

# Chapter 6

## Other consumer protection issues

6.1 In a scheme that limits insurance claims to the builder's death, disappearance or insolvency, it is all the more important to assure the quality of other aspects of building regulation and dispute resolution which are the consumer's defence if those conditions are not met. Many submissions related more to these other defences than to home warranty insurance as such. There is a need for:

- better regulation of builders at licence and licence renewal, with more expeditious procedures for disciplining or delicensing delinquent builders;
- better public information about builders' licensing and disciplinary record;
- quicker and cheaper dispute resolution.

6.2 The committee has not researched the position in each state, beyond noting the mostly qualitative comments in evidence, and makes only general comments.

### Need for better regulation of builders

6.3 Assuring the technical competence of builders is the responsibility of state licensing authorities. Some submissions thought that the states are not rigorous enough about this. For example:

One of the problems that I have with the licensing arrangements in Victoria... is that it is basically like a golf club: you go through your initial assessment and you are accepted onto the book as a builder, and from then on in, provided you paid your annual fee to remain on the register, you could remain on the register.... It ought to be like a current licence, some sort of annual assessment, in my opinion.<sup>1</sup>

6.4 All agreed on the need for better links between disciplinary decisions and licensing. Vero sees this as part of the 'defence in depth' against delinquent builders:

It is typical of the building industry (and other industries, too) that certain participants are inclined to ignore or work around whatever regime is in place. In this context it is absolutely essential that the consumer protection structure provides defence in depth - from up front education and clear enunciation of homeowner responsibilities, through to penalties for recalcitrant builders (that do directly influence the correct behaviour or permanently remove them from the industry) and backstop insurance protection.<sup>2</sup>

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1 Mr M. Stokes, *Committee Hansard* 13 June 2008, p.32

2 Vero Insurance Ltd, confidential additional information 18 June 2008, p.21

6.5 The NSW Government said there is ample scope in NSW for deregistering builders who do not meet appropriate performance standards. It gave figures on disciplinary cases over the last few years: for example, in the three years to 2006/07, 814 licences were cancelled due to Licensing Branch compliance actions, such as licensees becoming insolvent, failing to comply with a Consumer, Trader and Tenancy Tribunal order, or lodging a fraudulent application.<sup>3</sup>

6.6 The Victorian government said it is currently reviewing its builder registration and disciplinary framework with a view to better protecting consumers against problem builders.<sup>4</sup>

6.7 There are different opinions on whether the licensing function should be in the same body as the insurance function (as in Queensland). The Queensland Building Services Authority thought that there were benefits in integration:

We are the only state that places financial requirements on our licensees—because they [the other states] leave it to the insurer to look at the financial requirements. That gives me compliance intelligence, because every time they are paying insurance I now know whether they are exceeding their annual allowable turnover. That then allows me to go in and have a look at that business.... It is integrated, because you are getting the intelligence, you are getting the data, and you know instantly when there is a problem... [In the other states] All they say is, 'We're not going to give you insurance,' so the regulators then do not move on the individuals that may have financial trouble in the industry.<sup>5</sup>

6.8 On the other hand the HIA thought that licensing and insurance should not be in the same body, because of the possible conflict of interest:

QBSA not only provides insurance and regulates licences it also represents consumers in disputes with builders. This is neither appropriate nor desirable because of the inherent conflicts of interest. State regulator/licensing bodies must be responsible for resolving disputes. When the role of regulator and insurer are fused there is moral hazard, since a finding in favour of one party or the other will have direct financial implications for the regulator/insurer. One of the major reasons for the decline and ultimate demise of the Housing Guarantee Fund in Victoria and the New South Wales Building Services Corporation was exactly this conflict of roles.<sup>6</sup>

6.9 VCEC in its 2005 inquiry noted that linking performance to registration does not depend on government ownership of the insurance:

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3 NSW Government, submission 34, p.5

4 Victorian Government, submission 38, p.4

5 Mr C. Wright (Queensland Building Services Authority), *Committee Hansard* 10 April 2008, p.27

6 Housing Industry Association, submission 60, p.9

While integrating insurance and registration within a government agency offers this advantage, it is not essential. The key is the early identification of poor builder performance and linking this to registration.<sup>7</sup>

### ***Committee comment***

6.10 The committee agrees there is a need for better regulation of builders and better links between disciplinary decisions and licensing/delicensing. However the Committee notes that this does not depend on government ownership of the insurance scheme.

### **Better public information about builders' licensing record**

6.11 Submissions argued that consumers should have full information about builders' licensing and disciplinary record. There is no disagreement about this. NSW has a public register with this information.<sup>8</sup> In Queensland it is on the BSA website. It appears the same information is not easily available in Victoria.

### **Need for quicker and cheaper dispute resolution**

6.12 Dispute resolution arrangements typically include mediation at an administrative level, followed by action in a consumer tribunal if mediation fails. Details vary between the states.

6.13 Many consumer submissions described extraordinarily long drawn out building disputes, including absurdly high legal costs in the tribunals in relation to the sum in dispute. For example, the Consumer Action Law Centre in Victoria described a case where - ·

- The dispute has lasted four years, without a satisfactory resolution;
- The builder rejected all attempts to conciliate the matter at Building and Conciliation Victoria;
- Proceedings in the Victorian Civil and Administrative Tribunal were drawn out and expensive, resulting in an order in favour of our client of over \$63,000;
- Independent costing of our legal services showed that over \$88,000 costs were incurred in relation to the matter;
- The order remains unsatisfied, requiring our clients to seek to wind up the builder's company in order to claim on Home Building Warranty Insurance (estimated to cost an additional \$4,000 - \$15,000)...<sup>9</sup>

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7 Victorian Competition and Efficiency Commission *Housing Regulation in Victoria - building better outcomes*, October 2005, p.227

8 Mr S. Griffin, (NSW Office of Fair Trading), *Committee Hansard* 13 June 2008, p.78.

9 Consumer Action Law Centre, submission 32, p.9

6.14 There were similar stories about the Consumer, Trader and Tenancy Tribunal (CTTT) in NSW.

6.15 The Consumer Action Law Centre saw a problem that 'while the Consumer Affairs Ministries of the various States and Territories often provide mediation services, these are not typically reinforced with any determinative power on the part of the regulator...'.<sup>10</sup>

In Victoria, consumers with a complaint about a builder can complain to the Building Advice and Conciliation Service Victoria (BACV), which is managed jointly by Consumer Affairs Victoria (CAV) and the Building Commission. The problem with dispute resolution at BACV... is that builders do not have an incentive to resolve cases on a conciliated basis. ... Further, the BACV has no capacity to enforce an outcome.... The inability of conciliation to provide rectification orders leaves a very significant gap.<sup>10</sup>

6.16 In NSW building inspectors can issue rectification orders, but if the builder does not comply the consumer must still take the builder to the CTTT (the inspector's building report may be used as evidence of defects). Not complying with a rectification order is grounds for disciplinary action.<sup>11</sup>

6.17 In response to the consumer complaint stories, the authorities gave statistics showing what they argue is a satisfactory overall achievement in early dispute resolution. In NSW:

The operation of the dispute resolution service initially involves an attempt to resolve the dispute by Fair Trading Centre staff. In 2006/07 of the 6,112 complaints received by Fair Trading around 2,251 or 36% of disputes were resolved at this stage. Of the 2,517 complaints referred to the Home Building Service, 1,784 were subject to site inspections, of which 1,533 or 86% were resolved.... The early intervention dispute resolution service has reduced the volume of building complaints going to the Consumer, Trader and Tenancy Tribunal by approximately 30%.<sup>12</sup>

6.18 In Victoria:

Around 80 per cent of disputes conciliated by Building Advice and Conciliation Victoria are successfully resolved.... The number of matters initiated [in the VCAT] has declined from over 1000 in 2000-01 to 825 in 2006-07.... The Victorian government is closely monitoring its domestic

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10 Consumer Action Law Centre, submission 32, p.5

11 NSW Office of Fair Trading, submission 16 to Legislative Council General Purpose Standing Committee No.2, *Inquiry into the Operations of the Home Building Service*, November 2006, p.43

12 NSW Government, submission 34, p.4

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building alternative dispute resolution services to identify opportunities for improvement.<sup>13</sup>

6.19 There are similar statistics for the tribunals. For example, in the NSW CTTT, 48 per cent of home building matters are listed for hearing within 28 days, 65 per cent are finalised before or at the first hearing, and 36 per cent are finalised within 35 days.<sup>14</sup> In Victoria 72 per cent of domestic building cases are resolved by mediation, 62 per cent of cases are resolved within 20 weeks, and 78 per cent within 35 weeks.<sup>15</sup>

## Discussion of consumer protection needs

6.20 As many submissions noted, home building or renovation is likely to be the most significant purchase most people make in their lives, and one that they have little experience of dealing with. In this situation it is particularly important that there is good consumer protection.

6.21 The consumer complaints - especially the stories of unbelievably long-drawn-out tribunal cases - show that there are still problems with dispute resolution in domestic building. However the committee does not think that the correct response is to return to a first resort government scheme.<sup>16</sup> That would improve matters indirectly, by throwing more responsibility back on insurers, but it would risk other problems, which the industry groups suggested, arising from the fact that the insurance concerns events which are within the control of the insured builder (see paragraph 8.2).

6.22 In the committee's view the better response is to improve the builder licensing and dispute resolution arrangements directly. The committee agrees with VCEC's comment: 'The key is the early identification of poor builder performance and linking this to registration, rather than government ownership [of the insurance].'<sup>17</sup>

6.23 This includes the systems which go to minimising disputes - licensing & disciplining of builders - and those that go to resolving disputes expeditiously - a clear hierarchy of complaint/ mediation/ escalation/ judgement, with time limits. It should include protocols to ensure that, if licensing and complaint-handling are in different bodies, adverse decisions about builders in a consumer complaint flow through

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13 Victorian government, submission 38, p.3

14 NSW Office of Fair Trading, submission 16 to Legislative Council General Purpose Standing Committee No.2, *Inquiry into the Operations of the Home Building Service*, November 2006, p.41

15 Victorian Civil and Administrative Tribunal, Annual Report 2006-07, p.23

16 In principle the issue here is first resort versus last resort, not government versus non-government; but '*...government scheme*' is used because of the strong evidence that private insurers would not participate in a first resort scheme.

17 Victorian Competition and Efficiency Commission *Housing Regulation in Victoria - building better outcomes*, October 2005, p.227

promptly to the licensing authority's disciplinary actions and public information about the builder's record.

### **Should the insurance be voluntary?**

6.24 It has sometimes been suggested that home warranty insurance should be voluntary. In Tasmania it was made voluntary from 1 July 2008. The scheme in Western Australia used to be voluntary, but became compulsory in 1997.

6.25 In submissions opinions on this point were mixed. The Master Builders Association of WA argued for voluntary insurance, on the basis that 'typical savings of \$800 to \$1000 would be reaped for those homebuyers who choose to opt out'...

The highly concentrated structure of the WA housing industry means that a large percentage of project homes are built by a small number of extremely efficient builders. Consumers should be given the choice of whether to take out insurance under these circumstances.<sup>18</sup>

6.26 The more common view was that the insurance should remain mandatory, on the grounds that otherwise the risk to consumers is too high. For example, CHOICE said:

It seems there are three options. There is a system like Queensland's; there is a system like the one we have now but with improved transparency and improved coverage for home building warranty and last resort insurance; or there is voluntary insurance. I think the voluntary insurance would be the worst option.... because I just do not think that the consumers who need protection will, in sufficient numbers, choose to take out the insurance.<sup>19</sup>

6.27 The 2003 Grellman inquiry in NSW and the 2005 VCEC inquiry in Victoria made similar comments.<sup>20</sup>

6.28 Insurance industry representatives argued that voluntary home warranty insurance is not practical because the market is too small and because of 'adverse selection' problems: the most likely takers would be builders who are at risk or consumers who think their builder is at risk. Vero advised that 'it would not be worth us writing voluntary insurance.'<sup>21</sup>

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18 Master Builders Association of WA, submission 37, p.2

19 Mr G. Renouf (CHOICE), *Committee Hansard* 13 June 2008, p.28. Similarly Consumer Action Law Centre, submission 32, p.7. Dr R. Silberberg (Housing Industry Association), *Committee Hansard* 17 September 2008, p.13

20 NSW Government, submission 34 p.3. Victorian Competition and Efficiency Commission *Housing Regulation in Victoria - building better outcomes*, October 2005, p.197,213

21 Mr G. Donovan (HIA Insurance Services), *Committee Hansard* 11 August 2008 (in camera), p.10. Mr P. Jameson (Vero Insurance Ltd) *Committee Hansard* 20 June 2006 (in camera), p.16

***Committee comment***

6.29 The committee notes with interest the recent change to voluntary home warranty insurance in Tasmania and recommends that a review of the new system be undertaken after it has been fully implemented. Such a review would assess the success of a voluntary scheme combined with the stronger dispute resolution and reporting procedures that have been flagged by the Tasmanian government.

6.30 However the committee notes builder failure in the past, some on a large scale and, despite some problems with the scheme, believes that HWI has provided some redress. The Committee does not support a voluntary scheme at this time since a builder collapse would then leave consumers with no minimum level of protection.

6.31 The committee agrees with the predominant view that the insurance should remain mandatory.