


18 September 2012



To:
Research Director
Transport, Housing and Local Government Committee
Parliament House
BRISBANE
QLD 4000

Inquiry into the Operation and Performance of the Queensland Building Services Authority

Attached is my submission to the above inquiry being conducted by your committee.

Please ensure my address, phone number and email address are kept confidential.

I am happy to clarify or discuss any of the matters raised in my submission.

Yours sincerely

Signed: D R Jender

Don Jender

Submission to the Inquiry into the Operation and Performance of the Queensland Building Services Authority

This inquiry is to consider the eight issues below. To assist the committee, I have placed my comments under the most applicable issue.

Introduction

It is important to keep in mind that the BSA is only one part of a complex system which leads to the completed house: land development; housing standards (Australian Standards; Building Code of Australia (BCA)); engineers; soil testers; builders; tradespeople; certifiers; regulators (BSA); product manufacturers; insurers; home owners.

All of these parties need to do their job correctly for the home owner to have a problem free house. And even then, natural events such as drought, heavy rain and problem soil can cause complications.

My background for commenting on the BSA and building matters is:

- I have had a subsidence complaint about my current house active with the BSA since September 2010. The BSA declined my claim and I now have a review case active in QCAT.
- Before buying my current house, I inspected 91 houses and 17 blocks of vacant land.
- I have had to develop knowledge of building, BSA, QCAT and other matters in the course of dealing with problems with my current house.
- I have degrees in physics/maths; computer science; administration. This has helped me develop some understanding of technical and legal issues involved in building.
- My father and grandfather were carpenter/builders, so I absorbed some knowledge of building (in the old wooden style).

1. Balancing interests of building contractors and consumers.

It is probably impossible for the BSA to balance the interests of both parties so that both are happy, since to some extent their interests are opposed. My view as a consumer is that the BSA does not do enough to enforce the standards which builders are supposed to adhere to. The general position should be that the consumer is entitled to expect that a house will be built to satisfy all relevant standards. When it is not, the BSA should force the builder to rectify to meet those standards. It is important to realise that consumers are not building experts, so may not realise that work is substandard (or indeed that there is a defect). But when a consumer identifies a probable defect and reports it to the BSA, the BSA should investigate and enforce building standards. In my experience, BSA performance here is variable. However the consumer is not entitled to building perfection – just work which meets standards. The exception would be if the building contract specifies higher levels of quality.

I know of cases where the BSA favours the builder. For instance, in my case the builder asserted that something was allowable with the termite inspection zone. The BSA accepted that without question. However, when I proved that the builder's assertion was not correct, the BSA felt it necessary to verify that what I said was true.

The current system whereby a builder can file a QCAT complaint which has the effect of “freezing” action about defects should be changed. Currently a home owner can be stranded in a prolonged defect limbo because of this situation.

2. Reduce regulation to lower the cost of house building.

It is important to consider the cost of building a house in the context of total cost of ownership, plus the intangible costs. The purchase price paid to the builder is only the start of the total cost, and it may not be desirable to try to absolutely minimize that purchase price. For instance, in the absence of effective standards and regulation, a builder might build a lower priced house. However the buyer might pay considerably more over the years in trying to fix the defects in the house, not to mention the uncoded time and emotional cost involved.

My impression is that, on paper, the current systems of standards and regulation should produce houses of reasonable price and quality. However, in practice this often does not happen. There are many reasons for this, such as builders not knowing or not working to standards (to cut costs), and inadequate regulation of building work by the BSA.

My view is that what is needed is more effective enforcement of the regulations which currently exist.

Although not specifically in the committee's terms of reference, self regulation by an industry has enjoyed some popularity in recent years, as a way of reducing government regulation. My view is that self regulation by the building industry would be a disaster for home owners/consumers, and should be avoided at all costs. My reason for this view is that there are now notorious failures by builders to build properly (even under the current regulation regime). Failures would be larger and more frequent under self regulation.

3. a: Remedies for defective building work. b: BSA support, education and advice.

I think in theory the current methods BSA has to remedy building work are adequate (ie requesting/directing the builder to rectify). I think it is the implementation which is needs improvement.

For instance, BSA might ask/direct a builder to rectify a defect. On my experience, the onus is on the home owner to verify that remedial work which the builder has done is satisfactory. BSA does not check that rectification work the builder proposes to fix defects will meet standards, nor that the work when actually done does meets standards. But a home owner will often not have the expertise to make such assessments. In my case, BSA asked the builder to rectify faulty articulation joints. I had to instruct the tradesperson in how to do this to standard. It was fortunate that I had previously researched how it should be done and could produce the relevant Technical Note.

So I think BSA should do more to support the home owner in verifying that remedial work does meet standards. It also seems that more needs to be done to educate builders and tradespeople in the required standard of work. I know BSA does some work in this area already, in terms of seminars and publications. It seems that a more intensive and perhaps regulatory effort is needed. After all, licensed builders and tradespeople are supposed to know how to do work properly before they start working on houses.

There is an issue of educating home owners who are not the first buyer about the BSA, QHWS and owner responsibilities. I gather that the first owner (ie after the house is built) receives from the builder information about the QHWS and home maintenance. On my experience, often this will not be passed on to subsequent owners, due to papers getting lost etc. When we bought our house (as third owners), we knew nothing about the BSA and the QHWS. This is important

information for owners, because there are time limits in the QHWS on complaining about defects.

A reliable method of informing subsequent owners about the BSA and QHWS should be devised. Although this is an inquiry into the BSA, I do not believe the BSA is the appropriate agency to do this. The BSA might have a conflict of interest, in that more of these now better informed home owners might lodge complaints with BSA and claims against the QHWS, thus increasing pressure on the insurance fund. It seems to me the Land Titles Office would be a suitable agency to send out an information pack to each new owner, as this could be made an automatic part of the change of title process.

4. Governance – board and General Manager.

The Qld Building Services Board has one consumer member. Reading Jim Russell's background in the BSA Annual Report 2010-2011, it is hard to see how his background in insurance and business qualifies him to represent consumers (if "consumer" means the ordinary home owner, among others). The board membership looks like it represents the sectors of the building industry. Since the building industry only exists to build and repair buildings for various types of consumers/end users, it should have a larger representation of genuine "consumers".

5. Qld Home Warranty Scheme (QHWS).

My personal experience of the QHWS is that it operates just as a commercial insurance scheme does, ie the insurer will seek any conceivable reason to avoid payout.

Insofar as homeowners know about the BSA and QHWS at all, the impression seems to be that it is a scheme to assist homeowners with defective housing (defects identified within 6.5 years). Indeed this was the impression we had initially – people told us how lucky we were that BSA provided insurance coverage for faults.

In practice it seems to me the QHWS is designed to provide an image of support for homeowners. However, like all insurance policies, it is written by the insurer to support the interests of the insurer, not the policy beneficiary (the home owner). The devil is in the fine detail of the policy clauses and the exemptions they give the BSA.

Furthermore, the BSA claims the QHWS is a "no-fault" policy in relation to subsidence (eg see BSA Annual Report 2010-2011 page 12; also KPMG's QBSA Organisation Review Final Report page 20). However in practice, it seems this means "no-fault" only in relation to the builder, ie the policy provides subsidence coverage if the builder is at fault. It is not "no-fault" in relation to the home owner. I heard anecdotally that the BSA tries hard to find any instance of the home owner being at fault, in the sense of not having implemented every recommendation (eg in Australian Standards and the BCA) relevant to house maintenance issues such as drainage (and these recommendations are extensive). This has also been my experience with the BSA. The BSA then uses any alleged home owner fault as a reason to deny a QHWS claim. The effect of this is to disadvantage home owners who are not building/drainage/soil experts and who are unlucky enough to have a house with subsidence problems. The above BSA Annual Report (page 25) notes that subsidence claims are increasing, so the BSA has an incentive to fight claims if at all feasible, in order to defend its insurance fund. Engineering opinion is that years of dry weather dried out clay soils. More rain in recent years then moistened the soil, which swelled and caused subsidence problems. However weather related soil problems are not the fault of home owners.

No doubt the BSA does provide help for home owners under the QHWS when there is no scope for denying a claim (eg when a builder becomes bankrupt). However, a home owner who has a QHWS claim denied then labours under huge disadvantages if he wishes to dispute the BSA decision.

The BSA is in a very strong position, in that:

- It drew up the QHWS policy and interprets it.
- It has expertise in building matters.
- It has an inhouse legal department and can afford to employ external legal advisers if it so desires.
- It can pay for external engineering advice if needed.
- It can simply outlast the home owner, who will often not have the time, knowledge, money, patience or emotional strength to pursue legal action to review the BSA decision. The BSA does not need to be concerned about time and cost when in a legal dispute with a home owner.
- In a QCAT case, the BSA will be represented by lawyers and the home owner will probably represent himself, as QCAT is basically a self representation tribunal. Few home owners would be as effective as a lawyer, but a home owner may not have the money to be represented in a QCAT case and anyway may not be given permission to be represented.

The home owner usually does not have a building industry, engineering or legal background. However to have a plausible chance of success against the BSA, the home owner should get engineering and legal advice on his situation, and this is expensive.

Given the above, I think the QHWS needs a major overhaul. One option would be to transfer the function to the private sector insurance industry, rather as motor vehicle compulsory third party insurance is in the private sector. If BSA runs the QHWS in the manner of a private insurer, rather than a consumer oriented scheme of public interest value, then there is no need for it to be a government function. Private sector competition might produce benefits in terms of competition and innovation.

Alternatively the QHWS in BSA should be overhauled to emphasise that its function is to support home owners who have defective houses. That would require a change in the policy wording, in how the BSA administers the policy and probably also a major cultural change in the BSA.

If the BSA retains the QHWS, some mechanism should be introduced to facilitate mediated or compromise settlement of BSA/home owner disputes under the QHWS. The present system encourages the BSA to fight cases to the bitter end, in the hope that the home owner (the weaker party) will give up, especially due to the expense of fighting.

I gather home warranty insurance schemes have had a varied history in different parts of Australia. For instance, see attached article, which is from:

<http://www.propertyoz.com.au/Blog/archive/2012/05/28/151.aspx>)

This history should be evaluated when considering changes to the QHWS. The situation in each State/Territory is summarized in KPMG's QBSA Organisation Review Final Report, Appendix D.

6. a: Licensing. b: Auditing to maintain standards.

I do not know enough about BSA licensing to comment on the initial licensing of a builder or tradesperson. However my impression from inspecting many houses before buying my current one (and observations since) is that builders and tradespeople often do not build to the relevant standards. Even some display homes (which are supposed to showcase the builder's competence) have defects evident to those who know the building standards. I attribute this to lack of knowledge of the standards, lack of a quality culture in house building, and a desire to get work done as quickly and simply as possible, to minimize cost.

The current system seems to rely on consumers formally complaining to the BSA about defective work. Since consumers might not recognize defective work, BSA should do more auditing of building work at critical stages. This would give builders more incentive to build to standards. In addition, defective work in some areas (eg foundations, slab, frame) is very expensive or impossible to fix later on. More auditing should reduce the number of defects consumers need to complain about to the BSA, thus saving the BSA eventual work and saving consumers money, time and stress.

7. Trades licensing by the BSA.

No comment.

8. Reform BSA to enhance assistance to industry and consumers.

I imagine the building industry would like BSA reform with a view to having less BSA regulation of building activity, since it is often faster and cheaper to build substandard work, and hope to fend off complaints later. Obviously this type of reform is against the interests of consumers.

From the consumer point of view, I would like to see BSA reformed to give it a stronger mandate to assist consumers/home owners. The building industry should have no concern about this, if builders behave responsibly and build to meet the relevant standards.

A stronger mandate would involve more forceful regulation of builders to make them adhere to standards; more inspection of building work at critical stages; more education for builders and consumers about what constitutes good building work; reform of the QHWS to make it more consumer oriented (see topic 5. above); improvement in the standard of communication between BSA and consumers.

I mention communication because I have received letters from BSA which were unclear about important matters. For instance, I received one letter where neither I nor my lawyer could work out whether a reviewable decision was being communicated to me or not. This is important, because there is a limited time within which reviewable decisions can be appealed.

Also on communication, I received confusing advice from BSA about subsidence and deflection (of a slab). This experience suggests a need for more training of BSA staff in complex topics such as subsidence/settlement, and in how to communicate these complexities to home owners. In a corporate sense, BSA information about subsidence, settlement and related issues should be made more comprehensive. Also BSA information about how a subsidence claim is handled in BSA should be clearer and more detailed.