



Builders Collective of Australia

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Building Stronger Foundations consultation
Regulatory Policy, Better Regulation Division
Department of Finance, Services and Innovation
2-24 Rawson Place
HAYMARKET NSW 2000

Submission

Back in the day before we had consumer protection schemes and licencing, our industry constructed safe buildings, and most were delivered with integrity and pride.

Due to a few builders, consumer protection became a topic in the early seventies and has since become central to the industry management as a public policy that in general terms has been supported by industry.

In the mid-seventies HIA and MBA, each devised and managed their own separate consumer protection schemes on behalf of governments for about a decade.

This experiment ended up being a debacle, and around 1984 government-initiated statutory funds came into being in NSW and Victoria. These schemes were First Resort, well run, successful, and they delivered their charter.

However, by 1996 HIA and MBA had again convinced governments to privatise the consumer protection and they would be the commission brokers to deliver the consumer's insurance product to the nation's builders and the majority insurer at that time was none other than HIH.

A couple of years beforehand, the Governments of Victoria and NSW with the support of the trade associations and others decided to privatise the

certification process that had been previously undertaken by municipal councils and their building departments.

Even though the council system itself was not timely, and some building inspectors were accused of being unnecessarily robust by some. It was generally well accepted and respected by the majority of builders. In any event, it was seen as a reasonable system but importantly it mostly delivered quality buildings.

Again, Governments were put under pressure by industry and their agencies to consider and apply what is now known as [Deemed to Satisfy provisions](#) that allow the use of a product within the building project if a Surveyor/Certifier is prepared to sanction its use after meeting the conditions as explained by the NCC.

In the CSIRO report undertaken on behalf of the Victorian Building Commission and published in 1999 was the [Privatisation and Performance-Based Regulations: Are they Cost-Effective?](#)

This document remains on the VBA website today.

Page 12 of this document states that a developer made savings on his specific project that was costed under normal building circumstances and deemed unviable but through applying the deemed to satisfy provisions a saving of 29% was achieved making the project very viable.

A massive saving to support the bottom line for the developer and demonstrated to Governments that this process would increase building productivity.

In March 2001 the most prominent corporate collapse in our history eventuated when HIH the insurance giant went into liquidation, and the resulting impacts of that collapse are still being felt today as many thousands of Australians suffered under that failure.

HIH had provided virtually all the builders warranty insurance in the nation on a first resort basis which simply means it was insurance as we know it.

Governments sat on their hands for 14 months while the Builder's self-called peak association the Housing Industry Association (HIA) was secretly putting together a scheme with Royal Sun Alliance (later VERO) as the insurer, and this draconian scheme was forced on us on the 1st July 2002 in association with the Governments of NSW and Victoria.

Known at that time as Last Resort Builders Warranty Insurance (BWI)

Nothing short of complete mayhem existed at this time as there was virtually no legislated mandatory insurance available other than from a couple of very minor players who had no hope of filling the needs of the nation's builders.

Builders trying to access this mandatory BWI insurance found the criteria to obtain it bewildering as well they had to expose their financial soul and commit all assets including their home to the insurer to receive a letter of eligibility which capped their annual turnover as well as the size of the house they could build.

The letter of eligibility was the only instrument to activate their building licence, and then it gave them access to an insurance certificate they must purchase in the name of their client before they could obtain a building permit.

In other words, under extreme duress, the Builder becomes the underwriter of the insurance product, not the insurer as most believe, and this circumstance gave rise to the phoenix builder concept in no uncertain terms.

The BWI insurance is far more potent than a builder's licence or a building permit.

Many thousands of builders lost their businesses, and some took their lives through not being able to operate as they were unable to obtain the mandatory insurance to work legally resulting in zero income so many went underground and worked illegally just to put food on the table, and that same practice has widened and continues today.

Only South Australia provided a moratorium to its builders until the insurance product was readily available.

Consumers believed the builders paid for the BWI warranty for them, and it would protect them against their builder's failure to rectify defects or complete their home.

They were not told it was Last Resort Insurance and those two words became a massive learning curve for consumers and builders as they had never heard of the term or its meaning which is still the case today.

A press conference held by the Victorian and NSW governments and HIA in Victoria to silence dissent from builders was recorded by [Rehame Transcripts](#) now Media Monitors, and this document is where HIA explained the new system they had put together for the Governments of NSW and Victoria and its benefits to consumers and builders.

What came with the BWI product was the management of the industry and a document described by the Victorian Building Commission as the 10-point plan where at point 4 it excluded the Hi-Rise commercial builders from providing a warranty on their buildings. (The 10 point plan document is attached)

Point 9 states the Governments will underwrite any claim above \$10 Million just in case a prominent builder went under, and the insurer was exposed, so governments were in the insurance business relating to consumer protection from day one.

Over the past 20 years, we have witnessed the Australian building industry decline in standards, quality of buildings, integrity and that brief history was necessary to understand how we have arrived at this point, and how we may map the future.

We believe some of the major elements that set our industry on the downward spiral are related to:

- Privatisation of the Certifiers/Surveyors
- Deemed to satisfy provisions
- The HIH collapse
- Introduction of the last resort insurance scheme (BWI)
- Adoption of the 10 Point Plan

Today's position:

We have allowed a culture to develop whereby those who have vested interests have influenced State and Territory agencies and a tightly driven wedge is now between those who want reform and those who feel the status quo should remain.

This culture created a them, and us mentality and reformists are treated with spin and tokenism only.

HIA is a private company with 11 directors according to the ASIC company data obtained in May this year

We wonder how on earth a private company was able to put together a scheme that gives them total sway over the nation's builders to exploit them through the financial criteria they managed on behalf of the insurer.

This process gave HIA a massive income stream together with virtually an automatic membership from a suppressed base unable to voice their distaste and opposition for fear of losing their business which has, and still can happen today at the stroke of a pen.

HIA alone was the sole provider of the BWI insurance product for the first four years until the ACCC assisted the Builders Collective in opening the market to more insurers and brokers in 2006.

Over that first 4 years, the HIA income propelled them from a \$30million a year business to over \$100 million annually.

Consumer protection in the building industry is a public policy and should run with complete transparency, yet this HIA BWI scheme is secretive and still unaccountable to this day.

The only time we were able to obtain factual performance data of the scheme was through the Victorian Attorney-General, and the [AGE newspaper ran this story](#).

The BWI scheme allowed the state and territory regulators to lessen their responsibilities from the role of assessing builders for registration and secondly, from any proactive enforcement as they asserted the insurer now had the role of vetting and assessing the financial viability of builders, which would remove the bad builders.

The BWI scheme has been a very cosy arrangement between regulators and the Housing Industry Association who purports to represent the builders of the nation however if BWI was removed today we doubt if HIA would retain any of their members or builders that were exposed to their conduct at that time.

The building industry is in crisis and blame for its decline over these past decades can be squarely placed at the feet of a number of entities through their role in satisfying the needs/requests of the major builders that has seen contracts become a mess devoid of direct accountability.

The legal fraternity embraces the BWI scheme, and they have taken dispute and resolution to a level most cannot comprehend let alone afford and certainly not our consumers.

The training of industry has been captured by the short course system that has seen some RTO's churning out registered builders after six weeks and \$1500 or as the Ombudsman found just purchasing a licence from the registrar of the previous Building Commission in Victoria.

The PI Insurance debacle splits the industry, and we see industry professionals being targeted just because they have a PI Insurance policy.

Adding to the decline in standards and quality has been the role of our trade associations the HIA and the MBA that remain mute on the fundamental issues and more recently the obvious failures as their interest is in the status quo that protects their income streams.

Instead of understanding and accepting that industry governance and insurance is not about them it is in fact about quality and duty of care not to mention protections for their indirect yet more vast set of stakeholders, the Australian home-buying public.

The issues of today!

The national cladding issue and the structural failures of the Opal, Mascot, Campsie Apartment towers, and an apartment block in Sydney's southwest suburb of Zetland together with the apartment fires and the flooded Liberty Tower in Melbourne not to mention the many defective homes that don't have the media interest of huge towers or fires have all shone an extremely bright light on the industry woes.

There is a raft of further issues throughout the industry such as the ability to so quickly obtain registration in various categories even though the applicant may not possess skills for that category, but the financial kickback from the Commonwealth appears more attractive than delivering appropriately skilled builders and tradespeople.

We currently have an industry that cannot be reformed under the existing model as it is impossible under that scheme to meet the requirements or values of a modern-day Australia as we have not moved with the times

and continue to struggle and fail under the current structure that is over twenty years old.

The Builders Collective was directly responsible for having the Last Resort BWI scheme removed in Tasmania in 2008 as their Hansard records show and at that time an MP described the trade associations as wolves in sheep's clothing.

That system was removed entirely without replacing it with any insurance, and over the last decade, the Tasmanian building industry has flourished without incident in this area thanks to their Consumer Affairs.

Recently both the Victorian and the Northern Territory conservative governments were on the verge of throwing out the Last Resort BWI schemes to be replaced by a statutory first resort regime until the trade associations threatened them with the loss of their forthcoming elections.

Both put the new legislation on the back burner until after the election which they both lost, but the big losers were the building industry, and its consumers as the reform bills were condemned to the depths of Hansard.

Still, to this day all consumer advocates in the nation condemn the Last Resort scheme including 'CHOICE' who state Builders Warranty is [the worst insurance in Australia.](#)

We believe sensible reform will only be achieved by removing the illusionary Last Resort BWI scheme, its management, the current culture of agencies together with the vested private interests.

The government agencies must re-adopt and implement their charter, which would see existing regulations and compliance enforced on a proactive basis largely without the need for any more regulation. We need the current rules applied appropriately.

The insurance industry condemns the BWI scheme and refers to it as a ['House of Horrors'](#) and fundamentally flawed.

Seventy plus reviews/inquiries over the past two decades have not achieved any outcome that has made a difference to the downward spiral of our industry.

Our industry is a national industry under one code.

The way forward:

Our industry is enormous but presents as out of control today that is hurting tens of thousands of its consumers in the extreme, not to mention its builders and no sector has the right to inflict such pain on its participants.

Those standing in the way of reform have had **unfettered opportunity** to administer our industry and deliver a compliant and regulated industry with integrity however they have instead chosen to retain their income streams by maintaining their 20-year-old scheme and demean all who dare question them.

The failure of the current administration in all the States and Territories of our industry to manage it has been unaccountable and extreme by any standards.

Our industry cannot be reformed under this existing model as it can't meet the requirements of a modern-day Australia.

It is our firm belief reform can only be achieved by removing the illusionary BWI scheme, its management, and the current culture of agencies together with the private vested interests.

Then when government agencies adopt and implement their charter, which would see existing regulations and compliance enforced on a proactive basis even without the need for any more regulation, and regulators should be held to account in terms of their inaction and applauded when they do act for ordinary Australians.

The removal of vested interests is essential for legislation to be applied without fear or favour to ensure compliance of the regulations.

The registration of all trades and professionals is essential to maintain the integrity of the industry, and vested interests must not stand in the way of its implementation in the States and Territories where only builders, plumbers, and electricians are registered.

Building contracts require a complete overhaul, reduction in size and provided by the government to reflect fairness to both the consumer and Builder.

Such a contract would be plain English that all can understand and if a dispute arose, a dispute and resolution panel of building experts could determine resolution with a fallback to a civil court at the participant's cost.

The current contracts presented by the various associations are all loaded in favour of their members, and many clauses can be interpreted in so many ways causing confusion and ongoing expense.

The legislation forcing building participants to enter a tribunal for dispute and resolution is archaic in modern Australia.

Builders, plumbers and other experts that fully understand our industry should be a part of every agency in the nation to ensure the views of consumers and builders are always at the forefront simply because their contracts are the basis of the industry.

Regulators should be able to compel those who do not do the right thing, to fix it. Point blank. No phoenixing, no obfuscating, just remediation under threat of prosecution.

We initially applauded the appointment of Mr Michael Sukkar as the Federal Minister for Housing a circumstance we have always advocated.

However, it was disappointing after meeting with the Minister recently to find his role is limited to the availability of housing stock only and has now directed us to Minister Karen Andrews who is chair of the Building Ministers Forum and it is her role as the responsible Minister.

We call on the Commonwealth and each of the States and territories to establish a sole Housing Minister as our contribution to the nation's employment and fiscal health warrants and demands such a move.

The current position of being the junior partner to planning in most States is not acceptable, as planning often moderates good building governance and practice, and split Ministerial roles only confuse and hold back the industry.

Recently Premier Berejiklian conceded Sydney's building industry is failing. She said self-regulation has not worked.

We have requested Prime Minister Morrison to instigate a short sharp Royal Commission with a duration of six months with targeted terms of reference into the national building industry.

Be assured a broken system can't be fixed with the same thinking that created it!

However, we have the Queensland model to draw inspiration from as it's the only workable system that is endorsed by all consumer advocates in the nation.

Such changes will be good for business, good for people, and good for a modern nation.

Phil Dwyer
National President

Attached: '10 Point Plan'.

New Model for Builders' Warranty Insurance in NSW/Victoria

1. The threshold for compulsory home warranty insurance will be raised to \$12,000.
2. The minimum period of cover for structural defects will be 6 years.
3. The minimum period of cover for non-structural defects will be 2 years
4. The mandatory requirement for builders of high-rise residential buildings is to provide builders warranty insurance will be removed. Owners of high-rise dwellings will have access to a last resort catastrophe fund which is to be funded by builders and insurers.
5. The maximum cover (i.e. excluding legal costs) for non-completion claims will be 20 per cent of the original building contract amount.
6.
 - A. A homeowner will be able to claim under a home warranty insurance policy when their builder:
 - Is dead
 - Has disappeared; or
 - Is insolvent.
 - B. Insurers and NSW and Victorian agencies will agree procedures which will provide insurers with an opportunity to meet consumer needs for settlement of a claim prior to the 6A trigger points being reached
7. The minimum amount of cover will be \$200,000 (inclusive of legal and other costs).
8. New South Wales and Victoria will use their best endeavours to harmonise their builders' warranty insurance products and the specified processes to be followed by all parties (insurers, builders and homeowners).
9. Insurers' liability in respect of claims above \$10 million arising from the death, disappearance or insolvency of any single builder will be capped. The catastrophe fund referred to at 4 above will also be available to meet claims liabilities in excess of \$10 million.
10. New South Wales and Victoria will use their best endeavours to harmonise the reporting requirements for insurers between the two States.