

6 July 2012

By email: dbcp.project@dtf.vic.gov.au

Domestic Building Consumer Protection Project
c/- Department of Treasury and Finance
1 Treasury Place
East Melbourne VIC 3002

Dear Sir or Madam

Consultation Paper: Victorian Domestic Building Consumer Protection Framework

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Department of Treasury and Finance's *Victorian Domestic Building Consumer Protection Framework Public Consultation Paper (the consultation paper)*.

Rather than answering individual questions in the consultation paper, we have made broader comments on our concerns with the current consumer protection framework and have made specific recommendations.

Broadly, this submission:

- argues that the nature of domestic building transactions mean that specialised and strengthened consumer protections are required;
- recommends that the entire consumer protection framework for domestic building needs overhaul, small reform at the margins will not be sufficient to achieve necessary consumer protections;

Regarding the registration and enforcement of builders, we recommend:

- that a detailed review of sanctions and enforcement activity undertaken by the Building Practitioners Board is necessary to ensure the enforcement process provides adequate disincentives to misconduct and encourages a high standard in the industry;
- that information on enforcement activity undertaken against builders by Consumer Affairs Victoria be publicly reported fully;
- that the Building Act be amended to give the Building Practitioners Board the power to order rectification or compensation for deficient work;
- that, where a person applies for a licence after previously having it cancelled, the Building Practitioners Board should be required to presume that the applicant is not of good character unless proven otherwise;
- that the Building Practitioner's Board should also be free to impose conditions on a builder's licence.

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Regarding the institutional framework, we

- believe that it would be reasonable for consumers to question the integrity and effectiveness of the Building Commission and recommend that the Government review the governance model and consider a complete restructure to ensure that identified concerns cannot be repeated;
- believe that the membership requirements of the Building Practitioner's Board could lead to regulatory capture, and the Building Act 1993 should be amended to reduce this risk;
- question the need for the Building Practitioner's Board to investigate complaints by hearing (rather than by simply considering written submissions) and that the Government examine how commonly such hearings occur, whether they seem necessary, and how hearings are conducted;
- have concerns that the current regulatory framework could allow the work of surveyors to be compromised by conflicts of interest, and recommend changes to the way that surveyors are assigned to jobs. We also support the recommendations of the Auditor-General regarding improvements to how the Building Commission monitors surveyors;
- Believe the current arrangement where Building Advice and Conciliation Victoria is run by two different agencies will lead to confusion and waste. We recommend the Government consider whether the multiple agency approach is necessary;

Regarding dispute resolution processes, we believe that the current system of voluntary conciliation, and dispute resolution through VCAT where conciliation fails is insufficient. We recommend that the government improve the dispute resolution system to ensure that it is

- mandatory for builders;
- free for consumers;
- accessible; and
- empowered to make binding determinations.

We also recommend that the Government consider the need to fund a specialised consumer advocacy service for building consumers, given the significant imbalance between the resources of builders and consumers.

Regarding Domestic Building Insurance, we recommend that the current Queensland scheme operated by the Queensland Building Services Authority (**QBSA**) should be adopted in Victoria.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

We also operate MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians experiencing financial difficulty.

The need for effective consumer protection in domestic building

While Commonwealth and Victorian law provide a framework of consumer protection law that applies to all consumer transactions, domestic building transactions demand specialised and strengthened consumer protections. This is because:

- an unusually large amount of money is at stake: a home will usually be the most expensive thing a consumer will ever purchase;
- remedies are harder to access: a defective home cannot be repaired or replaced as easily as typical consumer products, and any claim for refunds or compensation will be likely to be resisted by a trader given the large amounts of money involved;
- there are significant information asymmetries between the parties: home building contracts are complex and most consumers will have limited understanding of how they work. Builders enter such contracts frequently and understand them well. The product itself is also a highly technical one, and few consumers will be able to assess for themselves the quality of workmanship;
- consumers have very little power to switch builders once building has begun: if a consumer becomes aware that their builder is doing defective work, the cost of terminating the contract, searching for another builder, duplication of work and the associated delays will prohibit switching.

These characteristics demand a consumer protection system which limits problems occurring (licensing requirements, independent assessment of work by surveyors, sanctions and enforcement which deters misconduct) and cheap and accessible dispute resolution when they do occur.

Independent research also confirms significant consumer problems with building services. The Australian Consumer Survey 2011 finds that 28 per cent of Victorian consumers who have purchased building services in the last two years experienced a problem.¹ A 2011 Consumer Affairs Victoria report also found that 256,000 Victorian consumers experienced detriment with respect to building services. The report notes that

a large majority of the problems with building a new home related to being 'below standard/not as expected' and, to a lesser extent, service not provided or not completed on time.²

Further, it is worth repeating that home building or renovations involve very significant outlays from consumers and thus in terms of value, the detriment that can occur to affected consumers

¹ Australian Government, 2011, *Australian Consumer Survey 2011*, Sweeney Research, page 167.

² Consumer Affairs Victoria, 2011, *Consumer Confidence and Market Experience Study 2010 – 2011*, p

may be substantial. A Consumer Affairs Victoria study of consumer detriment in 2006 found that 22.4 per cent of consumer detriment in Victoria occurred in relation to building services, greater than any other sector.³ Consumer detriment is measured not only in terms of the costs of rectification, but in terms of costs incurred in following up problems (for example, seeking assistance, participating in dispute resolution and taking time off work). The CAV study found that 50 per cent of consumer detriment in building disputes involved following up and resolving problems, a significantly greater proportion compared to other sectors.

Consumer Action has limited capacity to assist consumers who have a dispute with a building practitioner. This is because, in our experience, the dispute takes up significant resources lessening our ability to assist a broader number of consumers. At Attachment A to this submission are two case studies outlining the experience of a clients pursuing home building complaints against a registered builder, which demonstrates just how lengthy and expensive these cases are to run.

In our view the entire consumer protection framework for domestic building needs significant overhaul. As noted by the consultation paper, successive governments at state and federal level have held inquiries into this system⁴ and found serious and complex problems. It will not be enough for the Victorian Government to end the current process by merely tinkering with individual elements. The framework needs to be considered as a whole and reworked into a functioning system.

Registration and enforcement

Under the *Building Act 1993*, The Building Practitioners Board must register an applicant for registration if they have completed the required paperwork, have a relevant qualification, are 'of good character' and have met any other requirements of the particular category of registration they seek.⁵

Once registered, the Building Practitioners Board can inquire into the conduct of a registered builder and impose a number of sanctions, including suspension and cancellation of license. While it is evident that the conduct of many practitioners have been investigated by the Building and sanctions (including suspension and cancellation of registration) are being imposed,⁶ we recommend a review of sanctions and enforcement to ensure process is providing adequate disincentives to misconduct and encouraging a high standard in the industry.

The review should consider:

- the number of complaints that have been made to the Building Practitioners Board in recent years, and whether any particular trends or systemic issues are apparent;
- the sanctions being applied and whether they amount to adequate disincentives to breaches;

³ Consumer Affairs Victoria, 2006, *Consumer detriment in Victoria: a survey of its nature, costs and implications*, Research Paper No 10.

⁴ On page 6.

⁵ Sections 169-170.

⁶ Building Practitioner Board Register of Inquiries, accessed from <http://www.buildingcommission.com.au/www/html/1187-introduction.asp>

- the level of awareness amongst builders of the sanctions available, and whether the Board (and other relevant regulators) are adequately resourced to police the industry; and
- how the Board handles systemic or repeated misconduct.

We also believe that there is an absence of information on enforcement activity by Consumer Affairs Victoria in domestic building. The consultation paper notes that CAV is one of three bodies charged with regulating this area (along with the Building Commission and the Building Practitioners Board)⁷ and CAV's website advises that 'if there is evidence a builder has broken the law, we can take action against them, including seeking redress for affected consumers'.⁸ However, while there is some information on compliance and enforcement activity in CAV's annual report, it is not clear to us how often this occurs and what outcomes are achieved. We recommend that the Government require this data to be publicly reported, either by CAV, the Building Commission or the Building Practitioners Board.

In addition, the Building Act needs to be amended to give the Building Practitioners Board the power to order rectification or compensation for deficient work. This would streamline the dispute resolution process and reduce reliance on court, VCAT and last resort insurance.

The Building Act should also be amended to specify that prior misconduct and any sanctions applied by the Building Practitioners Board (or any other relevant body) is to be considered when assessing whether a license applicant is of 'good character'. While the Building Act and Building regulations require an applicant to disclose whether they have received such sanctions in the past,⁹ it is not clear what weight this carries. We suggest that, where a person applies for a licence after previously having it cancelled, the Board should presume that the applicant is not of good character unless proven otherwise. The Board should also be free to issue a licence under certain conditions if it believes such conditions are necessary based on past misconduct.¹⁰

Institutional Framework

The Building Commission

The Victorian Auditor-General's 2011 report *Compliance With Building Permits* raised multiple, serious concerns about the performance and governance of the Building Commission.¹¹ Among the most concerning findings are that the Commission seems to have failed to respond to earlier, similarly serious findings by the Auditor-General and the Victorian Competition and Efficiency Commission.¹²

⁷ At page 15.

⁸ Consumer Affairs Victoria, 'Building defects, delays and disputes', <http://www.consumer.vic.gov.au/housing-and-accommodation/building-and-renovating/building-defects-delays-and-disputes>. Accessed 5 July 2012.

⁹ Building Act paragraph 169(2)(ca); Building Regulations para 1509(d) and (e).

¹⁰ The Queensland Building Services Authority has the power to impose conditions on the grant of a licence: *Queensland Building Services Authority Act 1991*, sections 35-36.

¹¹ Victorian Auditor-General (2011), see for example page viii.

¹² Victorian Auditor-General (2011), page xii.

As well as the damning findings of the Auditor-General, media reports have aired allegations of serious failures of corporate governance, corruption¹³ and also that Commission funds have been spent on corporate entertainment for major building firms, suggesting the Commission has been captured by the businesses it should be regulating.¹⁴

In light of the points above, we think it would be quite reasonable for consumers to believe that the integrity and effectiveness of the Building Commission has been compromised and so by extension have little faith in the building industry. Rebuilding that faith will require fundamental reform to the Commission. The Auditor-General's report made a range of recommendations on changes to practice and procedure in the Commission, and while we support those recommendations, we believe even more fundamental change is required.

We recommend that Government review the governance model and consider a complete restructure (with reference to the structure of effective Australian regulators) to ensure that the kind of problems noted above cannot recur. This restructure would need to consider reforms to:

- composition of the Commission, qualifications and independence of senior staff;
- protocols for how the Commission should and should not engage with industry to prevent capture (or the appearance of capture);
- the Commission's transparency, reporting and accountability requirements;
- the Commission's processes for monitoring the work of builders and surveyors; and
- the overall regulatory approach to compliance and enforcement mechanisms

In terms of reforming the approach to compliance and enforcement, we would recommend close consideration of the independent review by Stan Krpan of the Victorian Environmental Protection Agency (EPA).¹⁵ This review was commissioned in light of findings by the Victorian Ombudsman and Auditor-General that the EPA's regulatory approach was inadequate. The review proposed eight key principles which provide a benchmark from which the community can assess its performance. These have been adopted by the EPA. Similarly, in 2008 CHOICE published *Good Practice in Consumer Protection Enforcement*.¹⁶ CHOICE's literature review noted that, while there is extensive literature and debate about good practice regulation, this largely relates to the quantity and quantity of regulation and very little considers its enforcement. CHOICE summarised the available literature and proposed a Good Practice Model with eight statements of good practice. We recommend close consideration of both the EPA key principles and CHOICE's Good Practice Model which are included at Attachment B.

Building Practitioner's Board - Membership

¹³ 'Building watchdog shambles', *The Age*, 4 April 2012; 'Fees queried in new claims', *The Age*, 19 May 2012.

¹⁴ 'Builders winned, dined by regulator', *The Age*, 5 April 2012.

¹⁵ S Krpan *Compliance and Enforcement Review: Overview of key themes and recommendations for EPA Victoria* (2011), available at:

<http://epanote2.epa.vic.gov.au/EPA/publications.nsf/PubDocsLU/1368?OpenDocument>.

¹⁶ CHOICE, *Good Practice in Consumer Protection Enforcement* (2008), available at:

<http://www.choice.com.au/consumer-action/past-campaigns/consumer-protection/consumer-protection-enforcement.aspx>.

The functions of the Board, which include administering the registration system and '[supervising] and [monitoring] the conduct and ability to practice' of registered builders¹⁷ are the typically the tasks of a government regulator. However, the *Building Act 1993* effectively ensures that the Board is almost entirely made up by building industry representatives. While we acknowledge that the Board must also include a chairperson, a lawyer, an architect, and a person who 'is able to represent the interests of users of the services of building practitioners'¹⁸, the Act does not prevent these members (even the consumer representative) from being drawn from the building industry.¹⁹ Without questioning the professionalism of those who have served on the board, we think it is clear that this governance model will lead to regulatory capture. While it might be intended that the board needs significant industry representation due to the technical nature of its responsibilities, we would argue that having at least 8 out of 12 members of the board being representatives of the building industry is inappropriate.

We would contrast this with the Legal Services Board. Lawyers, unlike builders, are charged with strong fiduciary duties requiring overarching duty to their clients and the public interest. However, even the Legal Services Board has only a minority of its members being legal practitioners. The Legal Services Board is made up of three practitioner members, three non-practitioner members and an independent chair.²⁰ The equal representation of non-practitioner members is, at least in part, designed to ensure that the views of users of legal services are represented and ensures the board is not able to be "caught" by the legal profession.

Another model is that of the Australian Securities and Investments Commission, where Commissioners are not appointed as representatives but are appointed based on their knowledge or expertise of a relevant field.²¹

We recommend that section 184 of the Building Act be amended to remove the requirement that each category of registered building practitioner is required to be represented on the Board. Section 184 should either be redrafted to require that Board members be appointed based on knowledge or expertise of a relevant field or, if representation of particular sectors is considered appropriate, for representatives of building practitioners not to make up the majority of the board.

Building Practitioner's Board - Investigations

We have received a complaint from a consumer who reported that a Building Practitioners Board inquiry into their complaint was run in an adversarial style and, according to the consumer, highly irregularly.

This raises a number of issues. First, there is a significant risk that consumers misunderstand the function of investigations compared with dispute resolution. As noted above, investigations

¹⁷ *Building Act 1993*, section 183.

¹⁸ *Building Act 1993*, section 184.

¹⁹ We note that the current consumer representative, Carolyn Lloyd, has previously served as the CEO of the Housing Industry Association. We query whether a person with this professional background - however professional and well intentioned they may be - could effectively 'represent the interests of users of the services of building practitioners'.

²⁰ *Legal Profession Act 2004* (Vic), section 6.2.5.

²¹ *Australian Securities and Investments Commission Act 2001*, section 9.

can involve the Board suspending or cancelling registrations, but more regularly involve imposition of fines or costs, as well as reprimands. It appears that consumers are often asked to participate as witnesses in very stressful and intimidating circumstances. There is no prospect that this process will produce any outcome for the individual consumers—for individual outcomes a consumer needs to engage in conciliation and/or make a complaint to VCAT (described further below). We're not convinced that consumers that do participate understand this fact.

Moreover, in our view, investigations by written submission will usually be a more appropriate method than a quasi-judicial hearing.²² Investigation by submission is less formal, less intimidating, reduces the need for legal representation and in general levels the playing field between parties.. We would question the need for investigation by hearing in most cases. If such hearings are necessary, they should be run only by qualified personnel following clear rules of procedure and evidence.

We recommend the Government examine:

- how commonly the Building Practitioners Board investigates disputes using hearings (rather than simply relying on written submission) and whether hearings appear necessary in the cases they are used;
- where investigations involve public hearing, whether firm guidelines exist on how hearings are run, whether further guidance should be produced and whether the officials running the hearings are appropriately qualified.

Surveyors

We have concerns that the current regulatory framework could allow the work of surveyors to be compromised by conflicts of interest. The consultation paper explains that:

RBSs [Relevant Building Surveyors] are required to exercise independence in their certifying functions. An owner will often engage the RBS at the recommendation of a builder whom they have already engaged to carry out the domestic building work. The RBS and the builder may or may not have an ongoing commercial relationship.²³

Without wishing to pass comment on the work of individual surveyors, it must be said that a system where a builder has significant influence over which surveyor is chosen and the builder and surveyor may have an existing commercial relationship is a system which invites conflicts of interest.

The same concerns were held by the Victorian Auditor-General, who (in relation to the role of surveyors in calculating and collecting levies) found that a

lack of transparency and accountability over building surveyors' decisions, coupled with the commission's inadequate monitoring and enforcement controls means that surveyors could collude with clients to minimise their exposure to fees with little risk of detection.²⁴

²² We note that section 178 of the Building Act contemplates investigations either by hearing or written submission.

²³ Consultation paper, page 17.

²⁴ Victorian Auditor-General's Office (2011), page x.

Even more concerning was the Auditor-General's findings with regards to monitoring of the standard of work being done by surveyors.

The absence of targeted, risk-based technical audits of building surveyors means the [Building] commission is unable to provide reasonable assurance of the integrity and reliability of the building control system.²⁵

The work done by surveyors is extremely important—it not only seeks to ensure quality of work, protect a significant consumer investment and prevent disputes, but also protects the safety of building occupants. Consumers should not be left wondering if the surveyor's opinion has been affected by a relationship with the builder, whether an actual conflict exists or not.

One option may be to implement the WA model where building permits may only be issued by local authorities. Another may be to create a system to require that surveyors can only be assigned by a central authority on a 'cab rank' basis if they are

- issuing building permits;
- certifying that work performed complies with the permit; or
- conducting mandatory inspections.

The system could allow consumers to select a surveyor of their choice rather than having one assigned. However, builders should not be permitted to recommend a particular surveyor, nor should a surveyor accept a job (either from the 'cab rank' or from a consumer) if they have or have had a commercial or significant personal relationship with the builder.

We also support the recommendations of the Auditor-General regarding improvements to how the Building Commission monitors surveyors.

Building Advice and Conciliation Victoria

The consultation paper notes that Building Advice and Conciliation Victoria (BACV, which provides a voluntary dispute resolution service for consumer building disputes) is 'managed and delivered jointly by Consumer Affairs Victoria and the Building Commission'.²⁶ Where a consumer and builder cannot resolve a dispute between themselves, a consumer may lodge a written complaint to BACV. Where BACV believes that a settlement is possible, the case is forwarded to conciliators at Consumer Affairs Victoria.²⁷

We believe this system of having two agencies running the conciliation service invites unnecessary referrals and 'buck-passing', and consumer confusion over which agency (the Commission, CAV or BACV) is handling their complaint. It necessarily seems that this arrangement would create situations where individual consumer files are handled by many different officers across different organisations and consumers being required to explain the facts of their complaint many times over. Ultimately, it is also unclear which organisation takes

²⁵ Victorian Auditor-General's Office (2011), page xii.

²⁶ At page 8.

²⁷ At page 11.

responsibility for the outcomes and effectiveness of the conciliation system and who has responsibility for making improvements.

We recommend the Government consider whether the multiple agency approach is necessary, and what savings could be made (by consumers, builders and Government) by moving the entire conciliation process to a single body.

Dispute resolution

Conciliation through Building Advice and Conciliation Victoria (BACV) will be useful in some circumstances but is not an adequate solution on its own.

Voluntary conciliation does not provide any incentives for builders to participate or comply with a settlement. The consultation paper finds that BACV "successfully resolved 94 per cent of on-site conciliations in 2010-11".²⁸ However, we do not believe this figure tells the whole story. We suggest that this success rate is only as high as it is because the parties to these disputes before conciliation (who have voluntarily agreed to participate) will only have begun the conciliation process because they were willing to attend and come to an agreement. The 94 per cent success rate figure does not give any indication of how many disputes fail to be resolved because the builder is unwilling to attend. It also does not indicate how many of the (non-binding) agreements are honoured after the agreement is reached.

If a consumer has a dispute with a builder who is not willing to engage in good faith, the consumer's next best option (as acknowledged by the consultation paper) is VCAT. This is a long and expensive process, largely because the subject matter of a building dispute is likely to be highly technical and parties will need to rely on expert evidence. As demonstrated by case study 1 in Attachment A, this VCAT process can come after an already lengthy period of dispute and before other costly attempts to enforce judgement even if successful. If a consumer sought our advice in relation to a building dispute and the builder wouldn't participate in conciliation, we would probably not recommend pursuing a matter at VCAT unless the claim was substantial (over \$100,000). In our experience, it is not worth pursuing a building dispute through VCAT because the costs are so high - case study 2 in Attachment A demonstrates that such a dispute could cost many tens of thousands of dollars, and many years, and still not be completed. This is a clear failing of the current framework.

We are strongly of the view that the dispute resolution system for building disputes needs improvement. Conciliation and VCAT are both necessary parts of that process, but their limitations need to be recognised. We also broadly approve of suggestions in the consultation paper that inspectors despatched by the Building Commission could assess complaints, triggering a rectification or compliance order and sanctions if the builder does not comply.²⁹

However, consumers also need access to a user friendly dispute resolution scheme which:

- is mandatory for builders—that is, participation in the scheme is a condition of license and a refusal to participate or comply with determinations can impact on license;

²⁸ At page 19.

²⁹ At pages 20-21.

- is free for consumers—for example, other industry ombudsman schemes such as the Financial Ombudsman Service or the Telecommunications Industry Ombudsman are funded by industry and industry members pay when cases are brought against them
- accessible—external dispute resolution schemes do not require legal assistance and are less daunting than court because most hearings are conducted 'on the papers' rather than face to face; and
- has the power to make binding determinations—external dispute resolution findings are binding on members (that is, the industry party).

We recommend that the Government amend the current dispute resolution system (perhaps by strengthening Building Advice and Conciliation Victoria, or by creating a new body) which meets these requirements as well the Department of Industry Science and Tourism Benchmarks for Industry Based Customer Dispute Resolution Schemes (**DIST Benchmarks**).³⁰ These benchmarks are recognised by all Australian industry-based external dispute resolution schemes, and were developed with input from consumers, industry and government. The application of objective benchmarks provide for high consistent standards and are important requirements for an effective industry-based EDR system. The framework also facilitates ongoing evaluation and improvement of the services provided by EDR schemes to industry and the community. We have attached a copy of the benchmarks to this submission.

We would also ask the Government to consider the benefits of establishing a specialised consumer advocacy service for building consumers. In other sectors, such as utilities, the Government has sought to provide support for consumer advocacy. As noted above, given the specialist nature of the area, and the lack of a realistic avenue for effective dispute resolution, our centre does not provide ongoing legal assistance to consumers with complaints about builders. Given the significant imbalance between consumers and building practitioners in what is a very large transaction, we think there would be value in establishing an independent consumer advocacy service that might provide information, assistance and support to consumers seeking to use building services. Such a service might also operate to improve consumer confidence in the industry.

Domestic Building Insurance

The consumer problems with Victoria's last resort Domestic Building Insurance (DBI) system have been well documented on previous occasions. Without wishing to repeat those problems in detail, key issues are that:

- it is extraordinarily difficult for consumers to make a claim, both because claim criteria are very narrow, and because a number of complex, costly and time consuming administrative and legal steps must be taken before a claim can be made.

³⁰ Department of Industry, Science & Tourism, 1997, *Benchmarks for Industry Based Customer Dispute Resolution Schemes*, available at: <http://www.anzoa.com.au/National%20Benchmarks.pdf>.

- 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 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.
- payouts received through a successful claim will not necessarily cover the costs required to access the payout. This is because, even if a consumer is successful at VCAT, they 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 case study at Attachment A 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.
- the amount of payouts is low relative to premiums paid, suggesting that the product is poor value for money. The consultation paper (citing data collected by the Essential Services Commission) reports that while total claim costs were \$42.5 million from January 2002 to June 2011, premiums collected exceeded \$200 million between 2005 and June 2011 alone.³¹
- coverage and limitations are widely misunderstood by consumers who (understandably) have little exposure to the product.

Submissions to the Productivity Commission's *Review of the Consumer Policy Framework* in 2008 indicate that not only consumers but also builders are concerned about domestic building insurance. Among other things, the fact that some builders can only access cover by providing indemnities and bank guarantees to the insurer led one builder to describe the system as 'fraud' as they are essentially insuring their insurer.³²

We recommend (as we have done in the past) that the current Queensland scheme operated by the Queensland Building Services Authority (**QBSA**) should be adopted. The ability of QBSA to make binding rectification orders³³ 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

³¹ Consultation paper page 24, citing Essential Services Commission Victoria (2012), *Performance of Victoria's Domestic Building Insurance Scheme*.

³² Evidence by Keith Atkins, cited in Productivity Commission (2008) *Inquiry into Australia's Consumer Policy Framework*, Vol. 2, p 122. See also evidence by Kalida Pty Ltd, Vol. 2, p 123.

³³ *Queensland Building Services Authority Act 1991*, s 72.

- 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.³⁴

While there are monetary limits and conditions on the insurance cover, it is clear that this scheme provides far wider coverage than Victoria's last resort DBI scheme.

Another proposal that has been raised in the past has been that mandatory DBI be removed and improvements be made to dispute resolution procedures as well as registration and compliance procedures. Tasmania has abolished its mandatory insurance scheme. CAV has also raised this possibility, noting that given the limited consumer protection DBI provides, it may be 'preferable to relax or remove requirements for builders' warranty insurance and focus on improving building practitioner registration and compliance'.³⁵

We would not support such a proposal as sufficient to protect consumers. While we agree that sound building practitioner registration, compliance and dispute resolution processes are important, removing DBI would create a system where a wronged consumer could be left uncompensated. An effective DBI 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.

³⁴ Queensland Building Services Authority, 'When will Home Warranty assist me?'. Accessed on 5 July 2012 from <http://www.bsa.qld.gov.au/HomeOwners/HomeWarrantyProtection/Pages/WhenwillHomeWarrantyassistme.aspx>

³⁵ Consumer Affairs Victoria, *Supplementary Submission to Victorian Competition and Efficiency Commission's Inquiry into the Housing Construction Sector and Related Issues*, September 2005.

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

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive style with a large, sweeping 'G' and 'B'.

Gerard Brody
Director, Policy and Campaigns

A handwritten signature in black ink that reads "D.L.". The signature is written in a cursive style with a large, sweeping 'D' and 'L'.

David Leermakers
Senior Policy Officer

Attachment A – Case studies

Case study 1

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 Advice 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. They 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 were 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 so 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 hysterectomy. 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.

Case Study 2 (provided by Footscray Community Legal Centre)

Between 2008 and 2011, a number of families in Melbourne's Sudanese Community entered into home building contracts with the same building firm (**the builder**). In all cases that we are aware of, the standard of workmanship was extremely poor and each building had significant faults. This was confirmed by inspections by Consumer Affairs Victoria and the Building Commission.

Affected consumers approached Footscray Community Legal Centre (Footscray CLC) for assistance with lodging a claim in the Victorian Civil and Administrative Tribunal (VCAT) against the builder. Footscray CLC in turn requested the assistance of a large commercial law firm (**the commercial law firm**) who acted without charge with the assistance of a pro bono QC and junior from the Victorian Bar.

Relatively early in the dispute, Consumer Affairs Victoria successfully applied for an injunction to prevent the builder from taking on any more work based on the poor quality of previous work. The Building Commission also investigated and de-registered the builder. In addition, the lender who provided finance to many of the consumers affected began proceedings to bankrupt the builder which, if successful, may provide access to a payout from the builder's Domestic Building Insurance policy. Most of the consumers could not afford to take the builder to VCAT.

Footscray CLC and the commercial law firm have only been able to assist one family out of eight to seek compensation. However, it is expected that even this will be a hollow victory as it is unlikely the builder will ever be able to pay the compensation ordered, and claiming against the builder's insurance is extraordinarily difficult even with expert assistance.

At no point during these and other processes did the builder ever seriously defend the allegations of incompetent workmanship.

Over the 18-20 months since Footscray CLC was first approached, solicitors from Footscray CLC, the commercial law firm, a barrister and a number of junior counsel have provided hundreds of personnel hours in advice and assistance to the clients. This work, if not provided for free, would have cost many tens of thousands of dollars. Consumer Affairs Victoria also provided a grant of in excess of \$20,000 to cover disbursements such as reports and the cost of an African community worker to work with the families to explain the various disputes resolution processes.

Footscray CLC lodged complaints and negotiated exits from the mortgages for all of the consumers as a result of their failure to obtain access to the houses or compensation from the builder. The lender also presumably spent considerable resources over a lengthy period attempting to bankrupt the builder and resolve the mortgage defaults arising out of these cases.

Even with so many resources spent on a case, and even in circumstances where the misconduct and damage appear irrefutable, these consumers remain unable to access just compensation under the current consumer protection framework. As staff of the commercial law firm recently expressed:

The matter has been in VCAT since 2007. [The commercial law firm] has been involved in the proceeding since 2009, with the assistance of very good counsel. The proceeding has not yet been concluded, for reasons beyond the control of the parties or their lawyers. However the conduct and duration of the proceeding has exposed a number of weaknesses in the protections afforded generally to persons who use a builder to build their homes, and in particular, in the protections available to new migrants and other persons who are socially and/or financially disadvantaged.

Attachment B: Recommendations to EPA

Transforming EPA into a modern regulator

EPA's Chairman and CEO redefined the organisation's objectives in early 2010, stating that their intention was to transform EPA into a 'modern regulator'. The Review is an important part of that transformation.

The Review proposes eight principles by which EPA should undertake its regulatory role. The principles provide a benchmark against which the community can judge EPA's performance. They also provide a basis for EPA to measure its own effectiveness as a regulator. The principles and their regulatory impact are:

Targeted: Compliance and enforcement activities will be targeted at preventing the most serious harm.

Proportionate: Regulatory measures will be proportional to the problem they seek to address.

Transparent: Regulation will be developed and enforced transparently, to promote the sharing of information and learnings. Enforcement actions will be public, to build the credibility of EPA's regulatory approach and processes.

Consistent: Enforcement should be consistent and predictable. EPA aims to ensure that similar circumstances, breaches and incidents lead to similar enforcement outcomes.

Accountable: To ensure accountability, compliance of duty-holders, enforcement decisions and the conduct of authorised officers will be explained and open to public scrutiny.

Inclusive: EPA will engage with community, business and government to promote environmental laws, set standards and provide opportunities to participate in compliance and enforcement.

Authoritative: EPA will be authoritative by setting clear standards, clarifying and interpreting the law and providing authoritative guidance and support on what is required to comply.

EPA will be prepared to be judged on whether individuals and business understand the law and their obligations.

EPA will also be an authoritative source of information on the state of the environment, level of compliance with the laws it regulates, key risks and new and emerging issues.

Effective: Enforcement will seek to prevent environmental harm and impacts to public health, and improve the environment. Enforcement action will be timely, to minimise environmental impacts and enhance the effectiveness of any deterrence.

Source: S Krpan Compliance and Enforcement Review: Overview of key themes and recommendations for EPA Victoria (2011) p 3

Attachment C: CHOICE Guidance for good practice in consumer protection enforcement

Source: CHOICE, *Good Practice in Consumer Protection Enforcement*, 2008 p 17.

| Overview of the Good Practice Model | |
|-------------------------------------|--|
| CAPACITY | <p>Power The regulatory agency should have statutory enforcement options that:</p> <ol style="list-style-type: none"> 1. have a sufficient range (including criminal prosecutions, civil proceedings and administrative actions), 2. provide flexibility, 3. are adequate in scope, and 4. provide appropriate remedies. |
| | <p>Policy The regulatory agency should publish an enforcement policy that focuses on minimising the risk of consumers suffering non-trivial harm. The published policy should set out:</p> <ol style="list-style-type: none"> 1. the purpose of the policy, 2. the regulator's jurisdiction and available enforcement options, 3. the regulator's compliance and enforcement strategy, 4. the principles and approaches underlying the policy, 5. the process of prioritisation of enforcement matters, and 6. how the regulator uses its discretion. |
| | <p>Resources The regulatory agency should allocate adequate resources to consumer protection enforcement. It should have a designated unit for enforcement and compliance.</p> |
| EFFECTIVENESS | <p>Monitoring The regulatory agency should use a range of mechanisms to monitor business compliance. It should use the information collected in planning and implementing its enforcement operations. It should also monitor its own performance, including reflecting on whether its enforcement activities are effective in building compliance through behaviour change.</p> |
| | <p>Targeting The regulatory agency should apply its consumer protection enforcement resources to areas of high consumer risk. It should select the type of enforcement option most likely to deter unlawful behaviour, taking into account the likely extent of potential impact on consumers, that is, ensuring the enforcement action is proportional to the risk and level of harm. The regulatory agency should periodically review the success and impact of its targeting.</p> |
| | <p>Enforcement Outcomes The regulatory agency should obtain a sufficient number of enforcement outcomes in areas of high risk to consumers. It should deter breaches of consumer protection laws through enforcement actions most likely to promote compliance.</p> |
| ACCOUNTABILITY | <p>Transparency The regulatory agency should provide comprehensive information on its enforcement decision making process and publish its enforcement outcomes in a manner that facilitates comparative analysis.</p> |
| | <p>Consultation The regulatory agency should:</p> <ol style="list-style-type: none"> 1. adequately resource its consultative processes, 2. have a range of different consumer consultation strategies, including a formal consultative structure, 3. have a wide range of consultation targets, and 4. be genuine and responsive to input from the consultation process. |

Attachment D: Overview of Benchmarks for Industry-Based Consumer Dispute Resolution Schemes.³⁶

1. ACCESSIBILITY

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

2. INDEPENDENCE

The decision-making process and administration of the scheme are independent from scheme members.

3. FAIRNESS

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

4. ACCOUNTABILITY

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

5. EFFICIENCY

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

6. EFFECTIVENESS

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Source: Department of Industry, Science & Tourism, 1997, *Benchmarks for Industry Based Customer Dispute Resolution Schemes*.

³⁶ A full description of the Benchmarks can be found at:
<http://www.anzoa.com.au/National%20Benchmarks.pdf>.