

# MANAGING TERMITE LIABILITY



Technical

When building a new home or adding to existing, builders have a responsibility to satisfy local government regulations, consumer protection legislation and to properly exercise their duty of care. Unless each of these areas is satisfied, the builder is potentially exposed to litigation in a number of ways.

## Building regulations

Local Government requirements are administered by Councils and the technical aspects of the building regulations are set out in the Building Code of Australia (BCA). Termite requirements of the BCA Housing Provisions are clear – wherever a *primary building element* is considered susceptible to termite attack, a barrier system must be installed. Some Council areas are regarded as having a low risk to attack however this does not remove the susceptibility to attack but merely lowers the likelihood. The BCA defines a *primary building element* as a member of a building designed specifically to take part of the building load and includes roof, ceiling, floor and wall framing members, including any bracing members designed for the specific purpose of acting as a brace to those members. Queensland has established a state variation to the BCA that extends the definition of *primary building element*.

Requirements of the BCA do not apply in the following cases:

- Where subterranean termites are not known to present a potential risk of attack to the primary building elements of the building in a particular area;
- Where all the primary building elements are constructed of termite resistant materials as listed in the BCA. These materials are steel, concrete, masonry, fibre reinforced cement and treated or naturally termite resistant timber as listed in Australian Standard AS3660.1; and
- Buildings in Tasmania (the risk of termite attack in the remainder of Australia is regarded by AS 3660.1 as significant).

Although some council areas in ACT and Victoria regard the risk of termite attack as “low” a risk is still present and a builder would be vulnerable to litigation under common law if an attack occurred and no barrier system was installed.

## Acceptable construction manual

Australian Standard AS 3660.1 *Termite management, Part 1: New building work* is called up in the BCA as an Acceptable Construction Manual and contains details which are “deemed to satisfy” performance requirements for termite risk management. The standard specifies site management requirements prior to construction and a variety of methods of protection that can be used as single systems or in combination including –

- Concrete slabs
- Sheet materials (conventional ant capping)
- Woven stainless steel mesh
- Graded stone particles
- Chemicals, either hand spray or reticulation system

The standard recognises that although the barrier systems it describes satisfies the performance requirements of the BCA the systems cannot prevent termite attack. The purpose of termite

*The above is intended to provide general information in summary form. The contents do not constitute specific advice and should not be relied upon as such. Formal specific advice should be sought by members with respect to particular matters before taking action.*

# information sheet

barriers is to interrupt concealed entry into a building above the barrier, forcing termites to build around the barrier where their workings or evidence thereof, are exposed to view where they can be detected during regular inspections.

Any one or a combination of any of the systems generally satisfies requirements. The BCA and AS 3660.1 both require notification of the system used, the date of installation, the effective life of any chemicals used and the recommended scope and frequency of future inspections for termite activity. A durable notice providing this information must be displayed in a prominent position in the building, usually the electric meter box.

Site management requirements include inspection by an expert to establish the termite situation before a site is disturbed, either a new site or additions to an existing building. Any termite activity can be treated or if no activity is found, an assessment of the potential for future attack will influence the choice of a barrier system and the frequency of post construction surveillance. A contact will also have been established for future inspections.

### **Termite resistant is not a barrier**

Using termite resistant materials does not in itself provide a termite barrier. In fact termite resistant materials can provide concealed access to other parts of the building. Termites may gain entry through the many fissures in mortar joints therefore masonry, whilst termite resistant is not a termite barrier. The function of a barrier is to block a concealed path and lead termites to an area that is exposed to view and can be identified during an inspection. This is why AS 3660.1 requires termite shields to go all the way through masonry into which they are built and be visible on the outside. The mud tunnels that are built by the termites are to provide protection from light while they work around the barrier and the trained eye of a competent inspector readily detects them.

Despite the recognition in AS 3660.1 of chemical use, some Councils will not accept chemical systems for the control of termites. Others will only accept chemicals used with a reticulation system that will facilitate periodic replenishing the chemical.

Early communication with the client on all options for termite treatment is essential to establish a system that will satisfy the client's wishes and comply with the BCA. For example, although it may be possible to replenish the chemical under a slab by drilling holes through the floor, the intrusion might not be acceptable to the client, especially if the finish is ceramic tiles. Some clients may not want chemicals at all, while others may not like the appearance of, or be too inconvenienced by an exposed slab edge. When choosing a system the client will no doubt rely on the builder's skill and judgement. As soon as the builder poses the question the response will be either which is cheapest or what do you recommend. Builders should therefore be cautious about proposing any minimalist approaches to systems. Make sure you deal with reputable installers who stand behind their products with guarantees and insurance

### **A barrier may not always be possible**

Some situations are difficult if not impossible to provide a barrier. Where construction is carried out at or near the boundary it may not be possible to install a complete barrier system. These situations may include duplexes, villas, townhouses, parapet walls, and buildings with zero lot alignment to a common boundary and the like. First floor additions where the existing house is not disturbed at ground level is particularly difficult, if not impossible, to install a barrier. Reliance is totally on any existing system and particularly on regular inspections

Building owners should be made aware that the deemed to satisfy provision contained in the BCA and referenced standards may be nullified by any one or a combination of –

- Lack of access to install a barrier during construction
- Lack of access for inspection and maintenance
- The action of adjoining owners who may compromise the effectiveness of the barrier after construction is completed.

Full documentation of the limitations of the barrier system installed should be provided to the client and should include recommendations for the frequency of future inspections.

It is a major part of a builders 'risk management' procedure to check with the Council, before finalising the quote, to establish what systems are acceptable and what certificates will be required on completion. If you are considering using a new system, it is absolutely essential that you check. Councils generally will not accept new systems until a satisfactory report, in writing, is available from a recognised authority.

### **Not only Council requirements**

Satisfying local government requirements are only one part of a builder's responsibility. Consumer protection laws vary around the States and Territories but all expect a builder to exercise "due diligence" and to have a duty of care to provide a product that is fit for its intended use. They can also provide that the builder gives statutory warranties to the client. Termite risk is considered to be significant in all areas except Tasmania so the "fitness for purpose" test must be considered in relation to construction to impede termite attack.

Under common law actions can be instigated at any time by a homeowner who believes they have a justifiable reason such as economic loss. In the case of termite liability, the builder would have to establish that it was "prudent" to do what was done (that is, what would a reasonably competent and experienced builder do to meet the community expectation that no part of their home be susceptible to termite attack). If a barrier system was not installed, or not installed correctly, it could be difficult to establish that it was "prudent", even if the structural elements were termite resistant, or it was considered that the area was a "low risk area" for termite attack. Consumer expectations are not confined to "structural elements" but apply to all items of the building susceptible to termite attack such as skirtings, window reveals, cupboards, etc.

### **What do you need to do?**

Addressing your responsibility should begin before the site or existing building is disturbed. (see site management in AS 3660.1). This initial inspection if arranged by the client would increase the likelihood of all tenders allowing for the same treatment. A contact for ongoing regular inspections will also have been established.

A copy of all the paperwork associated with termites should be filed with the contract documents for the job and should include:

- A copy of the initial inspection report including any pre-building treatment.
- A copy of the certification from the installer of any systems certifying that the system has been installed according to the manufacturers written instructions. (Remember that it is very difficult to prove that the installation was "correct" after the slab is poured). If the builder installed conventional galvanised ant capping, the builder, as the installer, need to certify that it has been done according to AS 3660.1.
- Advice of the limitations of the systems due to site specific or construction difficulties

Originals should be given to the client when the job is "handed over".

If you have done all of the above and an attack occurs at some future time, you are then in a good position to defend yourself in any action that may be taken against you by arguing that all reasonable steps were taken to manage the risk of termite attack.

For further information contact HIA MEMBERLINE 1300 650 620.