-payment of approved variations for works completed (32.73%)
- Payment disputes relating to building quality or defective work (16.36%)
- Contractual pre-condition issues (10.91%)
- Completion time or program issues (12.73%)
- Contract disputes over the meaning of written terms (29.09%)
- Other (34.55% generally relating to contract matters)

<u>Subcontractor workshop</u>
MBA held a workshop with subcontractor members to discuss the results of the member survey in greater detail. The key feedback received from this workshop was as follows:

- In general terms participants reported that the incidence of payment disputes in the ACT was much less than in other jurisdictions where ACT members were active. This was possibly due to the fact the ACT is a smaller jurisdiction where construction industry participants were well known to each other and have good working relationships, making communication easier.
- Participants reported that where there was a high degree of two-way communication between head contractors and subcontractors, payment disputes were generally less, were resolved quicker, and were more often resolved without litigation.
- Participants reported that industry associations (such as the MBA) played an important role in minimising the incidence of payment disputes. Industry associations play a role in educating members about security of payment legislation, act as a mediator to help resolve payment disputes, and provide advice to members to help resolve disputes. These services were seen as valuable for members.
- In regards to ACT Security of Payment legislation, most subcontractors preferred to only use legislation as a solution of last resort. Reasons for this include the costs and time involved, and

the relationship damage that would likely occur with the other party if payment was pursued through a legal process. Members that had attempted to use the ACT Security of Payment legislation to resolve payment disputes found definitions in the Act unclear and the legislative process complex and difficult to follow.

Participants also discussed the use of trust accounts as a possible solution which is discussed in the following section.

Retentions and building project accounts

The MBA NSW 2012 Submission to the "Inquiry into Construction Industry Insolvency in NSW", considered in detail the use of project accounts and trust accounts as a potential solution to payment disputes. As the MBA NSW submission notes, in July 1996 a comprehensive analysis of the consequences attached to introducing trust arrangements into Australian construction contracts was undertaken by Price Waterhouse for the then National Public Works Council Inc, as part of proposed means to improve the flow of funds to subcontractors in particular (please see www.apcc.gov.au).

The conclusion at the time was that the complex commercial and administrative burdens and obligations of trusts would be likely to prevent their implementation on a widespread basis throughout the building and construction industry.

Based on specific feedback from MBA ACT members, while a small group of subcontractors have reported that they support the use of trusts, the overwhelming view from all sectors of our membership is that trusts will not help the payment of money throughout the contractual chain, for three main reasons.

Firstly, trusts place a significant administrative burden on builders and subcontractors. This additional cost will inflate the cost of building. An example that was discussed at our subcontractor workshop involved a series of trust accounts being setup for each subcontractor (one for progress payments, one for disputed amounts) working on a single project. For a typical small commercial project, the head contractor may employ many dozens of subcontractors, and those subcontractors would in turn employ sub-subcontractors. In this example more than 100 separate trust accounts may be required for one project, with each payment requiring approval from the subcontractor, the head contractors, and the financier. For a construction project that processes dozens of invoices on a weekly basis, the addition of trust accounts into the process would quickly strangle the project in administrative red tape, and most likely result in slower payments.

Secondly, the use of trust accounts assume that future progress payments can be accurately determined so that the next progress payment amount is paid in a trust account to be used to pay subcontractors and suppliers. This assumption does not recognise how building projects are actually priced and delivered. For example, not all contracts have fixed progress payments. Some works are completed on an agreed price per square metre (eg. of paving) or price per cubic metre (eg. of earthworks). It is simply not possible to accurately estimate the future progress payments to be paid into the trust, as assumed by proponents of trust accounts.

Thirdly (and probably of most importance), trust accounts will not result in contractors being paid any quicker. The assumption behind paying progress payments into trust accounts is that funds to pay contractors would otherwise not be available. However, as the MBA survey results suggest, there are a range of reasons that drive non-payment, including disputes about contractual terms, late payments issues and administrative and quality issues. Trust accounts would not resolve such disputes and may even prolong payment where there is no dispute.

For most contractors who pay claims on time, trust accounts only add an additional level of administration into the payment process before contractors are paid. This may in fact have the reverse

effect and lead to payments being further delayed because of the additional administrative process. Where there is a payment dispute and contractors are not immediately paid until the dispute is resolved, the same dispute resolution time frames will apply under existing legislation. MBA cannot find any evidence suggesting that the use of trust accounts will result in faster payments, fewer payment disputes, or fewer insolvency events.

Senate Inquiry Recommendations

The Senate Economics Reference Committee handed-down its report in December 2015, including 44 recommendations the committee believes would overcome many of the challenges the construction industry faces in dealing with its unacceptably high rate of business insolvency.

In relation to project trust accounts, the committee recommends:

> *Recommendation 29*
> *10.55 The committee recommends that commencing as soon as practicable, but no later than 1 July 2016, the Government undertake a two year trial of Project Bank Accounts (PBAs) on no less than twenty construction projects where the Commonwealth's funding for the project exceeds $10 million.*

Given the recommendation of the committee and considerations by the Federal Parliament currently underway, we recommend the ACT government allow the Federal government to consider the committee's recommendations, before progressing with any ACT-specific proposals in relation to project trust accounts.

The committee also makes a number of other recommendations, including (but not limited to) additional training and education for industry participants in relation to business management and security of payment laws. We are supportive of these recommendations and suggest the ACT government further consult with industry on the full list of committee recommendations to identify which could be progressed within the ACT.

Other relevant matters – payments from home owners

An important issue affecting small subcontractors and residential builders is securing payments from home owners. Many of our members are small subcontracting businesses that work directly for home owners performing maintenance work, repairs, small renovations and the like, or are residential builders who work directly for home owners. Based on feedback from our Residential and Subcontractor/Supplier Sector Councils payment from home owners is a major issue for this sector of the industry. The current provisions in the ACT Security of Payment Act apply to owner/builders issued with a license under the Construction Occupations Licensing Act, however, these provisions do not extend to owner/occupiers.

We recommend any review of the ACT Security of Payment legislation should strongly consider including owner/occupiers being subject to the provisions of the Act where they enter into contracts with builders.

Market manipulation in the commercial industry

As detailed in the Final Report of the Royal Commission into Trade Union Governance and Corruption, there are significant levels of union-coordinated market manipulation in Canberra's commercial construction industry, a matter now being probed by the Australian Consumer and Competition Commission (ACCC).

In a market where builders are essentially management teams, with most physical construction undertaken by specialist contractors, the ACT CFMEU is extremely effective in determining the

allocation of work by builders. For fear of site disruption, builders tend to award contracts to those businesses which are nominated by the union, i.e. those contractors which have met union demands. Those demands include pattern ACT CFMEU enterprise agreements (EBAs) payment for union memberships, 'donations' to the union or related entities, or (in the case of one former ACT CFMEU official) even cash payments. Additional pressure is also placed on subcontractors through intimidation.

The evidence of these tactics cannot be denied. More than fifty witnesses gave evidence in Canberra about threats by the ACT CFMEU to exclude them from the commercial construction industry. Consider the testimony of a small formwork company-owner's evidence before the Commission. He was told by a CFMEU union official to sign the union's pattern EBA as "this is the way the industry is going… we will take control of the jobs. We will … tell… you which ones you can and can't go on", before offering "other ways" to come to an "arrangement", including "donations" or payment for memberships. When he said he couldn't afford these demands, the official said he "didn't give a f*$k about small businesses" and ordered a builder to black-ban the company and engage a union-endorsed rival.

In an AFP phone tap played before the Commission, a union official told an employer that, if he didn't pay for some more union memberships, the union would ensure that the company "won't be doing any work on commercial sites" – effectively a threat to put the company and its employees out of work.

Following the Royal Commission, three ACT CFMEU officials have been referred to Fair Work Building and Construction for allegedly coercing employers to pay for union memberships, with one official referred for prosecution for allegedly taking adverse action against an employee because they did not want to join the union. An ex-ACT CFMEU official is also on criminal blackmail charges for allegedly extorting more than $200,000 from contractors.

Research undertaken by MBA suggests that unlawful exclusion form the marketplace is widespread. In a 2014 survey of approximately 100 members:

- 58 per cent reported threats by the ACT CFMEU to exclude them from the market if they did not agree to the CFMEU's pattern EBA;
- 32 per cent reported being asked to make 'donations' to the ACT CFMEU or related business entities in exchange for 'industrial peace', with 7 reporting being asked for what they considered to be bribes;
- 51 per cent reported being told by the ACT CFMEU that they could not perform work unless their employees / subcontractors joined the ACT CFMEU;
- 71 per cent reported verbal intimidation by the ACT CFMEU; and
- 41 per cent of approximately reported physical intimidation by the ACT CFMEU.

The effect of these behaviours of the solvency of companies which do not meet union demands is obvious – they are excluded from the commercial market. For those companies that 'pay the price' of entering the commercial market, the various on-costs associated with the pattern EBA (which requires payments to union entities and imposes a range of restrictive work practices) and other union demands diminishes their competitiveness.

Nevertheless, over the short-to-medium term, such contractors are able to prosper despite their higher costs, because competition from companies with lower costs is suppressed by the ACT CFMEU, at times with employers' active cooperation.

In a series of text messages aired before the Royal Commission, a contractor informed a union official that a competitor (one without a pattern CFMEU EBA) had won a contract and that the official should

"hammer him". A phone tap revealed the union official as having told the competitor that he "can't be going around pricing", with the official saying: "I need to give you rates, I need to get you an EBA if you want to do commercial [work] … we've … got a system in place and can't have you f$*kin' disrupting it."

The effect of the ACT CFMEU's industrial tactics over time leads to the creation of union-coordinated construction cartels, whereby the market is effectively shared amongst union-nominated contractors, who win the bulk of contracts from builders. This tends to entrench market dominance of larger businesses – those who can afford the union's demands. Emerging small-to-medium sized (and often more innovative) competitors are excluded from the market, unless they submit to labour costs that may be unaffordable at their economy of scale.

Over the longer term, the restricted competition in the sector pushes up construction costs and impedes growth. This is the established pattern of cartels: over the short to medium term, they produce super-profits, but over the long term, their inflated costs reduce demand. The suppressed competition resulting from such practices is a major factor in inflating construction costs, which is hard to calculate but has been estimated at between 20 to 30 per cent.

As prices reach 'breaking point' and consumers look to more affordable accommodation, office and retail space, competitors bearing artificially inflated costs become extremely exposed in the event of free-competition. Those companies with lower costs tend to increasingly win work as builders turn to cheaper alternatives in order to maintain their market share.

MBA considers that market manipulation is a significant factor restraining the growth of the commercial construction sector, with obvious impacts on the liquidity of those which are able to compete, as much as those which are excluded from the market. This operates vertically to reduce demand and drive insolvency events, while the distortions in the sector create an environment in which boom / bust cycles are exacerbated.

MBA welcomes the ACCC investigation into market-sharing arrangements and possible price-fixing in the commercial sector. Evidence of price-fixing is perhaps the clearest indication that unsustainable costs are being borne by competitors, who are effectively forced to pay a variety of rents in order to survive and must then cooperate to enforce price floors to win work.

Reforming the sector to eliminate these kinds of market distortion is 'low hanging fruit' for increasing economic activity in Canberra, which is one of the surest ways to reduce insolvency events.

Recommendations:
In relation to project funding and retentions, we recommend as follows:

- The ACT government working with other State and Territory governments and the Australian government to review the recommendations from the Senate committee, with a particular focus on the committee's two major recommendations on project trust accounts and nationally consistent security of payment laws.
- Subject to agreement by the Commonwealth and other States/Territories, the review focus on trust accounts for retention amounts only, where retention amounts could be held in a single trust account established by the builder (or subcontractor, for retentions held for their sub-subcontractors). The single trust account would be subject to regular audit by a regulator and amounts quarantined in the event of insolvency.

In relation to security of payment:

- MBA is supportive of establishing a maximum period in a contract for payment of a progress payment to a subcontractor once a claim has been made (question 10 of the survey). The maximum period for payment should be 45 days, allowing 15 days to make a claim and 30 days for payment.
- MBA is supportive of amending legislative so that any form of request for payment in writing is deemed to be payment claim. This will remove any discretion from subcontractors to decide if a request for payment is being made as a formal payment claim, or not. Criteria would need to be established to clarify that only one payment claim could be made for each progress payment, and the definition of "payment claim" would be needed to avoid confusion.
- Further investigation be undertaken into making requests for release of retention claims to be covered by Security of Payment laws.
- That security of payment legislation be expanded to make home owners subject to these laws in the event of a payment dispute between owner/occupiers and builders.

8. ALTERNATIVE DISPUTE RESOLUTION – RESIDENTIAL BUILDING

The MBA agrees with the Discussion Paper's analysis of the limitations of the existing processes. The main issues, from the MBA's perspective, are:

- One-way scope of complaints process: The licensing complaints process deals only with allegations of defective work and not the (often related) issue of an owner's failure to pay. There is presently no forum for builders to seek resolution of payment issues outside the courts[5].

- Processes are slow: Both the complaints process and the litigious processes are slow. Ideally defects disputes ought to be resolved within weeks or months, not years. The longer the dispute brews, the more the parties become entrenched in their positions. Further, where the builder is in breach, the ultimate loss caused by these breaches is magnified due to delay in determining liability. For apartment complexes, the owners corporation has obligations to unit owners for damage caused to apartments, which may mean that instead of finding a solution to the underlying issue quickly, rectification 'band aids' are used to comply with demands of unit owners until the builder's liability is determined. For single dwelling construction, a dispute about defects during construction usually means that payment stops and work stops. The owner may be unwilling or unable to complete construction with another builder until the dispute is resolved, causing the owner to claim the cost of alternative accommodation, interest, and other costs whilst the site sits idle. These costs may be completely disproportionate to the cost of rectifying the original defect.

- Processes are expensive: Due to the need for expert evidence in defect disputes, and what are usually complex contractual interpretation arguments about defining the scope of work, the litigious process is difficult to navigate without legal advice. That advice is often prohibitively expensive on disputes of less than $100,000. Whilst the ACAT is significantly more user-friendly, its jurisdiction is only $10,000. Most building defect disputes exceed this jurisdiction. For disputes under $10,000 the cost of preparing the necessary expert reports (even if no lawyer is engaged) can quickly outweigh the amount in dispute. Because ACAT is a no-costs jurisdiction, those costs cannot be recovered.

The MBA supports an ADR model (eg. arbitration, expert determination, neutral evaluation, conciliation or mediation). However, the MBA does not support the 'one size fits all' 'ABDR' model proposed by the Discussion Paper. Home building disputes, even if limited to only residential building disputes, can be as small as a $2,000 dispute about uneven kitchen tiles in a home, or as large as multi-million dollar systemic waterproofing issue involving 300+ unit apartment owners. They may involve only two parties, or they may involve many parties with differing interests. They may be about technical specifications / building code issues, or statutory or contractual interpretation, or the legal effect of the representations made by (or conduct of) the parties during the course of the works.

To the extent that the proposed ABDR may be structured to allow access to different types of ADR for different disputes depending on the election of the parties, warring parties may never agree on the ADR type. To the extent that the proposed ABDR is a mediation model only, this is likely to be inadequate to deal with the significant category of disputes where the contract has been terminated and each party has a claim against the other for a significant amount: the builder for unpaid work and loss of profit; and the owner for alleged defects and cost of engaging another builder. Such disputes

[5] Noting that extending security of payment regime to residential building may go some way towards ameliorating this.

are usually entrenched from the outset and require an independent binding determination of who is at fault (i.e. in breach of the contract) before a resolution on quantum or rectification can be achieved.

There are also issues if the specific type of ADR used is to be pre-determined by reference to a simple monetary limit. A monetary limit based on the amount in dispute would be difficult to administer because it is often the issue of the cost of rectification which is most hotly contested. A monetary limit based on the contract value would not be appropriate because it may mean small value disputes on large value contracts (or vice versa) are forced into an inappropriate form of ADR.

The MBA is of the view that the appropriate form of ADR is dependent on the dispute, and the body best placed to determine that (in the absence of agreement) is one of the existing judicial bodies. The increased adoption / incorporation of ADR into the existing justice system is supported by the findings of the Productivity Commission, Access to Justice Arrangements (Inquiry Report No 72, 5 September 2014)[6]. Bringing an ADR regime under the umbrella of the existing justice regime has the benefits of:

- Cost and educational savings – the courts will be the 'one stop shop' for the resolution of disputes.
- Early identification of the issues in dispute which are suitable for resolution by an ADR method, and selection of that method and appropriate ADR professional.
- Expert witness / expert decision-maker accountability – experts sign up to obligations to the court with respect to impartiality and can be personally liable for breaches.
- Swift resolution of any legal challenge to the validity of the ADR process or any problems caused by one party failing to cooperate with the process.
- Time savings – ADR can be incorporated as an early step into the court process rather than being a stand-alone preliminary step run by a separate organisation. Parties will not be required to have a pre-court mediation and then attend a further court-ordered mediation (which is increasingly being adopted).

The MBA supports an ADR model which:

- Allows for an initial site inspection by an appropriately qualified technical expert to provide a non-binding but independent view and offer solutions for resolving the issue, and provides information about next steps (similar to the regime implemented by the Office of Fair Trading in NSW, and similar to the role played by the MBA in resolving complaints against members).
- Creates a new division within ACAT specifically for residential building disputes, similar to the home building division within the NSW Civil & Administrative Tribunal which deals with applications lodged by home owners, traders and insurers concerning residential building work up to the value of $500,000. This division would need to:
  - be user friendly such that it can be commenced without the need for lawyers (eg. simple forms, checklists, process diagrams).
  - be appropriately staffed with tribunal members and mediators who are skilled in resolution of building matters;
  - require the parties to attend an early mediation (unless the ACAT determines it is inappropriate) before significant costs are incurred;
  - adopt standard directions which require the parties progress the matter swiftly;
  - use a single court-appointed expert referee to determine technical elements of the dispute as early as possible to ensure issues are narrowed;

[6] See also: Angela Browne SC 'Reforms to civil justice: Alternative dispute resolution and the courts' (2015) 39 Australian Bar Review 275; Lord Jackson, 'The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review' 11th Lecture in the Implementation Program, RICS Expert Witness Conference, 8 March 2012; Michael Legg, Madeleine Hakin, Jacqueline Cahill 'ADR and the Federal Court of Australia' (2014) 1(1) ADR 8, 10.

- allow costs orders at the discretion of the Tribunal.

- Alternatively (or perhaps additionally with respect to non-residential building disputes), creates new divisions in each of the courts with specific rules appropriate to building disputes (similar to Victorian Supreme Court Technology, Engineering & Construction list, and the NSW Supreme Court Technology and Construction List).

No matter which forum is chosen for the administration of ADR, the MBA supports facilitating increased use of ADR for building disputes.