

Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

HOME WARRANTY INSURANCE SCHEME

Please find enclosed my submission to the Senate Inquiry into Home Warranty Insurance Scheme. If requested supporting documentation such as the letters from Vero and building inspection reports can be provided at your request.

As can be seen from my submission the position of the insurance company Vero means that I will be over \$70,000 worse off after having sought consumer protection and winning than if I had never sought it.

Further the position of the insurance company means I would be over \$200,000 worse off than if the house had been built correctly.

The system needs radical reform where the interests of consumers are protected as intended by legislation.

Yours sincerely

Rob Siebert

**SUBMISSION TO THE SENATE INQUIRY INTO
HOME OWNER WARRANTY INSURANCE**

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History

In September 2002 I entered into a contract with Cavalier Homes (Australia) to build my home. As Cavalier Homes (Australia) would not provide Council with a copy of the home owner warranty insurance a construction certificate was not provided to Cavalier Homes (Australia) and work on the house was delayed. In February 2003 the contract to build my house was novated to Cavalier Homes (Gold Coast) who started work in March 2003. The work was to be complete by May 2003

Problems with workmanship were apparent from March 2003 and these were brought to the attention of the builder who did nothing about them.

In August 2003 the builder issued a certificate of practical completion. The previously identified defects were not fixed and the house still had doors and steps missing.

In October 2003 as a result of a complaint to the Office of Fair Trading the house was inspected and the builder agreed to do various works. The builder did not undertake the works as agreed.

Due to the unrectified faults and because more defects were identified I took the matter to the Consumer Trader and Tenancy Tribunal (CTTT). It took some 12 months before a hearing was held.

I won the matter in the CTTT and was awarded costs. The builder did not pay so I had to liquidate the builder before I could submit a claim on home warranty insurance. A claim was submitted in July 2007.

As the claim was not responded to within 90 days (after 45 day its deemed as refused and I had another 45 days to lodge an appeal) I made application to the CTTT.

Vero then provided a response to my claim. In summary my claim was for Cost of alternate accommodation as per the Home Building Act and Insurance Policy (Records of rent can be provided)

Approx \$55,000

Legal costs as determined by the Supreme Court as per the Home Building Act and Insurance Policy (Supreme Court Determinations can be provided)

Approx \$59,000

Cost to liquidate the builder as required by Vero (receipts from solicitor can be provided)

Approx \$6,000

Cost to rectify the house as assessed by Vero (assessment by Vero Inspector that does not include a number major items)

Approx \$167,000

Total

Approx \$287,000

Vero's offer (a copy of their offer can be provided)

Approx \$50,000

That response means that after seeking consumer protection and winning I will be \$70,000 worse off than if I had accepted the defective house, which

cannot be given an occupancy certificate. This is discussed further below. Further I am, using Vero's assessment to fix the house, over \$237,000 worse off than is the house had been built correctly.

Insurance

At present NSW has a Home Owner Warranty Insurance scheme based on "last resort". The system creates a number of issues that could otherwise be avoided if the insurance was based on a first resort system such as in QLD.

The issues are

- Barriers to Submission of Claim
- Availability and use of damages
- Assessment of Claims
- Limitation on liability
- Use of Insurance to limit liability of builders at expense of consumers.

Further the Regulations and the wording of the policy create "loopholes" such that homeowners may remain having to meet a significant portion of the costs incurred in the resolution of their matter.

Barriers to Submission of Claim under Last Resort Insurance

How the present Home Owner Warranty Insurance scheme has been applied in my case is that I had to go through the CTTT to be awarded damages to rectify defects in my house, I then had to liquidate the builder before I could claim against the Home Warranty Insurance.

The cost of these steps have been

Legal costs	\$59,000 approx
Cost to liquidate the builder	\$6,000 approx
Total	\$65,000 approx

As the insurance is last resort insurance I have had to meet these costs before I could submit a claim against the insurance. Having to meet such costs creates a financial barrier to home owners needing to claim on insurance.

My situation is exacerbated because I have not been able to move into the house because an occupancy certificate cannot be given for the house. As such I have had to incur rental costs of \$55,000.

After meeting the cost of building a house most people are not in the position to be able to overcome the financial barrier, in my case \$120,000, to submit and insurance claim.

Having the insurance scheme based on last resort with significant costs having to be incurred before a claim can be made, effectively creates a financial barrier which must be overcome by home owners before they can access the scheme. The financial barrier also effectively blocks most home owners being able to contest the insurer's decision in the CTTT as if dissatisfied with the insurers decision they cannot afford to take it back to the CTTT.

It is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD.

Availability of/ use of damages under last Resort Insurance.

In my case whatever the settlement with the insurance company, some \$65,000 has been spent on legal costs and liquidation of the builder, and \$55,000 on rent waiting for damages to be determined and paid. There has also been expenditure by the builder in defending his position. This \$120,000+ has been spent on items other than fixing the house.

This expenditure has benefited neither the builder nor me. The only beneficiaries of the \$120,000+ have been lawyers, landlords and to a much lesser extent building inspectors. It is my opinion that it would have been more appropriate to have the monies spent on rectifying the house.

The situation is exacerbated if the cost of fixing the house, plus legal costs, plus rent exceeds the cap on liability as detailed in the insurance policy (now \$300,000). In such a case, if the cap is imposed, monies which should have been available to fix the house would have had to be used to pay legal costs and rent leaving the homeowner out of pocket for the repairs and possibly unable to fix the house. This seems to be at odds with the intention of the legislation. Further it does not seem to comply with the principals of award of damages being that a person should, in so far as money can, be placed in a position he or she would have been if the work had been completed properly.

It should be noted that if considered fairly a first resort insurance scheme would reduce the costs of alternate accommodation and legal costs during the dispute with the builder hence reducing the liability of the insurance company.

Again it is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD.

Assessment of Claims.

Section 99 of the Home Building Act requires a contract of insurance to insure

- (a) a person on whose behalf the work is being done against the risk of loss resulting from non-completion of the work because of the insolvency, death or disappearance of the contractor, and*
- (b) a person on whose behalf the work is being done and the person's successors in title against the risk of being unable, because of the insolvency, death or disappearance of the contractor:*
 - (i) to recover compensation from the contractor for a breach of a statutory warranty in respect of the work, or*
 - (ii) to have the contractor rectify any such breach*

Regulation 56 of the Home Building Regulations defines the losses indemnified.

An insurance contract must indemnify beneficiaries under the insurance contract for the following losses or damage in respect of residential building work covered by the insurance contract:

- (a) loss or damage resulting from non-completion of the work because of the insolvency, death or disappearance of the contractor,*
- (b) loss or damage arising from a breach of a statutory warranty, being loss or damage in respect of which the beneficiaries cannot recover compensation from the contractor or owner-builder or have the contractor or owner-builder rectify because of the insolvency, death or disappearance of the contractor or owner-builder.*

The Insurance Policy under Clause 3.1 as does Regulations 57 to 59 indicate the Insurer will pay if the home owner suffers

- Loss or damage due to breach of statutory warranty
- Alternate accommodation

- Any legal cost

The Regulations would seem to indicate that there are no exceptions to these items

The Home Owners Charter from Vero states

“We will provide you with a scope of works for the completion of your claim”

And

“Upon acceptance of your claim and with your agreement we will arrange for satisfactory completion or rectification. The work will be completed to the specifications and standard in the original building contract and in accordance with the Building Coded of Australia, relevant Australian Standards and the Guide to Standards and Tolerances”

The application of the Charter, the Policy the Act and the Regulations in my case can be summarised in the following table

Item	Item Claimed	\$ Claimed	What Vero the Insurer said	\$ Offered
Legal Costs	Legal Costs Cost to Liquidate the builder	\$58,948.34 \$5,986.06	Agreed Vero have not agreed Vero have not agreed even though Vero advised I had to liquidate the builder before I could submit a claim	\$7,840.13
Alternate Accommodation costs	\$220 /week from June 2003 \$250 /week from 26 July 2006 I was determined by the CTTT that the house should have been finished in June 2003. Liquidated damages were awarded based on that date. The house still cannot be lived in.	\$55,000 approximately	Vero acknowledged I had paid the rent for the alternate accommodation I had to live in due to the house not being adequate for an occupancy certificate to be given. Vero stated the contract included and I claimed liquidated damages. Vero was informed that the liquidated damages were a reasonable estimate of the cost I incurred due to the non completion of the building (the purpose of liquidated damages) and that the amount was based on the rent I had paid. Vero advised that because I had claimed liquidated damages instead of rent in the CTTT hearing, even though I incurred the expense, they would not pay the rental costs.	Nil
Rectification Costs	\$178,000 + or \$167,500 The estimate of \$178,000 was made in 2004 by a quantity surveyor on a lesser list of defects. The estimate of \$167,500 was made by Vero's building inspector and did not include fixing items such as the footings, slab or subfloor brickwork work required to meet DA conditions.	\$178,000+	Vero advised that even if the cost of rectification was above that awarded in the CTTT they would not pay the amount required to have the item fixed, only the lesser amount awarded by the CTTT. If their estimate was less than the award from the CTTT they would pay the lesser amount. If the CTTT awarded nothing I get nothing even though the defect exists and the house cannot be lived in. Other claims are time barred even though I have had to follow a long and protected system to submit a claim Items required to make the house comply with the DA and hence the EP&A Act have not been costed nor included in Vero's offer	\$43,052.60
TOTAL		\$297,948.40+		\$50,892.73

It is difficult to believe the Act and Regulations and subsequently the approved insurance policy were written to preclude a homeowner recovering damages that would place him or her in a position that they would have been if the work was completed properly. Notwithstanding the Vero is using the Regulations to seek to preclude me from recovering damages to meet my all my legal costs, my rental costs and the costs of rectifying the defects in the house.

My Legal Costs.

The Insurance Policy under Clause 3.1 as does Regulations 57 to 59 indicate the Insurer will pay if the home owner suffers

- Loss or damage due to breach of statutory warranty
- Alternate accommodation
- Any legal cost

Under the Regulations there is a specific requirement to any reasonable legal costs.

In my case the Supreme Court determined the reasonableness of my legal costs but Vero has refused to pay anything apart from approximately 7% of the amount as determined by the Supreme Court.

It would appear Vero has the ability to ignore the requirements of the legislation and their position is diametrically opposed to the principal of the award of damages as enunciated in Hadley v Baxendale and virtually all law originating from that decision.

Liquidated Damages – My Alternate Accommodation Costs.

Liquidated damages are defined as a reasonable estimate of the loss which will be incurred by the Principal, in this case the home owner, if the works are

not completed on time. In my case they were set at \$250 per week being a reasonable estimate of the rent I would pay if the house was not completed.

I considering the term liquidated damages for delay in the contract and insurance policy it would appear it has initially been interpreted as liquidated damages for the act of delay, not liquidated damages to meet the costs incurred due to the delay. In that sense liquidated damages for a delay when no costs are incurred due to the delay are simply punitive damages and should not be paid.

But, due to the lack of definition it would appear insurance companies have sought, and been successful in a number of cases, to extend the definition of liquidated damages for delay to include liquidated damages for all costs incurred directly as a result of delays in completion of houses. This is diametrically opposed to both the principal of liquidated damages and principals of damages in general as enunciated in Hadley v Baxendale and virtually all law originating from that decision.

In my case the fact that I claimed liquidated damages in the CTTT hearing and was awarded liquidated damages allows the insurance company to take a position where in respect to my rental cost of

“The amounts were not claimed in the CTTT proceedings against the builder and we are therefore unable to pursue our subrogated rights in relation to them”

Even though the Regulations specifically state the cost of alternate accommodation is to be met Vero's position means my costs for alternate accommodation for the period I could not move into the house (which continue) will not be met.

Damages – Rectification Costs.

The Home Building Act, Regulations, Home Owners Charter by Vero and the insurance policy all indicate that I should be indemnified against losses I have incurred due to the performance of the builder.

This can be compared with the assessment of my claim for incomplete and defective works where the position Vero as stated is:

Any items claimed against Vero which have been denied by the CTTT will be denied”

It goes on to say

“However Vero’s liability is limited to the amount awarded by the CTTT which was \$61,111.00. Further to this you have confirmed that there was an outstanding balance of \$20,895.53 which is greater than the amount determined by the CTTT”

In the case of the termite control the CTTT did not find the termite control defective despite two expert reports and a visual inspection. After the CTTT handed down its findings I engaged the Company, on who the CTTT relied in making its determination, to certify the termite control. They would not, placing me in a position where I cannot get the termite control certified and I do not have damages awarded to get it fixed. Vero agree the termite control is defective but will not fix it due to the CTTT decision.

Even where there are items found defective by the CTTT Vero offered nothing such as the slab on which the house was built. Where items were found to be defective by Vero but the CTTT awarded no damages Vero offered nothing.

If this is the position taken by Vero, the house will not be able to be repaired such that I can gain an occupancy certificate. I will be left with a house I

cannot live in nor sell because it does not comply with the conditions of development consent.

The issue would not arise if the insurance scheme was a scheme of first resort not last resort.

Secondly, as described previously, because of the performance of the CTTT I am limited in the damages I can recover.

It should be noted that when evidence on the performance of the CTTT was presented to an Upper House Inquiry, that inquiry found the performance of the CTTT so bad as to warrant a separate inquiry into the CTTT.

Again it is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD. In the alternate it is recommended the regulations and legislation be changed such that the home owner can recover damages through the insurance or have the insurance company do works such that the conditions of the Contract and development consent are met.

Limitation on Insurer's Liability

In NSW Clauses 52 to 77 of the Home Building Regulation deal with Home Warranty Insurance. Clause 56 details the losses indemnified and Clause 58 detail the limitations on liability. Clause 60 sets the amount of the minimum cover.

There is nothing in Clause 56 or Clause 58 that limits the liability of the insurer to any maximum. Clause 60 states the minimum insurance required but does not stipulate the maximum.

Clause 60 is being used by the insurance companies to limit their liability to a maximum amount which is now \$300,000. It appears that this is inconsistent with the Regulations and the Home Building Act as neither place any limit on indemnity. Insurers are using it to limit the indemnity provided to the home owner. This seems incongruous as there is nothing limiting a builder's liability if the builder remains a trading entity.

It is understood that an insurer's liability is capped at \$10m and thereafter it is underwritten by the NSW Government. In such a case the limitation of liability of the insurer to the home owner serves little purpose except to ensure profits for the insurer and it does not provide protection to the home owner.

It is recommended that no minimum amount be specified and that it is stated the losses indemnified are uncapped subject to the limitations in Clause 58.

Use of Insurance to Protect Builders

As early as May 2003 it was apparent there were problems with the house. In October 2003 I took the matter to the Office of Fair Trading. Fair Trading inspected the house and Cavalier Homes (Gold Coast) agreed to undertake various rectification works. Cavalier Homes (Gold Coast) did not undertake the rectification works.

Because the rectification works were not undertaken and because further defects were identified the matter went before the CTTT. My application was lodged in the first half of 2004 and the hearing was held in July, August 2005. The CTTT handed down its findings in July 2006. I won the CTTT hearing and was awarded damages and costs. Cavalier Homes (Gold Coast) did not

pay and I was forced to liquidate the company so that I could claim on home warranty insurance.

Parallel to these activities Cavalier Homes (Gold Coast), one of its shareholders and its nominated supervisor, Person A , the person who also owned T&T Building (the company that held the remaining shares in Cavalier Homes (Gold Coast)) was undertaking actions to avoid making payment to me and to remain in business as home builders.

On 19th July 2004, Person A renewed his licence for T&T Building, a company which I understand he owns, and on 1st March 2005 upgraded the licence to allow him to undertake all types of building works including building houses. At this time he effectively held two licences which is illegal under the Home Building Act in NSW.

On 4th August 2004 Person A established another company T&T Building (Prestige). I understand its shareholders are Person A and T&T Building which is owned by Person A with Person A's son as a director. The new company, T&T Building (Prestige), commenced trading building houses as can be seen from records of the QBSC. The new company had the same business address as Cavalier Homes (Gold Coast).

On 25th May 2005, immediately before the CTTT hearings Cavalier Homes (Gold Coast) surrendered its licence to build houses and although it remained a registered company it ceased work building houses.

T&T Building and T&T Building (Prestige) continue to operate as building companies with T&T Building (Prestige) building houses. Cavalier Homes (Gold Coast) is in liquidation.

Evidence can be provided in the form of Company Searches and Licence Checks to verify my statements in this matter.

It would appear Person A has indulged in the practice of Phoenix Companies where a company is closed down to avoid debts and a new company is established to carry on the business in this case of building houses. Further it appears this practice is supported by Vero.

My position is that after seeking consumer protection and winning I will be \$70,000 worse off than if I had accepted the defective house, which cannot be given an occupancy certificate.

On the other hand the builder has his liability limited to the \$50,000 offered by the insurance company, is not liable for fixing the house and continues to trade as a builder with insurance probably provided by Vero.

This demonstrates a practice, probably supported by Vero, where Vero effectively protects the builder by allowing the liquidation of the builder's company so that a reduced payout is made to the home owner. The amounts recovered by the insurer from sureties and bonds provided by the builder to Vero would be less than the amounts required to fix the house and meet the home owners costs. In effect the consumer gets less and the builder has to pay less to the insurer a situation that does not provide the consumer protection required by the Home Building Act but protects the builder.

Again it is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD. In the alternate it is recommended the regulations and legislation be changed such that the home owner can recover damages through the insurance or have the

insurance company do works such that the conditions of the Contract and development consent are met and that legal and alternate accommodation costs are met.

Position of Others

Australian Consumer Association (Choice), builders activist groups such as the Australian Builders Collective, consumer groups such as BARG, the Master Builders Association and every builder or home owner I have spoken to who has had dealings with Home Warranty Insurance except one all agree the system needs reform. All indicate they would prefer the QLD model over the NSW system.

A scheme similar to the one in place in NSW has recently been scrapped by Tasmania.

As can be seen from my submission insurance companies have been provided loopholes so that they do not have indemnify an owner against all the losses the owner may incur due to the poor performance of a builder despite what appears to be the intent of the Act and Regulations.

For the consumer there is no requirement for a builder to take out insurance for works under \$12,000. Most consumers would insure any other possession worth \$10,000 so it seems ludicrous that insurance is not required for building work of \$10,000.

One case heard before the CTTT at which I attended a homeowner engaged a tiler for approximately \$2,800 to lay tiles supplied by the owner. The tiling was laid without expansion joints and the tiles “exploded”. The cost of repair

is estimated by the CTTT at \$22,000. As there was no insurance it is most probable the home owner will not recover damages.

At the high end, if the cost of legal fees, rent and rectification cost is over \$300,000 the owner pays the amount over \$300,000 even though he or she is not at fault. The owner would not have to pay if the builder was still in existence. The owner gets less if the matter has to be claimed on insurance.

For the small to medium builder they generally have to put up their home as equity in order to get insurance.

It is ironic that consumers and builders on NSW both agree the system needs to be reformed. They can even agree on options to do so and have done so for some time but at this stage no reform has occurred.

Recommendations

It is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD.

It is recommended that insurance be required for all home building works

It is also suggested that those persons who have been disadvantaged by the last resort scheme be recompensed to be placed in a position, in so far as money can, that they would have been if the houses were built correctly and on time.