



## **Inquiry into Western Australia's Home Indemnity Insurance Arrangements**

### **Executive Summary**

The Barnett Government recognises the importance of our industry to the Western Australian economy directly from a fiscal sense and as a major employer however the same level of importance has not been placed on the factors that deliver this fiscal and employment outcome by the previous Government and in fact it could be said our industry has been treated with contempt in the past.

These factors include the effective relationship between the consumer, the builder and how this relationship is controlled through industry management, contracts, and education to protect and enhance what will become a contractual relationship.

Last resort warranty insurance is NOT consumer protection by any stretch of the imagination and must be completely removed and replaced with a viable alternative as a matter of urgency. This has always been and is still the goal of the Builders Collective of Australia and the thrust of this current submission. We will outline the flaws of this scheme and offer two options for solutions that could and should be implemented immediately.

Enough is enough of this terrible last resort experiment.

As a result, we believe the past decade has completely failed to deliver a reasonable consumer protection and/or a coordinated industry management regime.

Both systems are founded on a last resort builder's warranty insurance scheme. That is, consumer protection is supposed to be delivered through last resort insurance against builder failure and builder registration/management is also conditional on a builder gaining eligibility to purchase warranty insurance in the first place. Our whole industry is being undermined by what we believe is the worst insurance product to have ever been concocted and forced upon any developed democracy at any time, anywhere.

The last resort scheme is costly, provides extraordinarily limited cover for consumers and has only managed to deliver a slew of controversy. In fact, our major consumer advocate 'Choice' describes it as 'junk insurance' and of 'making a mockery of consumer protection'. (Refer attached ACA Letter) Added to which the Productivity Commission in 2008 referred to it as a 'running sore' since its inception after it was introduced across Australia in the wake of the HIH collapse.

The last resort insurance scheme has unsurprisingly seen a loss of consumer confidence in our industry nationally, and a perception that Government is incapable of managing one of the most important industries in the State because they have abrogated that fundamental responsibility to private companies and trade associations who have a deep financial interest in keeping everything exactly as it is.

At the same time WA consumers and registered builders have paid an enormous price for this last resort regime that still, despite attempts to band aid it, fails to cause building defects to be promptly and efficiently rectified. Many builders and consumers have not and will never recover from its effects.

Therefore any suggestion of retaining this current last resort insurance scheme with only tweaks and modifications will be met with even more criticism, controversy and alarmingly, consumer pain and suffering.

The HIA and the Insurers have recommended tweaks to this (their) system in the past and each tweak in any jurisdiction has failed to deliver any meaningful results because their basic scheme was always fundamentally flawed at inception.

That is, the premise that effective consumer protection can be delivered by gifting these sorts of secretive and litigious profit driven entities with responsibility for the development, administration and funding of a fair, transparent and just consumer protection scheme is patently ludicrous. It is akin to putting the fox in charge of the henhouse – stupid, unless of course you are the fox.

That is, there has been a focus on profits first with consumer and (building) industry benefit second. Hence why the vested interests of HIA, Insurers and brokers continue to be virtually the only ones to support last resort schemes and why wouldn't they – the scheme has been very, very good to those who administer and deliver this product for financial benefit.

These have been the consistent messages from the Builders Collective of Australia since the HIH collapse in 2001 and now, over a decade later, the consumer detriment is both apparent, measurable and utterly appalling to any reasonable observer who is untainted by the vested financial interest others seek to derive from the continuation of a Government protected Last Resort Insurance scheme.

The Barnett government now has the opportunity to effect wholesale change which in the eyes of the wider industry will see them as champions.

We request the Government to adopt a proven holistic approach and consider the benefits of a truly beneficial contracted outcome. We have found a blinkered approach focusing on singular elements of reform will only continue to fail as they have in the past, being lost yet again to vested interest.

Such an open-minded approach will also show how an insurance product alone is far from the only means to achieve the effective consumer protection that our industry craves and deserves as a key economic driver.

A holistic approach to building industry reform will deliver an acceptable outcome and while there is no single magic wand there is the ability to take the best from all jurisdictions and adopt them to Western Australia.

We also request the Barnett Government apply the principles they espouse which is the advancement of free enterprise and the belief that individuals are better placed to make decisions about their circumstances and future than the State.

The reality of the current system is that builders are unable to effectively plan for the future as our registration is wholly dictated by satisfying an insurer, with often obscure and arbitrary financial criteria, that we are worthy of continuing in business. This annual lottery is a ridiculous way to regulate one of the most important economic drivers to the States finances.

In addition, this annual review process from insurers impinges on our democratic rights to work in our chosen profession. It has also been demonstrated to other enquiries that insurers are not averse to using the threat of withholding warranty eligibility from builders who choose to be publicly critical of them or the warranty insurance regime generally. This lack of transparency and accountability of the warranty insurers creates an environment that encourages oppression and corruption while at the same time making it almost impossible to monitor and control.

## **Background**

Building or renovating a house is in most cases the most expensive and emotionally charged experience in our life. Builders and consumers expect building legislation and regulation to protect both parties by regulating for fair and just outcomes for all.

Consumer protection in Western Australia over the past 25 years has directly or indirectly been delivered by, or its outcome heavily influenced by the two building trade associations. These associations have managed to achieve a financial benefit in some form or another from all schemes over that period and have played wedge politics in making any argument necessary to preserve their income and/or membership generating outcomes – in short, they are rent seekers exploiting legislation to their own financial advantage

and often at great detriment to consumers who the schemes have supposed to be designed to protect.

However it is the HIA who have been at the forefront of the current arrangements as it was Royal Sun Alliance/Vero and the Housing Industry Association being virtually the only insurer and broker remaining after the collapse of HIH in 2001 who devised the 10-point plan that was introduced in harmony by the States of New South Wales and Victoria on the 1<sup>st</sup> July 2002.

Clearly most of the various schemes over the past 35 years nationally have not delivered an outcome that could be considered appropriate consumer protection and least of all is the Last Resort regime introduced in 2002.

This scheme was concocted as a knee jerk reaction to the 2001 HIH Insurance crisis and saw one insurer and one trade association presenting the outcome, being financially favourable to themselves, and has since been represented to Government as some sort of holy grail of consumer protection while never being able to produce one shred of evidence that they have achieved a claims/loss ratio that could even remotely be used to describe a successful consumer protection system.

### **The WA Mutual?**

The HIH insurance crisis also saw a Mutual/Fidelity Fund developed by WA building industry interests with the sanction of the Government and the intention was to implement the same Mutual in the other States (Refer to the Mutual attachments) however the WA Government suddenly withdrew their support for the industry based mutual because of the HIA submission to APRA (also Attached) and instead supported the Last Resort Home indemnity insurance regime we have today.

The past decade has seen a plethora of inquiries and reviews into building consumer protection in all States and Territories as well as the Productivity Commission and the Senate Inquiry Federally.

Both Federal inquiries eventuated as a direct result of requests by the Builders Collective of Australia in an effort to bring fairness back to consumer protection in our industry.

To date, all inquiries have failed to provide an outcome that is remotely acceptable, largely we believe due to the secretive nature of the last resort insurance scheme and the inability of Government to effectively understand and thereby monitor and control where the money flows from Premiums to claims. That is, without full public transparency and disclosure of ALL claims and premium data the vested interests of Trade Associations, brokers, and Insurers have managed to run an effective fear and smear campaign against anyone who dares to question the suitability of the last resort warranty regime.

These circumstances in Victoria allowed the Building Commission to embark on and, take a direction in direct conflict with their charter that eventually saw the Auditor General condemn their conduct citing corruption and collusion

within their ranks. It is expected the Ombudsman will table a report on the Commission in the very near future that may include serious charges.

In Western Australia we have had inquiries on the effectiveness of the current domestic building regulatory regime from conflicting departments. These inquiries, while recommending 'window dressing' reform, have not recommended realistically beneficial options for reallocation or restructure of regulatory responsibility that could effectively even implement any changes. As a result we are still mired with the current mandatory insurance scheme.

We are all aware that Western Australia is home to the nations three largest builders and consequently the fear factor for Government has been the potential of a failure of a large builder however history suggests such a fear is unfounded as in the case of the 2008 Beechwood failure in NSW that saw all contracts taken over and completed by another building entity and this circumstance has been repeated many times over in all States. We believe if such a circumstance eventuated in WA these same circumstances would apply.

However the Buckeridge Group believes the current arrangements give them a competitive edge due to their buying power and they support Last Resort to the detriment of the other 5,800 odd builders in Western Australia.

Insurers have come and gone over the years with much speculation as to the reasons for their departure and while some were due to financial failure others were a point of contention during the Upper House inquiry in Victoria in 2010 and while it was found brand damage played a significant role the stranglehold on the market that the Vero/HIA relationship achieved from 2002 to 2006 (92% of the Australian market according to the Grellman Inquiry as the attached shows) as they were virtually the only provider. This monopoly/duopoly proved to be a closed shop for the new players that had entered the market only to find they were unable to achieve a commercially viable market share.

The Vero departure was based on a commercial decision as the brand damage they would have suffered had they appeared before the Victorian Upper House Inquiry was unsustainable due to them publishing their facts and stats paper (attached) in 2006 that stated they had settled 6,000 Last Resort claims between 2002 and 2006 against the Victorian Essential Services Commission finding of only 273 claims being recorded between 2002 and 2008.

Builders generally have in the past and still today remain hesitant to change from one warranty provider to another due to the extreme amount of red tape they have to suffer and there is no guarantee their annual turnover limit wont be reduced as well as the size of project they can undertake.

Our industry and our customers deserve a better model and not one that makes our contractual relationship more difficult than modern building design and expectations already dictate.

Therefore we see the Western Australian model needs to deliver the following broad outcomes to meet those expectations:

- Appropriate building standards and regulations
- Register, train and support qualified builders
- Register, train and support the various trades
- Ensure building standards and regulations are enforced
- Provide timely information to every building consumer
- Resolve disputes quickly
- Reduce the cost of resolving disputes
- Reduce the amount of disputes
- Build an alternative financial model to replace private insurers and brokers
- Reduce unnecessary, delays, cost and red tape in getting defects and/or non completion rectified

### **The existing model**

The Western Australian model is overseen by the Building Commission and has an informal dispute resolution service similar to the Victorian BACV which is a free service however resolution is only achieved with two willing parties who are prepared to conciliate in the first instance, and both suggest their services enjoy a high percentage of success.

This is the case for those few willing to conciliate however the vast majority will not, and seek justice through the tribunals or now walk away due to the frightening cost of litigation.

VCAT in Victoria has been severely criticised by its own profession in recent submissions as is expected of the CTTT in NSW as the cost to mount a case in most instances exceeds the benefit that may be achieved.

Builders Collective has many examples and believes that the existing Western Australian model is also flawed and has not and does not deliver what the industry expects and consumers deserve and pay for.

If ever there was need/reason for ex-gratia payments by Government to consumers for compensation of a failed public policy then home indemnity Insurance would have to be at the very top of the list.

The fact that the WA Government underwrites any warranty event above \$10 Million demonstrates the willingness for the Government to play a direct role in any consumer protection regime however we believe this aspect was at the behest of the private insurance regime that demanded this requirement.

## Getting it wrong!

Getting it wrong is not at all difficult as for some 35 years there have been multiple attempts in Australia to achieve appropriate consumer protection for the building industry and we have ended up with a last Resort Regime over the past decade that could only be considered the ultimate failure.

This regime has not only failed in delivering basic consumer protection but its management of our industry has taken it down a continual slide into disrepute that has seen regulatory control and compliance compromised.

At the same time, the insurers, HIA, MBA and the brokers are awash with funds, the education of our industry has been left wanting and has thereby seen a gradual de-skilling of our industry with the apprenticeship program in serious trouble due to the plethora of short courses and the like being presented for a fee by associations for their own profit.

## Getting it right

The following provides a checklist of some of the issues to “get right”.

- A regulator to register; monitor and enforce compliance; and to educate builders and consumers - **an impartial regulator respected by both consumer and builder**
- A **practitioner registration** and renewal regime that ensures builders and the building trades are qualified to be registered and they maintain their skills
- Registration that allows the practitioner to build based on experience and expertise
- **Builders and consumers educated and informed**
- **A simple plain English standard building contract** to replace the HIA, MBA and Architects contracts that describes the project and the obligations of both parties
- Access for both consumers and builders to a **single** and timely **dispute resolution** service with a binding outcome
- A **enforcement process** to reduce operating and legal costs to builders and consumers

- A **dispute reduction** strategy based on **quality information** on the causes of problems and timely information to respond and reduce them.
- **Consumer protection to quickly rectify defects** or incomplete work where a builder refuses to return during a ‘warranty’ period and this could be based on the proven Queensland BSA model

We do not have to reinvent the wheel to design a model “to get it right” – there are examples we can quickly adapt to the Western Australian environment. As a minimum a model should include what is covered in the following section.

## Solutions

### Option one

1. The establishment of a **one-stop shop** managed by Government for all building related matters that would be based largely on the proven and effective Queensland system.

This will address some of our concerns for both builders and consumers who currently get conflicting and unclear information about where to go for information and in particular dispute resolution. A single agency will more adequately deliver:

- Satisfactory consumer protection being able to provide quick and effective service delivery including enforcement action against builders.
  - That is, a complaint is made by a consumer (or builder), investigated quickly, adjudicated soon after and rectified within 30 – 60 days
  - Rectification costs and organisation managed entirely by the One stop shop
  - In effect, consumers make one phone call and are not mired for months or years in tribunals and courts trying to get their case heard and resolved
- Solutions in line with recent Upper House Inquiry in Victoria Recommendation 6.4. – again, issues raised by Builders Collective
- Simplified administration and regulation of the industry through a single Ministerial portfolio.
- Transparency and accountability to both Parliament and by

extension, the public

We believe a single agency responsible for a one stop shop for all domestic building matters will more effectively deliver better outcomes for consumers and minimise risk to industry.

2. An insurance that works by:

- Introducing a significantly enhanced insurance product to provide 'real' consumer protection in the event of failure to comply with required building work. This will address:
  - Removal of for profit Trade Associations, insurers and brokers from the consumer protection regime so that the amount of consumer protection delivered is based on need, not restricted depending on profits to private companies as is currently the case
  - Limitations of the existing product and consumer expectation/understanding of what protection they have purchased
  - Provide real enhancement to the product to significantly reduce hardship to consumers with trigger points when all options to settle technical disputes have been exhausted with builders
  - Quickly fixing defects and completing projects at no cost to consumers
  - Builders who do not comply ('bad eggs') to be dealt with accordingly
  - Allowing consumers to seek redress to the scheme as a first resort in the event of a dispute instead of the current system which forces consumers to seek protracted legal redress in the first resort before they can even approach their insurance

## **Benefits include:**

### **Better information**

- Enhanced information collection and analysis across building complaints and dispute resolution
- Enhanced information available to inform the insurer/underwriter when developing and pricing an improved insurance product
- Mandatory reporting and public disclosure of all claims paid and premiums collected. Note the information annually published by the Queensland BSA should be used a minimum standard of disclosure

### **A better result for consumer and builders**

- A compliant system is the best means of guaranteeing consumer protection. The rule of law must apply and be seen to be applied in this, one of the most important industry sectors in Australia
- A single entry point for consumers for all domestic building related matters will eliminate confusion for consumers who currently have to know where to go for information, technical advice or conciliation and dispute resolution services, and most don't.
- A single agency responsible to administer and enforce the *Building Act*, *Domestic Building Contracts Act*, and the *Fair Trading Act* will provide clarification and eliminate the current confusion created for consumers and practitioners by being handballed between competing bureaucracies
- Information and cases will be managed by a single agency delivering a consistent message, reducing red tape, improving case record keeping and timelines
- Matters will be dealt with by the existing agency that specialises in all domestic building matters in Western Australia
- An enhanced insurance product to respond in a more timely and comprehensive manner to technical failures to fully cover consumers in distress as a first resort

### **Improve dispute resolution through Early Technical Intervention**

- Effective dispute resolution requires early technical intervention – Modern building is highly technical. The Building Commission registers builders and building surveyors and has had a relationship with the industry;
- The Building Commission administers investigations / disciplinary procedures, which are a key element to effective dispute resolution. Reforms to streamline and enhance dispute resolution, including rectification orders, to be improved to act on more timely information available through a single agency.
- Greater opportunity to monitor practitioner conduct
- Targeted education and training programs can be developed with training providers and industry to address capability and skill requirements.

On the surface The Building Commission should be the entity for this one stop shop role

### **Option two**

Is Option one with the removal of insurance.

### **Benefits include**

- Cost saving to consumer and time and cost saving to builder

The limitations of this option includes:

- No insurance for consumers in the case where a builder cannot or will not complete a contract or defects during a “warranty” period
- However current claims are so modest under the last resort scheme there may be far less consumer backlash than what exists now if it was removed. This was the experience in Tasmania when they removed the mandatory last Resort regime in its entirety. There has been no warranty insurance available in Tasmania ever since it was removed.
- Risk to Government as having to act, as insurer of last resort however the Tasmanian experience has not reflected any inherent risk here.
- Little scope for alternative forms of insurance for consumers being available in the market as the Tasmanian experience demonstrated how the private insurers withdrew the product from the market.
- A Discretionary fund could be established

Operating under either option

Would avoid any political embarrassment

Cover hardship cases allowing people get on with their lives

Funded via a levy on Home Indemnity Insurance premiums or a levy collected by the Building Commission. An appropriate board could oversee a discretionary fund.

There is a view which is dependant on the outcomes of the current national occupational licencing (NOLS) that all states will be required to meet their criteria but it appears National Licencing also has its own problems and continues to be delayed in respect to the builders of the nation. It should be noted that Victoria considers NOLS will only deliver further cost and red tape and do not intend participating in the proposal.

## **Conclusion**

Quite simply, a whole of industry approach to the building industry is long overdue and one that the industry and consumers endorse.

Western Australia needs an impartial regulator that is respected by both consumers and builders and a one-stop shop for all building related matters.

The benefit of option one and arrangements it proposes is not what is being questioned. What is in question is the political will to deliver.

The Queensland BSA is an example of a whole of industry solution that has consistently performed well and delivered for consumers and builders over many decades.

This was achieved because the Queensland BSA has taken leadership and responsibility and complete control of the industry at no net cost to the taxpayer as well as actively excluding the 'for profit' rent seekers from having any financial advantage in the scheme.

In particular, the HIA and warranty insurers have a disappointing track record over the last 12 years in saying and doing anything or providing any amount of misleading and false information to inquiry after inquiry for no other end than to preserve their lucrative and legislated income streams that is veiled in secretive and dubious claims that public data is commercial in confidence. This must stop.

Contrast this behavior with the utter transparency and public scrutiny the Queensland BSA subject themselves to, and the end result is an industry model that enjoys overwhelming consumer and builder approval.

This is a result that cannot be dismissed by its critics, as it is the 'holy grail' of regulatory control.

Western Australian consumers and builders deserve better than what the WA Government currently provides and we look forward to a careful and considered outcome based on the facts and not the spin of those with a large financial vested interest in the current scheme.

Yours Faithfully

Phil Dwyer  
National President  
16<sup>th</sup> August 2012