



651 Stuart Highway, Berrimah Business Park
Berrimah NT 0828
PO Box 63 Berrimah NT 0828
08 8995 6300

4 February 2025

Ms Caroline Heske
Acting Deputy Information Commissioner
Office of the Information Commissioner
GPO Box 1344
DARWIN NT 0801

By email: infocomm.OMB@nt.gov.au

Dear Ms Heske,

RE: Information regarding application for information on the Fidelity Fund NT

Thank you for your email of 17 January 2025 regarding a freedom of information request relating to the Fidelity Fund NT. The Housing Industry Association (HIA) takes this opportunity to provide a response to your queries on the operation of the Fidelity Fund and the impact it has on industry's ability to deliver housing in the Northern Territory.

The availability of Fidelity Fund NT coverage is an ongoing concern for the residential building industry and there is a growing level of discontent and distrust across industry in relation to its operation, as well as its financial position. Based on the issues communicated to us, HIA would be supportive of moves to ensure greater transparency in the operations of the Fidelity Fund, to provide industry with greater certainty and clarity, to ensure the Fidelity Fund is meeting its objectives and to confirm whether its operation is otherwise in accordance with the requirements of the law.

Further, given the serious nature of the concerns raised by builders to date and the gravity of the potential impacts on consumers, industry and government, HIA would support the release of the Fidelity Fund's financial information, as well as the details of its trustees. We have elaborated on these positions and responded to your questions in **Annexure A**. A table for comparison of the schemes across the various jurisdictions is included at **Annexure B**.

HIA looks forward to assisting government improve outcomes for residential builders and their clients. Should you require any further information or clarification please don't hesitate to contact me by phone or email [REDACTED]

Yours sincerely

HOUSING INDUSTRY ASSOCIATION LIMITED

[REDACTED]

Luis Espinoza
Executive Director

Cc: Hon. Bill Yan
Treasurer, Minister for Logistics and Infrastructure, Minister for Housing
By email: Minister.Yan@nt.gov.au



Annexure A

Overview of key issues

HIA's role

HIA has been the peak body for the residential building industry for 80 years. Our membership comprises a broad range of different businesses, including builders, trades and subcontractors, suppliers and manufacturers, designers, engineers and other professionals. The industry is also made up of a wide variety of business scales, from sole traders through to multi-national, multi-disciplinary corporations.

HIA has been at the forefront of policy and advocacy related to home warranty insurance and fidelity fund arrangements across the nation. We have been involved in a vast number of consultations, submissions and working groups and otherwise have directly advised government on the outcome of any proposals for review or reform. This includes our recent work in the NT.

In addition to advocacy, HIA offers a range of services to its members, including phone and email-based member support and advisory services from our Contracts & Compliance and Building Services Teams. Through member enquiries and feedback, HIA is uniquely positioned to understand the challenges faced by industry in relation to the Fidelity Fund.

Further, through HIA's partnership with AON, HIA Insurance Services provides brokerage of home warranty insurance across multiple states and territories. Collectively, these functions provide us with a well-rounded perspective and specialised insights into the schemes and their shortcomings.

Issues with the Fidelity Fund

Transparency

Builders raise concerns from time to time related to restrictions on Fidelity Fund coverage and delays in the issue of certificates. This happens under 'business as usual' conditions and also occurs in other jurisdictions under both fidelity fund and home warranty insurance schemes. Such concerns are typically limited to individual circumstances and are not necessarily indicative of systemic or widespread issues with the scheme or its operation.

HIA noted a marked increase in complaints from industry, beginning around April 2023. Largely, the issues raised were in relation to the Fidelity Fund's refusal to:

- maintain or increase builders' value caps, restricting the builder's ability to take on new work;
- deem some builds complete, holding up the issue of new certificates;
- provide clarification or feedback on refusals, referring only to the initial decision or ceasing communications with the builder entirely.

This prompted HIA to investigate further and resulted in work with the former government, including meetings and correspondence with the former Treasurer, Hon. Eva Lawler, and her office to highlight concerns around a lack of transparency in decision making.

Since then, HIA has continued to receive complaints from industry regarding the Fidelity Fund. By way of example, the following scenario was recently relayed to us:

The builder has been registered in NT and interstate for many years. Their company has been operating interstate for 10 years, and recently they have recommenced operations in NT. They have applied for Fidelity Fund coverage, with considerable cash in the bank to

pay their bills when they fall due and as a result the business has had no need to establish a line of credit.

Despite this, the Fidelity Fund has limited them to two certificates on an on-completion basis. This has created significant restrictions on the builder's ability to build homes in NT, despite factors demonstrating a low risk of insolvency. Furthermore, the member reported the Fidelity Fund refused to increase their cap unless they took out an overdraft.

Collectively complaints received by HIA reflect an inadequate level of transparency in decision making from the 2022/23 financial year to date.

HIA suggests that given the housing shortage across Australia at present, government and its agents should be taking steps to actively support industry in addressing this critical matter; not introducing further barriers. Firstly, the Fidelity Fund should be providing comprehensive reasoning when determining a builder is ineligible for coverage or where they are unable to provide the requested level of coverage. Additionally, they should be providing support for builders in improving their prospects of success in obtaining the necessary cover. Notably this additional function is one of the many benefits of a brokerage scheme for an insurance product but nevertheless could be a function of the Fidelity Fund administrator.

Context is also critical. The last four years do not represent business as usual. Instead, businesses across all industries have endured extreme and extenuating trading conditions. In the building industry established procurement and payment processes meant the full financial impacts of the pandemic were not immediately apparent.

It is unclear at this stage whether the Fidelity Fund is taking a pragmatic approach to decision making and whether it has briefed the actuary to ensure necessary adjustments are made to its risk assessments to allow for context. This is particularly important for builders who otherwise have strong, long-term financial records and have stayed in business through such exceptional circumstances.

Responsiveness

As noted above, HIA understands there is a general lack of responsiveness by the Fidelity Fund in relation to builder's concerns and complaints. Where a response is received, builders report a lack of necessary detail and as a result they are left to attempt to escalate matters through alternative forums.

[REDACTED]

As a part of HIA's advocacy, in early September 2023 HIA met with Fidelity Fund Secretary, David Malone, and discussed at length HIA members' concerns with the lack of responsiveness and transparency. During the meeting it was acknowledged there had been a breakdown in communication with builders regarding their applications for certificates.

Initially, as a result of HIA's advocacy, the Fidelity Fund NT organised an information session for industry on or about 26 October 2023, held at the MBANT premises. The session was intended to provide insight into the processes involved with the assessment of applications for coverage and certificates.

While the Fidelity Fund's initial acknowledgement of the issues and moves to convene a meeting were important milestones for HIA in pushing for improvements, it appears such efforts have since stalled. HIA is not aware of improvements in responsiveness following the meeting, nor have we received any further communications from the Fidelity Fund on actions implemented to drive improvement.

[REDACTED]

Perceived bias

In recent years builders have also raised concerns regarding perceived bias linked to industry association membership. In particular, there have been suggestions that builders who are MBA members receive preferential treatment. HIA is not able to confirm whether this is accurate.

It is important to note however that the circumstances in the NT do not assist with this perception, including:

- MBANT is the sole administrator for the scheme;
- MBA is a membership-based organisation with a commercial interest in the success of its members and hence their ease of access to certificates;
- there is little else known about how the fund is operated, including the identity of trustees and whether they are at arm's length from the administrator; and
- the Fidelity Fund has been unwilling or unable to produce required documentation under the *Building (RBI and Fidelity Fund Schemes) Regulations 2012* (NT) (the Regulations).

Little has been done to dispel this perception, and the lack of transparency and responsiveness by the Fidelity Fund have only exacerbated matters.

Impacts on industry

Excessive restrictions on Fidelity Fund coverage impacts industry in the NT on multiple levels.

Put simply, without timely access to certificates, industry is unable to deliver homes. This undermines government priorities at both territory and federal levels to deliver more homes and address housing affordability. Furthermore, access to secure housing is known to have direct impacts on social and economic outcomes, such as crime and productivity. Again, the advancement of government objectives is pinned to industry's capacity (or lack thereof) to build homes.

The unavailability of reasonable Fidelity Fund coverage constrains a builder's ability to carry on their business. In the various reports HIA has received from industry, builders are frustrated that they are unable to fulfill contracts they had anticipated they would be able to take on. While a builder's reduced ability to service clients can cause long-term damage to the builder's reputation, unreasonable and severe restrictions on a builder's business has serious commercial implications and will ultimately result in insolvency and business closure at a time when more building activity is needed.

In turn, this has impacts on the business owners at a personal level. The frustration and stress associated with running a business alone can be significant, but with the additional burden of restrictions on their turnover and their ability to trade out of several years of low-margin work during COVID-19 is enough to drive experienced builders away from industry. Industry cannot afford to lose skilled workers and good business operators, particularly in the NT where environmental and commercial conditions require a higher level of resilience and specialist knowledge.

As a result of being unable to progress anticipated projects, several builders have reported having to lay off workers, demonstrating the broad-reaching impacts beyond the builder's business and across industry.

Next steps

Considering both the impacts for stakeholders including consumers, industry and government, and the efforts industry has made to highlight the current issues with the Fidelity Fund, it is clear that government must take calculated steps to address the matter.

Financial information

Like many warranty insurance schemes or fidelity funds across Australia, Fidelity Fund NT operates as a last resort scheme to protect consumers in the event the builder is unable to fulfill their obligations for completion or rectification of domestic building work. In addition, it serves to protect government against the political and economic fallout associated with insolvency events.

While it is not the primary intention of the scheme, the scheme effectively acts as a throttle to business expansion, controlling the risk each participating builder is able to take on. This is viewed as a measure

to reduce the likelihood of insolvency and its impacts, however HIA suggests this is a narrow and potentially dangerous view.

For industry, contributions to the Fidelity Fund represent a tax on business. Builders who contribute to the scheme and remain solvent will never see direct benefits from the payments they make. However, it is important that their contributions are not in vain, and they see the secondary benefits of a scheme that is able to respond to an insolvency event, through consumer confidence and industry reputation.

For this to be realised, the scheme must not be in a position where it is carrying unfunded liabilities. That is to say, it must be managed and administered effectively such that it is able to respond in the event of a catastrophic insolvency and this can only be determined with transparent financial reporting.

In addition, to facilitate compliance, industry must have confidence in the scheme. If they do not, incidence of non-compliance may rise leading to adverse outcomes for consumers, government, the scheme and compliant members of industry.

The Regulations already make the following provisions:

- a capital management plan must be prepared by the trustees (r.79(1)(a));
- the plan must be reviewed annually (r.79(4));
- the plan must be made publicly available (r.79(5)); and
- the trustees must notify the Minister in the event the value of the net tangible assets drops below the prescribed minimum value (r.79(6)).

These provisions establish a system of checks to ensure the Fidelity Fund remains financially viable. However, in the absence of a capital management plan and a lack of proactive scrutiny by the approving Minister and regulator, the appropriate oversight of the Fidelity Fund and its trustees cannot be achieved. The Multibuild determination demonstrates the system has failed and as a result, interrogation of the Fidelity Fund's financial information may be appropriate.

Moreover, it is not for the trustees or administrators of the Fidelity Fund to decide whether or not to provide this information – it is a legal requirement. If the regulator does not take steps to monitor and enforce compliance, the integrity of both the Fidelity Fund and the government is called into question.

Under the circumstances, availability of the Fidelity Fund NT's financial documents and risk projections would provide useful insight into whether the Fidelity Fund, its trustees and its administrators are performing their roles in accordance with the law and in a fit and proper manner. Ensuring this information is available to the public, including builders, is in the public interest and serves to drive informed consultation on whether there is a more appropriate approach to managing consumer risk in building homes in NT.

Furthermore, as contributions are a regulatory requirement, and the funds are managed by a third party approved by government, it is appropriate that there is transparency and accountability for the proper use of those funds. In this case, the question of whether financial information and risk projections should be available to residential builders is too narrow; the availability of this information is in the broader public interest.

Under r.79(1)(b) the trustees of the scheme are also required to comply with the plan and under r.82 they must ensure the Fidelity Fund remains solvent. This includes ensuring there is adequate capital in the scheme at all times, based on the actuarial report prepared in accordance with r.84, and by obtaining a solvency certificate from the actuary per r.83. If there are legitimate doubts as to whether the capital held by the Fidelity Fund is adequate this information should be requested and made available.

Disclosure of trustee names

The Acting Deputy Information Commissioner is currently considering whether the benefits of releasing the names of trustees outweighs the potential drawbacks, including the personal safety of the trustees. HIA is not aware of information that might substantiate a safety concern for trustees, or of a history of prior behaviour by members of the building industry that would give rise to such concerns.

Trustees have various common law duties, largely related to the trust and the beneficiaries, as well as prescribed duties under the Regulations. A trustee owes a fiduciary duty to the beneficiaries of the trust, including the preservation of trust property. They have a duty to act in good faith, exercise impartiality, be honest, reasonable and not favour one beneficiary over another.

While a trustee in this instance may not be exercising favouritism in relation to particular beneficiaries, if preference were to be given by the Fidelity Fund to specific builders, this has an indirect impact on current and future beneficiaries due to additional pressure on builder solvency, cash flow and progress of works associated with restrictions on Fidelity Fund certificates. This would be a matter of public interest.

There is currently no financial insight into the Fidelity Fund, and as such it is unclear whether the trustee's duty to preserve Fidelity Fund property had been upheld. This is also a matter of public interest.

Trustees carry out a similar governance function to a board of directors. By comparison however, the names, qualifications and experience of board members are typically public. Arguably, the establishment of the Fidelity Fund by regulation demands a higher level of oversight and transparency in relation to its governance than that of a corporate entity.

Ultimately the trustees for the Fidelity Fund NT are charged with preserving a consumer protection mechanism. The significance of this duty alone should be justification enough for the details of the trustees to be made publicly available. Trustees in breach of their duties must be able to be held to account.

If it is revealed that there has been a serious case of misconduct by one or more trustees, this must be dealt with appropriately. While the release of personal details may not serve to assist a business that has been adversely impacted, there should be appropriate recourse. In acknowledgement of the severity of the impacts on business, if the trustee's duties have been breached, compensation should be considered for affected builders as a remedy.

Selection and oversight of trustees

HIA also suggests there may be other ways to address the concerns of industry in addition to the release of personal information.

An inquiry may be appropriate into whether the current trustees meet the requirements under r.31, including but not limited to:

- (2)(b) they have the competence, knowledge, skills, experience, qualifications and integrity to carry out the duties as trustee that would be expected of an ordinary prudent person carrying out those duties; and
- (3)(a) they do not have an actual or potential conflict of interest that is likely to influence the person's ability to carry out the duties of a trustee with appropriate probity and competence.

In future there should be clear criteria set for the selection of trustees in addition to better oversight of both their selection and performance. Further to r.31(3)(a) there should be a specific requirement for trustees and the administrator to be at arm's length.

Review of the scheme

HIA would not oppose a review of the existing scheme and its operation, including the potential for introduction of competitors. However, HIA cautions government against making changes to the statutory framework unless they can be justified by a positive cost-benefit ratio, as a part of a regulatory impact statement and comprehensive stakeholder consultation.

The need for a competitive market

The lack of competition in the market is problematic. Overwhelmingly reports and inquiries have recommended that warranty insurance schemes be run by the private sector. While there is a difference between the structure of an insurance scheme and a fidelity fund, there can be no argument that competitive pressure is the best way of delivering the most cost-effective outcome for the home buying public, in addition to driving improvements in service and efficiency.

As a part of the review process, it will be necessary to assess whether the current objectives are being met and whether there is opportunity for improvement. While there is the potential for this to result in improvements to the scheme's function as a safety net for homeowners, it may also support moves towards a competitive market in the NT.

Interstate schemes

A breakdown of fidelity fund and warranty insurance arrangements in other jurisdictions is provided in **Attachment B**.

The viability of a scheme similar to those in other jurisdictions will turn largely on the scale of the market, government, and the regulatory landscape. It is also notable that the only other state that currently has a fidelity fund arrangement in place is ACT, however this is run in parallel to an insurance scheme.

The appetite for insurers to provide home warranty insurance is limited. This is evidenced by the limited competition in other states and territories and the level of government involvement, as well as the recent tender process in Tasmania. Notably, the schemes in the majority of states are currently under review, which highlights the many flaws in the existing frameworks. This presents both a challenge and an opportunity for the NT government in relation to the Fidelity Fund.

There is no one scheme in operation that represents an ideal standard or that could be used as a model for improvements in NT. Nor would it be appropriate to fundamentally reinvent the current NT scheme, by transplanting a scheme directly from another jurisdiction. However, the status of reviews across the states and territories means the NT Government is uniquely positioned to leverage the variety of reports and analyses available to inform its own steps towards a better system for the NT.

The most relevant review to the NT scheme will likely be the recent work related to the ACT Fidelity Fund, covered in the *Review of Residential Building Work Insurance Regulatory Settings – Final Report*, dated December 2023 (the Report). This review was sparked by the Building Quality Inquiry recommendations about the fidelity fund, along with a high-profile case involving the fund.

While the Report is not wholly related to the fidelity fund, and conflates fund coverage with warranty insurance more broadly, a number of the recommendations pertain to the fund. In particular, recommendations include improvements in complaints management, regulatory oversight and compliance; as well as updates to the prudential standards.



Attachment B

Jurisdictional overview

Region	Status	Fund name	Govt/ Private	Project Threshold	Limits	First/ last resort	Amount of cover	Carve-outs	ADR	Additional triggers	Relevant legislation
ACT	In force, under review	Residential building insurance or Fidelity Certificate	Private MBA Fidelity Fund	\$12,000	5yrs / 2yrs in some circumstances	Last resort	\$200,000	Multi unit dwellings more than 3 storeys high.	Not provided under <i>Building Act 2004</i> .	No	<i>Building Act 2004</i> ; <i>Building (General) Regulation 2008</i>
NSW	In force, under review	Home Building Compensation Fund (HBCF)	Govt underwritten and run - NSW Self Insurance Corporation (iCare), with private brokers	\$20,000	<ul style="list-style-type: none"> • 6 years structural • 2 years non- structural • 1 year failure to complete 	Last resort	<ul style="list-style-type: none"> • \$340,000 • 20% of contract price for non- completion 	Multi unit dwellings more than 3 storeys high.	Yes. Non- binding.	Yes. Where the builder's license is suspended for failure to comply with an order of a Court or NCAT.	<i>Home Building Act 1989; Home Building Regulation 2004</i>
NT	In force	Fidelity Fund NT	MBANT	\$12,000	<ul style="list-style-type: none"> • 6 years structural • 1 year non- structural 	Last resort	\$200,000, up to 20% of the contract price.	Multi unit dwellings more than 3 storeys high.	Yes. Binding decision made as a result of breach of consumer guarantee.	Yes. Suspension or cancellation of a builder's registration.	<i>Building Act 1993</i> ; <i>Building (RBI And Fidelity Fund Schemes) Regulations 2012</i>

Region	Status	Fund name	Govt/ Private	Project Threshold	Limits	First/ last resort	Amount of cover	Carve-outs	ADR	Additional triggers	Relevant legislation
QLD	In force, under review	Home warranty insurance	Govt run (QBCC)	\$3,300	<ul style="list-style-type: none"> • 6 ½ years structural • 1 year non-structural 	First resort	\$200,000 each for: <ul style="list-style-type: none"> • Loss or deposit or incomplete work • Damage to incomplete work by natural disaster • Rectification after practical completion Option to buy additional cover up to \$300,000.	Multi unit dwellings more than 3 storeys high.	Yes - binding rectification orders	Yes. <ul style="list-style-type: none"> • Lawful contract termination (during construction); • licence suspension / cancellation; • failure to comply with QBCC direction to rectify; • subsidence or settlement affecting building. 	<i>Queensland Building Construction Commission Act 1991</i>
SA	In force, under review	Building indemnity insurance	Private with government providing reinsurance	\$12,000	5 years	Last resort	\$80,000	Multi unit dwellings more than 3 storeys high.	Non-binding conciliation through general CBS process.	No	<i>Building Work Contractors Act 1995</i>
TAS	Proposed	Home Warranty Insurance	Private with government providing reinsurance	TBC	6 years	Last resort	<ul style="list-style-type: none"> • \$200,000 • Value of deposit for non-commencement. • 20% of contract price for non-completion 		Yes. Binding ADR through the Building Standards & Occupational Licensing (Dept of Justice)	No	<i>Residential Building Work Contracts and Dispute Resolution Act 2016</i>

Region	Status	Fund name	Govt/ Private	Project Threshold	Limits	First/ last resort	Amount of cover	Carve-outs	ADR	Additional triggers	Relevant legislation
VIC	In force, under review	Domestic building insurance	Govt underwritten and run – VMIA, with private brokers	\$16,000	<ul style="list-style-type: none"> • 6 years structural • 2 years non- structural 	Last resort	<ul style="list-style-type: none"> • \$300,000 • 20% of contract price for non- completion 	Multi unit dwellings more than 3 storeys high.	Yes. Non- binding.	Yes. Failure to comply after 28 days of an order made either by: <ul style="list-style-type: none"> • VCAT, or • A court, including the Magistrates’ Court, County Court and Supreme Court of Victoria. 	<i>Building Act 1993</i> ; Ministerial orders: 1) Government Gazette S98 23 May 2003 2) Government Gazette G22 29 May 2014, page 1014.
WA	In force	Home indemnity insurance	Private with government providing reinsurance	\$20,000	6 years	Last resort	<ul style="list-style-type: none"> • \$200,000 • \$40,000 for loss of deposit 	<ul style="list-style-type: none"> • Multi unit dwellings more than 3 storeys high. • Builders building their own home. • NCC Clas 1B and 3 SDA developments. • Leased retirement villages. • Government housing. 	Yes. Non- binding.	Yes. Loss of registration for inability to meet financial requirements.	<i>Home Building Contracts Act 1991</i> ; <i>Home Building Contracts Regulations 1992</i> ; <i>Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2001</i> .