

Building Indemnity Insurance and related consumer protections

LGA Submission

March 2024

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Introduction

About the Local Government Association of South Australia

The Local Government Association of South Australia (LGASA) is the voice of local government in South Australia, representing all 68 councils across the state and the Anangu Pitjantjatjara Yankunytjatjara.

The South Australian *Local Government Act 1999* recognises the LGA as a public authority for the purpose of promoting and advancing the interests of local government. The LGA is also recognised in and has prescribed functions in 29 other South Australian Acts of Parliament. The LGA provides leadership, support, representation and advocacy relevant to the needs of our member councils.

The LGASA is a strong advocate for policies that achieve better outcomes for councils and the communities they represent. As such, the LGASA welcomes the opportunity to provide a submission to this consultation on the Review into Building Indemnity Insurance and related consumer protections.

This submission has been informed by consultation with our membership.

LGA Submission

Local government's role in Building Indemnity Insurance as related to the *Planning Development and Infrastructure Act 2016*

Timing for Provision of BII Certificates

Councils in South Australia have specific responsibilities for the administration of the Building Indemnity Insurance scheme (BII), under the *Building Work Contractors Act 1995*, (BWC Act). These responsibilities are prescribed in the *Planning, Development and Infrastructure (General) Regulations 2017*. Clause 36 of the Regulations states a Certificate of Insurance must be lodged with the relevant authority:

- a) Before the lodgement of an application for building consent, or
- b) On or before the giving of notice of the intended commencement of building work.

Councils have a statutory obligation to request the certificate per Clause 36 of the regulations. However, feedback from our members indicates a common occurrence where developers, contractors or similar parties fail to provide the Certificate as required. Furthermore, many only notify Council when building work is set to begin and that notification is often without the prescribed Certificate.

As a result, Councils are undertaking additional compliance and enforcement duties beyond their mandated responsibilities to verify insurance coverage and obtain certificates. This places added strain on Council staff who are already grappling with limited resources.

Councils possess the authority to issue 'Stop Works Notices/Orders' in instances where a Certificate has not been submitted. This often results in delays in project commencement, imposing extra time and financial burdens on builders/contractors and property owners. Our members frequently receive requests from builders to refrain from enforcing work stoppages due to time and cost constraints. Additionally, there's an added risk of owners pursuing legal action against builders/contractors for

breach of contract related to performance, timing, and costs, potentially leading to legal and financial consequences for Councils as well.

It should also be noted there are Councils who have established an internal procedure to refer those builders/contractors who have not acquired BII or have provided a questionable certificate to the CBS's compliance and enforcement team. This often occurs late in the process, placing strain on both CBS and Councils, as well as adding pressure on the builder.

By amending the timing of for the lodgement of BII Certificates to the beginning of the application process, it will:

- Allow builders, developers, contractors and owner builders more lead time to acquire the appropriate insurance and provide Councils with the Certificate.
- Reduce the workload of Council having to follow up missing documentation and make the assessment/consent workload more efficient.
- Give the builders/contractors assurance that all paperwork is in place and works can commence when ready once consent has been issued.
- Provide CBS an opportunity to liaise with Councils early in the process.

Collaboration between Councils and Consumer and Business Services

As discussed above, several Councils have adopted an internal procedure to refer matters of BII Certification to CBS for further action. Building Indemnity Insurance is a statutory consumer protection requirement under the BWC Act and CBS is the responsible for the administration of this Act including any compliance and enforcement functions.

Local government organisations are not statutorily responsible for consumer protection. Their sole obligation is to verify that a Certificate of Insurance is in place. However, reports from our members demonstrate an overlap of responsibility with Councils duties concerning construction work under the PDI Act.

An opportunity exists to enhance both the Council approval process and BII certification validation. LGASA advocates for the implementation of a procedure wherein Councils receive confirmation of BII certification before granting consent. This would require applicants going through a validation process with CBS prior to lodging a planning application where necessary. In the case of domestic building works, construction contracts should be submitted to CBS for confirmation/validation.

Providing CBS access to the SA planning portal would offer tangible benefits. It would enhance collaboration between CBS and Councils, facilitating the smooth execution of their respective duties under relevant legislation, particularly in areas of shared responsibility regarding BII Certification and validation.

Definition and Interpretation of Key Terms and BII Avoidance

Due to pressures in the building and construction industry, many people seeking to build homes are left to project manage the construction process. These people are often referred to as "owner-builders" however, neither the PDI Act nor BWC Act provides a definition for this term. Consequently, this leads to many owner-builders actively avoiding the need to obtain a BII certificate. Some examples of this provided by our members are:

- Licensed building contractors undertaking dwelling construction of more than one (1) dwelling without BII or with an exemption from CBS while claiming to be an “owner-builder”.
- Individuals claiming not to have engaged a builder or licensed contractor even though they may hold an appropriate license.
- Individuals claiming to be owner-builders while undertaking multiple construction projects.
- Individuals claiming to be owner-builders who allow their builder to avoid BII requirements without understanding the legal and financial risks.

In addition, the current legislative framework unintentionally creates pathways for builders, licensed building contractors, and “owner-builders” to undervalue each stage of the project build below the \$12,000 threshold to avoid triggering the need to obtain the BII certificate.

LGASA would request and support more guidance clarifying the definition of “owner-builder” including provisions outlining specific, unambiguous criteria for eligibility and stronger tools for both CBS and Council to govern the administration of their respective statutory responsibilities.

Scope of BII Thresholds and Coverage

The requirement to obtain BII is triggered when the cost of a project exceeds \$12,000 and is capped at \$150,000. LGASA notes that the purpose of this insurance is to protect the consumer and future owners (within 5 years) in cases where work is incomplete, or faulty work is not rectified due to circumstances such as the builder's death, disappearance, or bankruptcy.

However, these thresholds do not reflect current market conditions and consumer price indexing (CPI), nor do they account for the shortage of building materials or skilled construction workers, all of which pose a risk to the completion of building a dwelling.

Furthermore, the scope of work covered by the insurance includes only the basic construction of the physical building. It fails to account for additional assets that may need to be installed or existing assets that may need to be improved for the construction of a dwelling within the land's curtilage. For instance, the construction of a dwelling encompasses more than just elements like slabs/footings, framework, electrical/plumbing, and roofing. Essential infrastructure requirements such as driveways, access pathways, stormwater pipes, and related infrastructure are integral but are currently excluded from coverage under the insurance scheme.

LGASA would support and encourage a review undertaken by SAFA of the \$12,000 threshold and \$150,000 with consideration of market conditions and CPI increases and types of development that have a higher risk of making claims. We would also support the following:

- Consideration of inclusion of all building work within the curtilage of land to be included in the insurance cover i.e. infrastructure and other assets.
- Consideration of additional insurance options and packages i.e. the ability to purchase additional/extra cover under the scheme.
- Making BII applicable to both builders and owner-builders.

Mandatory Training and Education for Owner-Builders

There is a significant lack of knowledge among owner-builders about the BII scheme and its purpose and how it can protect them. Empirical evidence from our members has revealed officers spend a lot of time educating applicants on the merits and legal requirements of obtaining BII for their build. It has also been observed by our members that other states have implemented mandatory training and education for genuine owner-builders.

Currently there is no mandated requirement in SA for owner-builders to undertake any training or demonstrate sufficient knowledge of their duties, responsibilities, and liabilities. By comparison, other States have a statutory requirement for owner builder to undertake training and provide evidence of that training to the relevant authority before any application for any work is lodged.

In NSW the Department of Fair Trading Administers the governance of “owner-builders” and requires them to undertake mandatory training and provide evidence of the qualification to the relevant authority before undertaking any work or being granted development consent.

In Victoria, the Victorian Building Authority requires owner-builders to undertake an eLearning assessment. At the completion of this assessment a unique Certificate of Completion Code is generated, specific to that person. This code is used to complete the consent application form to the relevant authority.

The Queensland Building and Construction Commission requires owner-builders to apply for an owner-builder permit before any work commences. To be eligible for the permit, a person must be a genuine owner-builder and undertake a course provided by and RTO as approved by the Commission. Evidence of this qualification must be provided to the relevant authority prior to any consent being issued.

In Western Australia, the Department of Energy, Mines, Industry Regulation and Safety requires owner-builders to have sufficient knowledge of the duties and responsibilities involved in being an owner-builder. This can be done by completing an owner-builder course.

LGASA would welcome the introduction and implementation of mandatory training for owner-builders in South Australia similar to those requirements established by other States.

Conclusion

The LGA welcomes the opportunity to provide feedback to the Australian Government before final decisions are taken on these matters. Building Indemnity Insurance serves to provide consumers with a level of protection and requires Councils, CBS to be active in ensuring compliance with the relevant legislation. The LGA makes the following recommendations to improve the BII scheme by enhancing collaboration between and reduce the pressure on Council and CBS.

List of Recommendations

Recommendation 1:

Amend the timing for provision of BII certificates to be lodged at the development application stage.

Recommendation 2:

Remove the option for the provision of BII Certificates at notification of commencement of works.

Recommendation 3:

Provide Consumer and Business Services (CBS) access to SA planning portal to allow improved collaboration of governance and enforcement of the BII certification scheme.

Recommendation 4:

Implement a procedure for Councils to receive/obtain confirmation of BII certification prior to the granting of consent.

Recommendation 5:

Implement a requirement for domestic building work construction contracts to be submitted to CBS for confirmation and validation.

Recommendation 6:

Development and publication of guidance material that defines who is an “owner-builder” including eligibility criteria.

Recommendation 7:

Develop guidance materials to assist Councils and CBS to improve and enhance compliance and enforcement of BII scheme for better consumer protection.

Recommendation 8:

SAFA to undertake a review of the \$12,000 threshold and \$150,000 with consideration of market conditions and CPI increases and types of development that have a higher risk of making claims to inform appropriate minimums and caps.

Recommendation 9

Inclusion of all building work within the curtilage of land to be included in the insurance cover i.e. infrastructure and other assets.

Recommendation 10:

Make BII available to both builders and owner-builders.

Recommendation 11:

Provision for the ability of parties to purchase additional/extra cover under the scheme.

Recommendation 12:

Introduce and implement mandatory training for owner-builders in South Australia.

Recommendation 13:

Development and implementation of stronger legislative enforcement tools for local government to strengthen compliance with BII requirements.

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