Submission on RIS Buyer Protection Regulations 2025

Thank you for considering my submission on the RIS and draft regulations. Rather than respond to the specific questions, many of which I am not in a position to answer, I have identified specific issues that drew my attention from the material below.

The new insurance scheme

I am surprised to see that the new FHWS will not cover cost plus contracts. Will consumers receive warnings about this before entry into a cost plus contract. My understanding is that the Qld scheme does cover cost plus contracts over $3300. I query the justification for excluding these contracts from the scheme. Will there be any warranty insurance for cost plus contract s (ie last resort) or are owners left without insurance?

I note the following exclusions in clause 28 of the proposed regs and offer the comments below:

- Where a purchaser knew or ought to have known the work was defective or non-complaint. Does this mean that purchasers must obtain a pre purchase inspection and if they do, does this mean that anything identified in the pre-purchase inspection is not covered by the scheme? This seems harsh. The scheme is supposed to cover subsequent purchasers of homes for up to 6 years from completion.
- Where the designs, plans or specifications do not comply with the Act or BCA. This is just about every set of drawings approved by the building surveyor. Unless there is going to be some meaningful reforms to try to improve the inadequacy of design documentation, which is a major issue, this exclusion will apply to many projects. I note the explainer says the exclusion applies if 'defective or non-complaint work arising from non-compliant design'. I don't believe this is what clause 28 says. If there is a dispute about whether a defect has arisen from a design fault or from poor building work the owner should not have to be drawn into that dispute or impacted by it. Further, if the defect arises from a design issue, why shouldn't an owner be covered for that with the BPC then seeking recovery from the designer (who should have PI). If owners have to go and litigate these questions separately, they will be back in VCAT fending for themselves up against the finger pointing practitioners making it all very complex again.
- Where the designs are not prepared by an architect, engineer or registered designer. Presently it is not clear that building design documentation must only be prepared by a registered architect, engineer, designer or the builder. There will need to be very clear warnings to owners that if they don't use registered practitioners, they may not be covered by this insurance. What if they believed

their designer was registered and it turned out not to be the case. There are many unregistered 'designers' pretending to be architects.

- Failure by the owner to protect against pest infestation or exposure to natural timbers. Whilst the builder has control of the site, the owner cannot do anything about these issues. I have heard of many cases where the project stalls and the builder leaves timber frames exposed for months on end. Why shouldn't the consequences of this be covered.
- The action of vermin, termites or moths or other insects. What if part of the builder's contract was to install termite protection and this was not done at all or properly?

The developer bond scheme

My general view is that introducing a developer bond will encourage a litigation culture that has not previously existed in Victoria. In NSW, before the bond scheme started there was already a litigation culture because their statutory warranties had a 2 year limit on non-major defects, whereas in Victoria the limits on making claims only exist as part of the warranty insurance scheme, which is not applicable to buildings over 4 storeys. The DBS will bring inspectors on to buildings to 'find' defects in a way which has not previously been necessary in Victoria leading to increased litigation for OCs and builders.

I am not sure that all registered domestic builders would have the skills to inspect and assess buildings over 4 storeys. So many of them would only ever have built single dwellings or class 10s. The dilemma here is that there has never been an appropriate registration category covering builders who build multi storey class 2. Similarly, there are very few building surveyors and inspectors (unlimited) who have expertise in multi storey class 2 buildings (bearing in mind the vast majority of building permits are issued for class 1 and 10 buildings). Yes, we expect registered practitioners to act within their expertise but there will need to be some clear guidance given and auditing done to ensure that people without the expertise are not taking on these inspections. There are probably as many architects and registered engineers who would have the qualifications and experience to do this work as there are builders, surveyors and inspectors. I support the additional power for the BPC to approve people to do these inspections but there are real risks in letting any registered surveyor, builder or inspector (unlimited) do this work.

There should be provision for the inspector to do destructive testing if necessary to determine compliance.

In the FAQ when asked about what happens where the bond amount is not enough to cover the defects, it says that existing dispute resolution arrangements will be used by the OC to reach a resolution. We know these are inadequate which is why the DBS is

being introduced. I believe the DBCA should be changed to enable the OC to pursue both the builder and the developer for breaches of the statutory warranties. This would be consistent with the RO power which can be issued to builders and developers who become jointly responsible to comply. A statutory duty of care (like that introduced in NSW) would also have been helpful to OCs so that they have stronger litigation rights against developers and others where the 2% bond is not enough.

The bond amount should be calculated based on the total cost of the development including the land as well as the build cost. When a person buys an apartment, they are paying for all of the development costs and the land on which the building sits. The total cost of the development should be included when determining the amount that is 2%. Carve outs for things 'not in connection with the construction' and 'chattels' will invite the developer to game the system. I am not really sure what clause 7(3) is trying to cover but it will be abused and should be removed.

I don't agree with the carve out for CHPs. With all the money going into that sector, CHPs will be just as vulnerable to non-compliant building work and unscrupulous developers as any OC or apartment owner. In the FAQs it says that 'where a CHP purchases a residential apartment building from a developer, they would have the protections of the developer bond scheme'. I do not believe that this is reflected in the proposed wording in clause 8(b). An arrangement to purchase the land and building as a turnkey project is still a development being undertaken on behalf of (and funded by) Homes Victoria. The FAQs also say that 'it is expected that CHPs will have rigorous contractual mechanisms in place to manage any defective building work'. I am not sure what those 'rigorous' mechanisms are.

In terms of timing for commencement, there will absolutely be pressure put on private building surveyors to issue building permits before the commencement date based on scant documentation. This is what happened when the cladding levy was introduced. There was a massive spike in levy income because of the inordinate number of permits issued to beat the deadline and avoid paying extra levy. It is highly likely that RBSs issued permits with conditions requiring them to provided missing documentation – probably in breach of s24 but to my knowledge there was never any investigation done by the VBA to see whether the RBSs had waved through permits based on limited documentation. Because it has been done before, it will be done again.

If the government is going to go ahead with this as the trigger for commencement, then I suggest the BPC/OSBS put out guidance to all building surveyors about the expectations that will be on them to not issue a permit on demand to beat the deadline. This should be followed by an audit to detect and hold to account any RBS that has been willing to issue a BP to help the developer avoid paying the bond. I expect there will be many RBSs that will try to hold the line, but others will see this as an opportunity to secure their appointment as RBS by doing this 'favour' to the developer.

I appreciate that the proposed commencement trigger is better that what they did in NSW (which was a complete joke!) but I can assure you that there will be a very slow transition to projects requiring a bond as there will be a flood of building permits for class 2 developments issued before 1 July 2027. One solution is to kick it off on 1 July 2026, at least the inevitable avoidance tactic will run its course and hopefully by July 2027 there will actually be some developments with bonds. Another alternative would be to tie the commencement to the issuing of a planning permit. It is much less likely that councils will be pushed into issuing planning permits prematurely to help developers avoid this obligation. If it were tied to this issue of a planning permit, then the date should probably be well before July 2027 as planning permits are issued long before building permits.

Happy to discuss the above or the RIS more generally if you wish.

Regards

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