

SUBMISSION BY THE Housing Industry Association

to the

Transport, Housing and Local Government Committee Inquiry

into the

Operation and Performance of the Queensland Building Services Authority

September 2012

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.



Executive Summary

HIA contends in this submission that the operational model of Queensland Building Services Authority is fundamentally flawed. The QBSA's one-stop-shop structure with its multiple functions creates significant opportunities for internal conflicts of interest thereby exposing both the customers of the building industry and licensees to unjust outcomes from their dealings with the Authority.

This submission also suggests that the QBSA's role in the broader context of the regulatory framework in which the building industry operates is in need of significant overhaul due to the duplication of the QBSA's interests with other regulatory bodies. A policy body that can take a "whole of Government" approach to the industry's regulation is recommended.

HIA recommends that the licensing, dispute resolution, insurance and regulation of contracting functions need to be separated with the QBSA's role restricted to the management of the licensing system.

Most importantly there is an urgent need for the dispute resolution functions of the QBSA to become part of a specialist building division of the Queensland Civil and Administrative Tribunal that is funded by the QBSA's licence fees. Building disputes currently cannot be resolved in their entirety by the QBSA leading to frustration, delay and cost.

Moving dispute resolution under a judicial umbrella will allow the parties to a dispute to "have their day in Court", provide a solution to all of the issues in dispute and remove any potential for political interference in the process.

The submission recommends that the QBSA's warranty insurance functions need to be renamed to better reflect their limitations, be administered by the private sector and have its scope extended to provide coverage for homes in retirement villages and homes which are increasingly being manufactured off-site.

HIA is also recommending many improvements to the detailed operations of the QBSA's licensing and contract regulation functions to improve the fairness of these processes.



1 Regulation of the Building Industry in Queensland

The building industry in general and the home building industry in particular are heavily regulated sectors of the Queensland economy. The Queensland Building Services Authority (QBSA) is just one of a number of agencies which regulate the industry. Other agencies include Building Codes Queensland, local government and the Plumbing Industry Council. Each of these regulatory agencies not only administer the regulations but also have a role in the development of policy and associated changes to the regulations.

Decisions on the interpretation of the regulations are made by the Queensland Civil and Administrative Tribunal, the Courts and the Building and Dispute Resolution Committee. The roles of each of these agencies can be summarised as follows:

(i) Who can build

The QBSA:

- manages the licensing of all building and trade contractors in both the home and commercial building sectors including the setting of the eligibility requirements to hold a licence;
- manages the system for disciplining poorly performing licensees;
- issues licences to approved owner-builders; and
- licenses the building certifiers who approve building plans and provide building approvals for completed work.

The Plumbing Industry Council accredits individuals to undertake plumbing work.

(ii) How homes can be built

Building Codes Queensland (BCQ)

- controls the technical aspects of how buildings are built through the Building Code of Australia and the Queensland Development Code; and
- manages the policy environment through which the Building Certifiers operate.

The QBSA

- influences "acceptable industry building practices" especially in those areas where building codes do not exist through its inspection functions, mainly where there are disputes, and through its insurance policies and education programs.
- controls the contractual relationships between home owners and contractors, and also among contracting entities; and
- administers the licensing regime for the certifiers of building work.

Local Government

- influences what (and where) homes can be built through their planning schemes; and
- · approves plumbing work associated with buildings.



(iii) When something goes wrong

Where disputes arise about the work undertaken on a home building project:

The QBSA will become involved if the home is completed.

The QBSA;

- has a dispute resolution service that will inspect work and if necessary issue "directions to rectify" to the principal contractor who undertook the work;
- manages an insurance scheme that will rectify defective or incomplete home building
 work within the warranty period where the original contractor is either unable or unwilling
 to fix the problem, for example where the contracting business has failed;
- can issue demerit points and fines against contractors and remove or limit a contractor's licence; and
- administers the Building and Construction Industry Payments Act (BCIPA) which
 provides for interim adjudication of payment disputes on building contracts, except
 between home owners and contractors.

BCQ;

- Can provide technical interpretation of home building codes and standards;
- Resolve a limited range of disputes through its Building and Development Dispute
 Resolution Committees which can settle disputes among local governments, building
 certifiers, contractors and home owners around building and planning code issues.

Queensland Civil and Administrative Tribunal (QCAT);

Provides a judicial forum for resolving disputes between

- home owners and contractors;
- contractors and the BSA; and
- different contractors.

The Courts;

Resolve appeals against QCAT decisions and hear other disputes that are outside QCAT's jurisdiction or where both parties agree.



2 Assessment of the QBSA's Role in the Regulatory Framework

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The current arrangements see the QBSA performing the roles of licensing businesses in the industry, managing disputes, providing insurance for consumers and setting the policy for regulation of building contracts and dispute resolution. Additionally the QBSA also controls the licensing of building certifiers.

The perceived advantage of this broad role for the QBSA is that it can provide a "one-stop-shop" for both consumers and contractors. But this is also its fundamental weakness – the QBSA is caught trying to be all things to all people. For the most part the QBSA is able to successfully juggle these conflicts but there is a sizeable minority of cases where the internal contradictions in the QBSA's role inhibit good outcomes. There is no other jurisdiction in the country that combines all of these functions into the one body.

The QBSA faces a number of challenges in relation to equity for the parties, perceived bias from both consumers and contractors and confusion by the public over their role. QBSA inspectors are constantly put in a position by consumers and contractors expecting them to address contractual/legal matters which the QBSA is unable to do. From the contractor's perspective they may be being told by the QBSA that they have to repair defective or incomplete work even though their client may owe the contractor tens of thousands of dollars. If the work is not repaired then their licence is at risk of cancellation.

To an extent these problems of perception by consumers in particular are compounded by the QBSA's own marketing of its role. Its message is in essence "if you have any problem with a building job the QBSA will sort it out". While overtly helpful in its messaging this approach leads consumers to have unrealistic expectations of what the QBSA can and will do for them. With consumers being able to access the QBSA's services at no cost it should come as no surprise that there is a high level of demand for those services. HIA understands that a majority of the cases that are brought to the QBSA by consumers are for relatively low value issues around the quality of finish of building work, and that these issues consume a major portion of the QBSA's resources.

The one-stop-shop approach of the QBSA also creates tensions between the policy development and the implementation functions. There is a tendency for policy changes to respond to the needs of those administering the regulations rather than taking a more holistic and strategic view. The overlapping responsibilities between the QBSA, QCAT and BCQ also cause anomalies to arise in administration of the regulatory environment and in policy development.

The one-stop-shop structure of the QBSA creates the perception and the potential for conflicts of interest to arise among its functional areas. From the perspective of licensed building and trade contractors there is a perception that the QBSA acts, especially when resolving disputes, to use its licensing powers to coerce contractors into resolving disputes that they would otherwise contest. From a consumer's perspective there is always a suspicion that the QBSA will err on the side of saying work is not defective with a view to protecting the insurance scheme from potential claims.

The inherent conflict of interest in the QBSA's one-stop-shop model is most apparent during its handling of the failure of building companies. The QBSA will often know well in advance when a building business is at risk of failing but does not act on the business's licence in the hope of being able to become involved in the management of the company to manage down its warranty insurance risk. But while the QBSA does this it continues to advise consumers that the business is licensed and could therefore be used with confidence even though the company



might not be meeting the QBSA's own financial requirements to hold a licence. Acting in this way exposes more consumers to having to deal with the consequences of their builder's failure even though it might result in lower claims on the QBSA's insurance scheme.

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Another less dramatic example of this conflict has recently been seen with the QBSA's contractor education program. Faced with declining attendances at these events the QBSA has, in HIA's view inappropriately, used its licensing function to support these events by suggesting on the invitation that "Attendance at this seminar will be noted on your BSA Licence File". The implication is that not attending the event could be detrimental to the contractor's licence notwithstanding that there is no regulatory reason for keeping this information on file.

Recommendation: It is because of these fundamental conflicts built into the current one-stop-shop structure of the QBSA that HIA recommends that the functions of the QBSA need to be separated.

The following sections of this submission describe in more detail how the functions of the QBSA in licensing, dispute resolution, warranty insurance, regulation of contracting and education should be reallocated and refined.



3 A New Framework for Regulation of the Building Industry

Over-riding these proposals for reallocating the QBSA's functions there is a need at the highest level to separate the administration of regulations impacting on the industry and the development of policy around those regulations. HIA suggests that the separation of these responsibilities between WorkCover and Q-Comp is a good model to pursue whereby Q-Comp is responsible for oversight of the broader system and WorkCover administer the day to day operations of the workers compensation business. In this model the policy development functions of the QBSA and BCQ would be combined into one body - Building Regulation Queensland which should be directed by an independent board.

Recommendation: That the policy framework for the building industry's regulation should be managed by one body Building Regulation Queensland, and governed by an independent board.

Put simply HIA's recommended approach is to reallocate the QBSA's functions so that

- contractor licensing functions remain with the QBSA;
- dispute resolution moves under a judicial umbrella in a specialist division of QCAT that is funded by an allocation from the QBSA licensing fees;
- warranty insurance to have claims managed by the private sector and underwriting to be managed by the Treasury's Insurance Division;
- consumer education to be undertaken by the Office of Fair Trading; and
- regulation of contracting relationships to be developed by the newly established Building Regulation Queensland.

This recommended re-shaping of the regulatory environment is not revolutionary. The table below summarises how these functions are managed in other States and shows that in many jurisdictions the functional separation that HIA is recommending is already in place.

Regulation of Building in Australian States and Territories

	Regulation of Contracting	Policy	Licensing	Home Warranty Insurance	Building Disputes		
QLD	Building Services Authority (BSA)	Building Codes Queensland (BSQ) & Building Services Authority (BSA)	Building Services Authority (BSA)	Building Services Authority (BSA)	Building Services Authority & Queensland Civil and Administrative Tribunal (QCAT)		
NSW	Office of Fair Trading	Building Regulations Advisory Council (BRAC)	Office of Fair Trading	Private Broker (Government underwritten)	Consumer, Trader and Tenancy Tribunal (CTTT)		
VIC	Building Commission (VIC)	Department of Planning and Community Development (DPCD), Building Advisory Council & Building Regulations Advisory Committee (BRAC)	Building Practitioners Board (VIC) under Building Commission (VIC)	Private Broker (Government underwritten)	Victorian Civil and Administrative Tribunal (VCAT)		
WA	Building Commission (WA)	Building Commission (WA)	Building Commission (WA)	Private	Building Disputes Tribunal		
SA	Office of Consumer and Business Affairs (OCBA) transitioning to Consumer and Business Services (CBS)	Building Rules Assessment Commission (BRAC)	Office of Consumer and Business Affairs (OCBA) transitioning to Consumer and Business Services (CBS)	Private	Consumer and Business Services (CBS)		
TAS	Workplace Standards Tasmania	Workplace Standards Tasmania	Workplace Standards Tasmania	N/A	Department of Consumer Affairs		
ACT	Planning and Land Authority (ACTPLA)	Planning and Land Authority (ACTPLA)	Planning and Land Authority (ACTPLA)	Private	Civil and Administrative Tribunal		
NT	Building Advisory Services	Building Advisory Committee	Building Practitioners Board (NT)	Govt- planned move to QLD style system	No Tribunal – court only		
	HIA Proposed Model for Building in Queensland						
	Regulation of Contracting	Policy	Licensing	Home Warranty Insurance	Building Disputes		
QLD	Building Regulation Queensland (New)	Building Regulation Queensland (New)	Building Services Authority (BSA)	Private Broker (Government underwritten)	Specialist Building Division of QCAT		



What Building Work Should be Regulated?

The QBSA regulates building work valued at more than \$3,300. Contracts to do building work above this threshold must be entered into by a licensed contractor and must be insured with the QBSA's warranty insurance scheme.

HIA contends that too much of the QBSA's resources are devoted to dealing with issues that are relatively minor and which could be adequately dealt with elsewhere. The licensing, dispute resolution and warranty insurance activities of HIA's recommended regulatory framework should be focused on ensuring the structural quality of buildings rather than worrying about standards of finish or non-structural work.

QCAT currently has jurisdiction for consumer complaints and debt disputes for matters up to \$25,000 in value. HIA recommends that the current QCAT consumer and trader dispute processes be the avenue for pursuing building matters below this value and that \$25,000 is therefore an appropriate threshold below which the recommended dispute resolution and warranty insurance frameworks should not be engaged.

Having a consistent \$25,000 threshold for dispute resolution and warranty insurance would be easier to convey to the industry and consumers. It would also relieve the QBSA of a considerable administrative burden, freeing up resources to support the HIA's recommended approach to resolving building disputes.

For licensing and contractual requirements HIA recommends a lower dollar threshold, but that they be set at the same level for both of these purposes. This threshold should be resolved by the current work on the National Occupational Licensing Scheme. Until such time as national licensing adopts a dollar threshold HIA recommends that the limits should be set at \$12,000 to be consistent with thresholds in some other States. However it is HIA's view that works such as plumbing, drainage, gas fitting, termite management and fire protection should maintain zero dollar license thresholds as they are of a specialist nature and require specialist skills and expose consumers to greater safety risks.

The current regulated amount of \$3,300.00 for licensing creates unnecessary red tape for both the consumer and the persons attempting to carry out the works. This red tape could be minimised without creating a situation where the consumer is exposed to a great risk and further allowing the QBSA to concentrate on more important matters.

HIA has recently had a handyman call up who was asked to paint a shed, the amount for labour and materials exceeded \$3,300. This work was of a low risk nature and would not attract the attention of the QBSA except for the licensing threshold. Due to being unlicensed the handyman could not carry out the works even though there was no structural work, the client was happy to proceed and the likelihood of defective work was low.

However, small works such as handyman jobs, pergola's, small painting jobs and the laying of small decks (excluding joist and bearers) are always going to exceed the \$3,300 threshold particularly considering that this amount includes materials. These types of jobs are seen as a low risk activity in relation to defective work and are not the type of work that generally causes dispute for consumers.



Under the recommended \$12,000 limit the consumer would still obtain the protections of consumer law while maintaining the freedom to negotiate with persons they wish to for low risk activities. This also minimises the burden of red tape related to licensing under the current arrangements allowing the QBSA to allocate resources towards more pressing issues.

Recommendation: that the thresholds for:

- dispute resolution and warranty insurance functions be aligned at \$25,000; and
- licensing and contract regulation be aligned at \$12,000.



4 Dispute Resolution

The management of disputes over building work is the area of regulation in the industry that is in the most urgent need of reform. The current arrangements are dysfunctional, inordinately protracted and frequently very expensive.

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Disputes between building owners and contractors typically involve concerns over both the quality of work and contractual issues. In its current guise the QBSA does not involve itself in the resolution of the contractual issues: this is a major source of complaint and confusion about the process. Moreover the QBSA does not usually get involved in disputes that occur prior to the completion of a building project: again a source of frustration for consumers and contractors.

Building disputes between commercial clients and contractors have a range of options at their disposal for resolving disputes including the courts, the QBSA, QCAT, commercial arbitration, Subcontractors Charges Act, and BCIPA processes. Disputes initiated by home owners are managed exclusively by the QBSA except for a small proportion going directly to QCAT. The QBSA would not normally respond to a complaint from a contractor about a home owner, leaving the contractor having to go to QCAT to have their matter addressed. The current process is very lopsided to the detriment of contractors.

Issues around the quality of homes and contractual disputes with clients represent a tiny portion of the \$15billion a year home building industry. Yet the industry is subject to extraordinary levels of regulation and mandatory insurance regimes. But in spite of this degree of regulatory intervention, the processes for remedying the small proportion of jobs that have issues are costly, uncertain and lengthy. HIA members report that building disputes that go through the Queensland Civil and Administrative Tribunal processes can typically take 2-3 years to reach a hearing although around half of all the disputes are settled prior to a hearing. QCAT is not meeting its own goals of being quick, fair and economic: it needs more resources and this submission recommends that funds be reallocated from the QBSA to a specialist building list of QCAT.

 A 2009 study of the then Commercial and Consumer Tribunal found that the average time between the lodging of a dispute with the Tribunal and the Tribunal's decision was 430 days. More recent data from QCAT on its case completion rates suggests that these average delays are unlikely to have significantly improved.

In 2009-10 only 239 building disputes were lodged with QCAT, out of a total number of 16,566 lodgements received by the Tribunal. QCAT disputes between builders and home owners frequently involve tens of thousands of dollars and in some cases a builder's livelihood can be at stake. In these circumstances the time taken to resolve disputes is unacceptable.

The QBSA also provides dispute resolution services. In 2009-10 the BSA received 6,113 complaints about defective or incomplete work. Consumers also have access to the QBSA's insurance scheme to rectify work that a contractor is required by the QBSA to undertake but where the contractor is unable or unwilling to do the work e.g. the business is insolvent or the client refuses the builder access to the site. 2,997 claims on the QBSA insurance were approved in 2009-10.

Compounding this confusing picture is the role played by Building Codes Queensland, part of the Department of Planning and Local Government. BCQ also runs the Building and Development Dispute Resolution Committees. These Committees resolve building standards-related disputes over decisions made by local government or private certifiers. BCQ is also responsible for the regulatory framework for private certifiers (with the BSA responsible for their licensing), and for the development of building codes and standards for the State.



Consumers seeking QBSA involvement in a building dispute face no fee for lodging a dispute. This encourages consumers to lodge disputes with the QBSA for minor and sometimes frivolous matters rather than even approaching their contractor to discuss the issues. Similarly contractors will sometimes rely on the QBSA getting involved to venture an opinion on whether work is defective rather than manage the dispute themselves. This adds enormously to the QBSA's caseload and the quality of service that they are able to provide.

The QBSA reporting to a Minister also creates the potential for political influence over the handling of constituents' complaints.

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The QBSA does not have the independence that comes with being an arm of the judiciary. This is the most fundamental flaw in the current dispute resolution process – it could not be said that the current mechanisms are either fair or impartial. There is a perception institutional bias against builders: because the inspectors are part of the consumer protection framework, they are not impartial and typically are required to act as consumer advocate in addition to an inspector.

Both consumers and contractors feel that they "have not had their day in Court" when matters are determined by the QBSA. The inability of the QBSA to settle all of the contractual issues in a dispute (typically non-payment) just adds further to the frustration with the process.

This inability of the QBSA to resolve the contractual elements, (normally lack of payment), of a building dispute can only be resolved by moving the dispute resolution system under the umbrella of the judiciary. It would be entirely inappropriate for personnel from the administrative arm of Government (QBSA) to be asked to make determinations about contractual matters especially where the awarding of damages may be involved.

QCAT members are currently able to be involved in a very wide range of subject matters. HIA's experience has been that this approach may provide flexibility for the administration of QCTA but it is a significantly inferior system than the previous specialist Queensland Building Tribunal form the applicant and respondents' perspectives. With a specialist jurisdiction the members of the Tribunal developed considerable expertise in the complexities of building disputes and were therefore able to deliver judgements more efficiently and effectively. In the absence of Tribunal members who are specialists in building matters HIA has also noticed that QCAT is increasingly relying on legal representation by the parties to fill the hole in their knowledge which is contrary to the intention of the Tribunal to keep legal representation and the associated cost to exceptional circumstances.

Not only is there a precedent for a specialist building tribunal in Queensland, there is also precedent from the 1990s for the QBSA to be contributing to the cost of administration of that tribunal. HIA is recommending that the value of the resources saved from the QBSA by shifting its dispute resolution activities to QCAT and from removing small value disputes from its ambit, should be transferred to QCAT to fund the cost of a specialist building division of the Tribunal. The Victorian VCAT operates a specialist building division so this recommendation is not revolutionary.

The recommended specialist building division of QCAT should have all the necessary powers of a Court in resolving matters including having disputed monies paid into Court, awarding costs if claims are proven to be vexatious and appointing expert referees. Where parties agree there should also be a right for them to take their dispute to another court with the appropriate jurisdiction relevant to the amount in dispute.



One of the concerns with the current approach by the QBSA to resolving the technical aspects of a dispute is to rely on "accepted industry standards" for matters relating to quality of finish and other aspects of the work that are not covered by formal standards or codes. While the QBSA generally enjoys a good reputation in this area the judgments are made essentially on the knowledge if the individual inspector involved. This subjectivity can lead to further disputes. HIA and other organisations have published guides to standards and tolerances that cover many of these areas of dispute. These resources are well accepted by industry and should be adopted by QCAT as benchmarks for their resolution of the technical aspects of a dispute.

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This lack of technical knowledge means that the appointment of experts almost becomes mandatory in any dispute over defective work. Parties often shop around for a number of different opinions and there is no restriction on this practice, inflating the cost of litigation and making it impossible for building contractors to defend a claim that has been made against them without doing the same.

HIA has argued for some years that it is grossly unfair in the current system whereby the QBSA can direct work to be fixed where substantial sums are owed, while builders are denied access to the remedies of the Building and Construction Industry Payments Act (BCIPA) to resolve payment disputes with home owners. HIA believes that its recommended approach to having a well-resourced specialist building division of QCAT to resolve all aspects of a building dispute should obviate the need for BCIPA to be extended to claims between builders and home owners. However, HIA would recommend that if the new arrangements did not prove timely in resolving disputes that builders should have access to resolving payment disputes with their clients through BCIPA processes.

Against this background HIA recommends that:

- 1. Building disputes under \$25,000 be managed through QCAT's current consumer and trader dispute processes;
- 2. QCAT be the body to manage all building disputes over \$25,000 through a specialist building division;
- The building division of QCAT be funded by the proportion of licensing fees that the QBSA currently applies to dispute resolution. It is envisaged that the current building inspectors of the QBSA would transfer to QCAT to become specialists to assist in dispute resolution;
- 4. That fees be introduced for claims made to the specialist building division of QCAT;
- That the specialist division of QCAT would have a broad range of dispute resolution tools at its disposal including mediation, conciliation, expert determination and full hearings;
- 6. Where QCAT orders rectification of building work that any disputed funds are held in trust by QCAT as a condition of the work proceeding;
- 7. That industry standards be drawn from existing industry standards and tolerances guides in addition to the provisions of building law; and
- 8. The extension of the BCIPA processes for resolving payment disputes to contracts between licensed contractors and home owners.

On a more specific issue that generates disputes, HIA is concerned that the responsibilities of a contractor where they are adding to work that someone else has done, especially the home



owner, are not sufficiently clear. This issue occurs frequently in undertaking home renovations where it may be impossible for a building contractor to properly establish the quality of the original work they are adding to: the original work may be concealed or underground. In HIA's experience the BSA will order the renovation contractor to rectify the defective original work if there is a subsequent problem with the new work, irrespective of whether the renovation contractor could have reasonably known that there was a problem with the original work. HIA believes that this is grossly unfair to the renovation contractor.

Recommendation: That work done prior to the building contractor undertaking new work should be the responsibility of the owner or the original contractor if the original work is still in its warranty period.



5 Contractor Licensing

As previously argued HIA is recommending that the role of the QBSA be restricted to the administration of the builder and contractor licensing system. Current COAG timetabling contemplates the national licensing arrangements are expected to become operative in the building trades in early 2014, so the QBSA's scope of licensing may be reduced somewhat. However the impact on the QBSA's revenue is not expected to be substantial.

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HIA further recommends that the new QBSA licensing function should provide for some reductions in the regulatory burden on the industry and to improve the fairness of the licensing decisions. These refinements which are outlined below could also apply within the current functional responsibilities of the QBSA.

Internal reviews of licensing decisions

The QBSA's licensing powers can have a devastating impact on an individual or company causing massive disruption to the business undertaking of the person, their family and their employees.

Licensing decisions that impact on a licensee's livelihood can be made by relatively junior people within the QBSA. Despite this significant authority there is no recourse for the licence holder to have the decision reviewed without resorting to QCAT. This process is onerous on the builder and is lengthy; in some cases it can take years to resolve. In the meantime neither the company nor the individual can operate their business, having detrimental consequences on a person's ability to earn a livelihood.

Recommendation: There should be a mechanism in place under the QBSA Act for the licence holder to have a decision regarding their licence internally reviewed within a limited timeframe of notification, say 28 days from receiving the statement of reasons, by an established panel made up of senior QBSA personnel and independent external people. This mechanism will enable for a decision within a shorter timeframe, without having major impacts on a contractor's abilities to earn a livelihood. Licensees would still have the opportunity to appeal to QCAT if they did not accept the panel's findings.

• Statements of reasons with adverse licensing decisions

Presently when issuing adverse licensing decisions the QBSA is not required to provide a detailed explanation as to why and how the decision was reached.

By way of example, in circumstances whereby the QBSA refuses a contractor's licence application, they generally inform the applicant in a letter that their licence application has been unsuccessful, and they may try again at another occasion. Further details will only state the area of the application that has been deemed insufficient which, in HIA's experience, leaves the applicant in a state of confusion as to the reasons for the refusal and what needs to be done to rectify the situation.

Disconcertingly where a licence holder has their licence suspended and they receive a letter stating that they have been deemed an 'unfit person' to hold a particular QBSA licence, they do not necessarily receive further explanation. This suspension is a significant cause for alarm, and can cause serious effects on a person's ability to earn a livelihood.

Recommendation: The QBSA should provide a clear and detailed explanation to licensees and applicants for licences as to what part of their licensing decisions. Decisions made by the QBSA can have a significant impact on the operation of a



business, and could significantly affect the career and livelihood of an individual. A simple and concise explanation could assist the affected party plan their future.

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Financial requirements for licensing

The approach to managing the financial requirements for licensing has evolved over many years and is now relatively well understood by licensees. It is not yet clear whether the forthcoming national licensing arrangements will include a financial requirements test.

HIA suggests that in the context of the QBSA the financial requirements for licensing are not really a licensing test at all but instead an underwriting requirement for access to the QBSA's warranty insurance scheme. In the regulatory structure recommended by HIA the insurance function would be removed from the QBSA. In this environment HIA would argue that there should be no financial requirement for licensing but that there would need to be financial assessment undertaken for those seeking access to the new independent insurance system.

Recommendation: That there be no financial requirements to hold a licence to be issued by the QBSA but that there will need to be financial assessments undertaken by the recommended independent warranty insurer.

Excluded Individuals

The current determinations of "excluded" and a "permitted" individual under the QBSA Act are ambiguous to say the least.

The format of determining excluded and permitted status relies on 'event' deeming provisions. One 'event' can result in an individual becoming unlicensed for five years, whereas two 'events' can result in the individual becoming permanently excluded. A permanent exclusion deems that the relevant person cannot have any influence or control over any building business activities in Queensland, as they are deemed 'not a fit and proper person'. To overcome such exclusion a person may apply to the authority to become a 'permitted individual' through an arduous and often lengthy process.

HIA is not opposed to the authority stamping out operators who pose not only a risk for members of the public, but other persons within the industry. But the current deeming of 'event' provisions of the QBSA Act are unfair and lack transparency.

The biggest concern is that what most people would regard as one event counts as two in the provisions of the Act. Where a building company fails this often results in the bankruptcy of the directors. While the failure of the business and the bankruptcy had the same cause, the Act requires these to be counted as two events resulting in permanent exclusion from the industry of the director.

Recommendation: The application of the QBSA Act s56AC needs be revised to regard an 'individual for a relevant bankruptcy event' and 'individual for a relevant company event' that flow from one set of circumstances as one event rather than two.

Public Records

Currently records of the holder of a QBSA licence are available for public view on the QBSA website. This is meant to give consumers and tradespersons the ability to review a builder's and/or building contractor's history including any indiscretions prior to contracting works. Through this mechanism the public can view the license class, business information, BSA directions to rectify defective work, infringement notices, and a variety of other matters.



But the content of what is included in the public document, and its readability is very poor. For the general public the information listed can be quite confusing and it can be difficult to find the required information if you are not an experienced user. This can result in a tradesperson missing out on a job because the information listed has been misunderstood.

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HIA proposes later in this submission that a system of builder rating be introduced into the licensing system. This will provide much better guidance for consumers than the current QBSA public record.

Recommendation: HIA proposes that the online public record be removed all together. Instead HIA proposes that the "builder rating" proposal, explained in detail later in this submission would be a more acceptable and easier method to use for all concerned.

Remove duplication of individual and business licence fees

Currently under the provisions of the QBSA Act an individual contractor who is operating under a company structure is required to not only maintain the licence fees associated with the individual trade licence, but also a company licence.

The double dipping of licence fees on individuals is an impost that should be removed. This is particularly the case for contractor license holders as they are small business operators and should not be made to pay almost a thousand dollars annually to have their QBSA individual and company licence. It is a significant burden on small building businesses in Queensland.

Recommendation: HIA contends if an individual seeks or renews a contractor's licence, they should have the option of attaching their business name to the license at no additional cost.

• Remove experience criteria for a licence application

Requirements for obtaining a QBSA licence cover

- Technical qualifications relevant to the licence being sought and for trade contractors the completion of a business management course;
- Experience- two years in the 'scope of works' for that licence category, including referees;
- Financial requirements; and
- Fit and proper person.

In HIA's experience in dealing with licence applications it is the experience requirement that is the most vague and subjective part of the process. The type of work an applicant has done, the extent of that engagement and the quality of that work are all difficult to define and costly for applicants to comply with.

Most importantly though HIA argues that the experience requirement is unnecessary as the applicant has already met acceptable industry standards of competence in their field through having the appropriate technical qualification. Duplicating this objective piece of information with opaque experience requirements is a red tape burden that adds no value to the licensing process.



If there are views that the technical qualifications are inadequate those views should be channelled through the training authorities rather than add another complex experience requirement to holding a licence.

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Recommendation: that the current "experience" requirement for obtaining a QBSA licence be removed.

Better handling of overseas qualifications

The high levels of overseas migration into Queensland bring with it a number of industry practitioners who seek to operate in the building industry and need a QBSA licence. The current process for having overseas qualifications recognised for licensing purposes is complex and costly.

For example, a holder of a New Zealand building qualification may apply for a QBSA builder licence through mutual recognition. A free service is available through the Department of Education and Training (DET), to make a comparison of the qualifications. This however, is only the first step; the applicant then needs to apply for a Recognition of Prior Learning assessment, (RPL). This is a costly exercise that can range from \$700 to \$3,000.

HIA believes that the QBSA should have built up sufficient experience of dealing with overseas qualifications to be able to make publicly available a list of acceptable overseas qualifications and those which require some level of "topping up" with Australian training. In particular, this should be available for those countries that are a major source of Queensland's migrants e.g. New Zealand, United Kingdom.

Recommendation: that the QBSA publish comparisons of the overseas qualifications and the Australian equivalent qualifications to help avoid the costly process of RPL assessment.

Owner builder requirements

HIA accepts the right of a suitably qualified individual to be able to build their own home. However protection of subsequent owners is a serious concern. Queensland's current regulation of owner builders is more effective than those in other states. But they could be further improved by requiring owner builders to have as a minimum a building trade qualification in addition to the current requirements.

Recommendation: to protect subsequent owners of an owner built home, the owner builder should be required to hold a building trade or builder qualification.

• Subcontractor Accountability and Security of Payment

There have been calls in recent years for the QBSA to become more active in making sub-contractors more accountable to builders for their quality of their work. It has been argued that the awarding of a licence by the QBSA to a sub-contractor is of little value unless sanctions are applied for poor performance.

From a builder's perspective taking action against a sub-contractor for poor performance through QCAT is time consuming and expensive. In HIA's view there should be scope for the QBSA to issue directions against sub-contractors for 'category one' building defects however the ultimate responsibility for the quality of the building should remain with the builder. The HIA is further of the belief that its own proposed dispute resolution arrangements would provide an alternative avenue to remedy building disputes between



subcontractors and Builders and may ultimately prove more effective and cost efficient on this issue than further intervention by the QBSA.

In the current depressed conditions in the home building industry there have also been calls from sub-contractors for improved security of payment. HIA suggests that the provisions of the Building and Construction Industry Payments Act and the dispute resolution procedures recommended for the specialist building division of QCAT will improve security of payment issues and be cost-effective process for the parties involved.

The HIA believes that the provisions of BCIPA are not well known in the industry and would support an education program for contractors being developed.

Recommendation: that the dispute resolution arrangements proposed in this submission and an industry education program on the use of BCIPA will provide improved accountability of sub-contractors and security of payment for them.



6 Regulation of Contracting Relationships

HIA recommends that all of the State Government's policy functions relating to the regulation of the building industry would be the responsibility of a newly created Building Regulation Queensland. Part of this new body's role would be to oversee the development of policy around the regulation of building contracts. Auditing of the contracting arrangements in the industry would be undertaken through QCAT's dispute resolution processes and through the retention of a small auditing unit within the QBSA: this unit would also be responsible for auditing the licensing regime.

Within the current regulations around contracting, HIA has identified a number of improvements that could be made as spelt out below. One change that the QBSA has been discussing with industry for some time is their desire to see one standard contract adopted for all home building projects in Queensland. HIA is strongly opposed to this suggestion. The nature of home building contracts is already very heavily regulated so there seems to be little benefit for consumers or industry in having just one standard contract. It is also uncompetitive and would deny contractors the opportunity to manage their building processes in their preferred manner: the nature of the contract dictates many of the back-office functions of a home building firm.

Recommendation: that there not be a move to a standard home building contract in Queensland.

Other issues that HIA would recommend be addressed by the Committee include the following:

• Cost-plus contracts

The Domestic Building Contracts Act (DBCA) generally prohibits the use of cost-plus contracts in Queensland, and requires the parties to enter into a regulated fixed price contract for all domestic building works over the defined dollar threshold.

Notwithstanding the limitations on the use of cost-plus contracts they are in considerable demand from consumers, especially in the renovation sector and in the more expensive custom-built segment of the market. In this environment of consumer demand HIA's view is that the extreme limitations on the use of cost-plus contracts is quite often ignored by parties entering into large scale renovations, and large scale architecturally driven domestic building works.

When challenged, consumers demand their right to contract freely and builders are left in no-mans-land as they cannot proceed where plans are underdeveloped or hidden defects are discovered and need to be corrected before the actual works can progress.

It is HIA's contention that the current model of highly regulated cost-plus contracts leads to more litigation, more compliance policing and at no benefit for the consumer as QBSA warranty insurance does not cover cost plus contracts for non-completion.

Recommendation: that parties to a regulated contract under the DBCA should be entitled to enter in a cost plus contract where they have received written Solicitor advice. This advice would outline possible issues related to the use of cost plus contracts, the inability to have QBSA warranty insurance for the works, and allow parties to understand their responsibilities under such an arrangement. Furthermore this enables each party to make an informed decision as to whether a cost plus contract is most suitable for the project, or determine whether they need to explore other contract arrangements.



Dollar thresholds for contracts

Earlier in this submission HIA recommended that to reduce red tape the DBCA should only apply to home building contracts where the value of the work exceeds \$12,000.

HIA further contends that the DBCA is not a suitable consumer based contracting framework where the works are of an intricate and high monetary level. Members of the industry where engaged in complex, and often professionally designed and supervised building work are often requested by clients to engage in commercial and 'negotiated' contract terms. Such a request of consumers is not unreasonable where they also want the freedom of contracting and negotiation.

Recommendation: that a regulated 'upper limit amount' is introduced for high value contracts, those at the value of \$500,000 or greater. This exemption for the DBCA would only apply where the parties agreed and where the work was to be supervised by an independent professional or where the consumer had received solicitor's advice.

• Project management contracts

The QBSA Act describes a project management contract as a contract under which a home owner engages a manager to provide building work services. Such building work services enable the project manager to provide administration, advice, management and supervision for the contracted building works, with the building works to be carried out by trade contractors under separate contracting arrangements with the home owner.

HIA's experience regarding the use of project management type of arrangements is that they are fraught with danger. Consumers demand their right to 'choose' the trades persons they see fit, and builders (who are often the project manager) assume all responsibility for these trades regardless of having an influence over the tradespersons used.

It is HIA's contention that the use of project management contracts between consumers and building contractors leads to more litigation, more compliance policing and at limited benefit for the consumer as QBSA warranty insurance is only partial for such works undertaken.

Recommendation: That parties to a regulated contract under the DBCA should be entitled to enter in a project management contract only on the premise that they have individually received written Solicitor advice. This advice would outline possible issues related to the use of project management contracts, and allow parties to understand their responsibilities under such an arrangement. Furthermore this enables each party to make an informed decision as to whether a project management contract is most suitable for the project, or determine whether they need to explore other contract arrangements.

Remove requirement for incalculable delays

Currently within the DBCA there is a requirement under section 34(2) for the building contractor to include in the building contract an assessment of 'incalculable delays', i.e. - those delays which are anticipated but cannot be calculated at the time of signing the contract. These "incalculable delays" are not included in the estimate of the duration of the building works.

HIA contends the use of "incalculable delays" is misleading, and leads to confusion between the contracting parties. It is a common misconception from the consumer's perspective and therefore a matter of dispute, that those advices relating to the



incalculable delay within the contract means that the delay is included in the contracts noted building period.

Recommendation: that the requirement to note 'incalculable delays' within a regulated contract is removed.

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Payment for Variations

A frequent matter of dispute in the industry relates to the raising and claiming of variations to the original scope of works of a domestic building contract. A typical dispute scenario arises where an owner verbally requests a variation, and the building contractor completes the variation works as requested. The building contractor is often left 'fighting' for recovery of the costs of variation works given their failure to comply with the provisions of the DBCA. These provisions require a building contractor to ensure that any variation to a building contract is put in writing in the shortest practical time and before any domestic building work related to the variation is carried out. The only exception to this requirement is where the work needs to be done urgently, and where it is not reasonably practicable to provide a variation document. Furthermore a building contractor is required to ensure that the variation document meets certain requirements of the DBCA in order to be an enforceable document.

Meeting the abovementioned requirements at times can be onerous for a small business, particularly where in a typical situation a building contractor is on site, and a family member performs the administrative duties at home. Simply 'forgetting' to put the document in writing, or relying on a 'gentleman's handshake' for variations too often has costly ramifications.

Should a building contractor fail to strictly ensure their variations are in writing, and/or fail to ensure the document is in the required format, there is little prospect of being paid for the work should the consumer refuse to pay. The limited opportunity to recover such a variation is restricted to proceedings via QCAT, and the contractor establishing 'exceptional circumstances' or 'unreasonable hardship' in accordance with section 84(4) of the DBCA. This can be difficult to establish and time consuming and costly to prosecute.

It also clearly offends equitable doctrine of unjust enrichment, often enabling home owners to have the benefit of significant variation works because of technical non-compliance.

HIA agrees that there needs to be rules and regulations around the use of appropriate documentation, but the current provisions are draconian and require amendment.

Recommendation: that section 84(4) of the DBCA is amended to provide for the ability to make a quantum meruit claim against an owner with respect to variations. The test for an order of such a claim should provide for an award of the claim where it can be established:

- the variation was requested by the owner (writing or verbally); and
- a reasonable estimate of the additional cost was given to the owner (writing or verbally); and
- the variation works comply with the law



Progress claims

The DBCA provides for strict limitations for the claiming of deposits, and defined stages for the claiming of payment. There is also a general principle that work cannot be claimed for in advance of it being undertaken on site.

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As a consequence, the residential construction industry operates under a negative cash flow model and this is the situation for volume builders, small and medium sized custom and semi-customised home builders, and builders of large, structural renovation projects.

In situations where a component of domestic building works is manufactured/built in a factory prior to the commencement of onsite installation, small business are left significantly 'out of pocket' in ensuring they comply with the deposit and progress payment conditions of the DBCA. This 'out of pocket' situation is particularly prevalent for building contractors who manufacture/build custom products such as kitchens, sheds, and cabinets in a factory, and thereafter move onsite for the installation component. The risk these small businesses bare is significant. In order to meet the requirements of the DBCA the business often will largely fund the build cost of the custom product prior to receiving a progress payment. If something happens to the customer or a dispute arises the building contractor is left with a custom product that has not been paid for and will have little value in other projects.

The general rule that builders are only ever paid in arrears, is inappropriate for all cases.

Recommendation: that the DBCA should provide for clear provision for the building contractor to be able to claim monies in advance of works being carried by specifying in the progress payments schedule which components need to be paid for in advance.

There is currently significant conjecture in relation to what work needs to be performed to achieve progress claim stages defined by the DBCA. In particular, there is often disagreement whether 'enclosed stage' or 'practical completion' has been reached leading to payment disputes over these major project milestones. The use of a standardised definition for all forms of domestic work is problematic. While HIA acknowledges that there is a Part B customised progress claim schedule with the ability to re-define stages, this is not the method preferred by the QBSA, lending institutions and consumers are they are often reluctant to agree to shift from the standard progress claim schedule.

To create more certainty for the builders, consumers, regulators and the judiciary, and to reduce the number of disputes, HIA recommends that further practical guidance material be developed on what constitutes completion of each of the regulated stages. In producing this guidance material it is essential that industry practice is encapsulated and different forms of domestic building work are considered.

Recommendation: Develop practical guidance material on what work needs to be done to achieve each of the regulated progress claim stages.



• Residential BCIPA

In the event that HIA's recommendation for a specialist building division of QCAT is not adopted, -HIA proposes that the BCIPA provisions need to be extended to contracts between builders and home owners.

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Currently if a builder is attempting to claim unpaid monies from a consumer they must either use the *Queensland Civil and Administrative Tribunal* or a court of relevant jurisdiction. In dealing with recovery of monies via QCAT there are significant backlogs in dealing with building matters due to the large volume of applications across a wide range of industries and dispute matters.

It has long been industry's contention that the use of rapid adjudication similar to that provided for under the *Building Construction Industry Payments Act 2004* should be created for situations where a consumer owes a builder an amount of money under a contract. The benefit of this 'temporary adjudication' would be that it would avoid large unpaid debts affecting the liquidity of domestic building companies.

To take into account the fact the owners are likely to be less familiar with the claim and adjudication process, the adjudication model might need to be modified. However the basic principle of a rapid, cost effective adjudication model would be preserved.

Recommendation: that the rapid adjudication provisions of BCIPA be extended to monetary disputes between consumers and building contractors for residential construction work in the event of a specialist building division of QCAT not being established.

Review of BCIPA decisions

BCIPA is utilised as a mechanism to:

"To ensure that a person is entitled to receive and recover progress payments for the carrying out of building and construction work or supplies related goods and services under a construction contract in Queensland.

To provide a quicker and cost effective resolution of payment disputes than the court system." (Building and Construction Payments Agency, 2006)

As the Judicial Review Act does not apply adjudicator's decisions, there is limited scope for a review of the 'temporary adjudicated outcome'. Although section 100 of the legislation preserves the parties rights to re-argue an adjudication decision for a final decision before QCAT or the Courts, it is HIA's experience that the member before QCAT will generally seek to rely upon the decision of the adjudicator. Ultimately the only basis to have the decision of the adjudicator set aside is via the Supreme Court on administrative law grounds such as jurisdictional error or breach of natural justice.

The cost of a Supreme Court application in many cases outweighs the amount originally in dispute between the contracting parties. While the parties have the ability to recoup costs in terms of such matters, the risk that the business bares is significant.

By way of an example HIA was recently contacted by a waterproofing subcontractor who received what he felt was an unfavourable decision. The overall amount of money that the sub-contractor was attempting to claim was approximately \$8,000.00. In order to



take this matter to the Supreme Court the legal fees would significantly exceed the overall amount that the sub-contractor was initially chasing.

Recommendation: that there should be an avenue of internal review within the Authorised Nominating Authority, and thereafter via the QCAT specialist building division as proposed. This would allow a cost effective means of disputing the decision in circumstances where contractors contend the decision was unfair and unreasonable.



7 Warranty Insurance

As previously outlined in this submission, it is HIA's firm view that the inherent potential for conflicts of interest in the QBSA's current "one-stop-shop" structure are sufficiently serious that its functions, especially its warranty insurance functions, need to be devolved.

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Ideally HIA would prefer to see competition in the market for this insurance. However, in the current insurance market HIA understands that this might be unachievable. As a step in this direction HIA's recommended model would see the insurance policy setting, premium collection and claims management functions structured in the following way:

- Insurance policy settings would be developed by the recommended new body Building Regulation Queensland;
- Premium collection would be contracted to agencies like post offices, insurance brokers and private certifiers;
- Claims management would be tendered to private sector claims management companies; and
- Management of the scheme's finances and underwriting arrangements would be undertaken by the insurance division of the State Treasury.

Detailed recommendations that HIA would make for the operation of the insurance scheme follow:

Name of the Cover

While it may seem like a second order issue, HIA believes that the use of the term "warranty insurance" by the QBSA is potentially misleading to consumers. Consumers will have built up an expectation of what a warranty will deliver through their experience with consumer goods, but the QBSA's policy is unlike the warranty on a consumer good in many ways, especially in that there is a dollar limit on the amount of cover available.

What the QBSA's scheme really provides is a performance bond: if the contractor does not perform the contract satisfactorily there is an amount of money available to complete the conditions of the contract. "Completion Bond" might be a preferable way of describing the consumer protection that is being offered.

Recommendation: that the insurance scheme be renamed as a Completion Bond.

Coverage of the Scheme

HIA suggests that the coverage of the QBSA's warranty insurance is too broad in some areas and inadequate in others. The Completion Bond should be focussed on redressing non-completion of a home due to the financial failure of the contractor and items that affect the structure of the building following practical completion. Too many of the QBSA's resources are devoted to addressing complaints about quality of finish post-practical completion. Consumers would be able to pursue contractors for these finish issues through the specialist building division of QCAT.

Recommendation: that coverage for the QBSA's insurance should be limited to completion of a contract to practical completion and for Category 1 (structural) defects that arise after practical completion.

An area of significant non-compliance with the current QBSA insurance obligations is where the building work does not require a building approval; typically for kitchen and bathroom renovations, decks and pergolas. HIA believes that the proposed dispute resolution arrangements are the most cost-effective way of dealing with issues in this



part of the market but that the insurance should be available to consumers where they choose to buy it.

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Recommendation: that insurance be voluntary for building work that does not require a building approval.

The areas where HIA believes that the coverage of the insurance is inadequate is its current exclusion of manufactured housing. The definition of what is manufactured housing is becoming increasingly blurred as more and more major components of new homes can be assembled off-site. The principle should be that the insurance is available to anyone buying a new home for their or a tenant's long term occupation, irrespective of how it is built and irrespective of the titling arrangements for the land on which the home is located.

There is also an inconsistency in the scheme's coverage of swimming pools. If the pool is part of a contract that includes a home, then the pool will be covered, but a standalone pool contract will not be covered. HIA acknowledges that there is some private insurance available for pools but only members of the Swimming Pool Association have access to the insurance for their clients. Insurance coverage for pools should be available from the QBSA scheme on a voluntary basis.

Recommendation: that coverage for the insurance be extended to

- all Class 1 buildings (as defined in the National Construction Code); and
- swimming pools on a voluntary basis.

Payment of multiple premiums on work for bodies corporate

Home warranty insurance premiums are calculated on each individual residence when a building contractor is carrying out insurable works, including works relating to multiple dwellings for a body corporate.

Where insurable works are relating to a communal area of a body corporate (i.e.- roof, or pool area), building contractors are required to calculate the amount of insurance payable based on the number of units in the dwelling, inevitably driving up the cost of building work for the consumer. Such a requirement appears to be a revenue raising exercise of the QBSA, given each dwelling is not directly obtaining the benefit of the works carried out.

Recommendation: that works undertaken for a body corporate should have any insurance premium based on the value of the work, not the number of units affected.

Builder rating

Under the current insurance structure of the QBSA the premium payment is based solely on the value of the building work. There is no consideration given to the type of work being undertaken and the associated risks. For example, the premium for a speculatively built home, where there is no risk to the insurance scheme for non-completion, is the same as for a contract built home where there is a non-completion risk to the scheme. Moreover contractors face the same insurance premium irrespective of their track record, time in the industry or claims experience.

Underwriters of insurance in other states that is similar to the QBSA's insurance have developed sophisticated and well used models for rating contractors. The factors that are included in the assessment cover time in the industry, experience, management systems, financial systems and type of building work undertaken. HIA believes that it



would send a powerful signal to the industry and consumers to have a similar system of builder rating adopted for insurance purposes in Queensland.

Recommendation: that insurance premiums reflect the type of work undertaken and that a system of builder rating be introduced for the insurance scheme. This rating will allow the consumer to easily understand who is a responsible builder and those that are in constant trouble and will reward responsible builders with increased work. This will have the flow on effect of disputes being avoided and fewer applications before QCAT and the courts.



8 Other Matters

Contractor and Consumer Education

The QBSA currently undertakes a range of contractor and consumer information and education programs. There is some duplication of these functions with the Office of Fair Trading, Building Codes Queensland and the role played by industry associations.

HIA would prefer to see this duplication removed and the QBSA's resources focused on its licensing function.

Recommendation: that the consumer education functions of the QBSA should become part of the role of the Office of Fair Trading and that the contractor information be undertaken by industry associations and Building Codes Queensland.

QBSA's Governance

The QBSA Board is essentially an advisory body to the Authority. The General Manager does not formally report to the Board, rather to the Minister for Housing and Public Works. To operate effectively HIA believes it is important the General Manager report directly to the Board and be appointed by the Minister on a recommendation from the Board, as applies in other statutory authorities. This will deliver a clearer role for the Board and more transparent accountability for the General Manager.