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Building Review Secretariat
Better Regulation Victoria
GPO Box 4379
Melbourne VIC 3001

Dear Expert Panel

Framework for reform – Modernising Victoria’s building system

Thank you for the opportunity to provide comment on the consultation paper, Framework for Reform – Modernising Victoria’s building system.

This submission responds primarily to the proposed improvements relating to consumer protection, in particular, the proposals to:

- Improve existing advocacy and support services for individual consumers;
- Establish a consumer representative body to address systemic consumer building issues; and
- Establish a consumer reference group or advisory mechanism.

We also comment on the proposal for a tool to develop quality, insurance arrangements and the approach to dispute resolution, from a consumer protection perspective.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Consumer advocacy proposals

We warmly welcome the recognition in the consultation paper of the role both individual assistance services and systemic consumer advocacy can play in supporting a robust building system in Victoria.

The recognition of the value of systemic advocacy is supported by various reports from the Productivity Commission which have referred to the important role consumer advocacy bodies can play by injecting consumer viewpoints into the policy making process. Referring to the ‘free rider’ problem,¹ the Productivity Commission has concluded that there are net benefits from the provision of additional taxpayer resources for consumer advocacy.

¹ While consumers in aggregate may value the services provided by advocacy groups, at an individual level consumers have an incentive to ‘free ride’ on the contributions of others. The Productivity Commission has found that this is a rationale for government resourcing of consumer advocacy: Productivity Commission, *Consumer Law Enforcement & Administration*, March 2017, pp. 215-6.

The value of individual assistance services was also clearly recognised by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Financial Systems Royal Commission**). The Final Report acknowledged the asymmetry of knowledge and power between consumers and service providers and recognised that many disputes are resolved with the assistance of a legal adviser or financial counsellor.²

While disputes systems such as Domestic Building Dispute Resolution Victoria (**DBDRV**) are designed without the need for legal assistance, there will always be some more vulnerable complainants who will require assistance from an advocate. Furthermore, the experience of advocates when assisting their clients through such forums can inform opportunities for their continuous improvement.

Both research and practical experience have demonstrated the significant benefits of integrating individual assistance services with systemic advocacy. Research which demonstrates this value include the following:

- In her 2009 report, *Reclaiming Community Legal Centres: Maximising our potential so we can help our clients realise theirs*, Nicole Rich (now the Director of Consumer Affairs Victoria) argues that community legal centres must engage in more than individual service work, submitting that it 'simply more effective to engage in a mix of activities if we want to maximise the benefits we provide to our clients'.³ Taking an approach that goes beyond direct service work is essential to efficient service delivery and positive outcomes for consumers.
- A further 2015 report by Agata Wierzbowski sets out a range of reasons why it is important to link individual assistance and casework with strategic work such as systemic advocacy.⁴ These include:
 - Academics say it's a good idea. For example, one four-year study of the top practices of high-impact not-for-profits nominated 'advocate and serve' as the first best practice principle.⁵ The researchers found that all 12 of the high-impact organisations they examined engaged in integrated policy advocacy and direct service work. The researchers found that such integration created a 'virtuous cycle' and that 'the two together can create impact that is greater than the sum of the part'.
 - The Productivity Commission says it's a good idea:⁶ identifying and acting on systemic issues that have arisen through casework involves 'addressing an underlying problem that has led to many disputes can free up the resources of affected parties, legal assistance providers, private lawyers, courts and governments.'
 - It enhances the rule of law by 'making the justice system operate more effectively by providing "robust feedback about the impact of the law on the lives of vulnerable people" and providing Victorians with an experience of the justice system that works for rather than against them, building their trust in it'.

Consumer Action Law Centre, which combines individual assistance with systemic advocacy, has also had feedback that this process provides useful information to regulators, and enables them to do their work. Delia Rickard, Deputy Chair of the Australian Competition & Consumer Commission states:⁷

² Final Report, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Sector, Volume 1, pages 490-493.

³ Nicole Rich, *Reclaiming Community Legal Centres: Maximising our potential so we can help our clients realise theirs*, Victoria Law Foundation Community Legal Centre Fellowship, 2008 <https://victorialawfoundation.org.au/sites/default/files/attachments/VLF%20-%20CLC-report-08.pdf>

⁴ Agata Wierzbowski, *Lawyering for Change: seven principles of strategic practice for community legal centres*, 2015, Victoria Law Foundation Community Legal Centre Fellowship, 2015, https://victorialawfoundation.org.au/sites/default/files/attachments/2015_web_CLCReport_final.pdf.

⁵ Leslie Crutchfield et al, *Forces for Good: Six Practices of High-Impact Nonprofits* (2008) 18

⁶ Productivity Commission, *Access to Justice Arrangements – Inquiry Report* (2014) Productivity Commission, see: <http://www.pc.gov.au/inquiries/completed/access-justice/report>, Volume 2, Recommendation 21.1.

⁷ Quoted in Dr Liz Curran, *Solving Problems – a strategic approach: examples, processes & strategies*, 2013, <https://consumeraction.org.au/new-report-solving-problems-a-strategic-approach/>.

Community Legal Centres such as the Consumer Action Law Centre are a critical ingredient if regulators like ASIC and the ACCC are to do our work well. Such services are often the first place disadvantaged consumers go to with their problems. Consequently these centres are frequently the first to identify emerging issues causing real detriment to vulnerable sectors of our community. This is particularly the case where centres combine financial counselling and legal services and integrate case work, research and policy development so that they can promote long term reforms.

Centres such as Consumer Action that combine these skills are in a position to analyse their cases, identify systemic conduct (such as poor practices by debt collectors or equity stripping by fringe mortgage brokers) and present the necessary information to regulators, industry and governments. Their work regularly results in regulators taking on major litigation as well as real changes to industry conduct and significant law reform. In short, such centres are essential part of our consumer protection regime.

Given this research and practical experience, we strongly recommend that the Expert Panel combine enhanced advocacy and support services for individual consumers with a consumer representative body to address systemic building issues.

RECOMMENDATION 1. Combine enhanced advocacy and support services for individual building consumers with a consumer representative body to address systemic issues in Victoria's building sector.

Consumer reference group

We also strongly support the proposal to establish a consumer reference group or advisory mechanism. Consumer Action has substantial experience with a range of different consumer advisory mechanisms and identifies the following as best practice:

- The forum should have a clear purpose around improving consumer outcomes, by being a mechanism to find out what consumers think, expect and need; bringing the consumer voice and experiences to the sector; and helping to protect consumers experiencing vulnerability.
- The forum should be chaired or co-chaired by an independent person, to drive forward an agenda.
- The members of the forum should have direct experience in consumer advice, casework, advocacy or research, and have the capability to effectively challenge vested interests.
- The forums should be scheduled so as to feed into the planning and priorities of regulators and policy-makers.
- The forum should be resourced sufficiently to undertake its own research, where necessary.

We note that many reference groups struggle to meet their objectives where they become a 'show and tell' by the host organisation. We encourage any reference group to be reviewed at least every three years to ensure that it continues to meet its needs.

RECOMMENDATION 2. Establish a consumer reference group or advisory mechanism following best-practice principles.

Quality tools

Tools which enable consumers to make informed choices when engaging in a building project are a very welcome proposal. We consider, however, that the purpose of such tools should not solely be about informing consumers. A more impactful purpose of such tools can be to influence industry players to engage in better practice. In our observation, where regulators or dispute schemes publish data about complaints, the primary benefit that results

is that industry players seek to reduce their complaint numbers relative to their peers. This is a good outcome, whether or not the data is used by consumers to make choices.

RECOMMENDATION 3. The purpose of any quality tools should be to inform consumers and influence industry players to engage in better practice.

Insurance arrangements

Consumer Action has long supported overhauling mandatory domestic building insurance (DBI). There are many problems with this insurance,⁸ often labelled junk insurance, but one problem is that insurance is not even required for multi-story developments with a rise of more than 3 levels.⁹ Moreover, as a last resort scheme, DBI does not provide genuine coverage for common building problems, such as non-completion or poor-quality work. Instead, the scheme only provides coverage if a builder is 'dead, disappeared, insolvent, or the builder has failed to comply with a Tribunal or Court Order'. Even then, numerous carve-outs limit any claim that a consumer might make.

In 2014, the then State Government introduce a Bill into the Victorian Parliament that sought to establish a Building Consumer Protection Fund to protect consumers from dodgy or insolvent builders.¹⁰ Under this proposal, consumers would have been able to apply for financial coverage when a builder is deregistered or has their registration suspended, or when a Rectification Order made by the dispute body was not complied with. Unfortunately, this Bill lapsed.

The later *Building Legislation Amendment (Consumer Protection) Act 2016*, which created the DBDRV service, did not replicate a Building Consumer Protection Fund. Instead, if a rectification order is not complied with, the consumer must then take action at VCAT to enforce the order.

We consider a Compensation Fund should be available to make any awards where orders from the dispute body are not met. We note that a similar compensation fund is being created at the national level for financial services, following the Financial Services Royal Commission.¹¹

RECOMMENDATION 4. Replace domestic building warranty insurance with a Building Compensation Fund that pays out where an order from the dispute body is not met. This should cover all residential buildings, including apartment blocks.

Dispute resolution

The DBDRV has been a success in improving access to justice. The 2019/20 Annual Report of the Department of Justice and Community Safety (DJCS) reports that 6,362 applications were received in that year.¹² By comparison, the 2014/15 Annual Report of VCAT (the year before DBDRV was established) reports that only 1,501 applications were received in relation to the *Domestic Building Contracts Act 1995* or the *Fair Trading Act 1999*.¹³ The availability of a free and accessible dispute service has enabled many more people to lodge disputes.

Despite this, we consider that there is a lack of data about the outcomes for consumers from lodging disputes at DBDRV. The aforementioned report from DJCS provides little information beyond the number of applications. By contrast, industry-based dispute resolution schemes like the Energy & Water Ombudsman Victoria, the Telecommunications Industry Association or the Public Transport Ombudsman regularly report detailed data about complaints made and outcomes.

⁸ See our 2012 submission to a consultation on Victoria's building consumer protection framework: <https://consumeraction.org.au/submission-submission-to-the-victorian-governments-consultation-on-the-domestic-building-consumer-protection-framework/>

⁹ Clause 57, Domestic Building Insurance Ministerial Order published in General Government Gazette G22 on 29 May 2014

¹⁰ See <https://www.legislation.vic.gov.au/bills/building-legislation-amendment-bill-2014>

¹¹ See Treasury consultation here: <https://treasury.gov.au/consultation/c2019-43848>.

¹² Department of Justice & Community Safety, Annual Report, 2019/20: <https://www.justice.vic.gov.au/annual-reports/annual-report-2019-20>.

¹³ VCAT, Annual Report, 2014-15 <https://www.vcat.vic.gov.au/about-vcat/annual-reports-and-strategic-plan#annual-report>

These external dispute resolution (EDR) schemes abide by the Benchmarks for Industry-based Customer Dispute Resolution,¹⁴ being accessibility, independence, fairness, accountability, efficiency and effectiveness. The schemes are regularly reviewed to ensure that they are meeting these benchmarks. Among others, schemes that comply with these benchmarks demonstrate the following benefits for dispute resolution:

- Participation in industry EDR schemes are typically a condition of holding a relevant licence, so all businesses in an industry must participate in the scheme;
- Industry EDR schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes;
- Industry EDR schemes typically have independent boards with 50 per cent representation from consumers so the dispute resolution processes are fair and balanced;
- Industry EDR scheme processes provide flexible outcomes to disputes but also have 'teeth' because the Ombudsmen can make findings binding upon the trader;
- Industry EDR schemes are typically required to investigate and report on systemic problems, meaning that they not only provide solutions for individual disputes but also help resolve bigger problems at their source; and
- Industry EDR schemes keep comprehensive records and make detailed reports that assists the advancement of consumers' interests.

RECOMMENDATION 5. Enhance DBDRV by having it comply with the Benchmarks for Industry Customer-Dispute Resolution.

Please contact us on 03 9670 5088 or at info@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer

¹⁴ Treasury, Benchmarks for Customer-Dispute Resolution Schemes: <https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution>.