16 April 2008

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

Dear Committee Secretary

Inquiry into Australia's Mandatory Last Resort Home Warranty Insurance Schemes

The Consumer Action Law Centre (**Consumer Action**) welcomes the Senate Economics Committee Inquiry into Australia's Mandatory Last Resort Home Building Warranty Insurance (**HBWI**) schemes. We have long been concerned that the mandatory HBWI schemes that operate in a number of Australian jurisdictions provide little or no protection for consumers, while coming at a significant cost. We note that this is consistent with a recent finding of the Productivity Commission in the Draft Report of its Inquiry into Australia's Consumer Policy Framework. The Productivity Commission has stated:

> "Though a cost for consumers, HBWI offers little protection to them. …Given that the cost of HBWI is passed on in building costs, it is important to ensure that this compulsory insurance product offers consumers value for money, and that consumers understand what they are getting".[1]

We agree with the Productivity Commission. We believe that problems with HBWI are interlinked with other aspects of the home building consumer protection regime, including licensing/registration requirements, access to alternative dispute resolution, and access to low-cost courts and tribunals.[2] For that reason, HBWI cannot and should not be looked at in isolation, but rather from a holistic, consumer protection perspective.

Home building consumer protection is particularly important considering that a home will typically be the single largest purchase a consumer will ever make. Considering the significant expense of home building, and the dislocation and trauma that can occur when building defects occur and consumers have to relocate at their own expense, a comprehensive and effective consumer protection regime is essential in the area of home building. It is our view that adequate and effective HBWI is an essential part of that framework.

[1] Productivity Commission, *Review of Australia's Consumer Policy Framework – Draft Report*, November 2007, p 101-2.
[2] Daniel Smith, *Builders' Warranty: First resort or last resort or does it really matter?*, Presented to the Institute of Actuaries of Australia, XVth General Insurance Seminar, 16-19 October 2005.

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Attached to this submission is a case study detailing the experience of a client of Consumer Action. The case study highlights particular problems with both the alternative dispute resolution mechanisms relating to home building as well as the significant difficulties a consumer faces should they wish to claim upon HBWI.

The remainder of this submission is divided into the following:

- Approaches to HBWI around Australia;
- Consumer protection problems in the building sector; and
- Potential reforms which may lead to better consumer protection.

Our final recommendation is that HBWI return to a government controlled warranty body, as previously operated in Victoria through the Housing Guarantee Fund (**HGF**) and as currently operates in Queensland through the Queensland Building Services Authority (**QBSA**).

HBWI in Australia is marked by divergent approaches

Most Australian jurisdictions have moved to a private, last resort systems of HBWI that only provide protection where the builder is dead, disappeared on insolvent. Victoria's current system came into effect from 1 July 2002.[3] Generally, the private schemes also incorporate numerous carve-outs that reduce any claim that consumers might make. More information about the problems related to these schemes is detailed below.

Queensland and the Northern Territory have government monopoly systems, although the Northern Territory is moving to privatise its system.[4] Queensland's system is unique, being a first resort system that covers individuals whether or not the builder is dead, disappeared or insolvent, and is linked to Queensland's more rigorous licensing requirements. This means that Queensland consumers can make a complaint to the Queensland Building Services Authority (**QBSA**) should their homes suffer defects. QBSA can conciliate complaints and, if required, make formal directions to builders to rectify works. Importantly, the QBSA, being also responsible for compliance and enforcement for licensing requirements, can suspend or revoke licenses based on the builder's performance in terms of complaints against him or her. This system provides strong incentives for builders to avoid having claims against them, and to rectify existing complaints.

Tasmania has most recently had a private system, and is moving to remove mandatory HBWI. Instead, it has proposed an alternative framework for consumer protection, including improved dispute resolution, enforceable rectification orders, standard contract terms and mandatory provision of information to consumers.[5] While these are all necessary protections in a home building consumer protection framework, we believe that HBWI is an additional necessary requirement should dispute resolution and rectification orders still result in consumers suffering loss that cannot be easily claimed from a builder.

Table 1 summarises some of the main differences in HBWI across Australia.

[3] Domestic Building Insurance Ministerial Order, Victorian Government Gazette No S82, 20 May 2002.
[4] See Northern Territory Government, *Guide for Residential Building Reform*, p 8, available at: http://www.nt.gov.au/lands/building/constructionreform/documents/rbrfaqs.pdf.
[5] See Tasmanian Consumer Affairs and Fair Trading, *A New Consumer Building Framework,* available at: http://www.consumer.tas.gov.au/fair_trading/consumer_building_framework.

Table 1

	Govt/ Private?	Limits	First/last resort?	Amount of cover	Carve-outs**	Approx. premium	ADR?	Tribunal access?	Relevant legislation
QLD	Govt	6 ½ years	First resort	$400,000	Works less than $3,300 Multi dwelling more than 3 storeys high	$156.40-$2,835.25	Yes- binding rectification orders	YES	Queensland Building Services Authority Act 1991
NSW	Private	6 yrs-stuctural 2 yrs- non structural 1 yr- failure to complete	Last resort	$300,000	Works less than $12,000 Multi dwelling more than 3 storeys high 20% of contract price only for non-completion	$1,100-$4,050*	Yes- non binding	YES	Home Building Act 1989 Home Building Regulation 2004
VIC	Private	6 yrs-stuctural 2 yrs- non structural	Last resort	$200,000	Works less than $12,000 Multi dwelling more than 3 storeys high 20% of contract price only for non-completion	$1,100-$4,050*	Yes- non binding	YES	Building Act 1993
SA	Private	5 yrs	Last resort	$80,000	Works less than $12,000 Multi dwelling more than 3 storeys high	$1,100-$4,050*	Non binding conciliation through general OCBA process	NO	Builders Licensing Act 1986
WA	Private	6yrs	Last resort	$100,000	Works less than $20, 000 Multi storey dwelling more than 3 storeys high	$1,100-$4,050*	YES- non binding	YES	Home Building Contracts Act
TAS	Private-phasing out	Tasmania is phasing out mandatory insurance	NA	NA	NA	NA	Proposed – will be binding	NO	Housing Indemnity Act 1992
NT	Govt-planned move to NSW style private system	10yrs	Last resort	$?	Works less than $12,000 Only active once a permit of occupancy has been issued Multi storey dwellings more than 3 storeys high	$1,100-$4,050*	YES – non binding, disciplinary complaints to Director are encouraged	NO	Building Act 2007
ACT	Private	5yrs 2yrs in some circumstances	Last resort	$85,000	Works less than $12,000 Multi storey dwellings more than 3 storeys high Only active once a permit of occupancy has been issued	$1,100-$4,050*	?	NO	Building Act 1972

* These figures are based on estimates of premiums provided by a major private HWI insurer, CGU Insurance Limited.[6] Information on premiums charged by private insurers is very hard to obtain, and appears to be deliberately not disclosed by some insurers. Premiums may very between states.
**Other typical carve-outs in the states other than Queensland include houses built for the government housing authorities and leased retirement villages.

[6] CGU Builder Home Underwriting Guidelines. http://www.cgu.com.au/cgu/pub/cgu/website/DocumentLibrary/Home%20warranty/HWI_Underwriting_Guidelines.pdf

Consumer protection problems in the building sector

Particular problems with last resort HBWI schemes

Consumer Action believes that last resort private HBWI schemes provide little or no consumer protection at significant premium costs – typically in the thousands of dollars. In fact, the private last resort HBWI schemes have been described as "a compulsory subsidy for the insurance industry, levied on homebuyers."[7] The primary reason for this is the significant hurdles a consumer faces before they can make a claim on the insurance.

HBWI does not provide genuine coverage for common building problems, such as non-completion or poor quality work. Instead, the last resort schemes only provide coverage if a builder is dead, disappeared, or insolvent, and even then contain numerous carve-outs that limit any claim that a consumer might make.

The practical result of this in Victoria is that a consumer must pursue a complaint through the Victorian Civil and Administrative Tribunal (**VCAT**) before any rights against the insurer accrue. Indeed, even if they are successful at VCAT, consumers must take further action to wind up a company in order to demonstrate 'insolvency' in accordance with the policy wordings. Such action comes at significant cost to the consumer involved. The example in the attached case study demonstrates that legal costs of around $92,000 - $103,000 were incurred to make a claim of around $63,000. Such legal costs are not recoverable from insurers. Other costs relating to alternative accommodation, removal and storage costs will also be incurred, and insurers are only liable for such costs up to a limit of 60 days.[8] These additional limitations mean that HBWI will not compensate a consumer for their entire loss, even if they are successful in any claim.

One consequence of HBWI being exempted from regulation under the *Corporations Act 2001* (Cth) pursuant to Corporations Regulation 7.1.12(2) is that there is no comprehensive reporting of the premiums earned and number and value of claims made in relation to the insurance (that is, the loss ratio of the product). For other types of insurance, this information is reported by the Australian Prudential Regulation Authority (**APRA**). For that reason, it is difficult to tell how much profit is being on HBWI in comparison with other types of insurance. The NSW Office of Fair Trading does release some information about the HBWI scheme that operates in that state.[9] That information demonstrates that the rejection rate of claims is very high and that the loss ration is low compared with other insurance products. The publication does state, however, that caution should be used in interpreting the data for a number of reasons.

It is our view that the loss ratio of HBWI should be reported to APRA as is required in respect of other insurance products.

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[7] Tyler, Dr Peter, *A Review of the NSW Home Warranty Insurance Inquiry 2003*, Peter J. Tyler Associates, 24 March 2004.
[8] Ministerial Order, clause 9(4).
[9] NSW Office of Fair Trading, *NSW Home Warranty Insurance Scheme – information on the scheme as at 30 June 2007.*

Conciliation and dispute resolution

One serious problem that has coincided with the move to last resort private schemes of HBWI has been that the government regulators typically no longer have the power, or resources, to order builders to rectify faults. While the Consumer Affairs Ministries of the various States and Territories often provide mediation services, these are not typically reinforced with any determinative power on the part of the regulator.

In Victoria, consumers with a complaint about a builder can complain to the Building Advice and Conciliation Service Victoria (**BACV**), which is managed jointly by Consumer Affairs Victoria (**CAV**) and the Building Commission. The problem with dispute resolution at BACV, as demonstrated by the attached case study, is that builders do not have an incentive to resolve cases on a conciliated basis. This is especially the case for builders who have little concern for their reputation. Further, the BACV has no capacity to enforce an outcome.

In 2006/2007, there were 2,189 complaints to BACV. While CAV note that many complaints are resolved through conciliation, in cases where conciliation did not resolve the complaint, CAV had no power to order a builder to repair defaults. The inability of conciliation to provide rectification orders leaves a very significant gap. The more unscrupulous builders will be well aware of BACV's lack of power, and may be aware that the only option consumers have if conciliation does not work is to litigate through VCAT, a highly expensive process in residential building dispute matters. While VCAT is theoretically a cost-free jurisdiction, the complex nature of building disputes has resulted in the increasing formality in the building list at VCAT, such that:

- legal representation is the rule not the exception;
- highly expert and technical evidence is required; and
- costs orders are not uncommon.

Each of these features render the VCAT increasingly 'court-like' with the resultant disincentives (financial and psychological) to consumers pursuing legitimate claims. Further, as outlined above, legal costs are not recoverable from the insurer. As such, many consumers do not pursue the insurer as it is uneconomical to do so.

While Victoria has clear gaps in its dispute resolution system in relation to building disputes, consumers in jurisdictions (such as South Australia) that do not have a Tribunal to deal with consumer/builder disputes are even worse off – they must go through the traditional court process, with its greater complexity and legal formality and importantly with the risk that the consumer must pay the builders legal costs if the consumer is unsuccessful.

Enforcement and compliance with registration requirements

The last resort HBWI schemes, such as those that operate in Victoria, do not complement the relevant system of licensing or registration of builders. This is because the only time a claim on HBWI can impact on a builder's licence or registration is when the builder is already excluded from future building – by death, disappearance or insolvency. This contrasts with a first resort system, that to remain tenable must respond to builder claims by penalising or de-registering builders who are subject to repeat claims.

In Victoria, the Building Commission is responsible for the administration of the registration of building practitioners and monitor their conduct. In 2006/07, the Victorian Building Commission cancelled only 3 building practitioner registrations from a total of 20,998 registrations.[10] This number is statistically very small, even when compared with the figure of 1,209 complaints made to BACV. While the Building Commission does include a register of prosecutions and inquiries of registered building practitioners on its website, it does not appear that they actively consider complaints to the BACV, including whether builders are willing to conciliate through BACV, in determining ongoing registration.

Proposals for reform

Queensland's first resort system is appropriate for a national scheme

It is our view that all States and Territories should adopt a first resort, government monopoly, mandatory HBWI scheme similar in form to the current Queensland scheme operated by the Queensland Building Services Authority (**QBSA**). As outlined above, the ability of QBSA to make binding rectification orders and its responsibility for considering builder's ongoing registration provide incentives for builders to resolve disputes and undertake rectification work. Importantly, however, there are not significant limits on the insurance cover.

The *Queensland Building Services Authority Act 1991* (Qld) provides for the Queensland statutory building warranty insurance scheme. Coverage is available, during the course of the contract, where:

- The builder becomes bankrupt or goes into liquidation; or
- The builder fails to complete the contracted works for reasons that are not the consumer's fault; or
- The builder fails to complete the contracted works and those works are found to be defective.

Coverage is available after completion of the work where:

- The builder fails to fix defects that have been the subject of a QBSA direction, or, for various reasons (eg. bankruptcy or liquidation, in another country, or deceased), can't attend to rectification; and
- The building suffers from the effects of subsidence or settlement.

Additional coverage is also available for:

- Reasonable cost of alternative accommodation; and
- Furniture removal and storage costs necessarily incurred.

While there are monetary limits and conditions on the insurance cover (see table above), it is clear that this scheme provides far wider coverage than the last resort HBWI schemes.

Another proposal has been that mandatory HBWI be removed and improvements be made to dispute resolution procedures as well as registration and compliance procedures. Indeed, as stated above, Tasmania has recently abolished its mandatory HBWI scheme. CAV has

[10] Building Commission, *Annual Report 2006/07.*

also raised this possibility, noting that given the limited consumer protection HBWI provides, it may be 'preferable to relax or remove requirements for builders' warranty insurance and focus on improving building practitioner registration and compliance'.[11]

We would not support such a proposal as sufficient to protect consumers. While we agree that building practitioner registration and compliance, as well as dispute resolution processes, need to be improved, HBWI is necessary where a consumer suffers loss that is not remedied through other means. The QBSA scheme provides this, and does not require consumers to exhaust expensive and difficult legal processes before being able to make a claim.

Another novel proposal has been to require all subcontractors who work on residential building projects to lodge a security bond with the regulators as a condition of retaining their trade license.[12] While we have some concerns about the practicality of this proposal and do not think it would of itself resolve the current problems, we think it is a proposal worthy of consideration. A particular concern is that it probably would likely involve significant administrative costs in the set up stage and may prevent entry into the market even where builders or subcontractors are otherwise appropriate to be registered.

Improved compliance and enforcement of builder's registration requirements

In many of the current jurisdictions in which a private last resort HBWI scheme exists, relatively little enforcement action has been taken in recent years against registered or licensed builders.[13]

One view is that the move to a private last resort scheme facilitates the reduction in builder oversight, as both information about builder non-compliance, and the need to ensure regulation of non-compliant builders reduces. In a first resort government scheme, builders who continue business may be subject to claims, and this provides information about builders who may be persistently non-compliant.

In a last resort system this is not the case because any claim under a last resort system can only occur once the builder who subject to the claim is dead, disappeared or insolvent. and therefore information from claims about these builders is of little use in preventing future non-compliance. Likewise, first resort government insurers could not remain viable unless they incorporated a developed system for detecting and punishing non-compliant builders – thus the success of the QBSA, and the HGF in Victoria until its unwinding in 1996, is due in part to appropriate access to and use of remedial action against builders for non-compliance.

We recommend that, to be effective, building dispute resolutions services and claims under HBWI, must be closely linked to compliance and enforcement regimes and registration requirements.

[11] Consumer Affairs Victoria, *Supplementary Submission to Victorian Competition and Efficiency Commission's Inquiry into the Housing Construction Sector and Related Issues*, September 2005.
[12] Dr Peter Tyler, *A Review of the NSW Home Warranty Insurance Inquiry 2003*, Peter J. Tyler Associates, 24 March 2004.
[13] As outlined above, only 3 builders were de-registered in Victoria during 2006/07.

Improved dispute resolution – conciliation and courts

Access to no cost dispute resolution forums is essential for any scheme that seeks to resolve disputes involving consumers and traders. Consumers should have access to an independent conciliation process that is underpinned by a binding power to order that faults be rectified.

A dispute resolution scheme needs to also have scope for, or a least links to, de-registration or disciplinary actions for builders who do not participate in alternative dispute resolution procedures in good faith. Only if there is such an incentive to participate in conciliatory processes will builders actually attempt to resolve disputes in the low-cost alternative dispute resolution environment. Another mechanism that has been effective in other industry based ADR schemes is to charge members subject to a complaint on an escalating scale, thus creating incentive for early resolution.

We recommend that all jurisdictions have an independent conciliation system which has power to make binding decisions that affect builders, for instance the power to order builders to rectify faults. Furthermore, Tribunals should be introduced in those states that do not currently have a Tribunal to determine disputes that cannot be settled through conciliation. All jurisdictions should have a Tribunal that operates on the principal that each party is ordinarily responsible for its own costs, such as the VCAT in Victoria and other similar Tribunals in other states. Efforts should also be made to ensure such Tribunals remain genuinely low-cost jurisdictions.

Should you have any questions about this submission, please contact me on 03 9670 5088.

Yours sincerely
CONSUMER ACTION LAW CENTREB

Gerard Brody
Director – Policy & Campaigns

Attachment – Case study of consumer complaint relating to home building warranty insurance

The below case study demonstrates a number of failings with building dispute resolution and Home Building Warranty Insurance. Issues raised by this case include:

- The dispute has lasted four years, without a satisfactory resolution;
- The builder rejected all attempts to conciliate the matter at Building and Conciliation Victoria;
- Proceedings in the Victorian Civil and Administrative Tribunal were drawn out and expensive, resulting in an order in favour of our client of over $63,000;
- Independent costing of our legal services showed that over $88,000 costs were incurred in relation to the matter;
- The order remains unsatisfied, requiring our clients to seek to wind up the builder's company in order to claim on Home Building Warranty Insurance (estimated to cost an additional $4,000 - $15,000);
- Had our clients not had free legal assistance, and if they were successful in winding up the company, they would still be out of pocket as the Home Building Warranty Insurance does not cover legal costs (that is, they would have spent $92,000 - $103,000 to recover $63,000); and
- Other consumers have unsatisfied claims against the builder, which won't be satisfied until someone spends the money to wind up the builder's company.

Problem

In 2002, our clients purchased a demountable home (the **dwelling**) for $3500 from a developer named Jim Buckley. The developer referred our clients to Classic Period Homes (**CPH**), as a company that would assist our clients to remove, transport and re-erect the dwelling onto their Cohuna property. Our clients met with Brendan John Clune, a director of CPH in Malmsbury on 15 August 2002, to select a home and to discuss the proposed building work.

Our clients instructed CPH to make several variations to the dwelling. They entered into an agreement with CPH to transport the dwelling for $5000 on 31 August 2002 and a home building contract for $58 000 on 31 August 2002. Our clients did not obtain independent legal advice prior to entering the agreement and the contract. During the negotiations, our clients dealt with variously Brendan Clune, Joan Piechatschek (a salesperson), Werner Piechatschek (the builder) and Curtis Piechatschek (son of the builder).

Around this time, Brendan Clune and Joan Piechatschek came to our clients' home in Cohuna, and thereafter visited the block. A basic plan of the dwelling was provided to our clients, however as it was not to our client's specifications, our clients contacted Brendan Clune and stated that if the plans were not redrawn they would exercise their rights to exit the contract within the cooling off period.

Our clients sold their existing home in Cohuna on 22 August 2002 and rented a house in Cohuna from 26 September 2002 to 20 December 2005.

The dwelling was delivered to the block in three pieces on 28 October 2002, however building work did not begin on the dwelling until 5 December 2002, two days before the building contract was meant to be completed. At this stage our clients' were compelled to live in a tin shed on the Cohuna block, their rental agreement having ended. During this time, our clients made several telephone calls to CPH to discuss the delays.

The builders left the site on 3 February 2003 and our clients' began working on the house, painting and installing the bathroom and kitchen etc. Within a few days of the builders leaving the dwelling, our clients noticed that screws in the ceiling were pulling on the ceiling plaster. Our client's advised Werner Piechatschek and his son Curtis Piechatschek of their discovery. Werner Piechatschek advised that the plumber and electrician had caused the problems by working in the roof and stated that he would charge our clients $50 per hour to fix the problem. Our clients continued to live in the shed on the land in conditions of extreme heat until 27 March 2003, when they received a certificate of occupancy. Our clients made payments to the builder of $54,550.

A number of serious problems with the dwelling have manifested since its construction. Our clients obtained a number of reports which indicated that the dwelling has serious structural problems relating to the foundations and the pitching of the roof. Preliminary quotes estimated that repairs to the dwelling would cost from $50,000 to $70,000. There were also significant departures from the agreement made with our client and from the plans.

As a result of the defects the Gannawarra Shire issued a building notice on the dwelling on 12 November 2004, which remains in force. Our clients are unable to conduct rectification work to the dwelling due to lack of means.

Attempts to resolve

Our clients attempted to resolve this matter by making complaints to Consumer Affairs Victoria (**CAV**). In October 2003, the clients lodged a Domestic Building complaint with the Building Advice and Conciliation Victoria (**BACV**) and an inspection of the dwelling was completed in December of 2003. This inspection revealed serious defects and required the CPH to rectify those defects. The Building Commission attempted to contact the builder to no avail and CPH rejected all attempts to conciliate the matter.

CPH and Brendan Clune have been the subject of criminal proceedings in the Heidelberg Magistrates Court, issued by the Building Commission.

In July 2006, CPH issued proceedings in VCAT seeking orders that our clients pay $16 965 as payment for variations to the home building contract. Our clients filed a defence stating that the variations that were being claimed were included in the original contract price. T hey also lodged an $80 000 counterclaim.

Around September 2006, CAV referred the matter to the Consumer Action Law Centre (**Consumer Action**). Consumer Action obtained the pro bono assistance of a barrister, Mr Andrew Kincaid to attend a mediation of the matter. The October 2006 mediation of the matter was unsuccessful.

Despite CPH having made the application to VCAT, CPH did not actively prosecute the matter and the proceedings where characterised by delay and continual breaches of VCAT orders on CPH's behalf. As a result of CPH's failure to serve an expert report, their application was dismissed and the counterclaim was fixed for hearing on 2 July 2007. On that date, the matter settled and a deed of settlement was drawn up. CPH defaulted on the reasonable terms of settlement and we applied to have the matter reinstated.

The matter was successfully reinstated and on 17 October 2007, VCAT awarded $63,666 to our clients in damages, plus $7, 639.92 interest. An indemnity cost order $88,265.65 was also made.

Unsurprisingly, the CPH has not satisfied these orders. Our client's are aware of a number of other decisions of VCAT for substantial awards of damages against CPH that are also unsatisfied. At one stage it appeared that another victim of CPH, who has obtained an order for damages of $137,102 plus costs, would instruct his solicitor to wind up Classic Period Homes. The costs of doing do has proved prohibitive and at this stage his solicitor does not have instructions to proceed any further.

Our clients are only able to claim under their Builders Warranty Insurance if the builder is "dead, insolvent or disappeared". As such, Consumer Action is considering undertaking proceedings to wind up Classic Period Homes.

Our clients are concerned that CPH continue to operate unscrupulously. They are also aware that persons involved in CPH have begun trading under the name "Heritage House Removals". This has been confirmed by the Building Commission.

Our clients

Our clients are a married couple in their early 40s.

The wife has suffered from breast cancer and has had a double mastectomy and chemotherapy. In October 2005, she underwent an uterectomy. In September 2006, she had a lump removed from her leg. She is medicated for stress and has doctor's certificates that recommended that she not attend VCAT proceedings. She has been recently diagnosed with secondary cancer and is awaiting information on surgery and treatment options.

The husband used to work as a truck driver, but he was injured in a workplace accident in 2003 and has not been able to return to work since then. He also suffers from an irregular heartbeat, and is medicated for that condition. Their sole source of income is the Disability Support Pension and they have limited assets.

Winding up a company under insolvency

Winding up a company in insolvency is a costly and technical process. As our clients are indigent, they cannot do this without free legal assistance.

The process they would be required to follow to claim under Builders Warranty Insurance would be as follows:

File the VCAT order in the County Court. This involves filing a certified copy of the order and an affidavit stating that the amount has not been paid. There is no charge for filing the order and the affidavit. Once filed, the order becomes a judgement debt.

Serve a statutory demand under section 459E(1) of the *Corporations Act*, specifying the debt and requiring the company to pay within 21 days.

Apply to the Federal Court for the company to be wound up if the creditor does not comply with the statutory demand. The application should be within 3 months of the non-compliance with the statutory demand. The filing fee of $735. Application is by originating process, stating the relevant sections of the *Corporations Act* and the relief sought with a supporting affidavit. The Application must attach a copy of the demand, set out the particulars of services and the failure to comply with the demand.

Notice of the application must be served on the company. An advertisement also needs to be placed in newspapers in accordance with the rules. The Federal Court will then list the matter for hearing within 4 to 8 weeks, but not longer than 6 months after the application is made.

Find a liquidator to consent to be appointed, in advance of the hearing.

At the hearing of the matter, if the application is successful, the Court will appoint the nominated liquidator. Until a liquidator is appointed, the person making the application prosecutes the proceedings at their own cost. The remuneration of the liquidator is set by a resolution of the creditors or the Court. The liquidator is generally paid out of the assets of the company. If the assets are not sufficient for payment of the liquidator and the creditors are unable to pay, the liquidator may apply to an ASIC fund for remuneration.

The cost of such an application is approximately $4, 000 to $15, 000 depending on the complexity of the matter and if it is defended.

Conclusions

Our clients have had to defend and prosecute time consuming and potentially very costly legal proceedings had they not obtained pro bono assistance through Consumer Action and the Victorian Bar Legal Assistance Scheme to seek redress from CPH. To obtain damages of $63,666, $88,265.65 in legal costs were incurred. If our clients had not sought our assistance, they would have either settled for a lesser amount or dropped their complaint completely. Our clients are aware of other victims of CPH who have had to agree to orders that they pay the spurious claims of CPH, because they were unable to fund their defence.

In order to claim under their Building Warranty Insurance, our clients are now required to make an application to the Federal Court to have the company wound up, which will take a minimum of 4 months and at a cost of $4,000 to $15, 000.

If successful in their application to wind up CPH, they will then need to make a claim to their insurance company, which will take further time and expense.

Even if our clients were successful and had not had pro bono assistance or our support, our clients would still be out of pocket as the insurance policy does not allow for the payment of their legal costs.