



**Finance
& Services**

**Consultation Summary Paper:
Licensing of commercial builders**

23 January 2013

Policy & Executive Services
NSW Department of Finance & Services
2 – 24 Rawson Place
Sydney NSW 2000
www.services.nsw.gov.au

Table of Contents

1. Introduction	2
2. Background	3
3. Consultation process	3
4. The Inquiry's recommendation to license commercial builders	4
Regulatory arrangements in other jurisdictions	5
Existing licensing framework for residential builders in NSW	6
The NSW Government's commitment to reducing business red tape	7
NSW better regulation principles	8
IPART's review of licensing in NSW	9
National Occupational Licensing	9
5. Publication of submissions	10
Appendix – the Inquiry's Terms of Reference	11



Licensing of commercial builders

1. Introduction

In August 2012 the NSW Government commissioned an *Independent Inquiry into Construction Industry Insolvency* to assess the cause and extent of insolvency in the building and construction industry and recommend measures to better protect subcontractors from the effects of insolvency.

The Inquiry's Final Report is now available from the Department of Finance and Services website at www.services.nsw.gov.au.

This Consultation Summary Paper outlines the main reforms recommended by the Inquiry in relation to the licensing of commercial builders. Other papers are being released on the Inquiry's recommendations in relation to statutory construction trusts and amendments to the [Building and Construction Industry Security of Payment Act 1999](#).

This Consultation Summary Paper does not provide prescriptive detail or comment on the Inquiry's Final Report. Its purpose is to outline the Inquiry's recommendations for the enactment of licensing of commercial builders and to provide an opportunity for industry to submit feedback on the proposal.

Nothing in this Consultation Summary Paper should be taken as in any way reflecting the Government's position on the recommendations of the Inquiry.

Written submissions responding to the Final Report or Consultation Summary Papers may be forwarded to:

Construction Insolvency Inquiry
Policy & Executive Services
NSW Department of Finance & Services
Level 17
2 – 24 Rawson Place
Sydney NSW 2000

Submissions may be emailed to Don.Jones@services.nsw.gov.au.

Enquiries about the Final Report or Consultation Summary Papers may be made to (02)9372 7761.

The closing date for submissions is **21 February 2013**.



2. Background

In August 2012 the Hon Greg Pearce MLC, Minister for Finance and Services and Minister for the Illawarra, announced the establishment of an *Independent Inquiry into Construction Industry Insolvency* to assess the cause and extent of insolvency in the building and construction industry and recommend measures to better protect subcontractors from the effects of insolvency.

The Inquiry commenced work on 13 August 2012. The Inquiry's Terms of Reference are included as an appendix to this Consultation Summary Paper.

As part of its work, the Inquiry consulted with building contractors and subcontractors, insolvency practitioners and accountants, the legal profession and representatives from the banking and insurance sectors among others. In accordance with its Terms of Reference, the Inquiry also established an Industry Reference Group comprised of key industry associations and business representatives.

On 12 October 2012 the Inquiry released a *Discussion and Issues Paper* and called for submissions from industry and other interested parties.

The Inquiry's Final Report is now available from the Department of Finance and Services website at: <http://www.services.nsw.gov.au/>

At the same time as establishing the Inquiry, the Government created a separate taskforce of major public sector construction agencies to address concerns about the potential consequences of insolvencies on public sector projects. In responding to the Inquiry's recommendations, the NSW Government will also consider this taskforce's report.

3. Consultation process

Written submissions on this Consultation Summary Paper or any of the other papers may be emailed or posted to the address listed on the front cover of this Consultation Summary Paper.

The closing date for submissions is **21 February 2013**.



4. The Inquiry's recommendation to license commercial builders

In its Final Report, the Inquiry stated that:

"... a licensing system which includes financial requirements for licensees would address issues relating to project capability and scope, and work to instil financial stability and discipline in head contractor and subcontractor businesses".¹

The Inquiry recommended that the NSW Government establish:

"... a licensing system which requires all builders and construction contractors operating in the commercial building sector to qualify within a particular graduated licence category according to the net financial backing they are able to demonstrate, in respect of proposed projects. The result will be that the work of builders and construction contractors will be restricted to the category of project value for which they have demonstrated financial backing and licenced accreditation."²

The Inquiry also recommended that building contractors be subject to *financial health checks* that involve:

"... financial monitoring and auditing of the accounts and financial affairs of all builders and contractors in NSW. There will be a formal set of standard financial and accounting requirements. In addition to those requirements, the NSW Building and Construction Commission will have the power, acting upon reasonable information, to conduct spot audits and to require the production of relevant financial information from building contractors and construction contractors who in the reasonable view of the Commission, may be in or may be in impending financial difficulties."³

¹ Final Report, Independent Inquiry into Construction Industry Insolvency, p. 92.

² Final Report, Independent Inquiry into Construction Industry Insolvency, *Recommendation: A licensing system for all*, p. 352.

³ Final Report, Independent Inquiry into Construction Industry Insolvency, *Recommendation 4: Financial health checks*, p. 353.



In making its recommendation to establish a licensing system, the Inquiry did not undertake an assessment of the financial costs, benefits and impact to industry and government. The Inquiry recommended that the NSW Government conduct a cost benefit analysis to establish whether to proceed with its recommendation to establish a Building and Construction Commission, which under the Inquiry's preferred model of regulation, would be responsible for licensing, standards and complaint handling.

Regulatory arrangements in other jurisdictions

On the issue of licensing, the Final Report notes that the Inquiry's main point of interest is "*.....the licensing of commercial builders coupled to the financial backing requirements that exist in Queensland.*"⁴ The Inquiry sets out the key elements (see for example pages 82-87 and pages 347-349 of the Final Report) of the licensing system operating in Queensland, administered by the Building Services Authority.

In other jurisdictions, aside from the Northern Territory, builders working in the commercial sector are required to be licensed or registered, however there are no provisions similar to the financial backing requirements that operate in Queensland.

The Queensland licensing system, through the *Queensland Building Services Authority Act 1991*, sets limits on the value of building work that a contractor can be engaged on. This limit or 'allowable annual turnover' is linked to the building contractor's net tangible assets. Builders are licensed according to the value of the work they are entitled to undertake.

⁴ Final Report, Independent Inquiry into Construction Industry Insolvency, p. 16.



State/Territory	Regulation
Victoria	Commercial builders are required to be registered under the <i>Building Act 1993</i> for work valued over \$5000.
Western Australia	Under the <i>Building Services (Registration) Act 2011</i> , a building contractor is required to be registered to carry out work valued over \$20,000 and demonstrate financial and organisational capacity.
South Australia	Any person or company conducting business as a building contractor must be licensed as a contractor under the <i>Building Work Contractors Act 1995</i> (including sub-contractors).
Tasmania	The <i>Building Act 2000</i> provides for the accreditation of builders.
ACT	Builders operating in the commercial sector are required to be licensed under the <i>Building Act 2004</i> .
Northern Territory	There is no requirement for commercial builders to be licensed.

Note: this table does not include information relating to exemptions and other prescribed requirements that may operate in particular jurisdictions.

Existing licensing framework for residential builders in NSW

This section of the Consultation Summary Paper provides a brief overview of the existing licensing arrangements for contractors working in the residential building sector. There are a range of other regulatory requirements such as workplace safety, planning, quality and standards that apply to building and construction work.

Under the *Home Building Act 1999*, it is a legal requirement to possess a license to contract, subcontract or advertise to perform residential building work where the total cost of labour and materials is more than \$1,000.

The objective of occupational licensing in the residential building sector is to ensure that work is performed by suitably qualified builders. In this way, licensing acts as a



consumer protection mechanism to assure consumers of a person's ability to undertake work in a competent and honest manner by requiring licence applicants to demonstrate evidence of good character and educational and/or technical qualifications.

In more general terms, licensing and other forms of regulation are typically designed and implemented to protect consumers where there is some specific market failure that is best addressed through formal regulation. Often these market failures may be attributed to asymmetry of information in the market. That is, consumers generally have less information and knowledge on the products and services, including on quality issues, offered by businesses, which can result in an inequality in bargaining power and poor consumer choice.

In the commercial building sector, the need to protect the principal (the client) for the same reasons as consumers does not exist.

The NSW Government's commitment to reducing business red tape

While the purpose of this Consultation Summary Paper is to facilitate discussion and comment on the Inquiry's recommendation relating to licensing, it is important that some context is provided on current Government policy in this area to provide stakeholders with as much relevant information as possible.

The NSW Government has committed to reducing regulatory costs for business and the community by 20 per cent by 30 June 2015. This has been estimated as requiring reductions in regulatory burden of \$750 million in annual terms by June 2015.

All regulatory proposals such as the licensing scheme recommended by the Inquiry will be considered both in the context of the Government's commitment to reducing the cost of conducting business in NSW and the existing better regulation principles.



NSW better regulation principles

Regulation designed to address a specific need or problem may also impose administrative and compliance burdens on business, consumers, government and the wider community.

These costs must be weighed against the benefits that the regulation may generate.

The costs borne by businesses, government and consumers may include:

- *administrative compliance costs* associated with demonstrating compliance with a regulation (such as paperwork and record-keeping costs);
- *substantive compliance costs* related to required capital and production expenditure (such as equipment and training expenses);
- *financial costs* which are payments made directly to the Government (such as fees, levies and fines); and
- *indirect costs* relating to the impact that regulation has on market structures and consumption patterns (such as restrictions on innovation and barriers to entry through licensing) and the cost of delays.⁵

As indicated earlier in this Consultation Summary Paper, the potential costs and benefits of the Inquiry's recommendations will be assessed as part of the NSW Government's response.

Consistent with the requirement for any new or amending regulatory proposal, the assessment will consider the following principles:

- Principle 1: The need for government action should be established
- Principle 2: The objective of government action should be clear
- Principle 3: The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options
- Principle 4: Government action should be effective and proportional
- Principle 5: Consultation with business and the community should inform regulatory development
- Principle 6: The simplification, repeal, reform or consolidation of existing regulation should be considered

⁵ Better Regulation Office, *Guide to Better Regulation*, November 2009.



- Principle 7: Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness

IPART's review of licensing in NSW

The Inquiry's licensing recommendation will also be considered in the context of the current work by the Independent Pricing and Regulatory Tribunal's (IPART) review on licence rationale and design.

IPART is examining NSW licences and identifying those where reform would produce the greatest reduction in regulatory burden (including red tape) for business and the community. As part of its work, IPART has also been asked to develop a conceptual framework to help:

- assess when licensing is the most efficient way of addressing identified problems and risks compared with other options;
- assess whether the design elements of a licence are consistent with its purpose;
- assess ways to improve the administration of licences; and
- consider best practice design elements across licence types and in other jurisdictions.

IPART is due to report to the NSW Government by June 2013.

National Occupational Licensing

In April 2009 under the Council of Australian Governments' agreement to deliver a seamless national economy, jurisdictions agreed to the creation of a national occupational licensing system.

The national licensing system will apply to certain occupational areas and allow license holders to perform regulated work anywhere in Australia while holding a single national licence. The national system is to replace current arrangements where each state and territory licenses an occupational area in a different way.

The system is to be introduced in a two stage process. National licensing for electrical, plumbing and gasfitting, property, refrigeration and air conditioning is scheduled to commence in 2013. Following the introduction of these national licenses, it is proposed



that the final consultation process for the introduction of occupational licensing for building and building-related occupations as well as valuers and conveyancers will commence.

The NSW Government in assessing the Inquiry's recommendation to license commercial builders will consider the obligations stipulated under the Intergovernmental Agreement for a National Licensing System for Specified Occupations signed by all jurisdictions.

8. Publication of submissions

Written submissions to the Consultation Summary Papers close at 5:00pm on 21 February 2013.

All submissions will be made publicly available from the Department of Finance and Services website.

If you do not want your personal details or any part of your submission released, please provide reasons and indicate this clearly in your submission.

Please note that even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information (for example, in accordance with the requirements of the [Government Information \(Public Access\) Act 2009](#)).

Appendix – the Inquiry’s Terms of Reference

The construction industry in NSW has a high rate of insolvency. The industry accounts for fifteen per cent of businesses in NSW, but up to thirty per cent of the companies going into administration. The government is concerned about this high rate of insolvency and the impact it is having on the community, small businesses, the NSW economy and the government’s construction program.

The government is establishing an independent Inquiry to:

1. Assess the extent and cause of insolvency in the construction industry.
2. Consider payment practices affecting sub-contractors, existing protections for subcontractors and the impacts of insolvency on sub-contractors.
3. Consider legislative or other policy responses that can be taken to minimise the incidence and impact of insolvency in the industry, including:
 - a. options for improving the priority given to unsecured creditors where the debt results from a sub-contracting relationship
 - b. opportunities to simplify debt collection processes
 - c. strategies to improve financial management skills in the industry
 - d. a mandatory insurance scheme to secure payments to sub-contractors
 - e. a discretionary mutual fund to compensate contractors from losses arising from insolvency of a lead contractor or principal
 - f. the effectiveness of trust arrangements in protecting sub-contractor payments retained by a lead contractor or principal
 - g. mechanisms to ensure appropriate and effective financial disclosure between contracting parties, including disclosing payment of sub-contractors
 - h. other relevant issues or innovations raised by the Small Business Commissioner or stakeholders.
4. In developing recommendations the Inquiry should consider the impact of Commonwealth jurisdiction over insolvency.
5. The Inquiry will receive advice from an industry reference group including industry key associations and the Small Business Commissioner.

The government has established a taskforce to review government procurement and contract administration processes. The Inquiry will also consider the work of this taskforce.

Given the role of the Australian Securities and Investment Commission, it is not the role of the Inquiry to make findings in relation to particular incidences of company failure. However, examples of failure may inform consideration of policy and legislative options.

The Inquiry will seek submissions from the construction industry, financial professionals, relevant government regulators and the public.

The Inquiry will report within three months of being established.



NSW Department of **Finance & Services**

www.services.nsw.gov.au

