15 August, 2022

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State Insurance Regulatory Authority

By email: hbcreform@sira.nsw.gov.au

Dear Sir,

Thank you for the opportunity to provide feedback on the proposed reforms based on my experience with my new home build on the [redacted] and subsequent insurance claim on icare HBCF under the home building compensation scheme.

Brief History

Site: sloping hillside tree and rock covered block. Block to be cleared, stabilized and then house to be constructed / supported over five tiered levels up the hillside.
Value of works: exceeded icare / HBCF maximum/minimum amount

Site clearance began in November 2011 and after a number of delays, I was able to move into my new house in December 2013. Only then did I begin to fully appreciate the large number and extent of the issues, mostly significant and ranging from unrectified or partly rectified through to inadequately or incorrectly rectified issues.

After 6 months of formally identifying major issues and defects with the help of engineering /construction experts and then a lawyer, a notice of dispute was issued to the builders in May 2014.

The Fair Trading (FT) required "informal resolution" process began but dragged on for months of elapsed time with the builders promising to fix the problems, requesting a number of extensions, while making limited and largely ineffectual attempts to fix the problems.

In Dec 2016, FT agreed for us to put a case to the NSW Civil and Administrative Tribunal (NCAT), so to get to this point took three years. (In April 2017, FT completed disciplinary action against the builders for improper conduct, resulting in a fine.)

Detailed preparation for the NCAT case took the first half of 2017, with the builder's contract terminated and NCAT submission lodged in July 2017. NCAT completed their considerations 1 year 4 months later, resulting in a ruling completely in my favour and with orders issued to that effect.

Two months after that the builders were ruled in default of the NCAT order and their licences were suspended on 4 Jan 2019.

This was a "Trigger event" that allowed me to lodge a claim with icare / HBCF. Preparation of this claim took about 2 months to collect documents, organize and scan into the required format.

Claim submission was recorded on 14 Jan 2019, and the final claim payment was made one year and six months later in June 2020.

Overall, on top of the original 2 year build, my dispute took another 7 ½ years from Jan 2014 to June 2020 to be finalized, through what I can only describe as an extended, horrible, costly, health and life-sapping experience.

In reference to your discussion paper, I offer the following observations:

Reform Idea 1: Cover victims of unlawfully uninsured home construction

In my case, both the certifier and I were provided with policy documents on NSW Government / Home Warranty Insurance Fund letterhead. I spoke with the insurance provider myself to check all was in order. I had already checked the builders' licence details on the NSW government website using the easily accessible online tool. And I had written contracts. With what I now know, I do realise how lucky I was with this part of the process.

Q1: I have mixed views about allowing uninsured individuals to claim, given it will undoubtedly increase premiums, although you note that there were only a small number of claims disallowed (21 over the two financial years). I think if claims are to be allowed, it should only be in very limited circumstances and with the same exhaustive requirements that an insured person is required to undergo. This should include fact checking any reasonable person might be expected to undertake.

Q2: Where adopted, it should only be for works requiring planning consent or to be declared to FT.

Q3: If adopted, homeowners should certainly be required to diligently pursue the business for a remedy first, as would anyone who was making a claim is required to do.

Q4: Unpaid premiums and claim costs for uninsured work should most definitely be pursued and recovered, including penalties and costs etc.

As an aside, does the relevant regulator need stronger powers and ability to pursue and penalize those who break the law? Your data indicates over the two financial years 2019-21, "failure to insure" infringement notices were issued to 521 businesses which seems large, but whether these led anywhere is unclear. And if not, then it seems unlikely that illegal behaviour would be stopped.

Reform Idea 2 – Allow claims earlier in the building dispute process.

I agree this area needs reform, and suggest that in addition to being quicker, there also needs to be a clearer description of what are the options available.

In my case, I accepted advice that with the nature and complexity of all my issues, I manage the informal resolution process myself (with support from experts / lawyers), keeping FT informed and involved; as a means to hopefully facilitate a good resolution and speedier completion of rectification work.

I believe I chose the best path, as I was able to devote my time exclusively to all these issues. NSW Fair Trading would undoubtedly have had a much broader workload and if they had managed the process, I expect that the associated elapsed time would likely have been longer.

FT investigated the main contracted builder and took disciplinary action, however as this involved only a minor fine, it did not seem to have any impact of the builder's attitude to the contract.

You make reference to failure to comply with an order issued by NSW FT as an earlier trigger to make a claim. I am unclear whether this was an option in my case. But if it was, I think it may have just delayed the process anyway.

FT advised after the "informal resolution" stage that as our matter involved compensation issues, they would be unable to assist, and we were free to pursue the matter through NCAT. (My understanding is that given the builders unwillingness or inability to complete the rectification works

over the past several years, there was no point to ask FT or NCAT for formal rectification orders but rather a monetary order to allow me to hire and pay another builder to finish the work off.)

I understood I had the options to either pursue my case through NCAT or if larger than was covered under their jurisdiction, then I could pursue the case through the normal district courts. The latter would have involved significantly greater costs and it seems that builders still would likely neither have paid nor finished off the work, so I would have just ended up with a far greater loss.

I pursed an NCAT case with the subsequent orders and the builders' licences were suspended when they defaulted, which was a "trigger event" for me to claim on the insurer.

From preparing to start informal resolution as required by FT through to FT suspending the licences took five years from Jan 2014 to Jan 2019.

One thought I have is that making the path to an insurance claim easier and quicker may well change the dynamic. It could place less emphasis on the possibility that the builders might rectify and finish the work and more on the fact that an insurance claim maybe a preferred outcome.

Part of me (or likely anyone in my situation) was that I was so deeply invested in my dream house build that I was desperate for a solution that would make it comfortable, properly livable as well as being compliant with all building regulations.

But knowing what I now know and with an easier path to a claim, I perhaps could have diligently pursued the "informal resolution" stage much faster. I could have been less naïve in believing the builders when they promised to do the work and been less accommodating when they asked for extension after extension. Essentially I could have spent less time on trying to resolve the issues and try and make my dream come true, and should have followed the quickest and least costly path that would allow me to make an insurance claim most quickly.

In my case, I still question if the timeframe could or should have been significantly condensed. Mainly I believe as this was quite a complicated case that at best it would still have taken about four years (instead of the actual five years) of elapsed time before I was able to put in my claim.

Q5: Yes absolutely, homeowners should be able to make an insurance claim for failure to comply with a NSW FT rectification order. For me I am still unclear if I could or should have sought a rectification order from FT first or instead of going to NCAT and whether that would have helped to speed up the process.

Q6: If the process is simplified, then the likelihood of high or perhaps any out-of-pocket expenses would be reduced. However, whilst I dealt directly with NSW FT and also with the insurer, I do not believe that I would have had a successful NCAT case without the help of my lawyer and also the experts (building consultants and structural engineers). The insurers already only pay a percentage of those expenses and I am strongly in favour of at least being allowed to claim a capped or proportional amount.

Q7: You suggest a 6 year warranty period, plus a 6 month extension for losses that only become apparent at the end of the warranty period.

My insurance agreement timing allowed me to claim within 7 years and it took me from apparent completion on 13 December 2013 (Occupation Certificate) to 21 May 2014 (when I advised the insurer of a potential claim) to 14 January 2019 (claim lodged). In total it took me 6 years 1 month.

It is reasonable to me to assume that a warranty period of at least 6 years from completion date should be enough if the process is simplified.

However, given there is much anecdotal evidence of issues showing up several years after completion (especially apparently in city high rises). In my case, 6 months after I moved in, I was only beginning to become aware of the extent of the issues with my place and all I could do was advise the insurer there might be a claim, without any real detail to provide at that stage. I suggest 6 month's warranty extension cover is not enough and it should be increased to at least 3 more years.

(This would need to be considered in light of your Q9 question which proposes two insurance contracts: one for construction and one for warranty).

Reform Idea 3 – Update the minimum insurance cover

I totally agree with this.

This has been the most difficult part of the process for me to understand. And in hindsight, where I got it very wrong, was that I did not ask (why on earth would I think to ask as I am not an i9nsurance expert?) nor was I told that the listed contract value on the certificate was actually going to be irrelevant in the case of me making a defects claim. It would have been more helpful if there had been a big warning sign on the certificate stating "contract value is only used to calculate the premiums or if you make a non-completion claim in which case you will be limited to 20% – for the actual claim maximum allowed for defects, this is a legislated amount so you need to refer to the Act clause xx to find the amount".

You say the idea of insuring to the value of the contract has been proposed by other stakeholders and I disagree with your logic in rejecting this.

I see no issue with a $30,000 renovation being capped at $30,000 – why wouldn't it be – or similar to a "normal" style insurance policy which might allow a 10% run-over. However why shouldn't a $500,000 construction be insured for $500,000? The premiums already seem to reflect this anyway.

Further it is not logical to me that I would be expected to pay a premium based on a contract amount but then be covered only for the legislated amount which in my case was less than the contracted amount? Or vice versa, where the premium would be on a lower contract amount, but the defect claim could be based on the higher legislated amount.

From my experience now with my building expert, there is an industry standard used to estimate construction values. This was tested by the NCAT requirement for an enclave involving my building expert and the builders' expert to reach agreement on costs.

From my experience now with the insurer, they check every piece of information and price quoted by the claimant through their own process and by having their own approved builder's visit onsite, review and price everything before they make any settlement offer.

So there seem already to be safeguards and industry standards to apply to ensure no-one is able to cheat during the process.

But if it is decided to stay with the current style of insurance and not what I would consider a more normal and transparent approach, then:

Q8: I totally agree that the amount should be increased to at least $400,000 (in line with increases in average building costs since last adjustment in 2012).

Q9: I agree with the idea of two contracts of insurance: one for the construction period and one for the post completion warranty period, so two amounts of $400,000 each.

This would need to be considered in light of your Q7 question where you suggest a six year warranty period plus a six month extension. I believe the construction cover period should still be at least 6 years and that the warranty period should be at least 3 years.

Q10: I am not clear which is the "threshold amount" referred to in this question. However, assuming it is the identical minimum / maximum amount in legislation, then I think reviewing at either 5 or 10 years is too long and suggest every 3 years is more appropriate. However, as costs often tend to increase annually, maybe an even shorter term could be considered, say 3 years or less, if indicated by a link say to a CPI trigger or some other appropriate trigger within your statistics. (See same recommendation for Q14).

Reform Idea 4 – Increase cover for non-completion claims

Current insurance covers non-completion claims that are less than 20% of the total contract price. However, your statistics indicate that there is clearly an issue with the current cap, given that 56% of claims reach or exceed that amount.

I note that the discussion paper refers to "20% of the total contract price" and "20% of the value of the insured work", which leaves me wondering whether this is also a case of the value not being the actual value but rather the legislated amount (currently $340,000).

Q11. If it is the legislated amount, then 30% of $400,000 maybe a reasonable increase. However, if it is the actual contract value, then we do not have enough information to identify what is required and it maybe that an initial increase to 25% is required to drop to what is an acceptable number / percentage of claims reaching the cap.

Reform Idea 5 – Publish exemptions published by SIRA

Q12: In the interests of both transparency and availability of information to interested parties, I agree that SIRA should publish a register of projects that SIRA has exempted from insurance.

Reform Idea 6 – Update the threshold for requiring insurance

Q13: I agree with increasing the threshold from $20,000 to $26,000 (in line with increases in average building costs since the last adjustment in 2012).

Q14: I believe that reviewing the threshold amount at either 5 or 10 years is too long and suggest every 3 years is more appropriate. However, as costs often tend to increase annually, maybe an even shorter term could be considered, say 3 years or less, if indicated by a link say to a CPI trigger or some other appropriate trigger within your statistics. (See same recommendation for Q10).

Reform Idea 7 - Opt-Outs or premium caps for high value projects

If a homeowner wants to take out insurance for high value works on a single dwelling, they should be able to do so, but doing do this as their decision and paying the appropriate premiums.

Q15: I agree that homeowners or building businesses should have the ability to opt-out of insurance for works over $2 million for a single dwelling.

Q16: No, I do not agree that insurance should remain either mandatory for high value work on a single dwelling, nor should they have premiums capped for work over $2 million regardless.

Reform Idea 8 - Broader Insurance Exemptions for high rise buildings

I am unfamiliar with the logic behind allowing a developer or building business to be exempt from insurance obligations for construction of multi-dwelling buildings over three storeys high.

But I do wonder on the use of the term "exemption" and how this might relate to the large amount of both anecdotal and physical evidence of significant problems around high rise dwellings.

Q17: No, I do not agree that the insurance exemption of construction of buildings over three storeys be expanded so that insurance is not required for renovations or alterations to such buildings. Mostly I disagree with the idea of it being an automatic "exemption". Why and what changes at three storeys to mean insurance isn't necessary whereas at one or two or three storeys it is?

I note that different from a developer's construction stage, I find the idea of extending an **exemption** to the owners within a strata hi-rise gives the wrong message and so does not sit well with me.

The idea of an "opt-out" provision is my preferred alternative and seems more appropriate. I say this as a first time resident in a high rise apartment of over three storeys. For any works that we might want to carry out, I would want the strata manager / body corporate / owners to consider alternatives and make a valued judgement and decision related to the work to be undertaken and the need or otherwise to insure it versus the cost of insurance. I assume this would not however cover every minor piece of R&M type work, but more likely major work, say that which requires a DA consent.

Reform Idea 9: Insurance exemptions for some housing services
Reform Idea 10: Insurance exemptions for local government
Reform Idea 11: Premium refunds exemption for "Build-to-Rent" Schemes

I have no knowledge of these areas so nothing useful to add to the discussion.

Reform Idea 12: Repeal provisions that regulate former scheme insurers

Q24: As the formed scheme stopped insuring in 2010 and is no longer receiving claims, there seems no reason not to repeal the legislation for the former insurer.

Reform Idea 13: Reform or repeal provisions for 'alternative indemnity schemes"

While I strongly agree with the business principle of free and open competition as the means to provide more choice and hence better and more market driven outcomes, it does not seem that AIPs like Fidelity Funds are an answer, at least for NSW.

I do note that the legislation allows private sector insurers authorized by APRA to enter the market. This I strongly support as potentially a good thing for NSW (noting the Vic scheme mentioned in Reform Idea 15).

Reform Idea 14: Legislatively amend SIRA's functions to regulate icare HBCF.

Q28: I agree that SIRA should have the power to make icare HBCF amend and resubmit its eligibility or claims handling models and so adopt specific changes if SIRA finds they do not comply with legislation or guidelines.

Q29: I agree that the law should require SIRA to publish a statement about its assessment and decision each time icare HBCF lodges a new eligibility or claims handling model.

Reform Idea 15: Refocus of the regulatory regime to a single, State-insurer model.

Q30: I cannot see why it would not be viable for multiple insurers and provider to operate in the NSW home building scheme. This works in Victoria which has two private insurers, and with the large amount of renovations, restoration of single dwellings and well as hi-rise strata works being done in NSW, it seems that there should be enough Australian insurance experience and potential policies to support similar here.

As noted above I am a strong supporter of free and open competition and favour this any day over an albeit highly regulated monopoly provider.

Q31: I'd want to understand why new entrants could not be attracted, as I do not believe that just reinstating a monopoly status is the best legislative answer and would certainly stop any new future entrants from entering the market.

Yours Faithfully,
[redacted]

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