

General Purpose Standing Committee No.2

# **Inquiry into the operations of the Home Building Service**

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## Terms of reference

That General Purpose Standing Committee No. 2 inquire into and report on:

1. The operations of the Home Building Service of the Office of Fair Trading, with particular reference to:
  - a) The builder licensing system
  - b) The Home Warranty Insurance Scheme
  - c) The resolution of complaints
  - d) The exercise of disciplinary powers
  - e) The enforcement of relevant legislative and regulatory provisions
  - f) The establishment of a Home Building Advice and Advocacy Centre
  - g) Any other relevant matters.

These terms of reference were self-referred to the Committee on Friday 27 July 2007

## Committee membership

<b>Hon Robyn Parker MLC</b>	Liberal Party	<i>Chair</i>
<b>Hon Christine Robertson MLC</b>	Australian Labor Party	<i>Deputy Chair</i>
<b>Hon Tony Catanzariti MLC</b>	Australian Labor Party	
<b>Hon Greg Donnelly MLC</b>	Australian Labor Party	
<b>Hon Marie Ficarra MLC</b>	Liberal Party	
<b>Ms Sylvia Hale MLC*</b>	The Greens	
<b>Revd the Hon Dr Gordon Moyes MLC</b>	Christian Democratic Party	

\* Ms Hale MLC Substituted for Ms Lee Rhiannon MLC for the duration of the inquiry.

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## Chair's foreword

Regulatory systems are put in place by government for the benefit of citizens. The home building industry is regulated in order to protect consumers, and consumer protection should always be seen as its first and most important goal.

The experience of home building consumers has been the key focus of this inquiry, and it is clear from their experience that the Home Building Service of the Office of Fair Trading has not always succeeded in protecting consumers, whether in relation to licensing of builders, complaints handling, or disciplinary matters. In addition, the home warranty insurance scheme is limited in its ability to compensate consumers when things go wrong.

The home building regulatory system must also work to the benefit of builders. It must deal with them fairly and support them as professionals. Building industry representatives also revealed a number of ways in which the licensing, dispute resolution, disciplinary and insurance systems need to be improved.

Ultimately, an effective regulatory system is one which prevents poor home building work in the first place, which deals with complaints swiftly and fairly, and which, where appropriate, penalises those who have acted improperly. It should compensate parties fairly when things go wrong. Finally, it should ensure that all parties are properly informed about the way the system works, and their rights and responsibilities.

The establishment of the Home Building Service in 2003 was a step forward for regulation of the home building industry and for consumer protection. However, the evidence gathered during this inquiry attests to a need for further work to deliver better outcomes for both consumers and builders. Legislative and policy changes are essential, as are improvements in the way the Home Building Service seeks to deliver on its performance standards. Additional resources will also be necessary to ensure that the Home Building Service is more effective in its licensing, complaints handling and disciplinary roles. Underpinning all of our recommendations is the sense that consumers need to be better informed and supported as they navigate the home building system. The Committee calls on the NSW Government to deliver each of these much needed improvements.

On behalf of the Committee I thank all those who participated in this inquiry, either by appearing as a witness, by speaking at the public forum, or by making a submission. We especially appreciate the contributions of those who shared their personal experiences of the home building industry and the impact that this had on their lives and those of their families.

I am grateful to my Committee colleagues for their commitment to this inquiry, and also to the members of General Purpose Standing Committee No. 4 who commenced the inquiry during the previous Parliament. My thanks also go to Merrin Thompson, Rebecca Main, Madeleine Foley, Beverly Duffy, Helen Vallance, Sam Griffith and Teresa Robinson in the Committee Secretariat for their work in facilitating the inquiry process and preparing the draft report.



The Hon Robyn Parker MLC  
**Committee Chair**

## Executive summary

This inquiry was unusual in that it was commenced by one committee and completed by another. General Purpose Standing Committee No. 4 (GPSC 4) established the original inquiry into the operations of the Home Building Service of the Office of Fair Trading (OFT) on 27 September 2006. The inquiry lapsed on prorogation of the 53rd Parliament on 5 March 2007 prior to the NSW State election, before the Committee could produce a report. Following the re-establishment of the General Purpose Standing Committees in the new 54th Parliament, responsibility for the Fair Trading portfolio was transferred from GPSC 4 to General Purpose Standing Committee No. 2 (GPSC 2, hereafter referred to as the Committee). The inquiry was in effect re-established, with the same terms of reference, by GPSC 2 on 27 July 2007.

In this report the Committee examines the effectiveness of the operations of the Home Building Service with a particular focus on the builder licensing system, the resolution of complaints, the exercise of disciplinary powers, the establishment of a home building advice and advocacy service, and the home warranty insurance scheme.

### Home building in New South Wales (Chapter 2)

The NSW Home building industry generates in excess of \$19 billion per year and employs approximately 250,000 people. In 2005-2006 the industry built 32,000 new homes and undertook 21,500 major renovations and 1.66 million minor building works.

The Home Building Service was established in February 2003. It is responsible for all building-related functions of the OFT including licensing, investigation of building complaints and the private home warranty insurance scheme. It also administers the government-funded consumer protection building insurance schemes that pre-dated the private scheme, along with the Building Insurers' Guarantee Corporation (BIG Corp).

The Committee recognises the imperative for effective regulation of the home building industry. Without proper protections, consumers as well as builders may experience massive financial loss. The difficulties of dealing with defective building work can also take an enormous emotional toll. The numerous State and national inquiries and reviews that have taken place over the last 15 years attest to this imperative and the accompanying need to continually modernise and improve regulation. While the Committee acknowledges the achievements of previous inquiries and the improvements they have helped to bring about, we consider that the regulation of the home building industry, and specifically the operations of the Home Building Service, need to be further strengthened.

### Builder licensing (Chapter 3)

In New South Wales the *Home Building Act 1989* (the Act) requires builders and tradespeople to be licensed for the work that they do. Only builders who are properly trained and who have relevant experience may be licensed. The Home Building Service sets and maintains standards of competence for builders and tradespeople and issues licences and certificates to builders and their companies that meet the requirements of the Act. It is responsible for assessing licence applications and in so doing, undertakes various checks. It also maintains a public register of information on builders, tradespeople and specialist workers which building consumers may check before entering into a contract.

On the basis of the evidence before this inquiry, as well as independent investigations by oversight bodies, it is clear that there are ongoing problems with the licence assessment system and the public register which undermine their credibility.

Individual homeowners have suffered at the hands of unscrupulous and/or poorly skilled builders when this could have been avoided had higher standards operated in the OFT at the time. When the licensing system fails it does so at massive financial and emotional cost to the consumers involved.

The Home Building Service has put in place a range of practical measures to enhance the robustness of the licence assessment system and the public register. However, we consider that the Home Building Service should find ways to further improve consumer protections through both these systems, including through a review of current performance standards and by investigating potential changes to the public register in respect of builders who are the subject of complaints that have not yet been resolved. The Committee also considers that a number of consumer concerns may be addressed through the implementation of recommendations of the review of licensing in the NSW home building industry conducted by Ms Irene Moss.

The Committee further believes that it is very important that the NSW Government work to minimise fragmentation and duplication in the home building industry, for example by considering the establishment of an independent building commission. In addition, the Government should ensure that the promised new *Home Building Act* delivers a more cohesive and user-friendly licensing system, and should establish clear objectives for the Home Building Service to enable both consumers and the building industry to better understand its role.

#### **Complaints resolution (Chapter 4)**

The building complaints resolution system has three tiers, with a role for Fair Trading Centres, the Home Building Service and the Consumer, Trader and Tenancy Tribunal (CTTT). Implicit in this model is an emphasis on early dispute resolution.

The Committee acknowledges the significant reforms to the complaints resolution system achieved through the establishment of the Home Building Service. We also acknowledge that a number of the cases presented to us by consumers predate these reforms.

Nevertheless, we remain concerned by the stories of inquiry participants and alarmed by the impact that costly and prolonged disputes have had on individuals and families. On this basis the Committee considers that early dispute resolution processes should be improved in a number of ways. Further effort should be devoted to both community and OFT staff education, and the industry competencies of building inspectors should be improved to ensure that they are better able to investigate and resolve disputes. In addition, builders should be able to initiate early dispute resolution through the Home Building Service rather than only through the CTTT, as is currently the case.

Without having taken evidence from CTTT representatives, the Committee is not able to document a complete picture of the CTTT's performance. Nevertheless, we were very concerned by the evidence put forward by consumers and industry representatives about the costs and protracted timeframes associated with the CTTT, as well as their questions about CTTT members' expertise to resolve matters satisfactorily. These concerns were strengthened by the findings of the recent CTTT Operations Review and the Ipsos Top Ten Tips Research Report. Together these would seem to indicate that the CTTT is not fulfilling its objective to resolve disputes in an accessible, informal, efficient and inexpensive manner.

We acknowledge that the CTTT is taking action in relation to the review findings, however, we consider that there is a critical need for substantial and timely action to improve the operations of the CTTT and thereby deliver better outcomes for parties involved in building disputes. To this end we recommend that the OFT should initiate discussions with the CTTT about its effectiveness. Further, the need to achieve change in this area is so strong that the Committee will consider establishing an inquiry specifically focusing on the CTTT.

The Committee also believes that there is a strong need for an independent body to provide advice and advocacy to consumers about home building disputes and thereby prevent many of the adverse experiences and outcomes brought to the Committee's attention. We recommend that a home building advice and advocacy service which is affordable and accessible throughout the State should be established on a long term basis.

### **Discipline of builders (Chapter 5)**

The Home Building Service also has an important role to play in ensuring builders' compliance with the Act and in disciplining them when they are in breach of it.

The Committee believes that the level of effort in enforcing builders' compliance with the Act has improved since the establishment of the Home Building Service. Compliance procedures have been strengthened and penalties have increased.

However, the fact that the Home Building Service determines whether it will investigate an alleged breach, and that some alleged breaches are not investigated, will trouble some stakeholders.

Moreover, the Committee is concerned by evidence from both consumer and industry representatives that the Home Building Service could be more active and consistent in the discipline of builders. This concern was strengthened by evidence arising from the Moss Review and also information from the OFT that only 70% of investigations in 2005-2006 were completed by their due date. While the Committee recognises that some delays are beyond the control of the Home Building Service, we consider that the Service should take greater steps to meet its performance standards in relation to the discipline of builders.

We consider that the penalty system should be reviewed with a view to further improvement in policing and encouraging compliance with the Act. The NSW Government should also examine the potential to enable not only contractors to be prosecuted for breaches of the Act, but also individual builders.

### **The home warranty insurance scheme (Chapter 6)**

A number of home warranty insurance schemes have operated in New South Wales over the years, with claims managed under the particular scheme operating when the building work was undertaken. The current scheme applies to building work done or to be done under a contract entered into on or after 1 May 1997.

Under that scheme the primary responsibility for ensuring that work is properly and adequately performed lies with the builder. It provides last resort cover for homeowners where the builder has not honoured this responsibility. Claims may be only be made where dispute resolution cannot take place because of the death, disappearance or insolvency of the builder.

The Committee was concerned by evidence put forward by inquiry participants about the poor consumer protections offered by the current scheme. Particular concerns included the ‘last resort’ nature of the scheme and its tendency to escalate disputes. In addition, payouts are sometimes seen to be inadequate while the costs associated with exhausting other avenues before claiming on insurance can be exorbitant. The fact that both consumer and industry representatives highlighted these deficits attested to the weight of the problem. For these reasons the Committee considers that the NSW Government should adopt the recent recommendation of the Home Warranty Insurance Scheme Board to introduce an additional trigger to enable consumers to claim insurance without having to pursue a builder’s bankruptcy or insolvency.

The Committee also recommends that both the Board and the OFT consider additional mechanisms to further increase consumer protection and promote early and fair dispute resolution in respect of home warranty insurance.

While the Committee accepts that New South Wales is operating under a privatised home warranty insurance model, we are nonetheless concerned by the perceived vested interests of insurers and industry bodies within that model. Recent moves to publish scheme data will go some way to improving transparency, however, again in the interests of consumer protection, the Committee considers that further effort should be devoted to promoting the accountability of insurers and the transparency of the scheme.

Finally, the evidence put forward by consumers, and to a lesser extent by industry representatives, indicates a mismatch between many consumers’ understanding and expectations of the scheme, and their entitlements under it. Thus the Committee recommends that the Home Warranty Insurance Scheme Board work with the OFT to improve consumer information about the scheme.

### **Conclusion (Chapter 7)**

Inquiry participants suggested that the Home Building Service requires more resources to effectively fulfil its roles in relation to licensing, complaints resolution and the discipline of builders. These claims were strengthened by the fact that they were made not only by consumers but also by industry representatives and other parties, as is documented throughout this report.

While the Committee notes the OFT’s efforts to make better use of its resources by restructuring the Home Building Service, we also consider that additional resources are required to enable the Home Building Service to effectively fulfil its roles in respect of licensing, complaints resolution and discipline. We call on the NSW Government to deliver these resources.

## Summary of recommendations

### Recommendation 1

Page 30

That the Home Building Service review its performance standards in relation to the licence assessment system and the public register, in order to maximise the:

- rigor of licence assessments
- accuracy and timeliness of information on the public register.

### Recommendation 2

Page 30

That the Office of Fair Trading, whilst taking account of the need for procedural fairness, investigate potential changes to the public register to alert consumers to builders who are the subject of not yet resolved complaints.

### Recommendation 3

Page 31

That the NSW Government take immediate steps to implement Recommendations 3 and 5 of the Moss review of licensing in the NSW home building industry that:

- the Government require only individuals to be licensed
- the Government issue a unique licence number to licensees to be kept by the licensee for life.

### Recommendation 4

Page 36

That the NSW Government examine ways to improve co-ordination in building industry regulation, including the establishment of an independent building commission.

### Recommendation 5

Page 37

That in re-writing the *Home Building Act*, the NSW Government:

- explicitly consider the need to make the licensing system cohesive and user-friendly
- implement Recommendation 25 of the Moss review of licensing in the NSW home building industry that the Government establish clear objectives for the Home Building Service to assist consumers and the building industry in understanding its role as the licensing authority in NSW.

### Recommendation 6

Page 37

That in reforming the continuing professional development scheme, the Office of Fair Trading ensure that the scheme is evidence based, relevant, accessible and easily complied with.

### Recommendation 7

Page 51

That the Office of Fair Trading develop and implement a strategy for further improving education for community members about early dispute resolution processes.

### Recommendation 8

Page 51

That the Office of Fair Trading improve early dispute resolution by ensuring the highest performance standards in this area, both among Fair Trading Centre and Home Building Service staff, including in relation to the provision of information to the public.

- Recommendation 9** **Page 51**  
That the Home Building Service work to further increase the industry competencies of its building inspectors to ensure that they are better able to investigate and resolve complex building disputes.
- Recommendation 10** **Page 51**  
That the Office of Fair Trading enable builders to initiate early dispute resolution through the Home Building Service.
- Recommendation 11** **Page 51**  
That the Minister for Planning take note of consumer concerns in respect of building certification.
- Recommendation 12** **Page 58**  
That the Office of Fair Trading initiate discussions with the Consumer, Trader and Tenancy Tribunal (CTTT) about the need for substantial and timely action to fully implement the recommendations of its 2006 Operations Review and the Ipsos Top Ten Tips Research Report and thereby ensure that the CTTT meets its objective of resolving disputes in an accessible, informal, efficient and inexpensive manner.
- Recommendation 13** **Page 61**  
That Office of Fair Trading publish the report completed in October 2007 on the pilot of the Home Building Advocacy Service operated by the Macquarie Legal Centre.
- Recommendation 14** **Page 61**  
That the Office of Fair Trading establish a home building advice and advocacy service on a long term basis which is affordable and accessible for home building consumers throughout New South Wales. In doing so, it should investigate models to enable the service to have a regional presence, for example on a rotating or mobile basis.
- Recommendation 15** **Page 71**  
That the Home Building Service further improve its results in meeting performance standards in relation to the discipline of builders.
- Recommendation 16** **Page 72**  
That the Office of Fair Trading review the current system of breaches and penalties to establish how it might be further improved. The review should include consideration of the use of:
- warnings
  - penalties (including on-the-spot penalties)
  - licence suspensions and cancellations for repeated serious breaches.
- Recommendation 17** **Page 72**  
That in re-writing the *Home Building Act* the NSW Government consider whether individual builders responsible for breaches of the Act, and not just the contractors overseeing the work, should be subject to disciplinary processes.
- Recommendation 18** **Page 86**  
That the NSW Government adopt the recommendation of the Home Warranty Insurance Scheme Board to introduce an additional trigger to enable consumers to access insurance without having to pursue a builder's bankruptcy or insolvency.



**Recommendation 19**

**Page 86**

That the Home Warranty Insurance Scheme Board and the Office of Fair Trading consider additional mechanisms in relation to home warranty insurance to further:

- increase consumer protection
- promote early and fair dispute resolution
- promote the accountability of insurers and the transparency of the scheme.

**Recommendation 20**

**Page 87**

That the Home Warranty Insurance Scheme Board and the Office of Fair Trading develop a strategy to improve consumer information about the home warranty insurance scheme.

**Recommendation 21**

**Page 90**

That the NSW Government provide additional resources to enable the Home Building Service to effectively fulfil its licensing, complaints resolution and disciplinary roles.



# Chapter 1 Introduction

This chapter introduces the report by describing the establishment of the inquiry and documenting the inquiry process. It identifies two key procedural issues that arose during the inquiry before concluding with an overview of the structure of the report.

## Establishment of the inquiry

- 1.1 This inquiry was unusual in that it was commenced by one committee and completed by another.

### General Purpose Standing Committee No. 4 inquiry

- 1.2 General Purpose Standing Committee No. 4 (GPSC 4) established the original inquiry into the operations of the Home Building Service of the Office of Fair Trading on 27 September 2006, under that Committee's power to make a self-reference. The terms of reference set out a focus on the builder licensing system, the resolution of complaints, the exercise of disciplinary powers, the establishment of a home building advice and advocacy service and the home warranty insurance scheme.
- 1.3 GPSC 4 held two hearings and received 36 submissions. The inquiry lapsed on the prorogation of the 53rd Parliament on 5 March 2007 prior to the State election, before the Committee could produce a report.

### General Purpose Standing Committee No. 2 inquiry

- 1.4 Following the re-establishment of the General Purpose Standing Committees in the new 54th Parliament, responsibility for the Fair Trading portfolio was transferred from GPSC 4 to General Purpose Standing Committee No. 2 (GPSC 2). The inquiry was in effect re-established by GPSC 2 on 27 July 2007.
- 1.5 Under its power to make a self-reference the Committee adopted the same terms of reference as those of the original GPSC 4 inquiry. Further details of the procedural issues arising from the re-establishment of the inquiry are provided in paragraphs 1.17-1.19 below. The inquiry terms of reference are set out on page iv of this report.
- 1.6 GPSC 2 acknowledges the work undertaken by GPSC 4 in commencing the inquiry and taking a major portion of its evidence. We express our appreciation to the then members of GPSC 4:
- The Hon Jenny Gardiner MLC (Chair)
  - Ms Sylvia Hale MLC (Deputy Chair)
  - The Hon Jan Burnswoods MLC
  - The Hon David Clarke MLC
  - The Hon Greg Donnelly MLC

- The Hon Kaye Griffin MLC
- The Hon David Oldfield MLC.

## Conduct of the inquiry

### Submissions

- 1.7 When the inquiry first commenced, GPSC 4 called for submissions through the *Sydney Morning Herald* and a media release distributed through all media outlets in New South Wales. It also wrote to a large number of relevant stakeholder organisations and individuals, inviting them to participate in the inquiry. Following the re-establishment of the inquiry, GPSC 2 wrote to those who had made a submission to the GPSC 4 inquiry to invite them to make a supplementary submission.
- 1.8 A total of 42 submissions and 38 supplementary submissions were received from a broad range of stakeholders including home building consumers, building industry representatives and insurance industry representatives. These are available on the GPSC 2 website at [www.parliament.nsw.gov.au/gpsc2](http://www.parliament.nsw.gov.au/gpsc2).
- 1.9 The Committee appreciates the contribution of those individuals and organisations who made submissions to the inquiry.
- 1.10 A full list of submissions is contained in Appendix 1.

### Hearings and public forum

- 1.11 GPSC 4 held two public hearings at Parliament House on 17 and 20 November 2006, taking evidence from stakeholders including the Department of Commerce, the Office of Fair Trading (OFT), the Housing Industry Association, the Master Builders Association, the Builders Collective of Australia and the Building Action Review Group.
- 1.12 After the re-establishment of the inquiry, GPSC 2 held a public forum on 2 November 2007, followed by a hearing with representatives of the OFT.
- 1.13 The public forum provided an opportunity for members of the community to have their say about the home building industry. Sixteen people took part in the public forum, fifteen of whom were home building consumers. The vast majority of the consumers reported adverse experiences with home builders as well as difficulties with the operations of the Home Building Service.
- 1.14 In the ensuing hearing with witnesses from the OFT, the Committee sought an update on activities since the GPSC 4 hearings, and responses to matters raised by participants in the public forum.
- 1.15 The Committee would like to thank each of the witnesses who gave evidence during the inquiry for the valuable contribution they made to this report. Of particular importance were the stories of forum participants; a number of these are documented in case studies

throughout this report. The Committee acknowledges the devastating experience of many participants and thanks each of them for their very important contribution to the inquiry.

- 1.16** A full list of witnesses and forum participants is set out in Appendix 2. Transcripts of each of the hearings are available on the Committee's website at [www.parliament.nsw.gov.au/gpsc2](http://www.parliament.nsw.gov.au/gpsc2). In addition, the GPSC 4 hearing transcripts are available at [www.parliament.nsw.gov.au/gpsc4](http://www.parliament.nsw.gov.au/gpsc4).

## **Procedural issues**

### **Referral of evidence from GPSC 4 to GPSC 2**

- 1.17** A number of procedural issues were raised by the prorogation of the 53rd Parliament before GPSC 4 could report on its inquiry.
- 1.18** In order for the evidence gathered by GPSC 4 to be utilised by GPSC 2, the agreement of the House was required for all of the documents received by GPSC 4 during the inquiry to be referred to GPSC 2. This included documents received up until the issue of the writs for the election, which occurred on 5 March 2007, including minutes, submissions, correspondence, transcripts and answers to questions on notice. This was agreed to by the House on 25 September 2007.
- 1.19** In addition, all of the documents received on the day of the issue of the writs up until the re-establishment of the inquiry by GPSC 2 were required to be re-submitted to GPSC 2. This was because neither the Committee nor the inquiry existed during that period. Accordingly, the Committee resolved on 28 September 2007 that it write to the people who sent correspondence or submissions to the inquiry during the period 5 March 2007 to 26 July 2007, informing them of the re-establishment of the inquiry and asking them to confirm in writing or by email if they wished their submission or correspondence to be considered as a submission to GPSC 2.

### **Publication of submissions**

- 1.20** Many of the submissions received from home building consumers detailed serious allegations of poor professional conduct and/or impropriety on the part of individual builders or building companies. These allegations were made both in the body of submissions and in some cases in extensive documentation attached to them. While some authors requested that their submissions remain confidential, many others were keen for their submissions to be published.
- 1.21** This posed a dilemma: how to balance the need to provide procedural fairness to those individuals or companies who were the subject of adverse mentions, with the need to conduct an open inquiry in which inquiry participants had a genuine opportunity to express their concerns about the home building industry.
- 1.22** As the Committee responsible for the original inquiry, this issue was considered in the first instance by GPSC 4. One option available to the Committee was to publish the submissions in full and invite and publish responses from those who were the subject of serious

allegations. However this was seen as undesirable as the impending prorogation of Parliament, and its termination of business, would have meant that if submissions containing adverse mention were published, replies from parties who were subject of those allegations may not have been able to be published for some time, if at all.

- 1.23** As a result, GPSC 4 resolved to publish most of the submissions from consumers, subject to the deletion of the names of individuals and companies who had been adversely mentioned, and not to publish lengthy attachments with frequent adverse mention.
- 1.24** In a few instances, the frequency of adverse mention in the main body of the submission meant that the removal of names would impact significantly on the readability of the submission. The Committee decided that these submissions should remain confidential. When it resolved to adopt the same terms of reference as those of the original GPSC 4 inquiry, GPSC 2 decided to adopt the same approach to the publication of submissions as GPSC4.
- 1.25** This Committee, like GPSC 4 previously, is not able to investigate individual complaints, so the focus of this report is on the systemic problems which have led to the setting up of this and other earlier inquiries.

## Report structure

- 1.26** This report has seven chapters.
- 1.27** Chapter 2 provides a broad overview of home building in New South Wales, describing how it is regulated and explaining the role of the Home Building Service of the Office of Fair Trading. It documents the major findings of the nine State and national inquiries into the home building industry over the last 15 years. It highlights the importance of effective regulation of the home building industry and notes the need to further improve the operations of the Home Building Service.
- 1.28** Chapter 3 examines the builder licensing system operated by the Home Building Service. It describes the licensing system and then explores the key issues in respect of licensing raised firstly, by consumers, and secondly, by builders.
- 1.29** Chapter 4 considers the resolution of home building complaints. It provides an overview of current complaints handling structures before examining the evidence before the Committee on early dispute resolution, the Consumer, Trader and Tenancy Tribunal and the establishment of a home building advice and advocacy service.
- 1.30** Chapter 5 examines the activities of the Home Building Service in relation to the discipline of builders in breach of the *Home Building Act 1989*. It describes the Service's disciplinary powers and the penalty system before examining the evidence of consumers and industry representatives about the Home Building Service's performance in this area.
- 1.31** Chapter 6 considers the home warranty insurance scheme, beginning with a brief overview of the development of the scheme and its current operation. It then examines a number of aspects of the scheme, drawing from the evidence of consumers, industry representatives and insurers.

- 1.32** The report concludes with Chapter 7, which draws together the evidence documented in previous chapters about the need for additional resources within the Home Building Service in order for it to fulfil its licensing, complaints resolution and disciplinary roles.





## Chapter 2 Home building in New South Wales

This chapter provides a broad overview of home building in New South Wales, describing how it is regulated and by whom, and explaining the role of the Home Building Service of the Office of Fair Trading. It then outlines the key findings of a number of inquiries into home building industry in New South Wales and across Australia over the last 15 years. The chapter concludes by underscoring the importance of effective regulation of the home building industry and observing that while previous inquiries have helped to improve the regulatory system, there is room for further improvement in the operations of the Home Building Service.

### The NSW home building industry

- 2.1** The NSW home building industry generates in excess of \$19 billion a year and employs approximately 250,000 people. In 2005-2006 the industry built 32,000 new homes and undertook 21,500 major renovations along with 1.66 million minor building works.<sup>1</sup>
- 2.2** The growth in the industry over the last 30 years is reflected in the increased number of building licences and certificates issued each year. While in 1973 the Builders Licensing Board issued approximately 16,000 licences and certificates,<sup>2</sup> in 2005-2006 the Home Building Service issued over 179,000 licences and certificates.<sup>3</sup>
- 2.3** The table below sets out the number of different authority holders (that is, licence and certificate holders) by category as at 30 June 2007. Further detail on the licence categories is provided in Chapter 3.

**Table 2.1 Authority holders by category as at 30 June 2006<sup>4</sup>**

	Full building	Restricted building	Electrical	Plumbing, draining, gas fitting	Other trades	Other trades (restricted)	Building consultants	
Contractor licence	28,722	3,167	27,664	16,065	45,645	8,394	508	
Qualified supervisor	5,768	806	29,770	1,342	5,382	1,878		
Tradesperson certificate			110	4,371				
<i>Totals</i>	34,490	3,973	57,544	21,778	51,027	10,272	508	<b>179,592</b>

<sup>1</sup> Mr Michael Coutts-Trotter, then Director General, Department of Commerce, Evidence, 20 November 2006, p 2

<sup>2</sup> Submission 16, Office of Fair Trading, p 7

<sup>3</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, Question 5, p 8

<sup>4</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, Question 5, p 8

## Regulation of the industry

2.4 Mr Michael Coutts-Trotter, then Director General of the Department of Commerce, stated in evidence that the home building industry is subject to greater regulation than other industries:

The home building industry is more heavily regulated than many other industries, and for good reason. The stakes for home buyers and builders are very high when things go wrong. People can lose their life savings or their business and their livelihoods. No system to regulate human behaviour is perfect and no such system can be. The regulatory system in New South Wales is anchored on the *Home Building Act* and supported by licensing, compliance, dispute resolution and mandatory insurance.<sup>5</sup>

2.5 Along with the *Home Building Act 1989* (the Act), regulation of the industry is enshrined in the Home Building Regulation 2004. The Act requires builders and tradespeople to be licensed for the work that they do, and to have proper contracts and insurance in place for most jobs.<sup>6</sup>

2.6 The Act provides for:

- the regulation of residential building works, including contracts and who can do certain work
- statutory warranties for building work
- the regulation of building consultants' work
- the issuing of building licences, building consultant licences and certificates
- the resolution of building complaints, including the jurisdiction and powers of the Consumer, Trader and Tenancy Tribunal in respect of building disputes
- disciplinary proceedings and actions
- home warranty insurance, including general insurance provisions and the establishment of the Home Warranty Insurance Scheme Board
- the establishment of the Home Building Advisory Council.<sup>7</sup>

2.7 The Home Building Regulation 2004 provides:

- definitions for the Act
- further regulation relating to residential building work
- prescribed fees and conditions for contractor licences
- regulation of insurance requirements
- schedules for penalty notices for breaches of the Act and the Regulation.<sup>8</sup>

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<sup>5</sup> Mr Coutts-Trotter, Evidence, 20 November 2006, p 2

<sup>6</sup> <[www.fairtrading.nsw.gov.au/building/homeowners.html](http://www.fairtrading.nsw.gov.au/building/homeowners.html)> (accessed 5 January 2007)

<sup>7</sup> *Home Building Act 1989* (NSW)

<sup>8</sup> Home Building Regulation 2004 (NSW)

- 2.8** Further regulation in respect of the home building industry is provided under the Building Code of Australia, which covers all residential and non-residential buildings and sets minimum requirements for building practices. In addition, local government planning regulations, the *Environmental Planning and Assessment Act 1979*, and occupational health and safety and industrial relations legislation all play a role in the regulation of the industry.<sup>9</sup>
- 2.9** The *Building Professionals Act 2005* and Building Professionals Regulation 2007 further contribute to the regulatory framework of the home building industry by establishing the Building Professionals Board and providing for the accreditation and regulation of building certifiers.

### **The Home Building Service**

- 2.10** The *Home Building Act 1989* and the Home Building Regulation 2004 are administered by the Home Building Service within the Office of Fair Trading (OFT).
- 2.11** While the OFT is an entity in its own right it is also a business unit within the Department of Commerce. The OFT is headed by a Commissioner, Ms Lyn Baker and is answerable to its own minister, the Minister for Fair Trading, the Hon Linda Burney MP.<sup>10</sup>
- 2.12** The Home Building Service was established in February 2003 as a result of the recommendations of the Joint Select Committee on the Quality of Buildings (referred to as the Campbell inquiry – see paragraph 2.25 below).<sup>11</sup>
- 2.13** The Home Building Service is responsible for all building-related functions of the OFT including licensing, investigation of building complaints and the private home warranty insurance scheme. It also administers the government-funded consumer protection building insurance schemes that pre-dated the private scheme, along with the Building Insurers' Guarantee Corporation (BIG Corp) established as part of the rescue package to assist victims of the HIH Insurance collapse.<sup>12</sup>
- 2.14** The Service is based at the OFT head office in Parramatta, with its compliance programs operating through the OFT's statewide network of Fair Trading Centres.<sup>13</sup>
- 2.15** As of November 2006 the Home Building Service had 140 staff, including 26 specialist building inspectors and 20 building investigators based around the State.<sup>14</sup>

<sup>9</sup> Moss I & Rice K, *A Review of Licensing in the New South Wales Home Building Industry, Final Report*, September 2006, (hereafter referred to as the *Moss Review Final Report*), p 21

<sup>10</sup> Submission 16, p 11

<sup>11</sup> Submission 16, pp 11-12

<sup>12</sup> Submission 16, p 11

<sup>13</sup> Submission 16, p 11

<sup>14</sup> <[www.fairtrading.nsw.gov.au/building/miscellaneous/abouttheofficeofhomebuilding.html](http://www.fairtrading.nsw.gov.au/building/miscellaneous/abouttheofficeofhomebuilding.html)> (accessed 5 January 2007)

## Previous inquiries into home building

**2.16** In its submission, the Office of Fair Trading advised that in the last 15 years alone, there have been nine key inquiries into the NSW home building industry and the home building industry nationally. A brief overview of each of these, including their key findings, is set out below.

### *Inquiry into the NSW Building Services Corporation (the Dodd inquiry)*

**2.17** The inquiry into the NSW Building Services Corporation,<sup>15</sup> chaired by Commissioner Peter Dodd, was established in 1993 in response to a recommendation of the 1991-1992 Royal Commission into Productivity in the Building Industry (the Gyles Royal Commission), which uncovered a vast number of complaints concerning the activities of the Building Services Corporation.<sup>16</sup>

**2.18** The Dodd inquiry examined all aspects of the Building Services Corporation's activities and found that the 'one-stop-shop' approach of the Corporation was unworkable and that its conflicting roles should be separated. Its recommendations included:

- establishment of an independent registry of building disputes
- use of a building disputes tribunal as the final arbiter
- that government no longer be involved in home warranty insurance but that the provision of insurance be the responsibility of the private sector.<sup>17</sup>

### *Inquiry into outstanding grievances with the NSW Building Services Corporation (the Crawford inquiry)*

**2.19** This inquiry, chaired by Mr Peter Crawford, examined outstanding consumer grievances with the Building Services Corporation. The inquiry looked at around 100 individual consumer grievances and delivered its report in December 1995.<sup>18</sup>

**2.20** The inquiry found features of systemic failure, inappropriate relationships between Building Services Corporation officers and the industry, and the trivialisation of defective work. It recommended a number of reforms including:

- establishment of a specific government body to deal with certification and licensing
- provision of insurance cover by accredited insurance providers
- improved building contracts
- certification at critical stages of work

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<sup>15</sup> The Building Services Corporation, formerly the Builders Licensing Board, was incorporated into the Department of Fair Trading (now the Office of Fair Trading) in 1995. <[www.fairtrading.nsw.gov.au/youth/schoolprojects/livinginamaterialworld1970topresent.html](http://www.fairtrading.nsw.gov.au/youth/schoolprojects/livinginamaterialworld1970topresent.html)> (accessed 5 January 2007)

<sup>16</sup> Submission 16, p 8

<sup>17</sup> Submission 16, p 8

<sup>18</sup> Submission 16, p 8

- establishment of a Consumer Protection Bureau within the OFT to provide consumer advice
- creation of a new forum for dealing with straightforward complaints
- establishment of a new tribunal to deal with complaints informally and speedily.<sup>19</sup>

***National review of home warranty insurance and consumer protection (the Percy Allen review)***

- 2.21** The national review of home warranty insurance and consumer protection was established by the Ministerial Council on Consumer Affairs in 2002 and chaired by Professor Percy Allen.
- 2.22** The review examined systemic issues in the domestic building indemnity and home warranty insurance industry, with a view to identifying a viable insurance scheme providing an appropriate level of consumer protection.<sup>20</sup>
- 2.23** The review's recommendations addressed insurance as well as licensing, contracts, dispute resolution and compliance. The review advocated neither a government nor private insurance scheme, but called for greater transparency and review of insurers' decisions, limitations on builder activity, and the exclusion of cover for developers and speculative builders.<sup>21</sup>

***Royal commission into the building and construction industry (the Cole royal commission)***

- 2.24** This federal royal commission examined industrial and workplace practice and conduct in the building and construction industry and was chaired by Mr Terence Cole QC. While its report, released in February 2003, focused on industrial law issues, it also identified problems in the industry relating to phoenix companies (that is, companies formed from the remnants of a failed company) and addressed state based insurance such as workers compensation.<sup>22</sup>

***Inquiry of the Joint Select Committee on the Quality of Buildings (the Campbell report)***

- 2.25** The Joint Select Committee on the Quality of Buildings, chaired by Mr David Campbell MP, was established in 2002 to inquire into the role of building certifiers in ensuring quality of workmanship and the operation of the builder licensing system. The report made 55 recommendations including:
- establishment of the Home Building Service
  - introduction of an early intervention dispute resolution service, including onsite meetings and inspections by building inspectors
  - establishment of a website for consumers

<sup>19</sup> Submission 16, p 8

<sup>20</sup> Submission 16, p 9

<sup>21</sup> Submission 16, p 9

<sup>22</sup> Submission 16, p 9

- continuing professional development for builders
- a guide to standards and tolerances of building work.<sup>23</sup>

***Inquiry into the NSW home warranty insurance scheme (the Grellman inquiry)***

- 2.26** The 2003 inquiry into the NSW home warranty insurance scheme chaired by Mr Richard Grellman arose out of ongoing concerns about timely access to insurance by sectors of the home building industry, and dissatisfaction with home warranty insurance on the part of some consumer advocates.<sup>24</sup>
- 2.27** The inquiry found that home warranty insurance should continue to be provided by the private sector and endorsed the provisions of a last resort scheme. It made seven primary recommendations for the scheme's reform to improve its transparency and accountability, its accessibility and affordability to builders, and its protections for homeowners.<sup>25</sup>

***Statutory review of the Home Building Act 1989***

- 2.28** The *Home Building Act 1989* was reviewed in 2005 as a result of the Minister for Fair Trading's obligation under section 145(2) of the Act to review the legislation to determine whether its policy objectives remain valid and its terms appropriate.<sup>26</sup>
- 2.29** The review, completed in March 2005, found that the objectives of the Act remain valid. However, the Minister subsequently indicated that the Act is to be re-written with the help of industry to update and simplify its provisions.<sup>27</sup>

***Independent Commission Against Corruption investigation into the conduct of persons making licence applications (Operation Ambrosia)***

- 2.30** Following the raising of concerns by Office of Fair Trading staff in 2003, the Independent Commission Against Corruption (ICAC) conducted an investigation, Operation Ambrosia, into the conduct of specific persons making licence applications.<sup>28</sup>
- 2.31** The investigation uncovered a scam where a TAFE employee had altered internal TAFE records to substitute the names of persons qualified for diplomas for those who were not. As a result, a number of licences were identified as having been obtained fraudulently. The investigation resulted in the cancellation of 105 licences, including 28 company licences.<sup>29</sup> The investigation's findings are discussed at paragraph 3.19.

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<sup>23</sup> Submission 16, p 9 and pp 12-13

<sup>24</sup> Submission 16, p 10

<sup>25</sup> Submission 16, p 10

<sup>26</sup> Submission 16, p 10

<sup>27</sup> Submission 16, p 10

<sup>28</sup> Submission 16, p 10

<sup>29</sup> Submission 16, p 31

***Review of licensing in the NSW home building industry (the Moss review)***

- 2.32** The Minister for Fair Trading established the review of licensing in the NSW home building industry in 2005 to inquire into and report on existing arrangements for the licensing of builders and tradespeople in the building and construction industry, and the regulation of owner-builders in the residential sector.<sup>30</sup> The review was conducted by the former NSW Ombudsman, Ms Irene Moss, and completed in September 2006. It made 29 recommendations aimed at modernising regulation of the industry including that:
- licensing be based on occupation, following an assessment of the risk associated with each occupation
  - only individuals, and not companies, be licensed
  - an intelligence database be established, based on complaints, warnings and cautions, to case-manage the performance of licensees.<sup>31</sup>
- 2.33** The findings and recommendations of the Moss review are germane to this inquiry and are discussed in greater detail in the following chapter.

**Conclusion**

- 2.34** The Committee recognises the imperative for effective regulation of the home building industry. Without proper protections, consumers as well as builders may experience massive financial loss as well as an enormous emotional toll.
- 2.35** The numerous inquiries and reviews that have taken place over the last 15 years attest to this imperative and the accompanying need to continually modernise and improve regulation. At the same time, they also attest to the deficiencies within the regulatory system over that period. Indeed, in many cases it was the devastating experience of consumers in particular that led to a number of these reviews.
- 2.36** Similarly devastating consumer experiences also led to this Committee's inquiry. While we acknowledge the achievements of previous inquiries and the improvements that have been made as a result of them, the Committee considers that the regulation of the home building industry needs to be further strengthened, and specifically the operations of the Home Building Service.
- 2.37** The following chapter explores the evidence gathered during the inquiry in relation to the home building licensing system.

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<sup>30</sup> Submission 16, p 10

<sup>31</sup> *Moss Review Final Report*, 2006, pp 11-12 and 16





## Chapter 3 Builder licensing

This chapter considers the builder licensing system in New South Wales. It begins by providing a brief description of how the licensing system works, including the application process and the various licence categories. It then considers the key issues in respect of licensing raised by consumers during the inquiry: alleged misrepresentation of information by builders seeking licences; problems with the Home Building Service's assessment of licence applications; and deficits in the public register licence search facility. The chapter then explores three key concerns raised by representatives of the building industry: the fragmentation and complexity of the licensing system; the need to re-write the *Home Building Act*; and the current arrangements for continuing professional development.

### The NSW builder licensing system

- 3.1** In New South Wales the *Home Building Act 1989* (hereafter the Act) requires builders and tradespeople to be licensed for the work that they do. Only builders who are properly trained and who have relevant experience may be licensed. Anyone carrying out residential building work worth more than \$1,000 in labour and materials is required to be licensed, as is any specialist tradesperson undertaking electrical wiring, plumbing, draining or gasfitting work, or air conditioning and refrigeration work (except plug-in appliances).<sup>32</sup>
- 3.2** Individuals, companies and partnerships may be licensed. If a licence is issued to a company or partnership, that company or partnership must employ a person holding a qualified supervisor certificate to supervise the work that is being carried out.<sup>33</sup>
- 3.3** The licensing and regulation of builders and tradespeople in the home building industry, along with specialist contractors across all industries, is the responsibility of the Home Building Service within the Office of Fair Trading (OFT). The Home Building Service sets and maintains standards of competence for builders and tradespeople and issues licences and certificates to builders and their companies that meet the requirements of the Act. As noted in the previous chapter, in 2006–2007 over 179,000 licences and certificates were issued by the OFT.<sup>34</sup>

### The licence application process

- 3.4** When assessing a licence application, the Home Building Service carries out a number of checks including proof of identity, qualifications, bankruptcy and criminal records checks.<sup>35</sup>
- 3.5** In order to qualify for a licence or certificate, an applicant must hold the appropriate qualifications, be of good character, and must not have been declared bankrupt. Current

<sup>32</sup> <[www.fairtrading.nsw.gov.au/building/homeowners/choosingabuilder.html](http://www.fairtrading.nsw.gov.au/building/homeowners/choosingabuilder.html)> (accessed 10 October 2007)

<sup>33</sup> Moss I & Rice K, *A Review of Licensing in the New South Wales Home Building Industry, Final Report*, 8 September 2006, (hereafter referred to as the *Moss Review Final Report*), p 26

<sup>34</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 8

<sup>35</sup> Submission 16, Office of Fair Trading, p 28

qualification requirements include a combination of TAFE qualifications, industry experience and skills assessments.<sup>36</sup>

**3.6** Applicants are required to demonstrate that they possess the necessary training to undertake authorised work. According to the OFT's submission, this evidence is increasingly in the form of a competency based qualification issued under the national training system. Assessments are conducted by registered training organisations separate to the OFT. According to the OFT, the advantages of this assessment system include:

- qualifications are competency based and include verification of on-the-job and off-the-job knowledge and skills
- knowledge and training are recognised in the form of a qualification recognised throughout Australia
- assessment is more objective and transparent as it is against an external standard.<sup>37</sup>

**3.7** The Act also requires that in determining whether a person is 'fit and proper' to hold a licence, the OFT must consider the applicant's good repute, having regard to their character, honesty, integrity and criminal history.<sup>38</sup>

**3.8** A diagram representing the home building licence assessment process, including timeframes for processing applications, is set out on the following page.

### **Licence categories**

**3.9** Under the Act there are a number of different licence and certificate categories for the home building industry, including:

- **Contractor licences** – which authorise the holder (individual, company or partnership) to enter into a contract to undertake the work described on their licence card, and to advertise to carry out such work.
- **Qualified supervisor certificates** – which allow the holder (individuals only) to carry out the work described on their licence as an employee, partner or director. The holder cannot contract in their own right.
- **Tradesperson certificates** – are required for specialist work categories such as plumbing and gasfitting. These certificates allow the holder (individuals only) to carry out work in the categories for which the certificate is issued, as an employee under the supervision of an endorsed contractor licence or supervisor certificate holder.

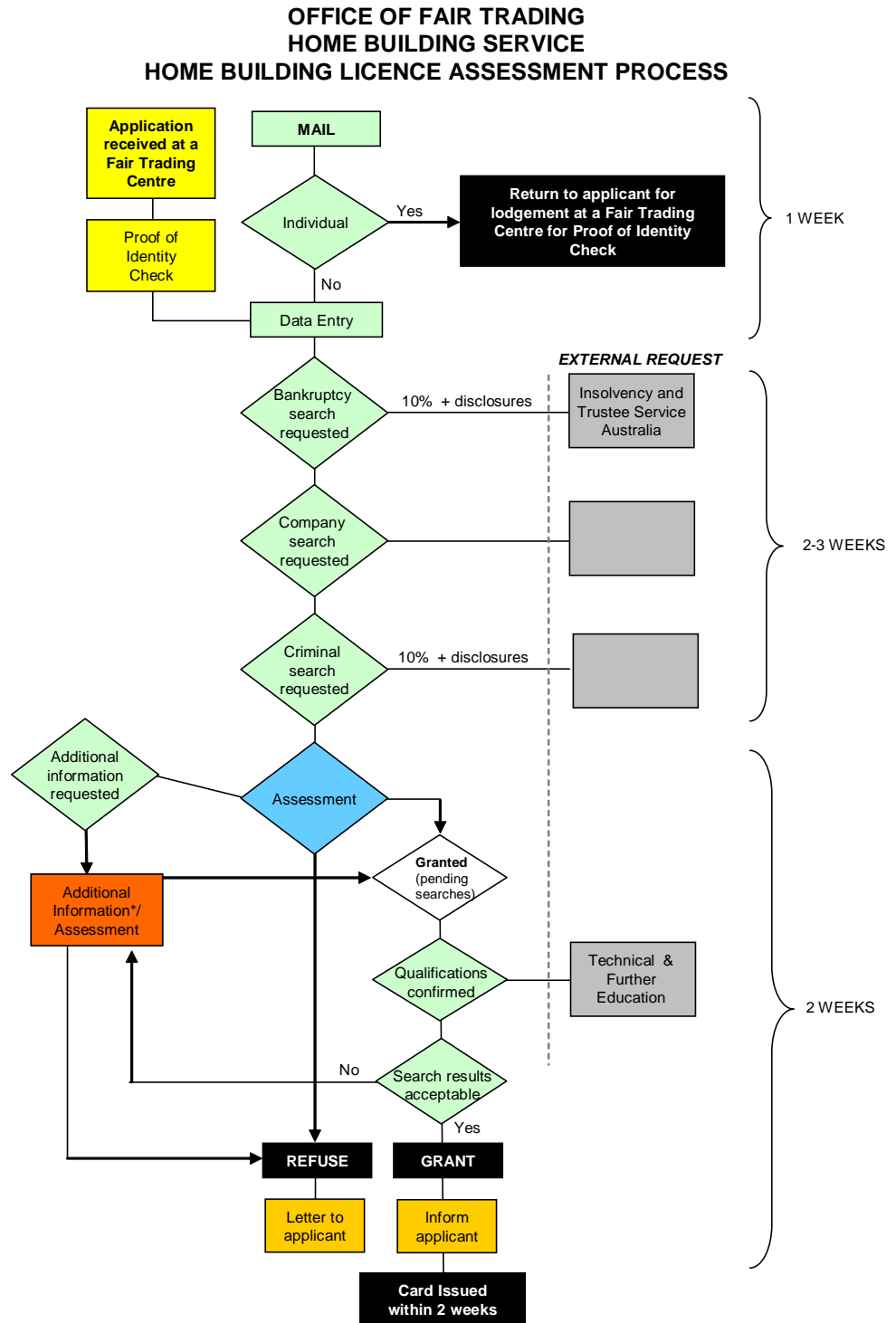
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<sup>36</sup> Submission 16, p 27

<sup>37</sup> Submission 16, pp 34-35

<sup>38</sup> Submission 16, p 27

Figure 3.1 Home building licence assessment process<sup>39</sup>



- **Building consultancy licences** – which allow the holder (individual, company or partnership) to make pre-purchase visual inspections of dwellings and report on their condition. A company or partnership must have at least one director, partner or full-time employee who is the holder of an individual building consultancy licence.
- **Owner-builder permits** – which allow the holder (individuals only) to carry out residential building work (except specialist work) on, or to organise the carrying out of work on, a residential property which they own or in which they have a prescribed interest.<sup>40</sup>

**3.10** The application fee for a one year builder's licence for an individual is \$522, with an annual renewal fee of \$349. Higher fees apply for partnerships and corporations (up to \$1,047).<sup>41</sup> Mr Michael Coutts-Trotter, then Director General of the Department of Commerce, stated in evidence that 'New South Wales has the cheapest building licences in Australia'.<sup>42</sup>

## Consumer concerns

**3.11** The consumer group Building Action Review Group (BARG) noted the critical importance of an effective licensing system for consumer protection. Its submission stated:

There is complete reliance among consumers that licensing of builders is based on competence and therefore affords the predicated protection against sub-standard building works.<sup>43</sup>

**3.12** A consumer participant, Mr Chris Fitzgerald, stated at the public forum held by the Committee in November 2007:

The fact that a person has been issued with a licence is supposed to mean that they are fit to conduct their business with some integrity and that you should be able to rely on them. That is not my experience. It is also supposed to mean that they know their trade. Again that is not my experience.<sup>44</sup>

**3.13** Many other consumers participating in the inquiry raised a number of concerns in relation to the home builder licensing system, based on their experiences with the industry. These concerns fell into three related areas discussed in turn below:

- alleged misrepresentation of licences and/or qualifications by builders
- licence assessments

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<sup>40</sup> *Moss Review Final Report*, 2006, p 26;  
<[www.fairtrading.nsw.gov.au/building/builderstradespeople/licencecategories.html](http://www.fairtrading.nsw.gov.au/building/builderstradespeople/licencecategories.html)> (accessed 24 October 2007)

<sup>41</sup> <[www.fairtrading.nsw.gov.au/pdfs/building/feeshomebuilding.pdf](http://www.fairtrading.nsw.gov.au/pdfs/building/feeshomebuilding.pdf)> (accessed 30 November 2007)

<sup>42</sup> Mr Michael Coutts-Trotter, Evidence, 20 November 2006, p 3

<sup>43</sup> Submission 27, Building Action Review Group, p 13

<sup>44</sup> Mr Chris Fitzgerald, Public Forum, 2 November 2007, p 4

- the public register.

### **Alleged misrepresentation of licences and/or qualifications by builders**

- 3.14** The first area of consumer concern related to the misrepresentation of licences and qualifications. When appearing in evidence in November 2006, Mrs Irene Onorati, President of BARG alleged that insufficiently qualified builders and companies had been licensed, and that licences had been granted without appropriate trade qualifications or with no qualifications at all.<sup>45</sup>
- 3.15** More specifically, in their submissions and oral evidence, BARG members made allegations of certain builders having misrepresented their licence on company letterheads and contracts. In doing so, these builders allegedly purported to have the authority to undertake work for which they were not authorised. BARG pointed out that this is in breach of the *Home Building Act*.<sup>46</sup>
- 3.16** Appearing at the hearing in November 2006, Mrs Onorati stated:
- I have in my submission three examples ... where ... builders misrepresented that a company or partnership were the holders of a construction licence knowing it was not the case. There is irrefutable evidence to prove that, letterheads, contracts, et cetera, displaying their own individual licences representing the particular company had that licence. The fact that they used their own licence number is evidence that they made representations, knowing that companies were not the holders of that licence.<sup>47</sup>
- 3.17** In addition, at the Committee's public forum, Mr Garry Wells and Mr Con Papanastasiou both alleged that their builders had falsely represented licences.<sup>48</sup> A case study of Mr Wells' experiences is set out below.

#### ***Case study: Mr Garry Wells\****

Garry Wells' difficulties with the builder licensing system began in April 2007, after an electrical fire in the roof cavity of his investment property. Mr Wells' insurer was called in to rectify the damage. At the end of May, after problems with the standard of the initial electrical repairs, the insurer sent him a contract for the repair of the fire damage by a builder stipulated by the insurer.

Mr Wells told the Committee: 'I was very confused because the licence number on the contract was different from the licence number on the business card ... I called the Office of Fair Trading and asked for a licence check. I was told that licence No. [...] on the business card was not for that company but was an individual carpentry and joiner's licence, and it had expired. They also told me that the other licence – [...] – was a building company and that the gentleman could not sign the

<sup>45</sup> Mrs Onorati, Evidence, 17 November 2006, p 2

<sup>46</sup> Submission 27, pp 21-32

<sup>47</sup> Mrs Onorati, Evidence, 17 November 2006, p 2

<sup>48</sup> Mr Garry Wells, Public Forum, 2 November 2007, p 17; Mr Con Papanastasiou, Public Forum, 2 November 2007, p 19

contract because he was not listed as a supervisor at that time. They also stated that the company licence [...] was a restricted licence for building work under \$12,000 and the company was not permitted to do work requiring home warranty.'

After he advised his insurer of his concerns, Mr Wells received two separate contracts to repair the fire damage: one for \$11,957 and one for \$1,648. Mr Wells believes that his insurer decided to split the work into two separate contracts to comply with the \$12,000 limit imposed by the builder's licence. Mr Wells refused to sign the contracts.

The building contractor nevertheless arrived at Mr Wells' property with his workers and materials. Mr Wells said: 'I felt that I was being intimidated to sign a third contract without the time to read it properly ... Also the same contract had two different company names – on one page it had the first company and on the second page it had another company name.' Mr Wells advised the Committee that the work stopped after three days and was left incomplete, after a dispute over the correct removal of asbestos.

### ***Office of Fair Trading response\*\****

The OFT claimed that the work did not proceed as the builder could not get access to remove the asbestos. This was followed by a dispute between Mr Wells and the builder, and then Mr Wells and his insurer, as to who would pay for the costs of relocating the tenants during the removal process. There was also a dispute between Mr Wells and his insurer over who would pay the builder.

After receiving Mr Wells' complaint on 27 September 2007, the Home Building Service conducted a site inspection and onsite mediation on 19 October 2007. Building work recommenced when the insurer undertook to pay the builder for his work. However, Mr Wells has now informed the Home Building Service that the builder has not completed the agreed works. A further site inspection was scheduled for 19 November 2007. The OFT noted that there are other issues outstanding, such as the standard of the initial electrical repairs.

The OFT remains active in this matter.

\* Evidence, Public Forum, 2 November 2007, pp 17-18

\*\* Submission 16b, p 3

**3.18** In its submission the Office of Fair Trading acknowledged there have been numerous instances of misappropriation of building licences. Operation Ambrosia, conducted by the Independent Commission Against Corruption (ICAC) in 2005 and initiated by the OFT, examined the conduct of certain individuals who had applied for builders licences.<sup>49</sup> As noted in the previous chapter, the investigation uncovered a scam in which a TAFE employee altered TAFE records to substitute the names of persons qualified for diplomas with those who were not.

**3.19** As a result of the investigation, ICAC recommended that the OFT:

- ensure greater rigor in checking and assessing statements of practical experience provided with licence applications
- tighten up the skills assessment process to minimise the potential for corruption

<sup>49</sup> Submission 16, p 10

- undertake a comprehensive fraud and corruption risk assessment
- review the '20 year rule' that enabled applicants without formal qualifications to gain a licence through 20 years industry experience.<sup>50</sup>

**3.20** The Committee notes that the Moss review recommended that the Government continue to ensure that adequate resources are available to enable these ICAC recommendations to be implemented in full.<sup>51</sup>

**3.21** When they gave evidence in November 2006, representatives of the OFT advised that there had been a number of developments in the NSW builder licensing system in 2005 and 2006 in response to the recommendations of ICAC's Operation Ambrosia. These developments included the:

- establishment of new qualification pathways for building licences, raising the standard of qualifications required
- abolition of the '20 year rule'
- introduction of national training qualification standards to optimise licence requirements and enable NSW licensees to trade in other states and vice versa
- introduction of a referees register to prevent inappropriate references
- establishment of a proof of identity check during the application process
- revamping of Home Building Service policies and procedures for licence processing.<sup>52</sup>

**3.22** In its supplementary submission, the OFT argued that the licence applications referred to by BARG members in their submissions and evidence were lodged and assessed some years before the Home Building Service was established, and that many if not all of the relevant licence applications were assessed and approved by the former Building Services Corporation or its predecessor. The OFT argued that the licence application process has changed considerably since that time, with significant work done in recent years to make the system more robust.<sup>53</sup>

**3.23** In addition, citing performance figures from 2005-2006, the OFT contended:

The claims made by BARG of licensing anomalies, whilst not conceded, if true, are relatively few in number when you place them into the context of a licensing regime containing more than 165,000 licensees and 13,000 applications per annum. It is our submission that this relatively low number of licensing issues is clearly not evidence that there are systemic problems with the licensing regime.<sup>54</sup>

<sup>50</sup> Submission 16, p 32

<sup>51</sup> *Moss Review Final Report*, 2006, p 76

<sup>52</sup> Mr Stephen Griffin, A/General Manager, Home Building Service, Office of Fair Trading, Evidence, 20 November 2006, p 13

<sup>53</sup> Submission 16a, Office of Fair Trading, pp 3-4

<sup>54</sup> Submission 16a, p 4

### Licence assessments

- 3.24** Closely related to consumer concerns about misrepresentation of licences and/or qualifications by builders is the second area of consumer concern: the checks done by the Home Building Service before a licence is issued. As reflected in Figure 3.1 earlier in this chapter, when assessing licence applications, the Home Building Service checks applicants' proof of identity, qualifications, bankruptcy history and criminal record.<sup>55</sup> Clauses 25-29 of the Home Building Regulation 2004 set out the provisions for obtaining a licence or certificate and the relevant checks.
- 3.25** In its submission, BARG argued that the criteria for obtaining and renewing licences are too open and that licences are too easy to obtain.<sup>56</sup> BARG also alleged that the previous history of builders is not always considered in the issuing or renewal of licences, particularly those builders who have previously been liquidated, bankrupted or disqualified and then form new companies that are issued a licence.<sup>57</sup> Such companies are referred to as 'phoenix companies'. Numerous participants in the Committee's public forum including Mr Robert Siebert and Mr Charlie Tran also recounted adverse experiences with such licensees.<sup>58</sup> Phoenix companies are discussed in greater detail in the following section on the public register.
- 3.26** The BARG submission also claimed that only ten percent of builders licence applications are checked by the Home Building Service, arguing that this provides far from adequate protection for consumers.<sup>59</sup>
- 3.27** The OFT clarified this issue in its supplementary submission, stating that *all* licence applications are checked against the requirements of the Act and the Regulation, with a further random ten percent of applications undergoing further checks. Specifically, the OFT stated that the licence assessment process involves:
- 100% checking of the TAFE or university qualification of the applicant and
  - 100% criminal record, bankruptcy and insolvency checks of the applicants who disclose that they have a criminal history or have previously been a bankrupt or involved with an insolvent company.<sup>60</sup>
- 3.28** In addition, as a risk management strategy the Home Building Service carries out criminal record, bankruptcy and insolvency checks on a ten percent random selection of applicants that have not declared a criminal record or a problematic financial history. These random checks are also applied to ten percent of renewals received by the Home Building Service each year. The OFT submission states that 'NSW is the only jurisdiction in Australia to have this additional layer of checks of licence applicants'.<sup>61</sup>

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<sup>55</sup> Submission 16, p 28

<sup>56</sup> Submission 27, p 2

<sup>57</sup> Submission 27, p 21

<sup>58</sup> Mr Robert Siebert, Public Forum, 2 November 2007, p 8; Mr Charlie Tran, Public Forum, 2 November 2007, p 18

<sup>59</sup> Submission 27, pp 17-18

<sup>60</sup> Submission 16a, p 3

<sup>61</sup> Submission 16a, p 3



**3.29** According to the OFT, the number of applications that are rejected each year is evidence that its checks are not limited to ten percent of applications:

Of the almost 13,000 licence applications received by the Home Building Service during the last financial year, some 3,878 were either refused or withdrawn. Clearly, the rejection of over one quarter of the applications received is not indicative of a regime that only checks 10% of the applications it receives.<sup>62</sup>

**3.30** The issue of whether the Home Building Service adequately examines the financial history of licence applicants was the focus of a NSW Ombudsman investigation in 2004 and 2005. The Ombudsman investigated a complaint that the Office of Fair Trading had issued a licence to a builder whose previous companies had been liquidated. The complainants had entered into a contract with the building company after obtaining advice from the OFT that the company's licence was valid and had no penalties or insurance claims against it.<sup>63</sup>

**3.31** The Ombudsman found that the builder's company licence had been incorrectly approved as a result of the 'combination of the failure of licensing officers to follow procedures and the actual procedures being inadequate and too narrow'.<sup>64</sup> Specifically, the Ombudsman concluded that there were inadequate procedures for checking licences of related companies, and for assessing the fitness and propriety of applicants to hold a licence.<sup>65</sup> In addition, it found:

clear evidence of a failure to follow procedures in all four application files reviewed as part of this investigation. This is indicative of a level of care, caution and due diligence below the standard the public expects of the OFT.<sup>66</sup>

**3.32** The Committee notes that the Commissioner for Fair Trading took issue with a number of the Ombudsman's conclusions. Specifically, the Commissioner did not agree that the OFT 'had an inadequate system for checks for assessing licence applications', nor that it 'had no criteria for assessing an applicant's overall fitness to hold a licence'. Rather, she contended that there were checks and balances in place and that human error played a part in that particular instance, with staff having failed to follow procedure.<sup>67</sup>

**3.33** Nevertheless, in response to the Ombudsman's findings the OFT advised the Committee that 'all related companies and licence entities are checked under current arrangements' for licence applications and renewals.<sup>68</sup> In addition, Home Building Service staff have received training on the guidelines for assessing that a builder is 'fit and proper' to hold a licence.<sup>69</sup>

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<sup>62</sup> Submission 16a, p 3

<sup>63</sup> NSW Ombudsman, *Final Report: Report under Section 26 of the Ombudsman Act – Department of Commerce*, 6 January 2006, (hereafter *NSW Ombudsman Report*), pp 1-2

<sup>64</sup> *NSW Ombudsman Report*, 2006, p 32

<sup>65</sup> *NSW Ombudsman Report*, 2006, p 31

<sup>66</sup> *NSW Ombudsman Report*, 2006, p 33

<sup>67</sup> Answers to questions on notice taken during evidence, 20 November 2007, Office of Fair Trading, p 10

<sup>68</sup> Answers to questions on notice taken during evidence, 20 November 2007, Office of Fair Trading, p 10

<sup>69</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 6

**3.34** Following the November 2007 hearing the Committee sought information from the OFT on a number of matters including:

- checks undertaken to verify that a licensee is still a fit and proper person to hold a licence
- measures in place to prevent a builder who has lost his or her licence from setting up another company and continuing to trade
- licence checks in respect of companies
- measures to identify builders who have been liquidated
- interstate checks in respect of criminal records
- cross-border arrangements to prevent builders who have been disqualified in one jurisdiction from starting up in another.

**3.35** The OFT provided a detailed response in respect of each issue. These are available for viewing on the Committee's website at [www.parliament.nsw.gov.au/gpsc2](http://www.parliament.nsw.gov.au/gpsc2).<sup>70</sup>

**3.36** The OFT also indicated that further improvements will be achieved through the Government Licensing System to operate across NSW Government agencies from November 2007.<sup>71</sup> The new system will include:

- phased implementation of a photo licensing system to enable on-the-spot identification of licence holders
- automatic electronic interface between the OFT and external bodies including the Roads and Traffic Authority (for photo licence processing and identity checking), the NSW Police Central Names index (for checking criminal history) and the Australian Securities and Investment Commission (for checking company details)<sup>72</sup>
- criminal history checks for all licence applications and renewals.<sup>73</sup>

**3.37** The OFT further advised the Committee that the efficiency measures along with the Government Licensing System:

will free up resources for reallocation towards monitoring ... changes to the circumstances of licensees over time, particularly the incidences of (phoenixing) company structures.<sup>74</sup>

**3.38** Finally, OFT representatives reported that the licensing system was more robust as a result of the introduction of performance measurement, service guarantees and monitoring. Mr Steve Griffin, General Manager of the Home Building Service, stated:

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<sup>70</sup> Submission 16b, Office of Fair Trading, pp 1-5

<sup>71</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 2

<sup>72</sup> Submission 16, p 36

<sup>73</sup> Mr Steve Griffin, Manager, Home Building Service, Evidence, 2 November 2007, p 8

<sup>74</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 2

We have performance measurement in place, we have guarantees of service, and we have monitoring of referees' statements of practical experience. All those checks and balances are now there, and they are finely tuned.<sup>75</sup>

### The public register

**3.39** The third key area of consumer concern focused on the OFT's web-based system enabling consumers to check the public register of information on licensed builders, tradespeople and specialist workers.

**3.40** Section 120 of the *Home Building Act 1989* provides that the Director-General is to maintain a register of details of contractor licences, building consultancy licences, supervisor and tradesperson certificates and owner-builder permits. The Home Building Service administers this through a public register that includes a web-based search facility and a telephone inquiry service. Using the contractor licence number or name, members of the public can gain details of a licence holder including:

- whether the contractor holds a valid and current licence which is suitable for the type of work to be carried out
- details of other licences held now or in the past
- any history of complaints and insurance claims.<sup>76</sup>

**3.41** The OFT advised that the register records the following information:

- date of licence issue and expiry
- conditions imposed on the licence
- names of partners of a partnership or directors of a corporation
- category of work that the licence holder is licensed to undertake
- results of any relevant disciplinary determination
- results of any prosecutions under the *Home Building Act* against the licence holder
- number of insurance claims paid (after 1 September 1997) in relation to work done by the holder
- details of any penalty notices issued to the holder
- any cancellations or suspensions of the licence
- number of Consumer, Trader and Tenancy Tribunal (CTTT) orders not complied with (since 1 January 2002).<sup>77</sup>

<sup>75</sup> Mr Griffin, Evidence, 2 November 2007, p 7

<sup>76</sup> <[www.fairtrading.nsw.gov.au/building/licencecheck.html](http://www.fairtrading.nsw.gov.au/building/licencecheck.html)> (accessed 9 January 2007)

<sup>77</sup> Submission 16, p 35. It should be noted that as a result of the 2001 amendments to the *Home Building Act*, since 1 January 2002 the public register has included unsatisfied CTTT orders against a licence holder. Prior to the introduction of this requirement, the information was not available to OFT and importantly, the legislation does not allow for retrospective recording of these details.

- 3.42** A number of consumers pointed to problems with the accuracy of the online checking system. BARG claimed that the system ‘is not assisting consumers to thoroughly check builders licences’, citing examples of how it was not possible to access accurate information.<sup>78</sup> The following case study of Mrs Diana Cornwell illustrates some of the difficulties that consumers face in relying on the public register.

***Case study: Mrs Diana Cornwell\****

Diana Cornwell has first-hand experience of the deficiencies of the public register. In 2000 Mrs Cornwell engaged an architect and project manager. They then nominated a structural engineer to oversee the building works and a contractor to undertake them.

Mrs Cornwell relied on the public register to check the contractor’s licence. The public register did not disclose that the contractor was at that time fighting legal proceedings in the CTTT. In addition, the register did not reveal that the foreman engaged by the contractor was unlicensed. Mrs Cornwell told the Committee: ‘The man who built our additions and made alterations to our house had no licence at all. The contractor was aware of this knowledge and totally failed in his duty of care.’ She advised the Committee that among other deficiencies, her home has no windows, no guttering, no overhead lighting, and no lockable exterior doors.

Mrs Cornwell was critical of the time taken to update the register: ‘For six months I was able to ring up as an outside person and be told that my contractor had no faults against his name, no insurance disputes, never been in the [CTTT], yet all the time ... there are six others also in the same boat ... He was in the CTTT fighting the other people. Of course, if I had known any of this he would never have been on the job.’

The OFT advised Mrs Cornwell to take her matter to the CTTT. To do so Mrs Cornwell needed to engage a legal team and commission a report into the building works; the cost of the report alone was quoted at \$25,000. Mrs Cornwell told the Committee that she could not afford such costs.

***Office of Fair Trading response\*\****

The OFT advised that Mrs Cornwell lodged a claim with them in 2004, and that it could not mediate a successful outcome due to the financial situation of the builder. Mrs Cornwell was advised to apply to the CTTT to resolve her dispute. No claim has been received by the CTTT.

The OFT has completed its action in this matter.

\* Submission 42; Evidence, Public Forum, 2 November 2007, p 6

\*\* Submission 16b, p 4

- 3.43** Mr Gerard Nicol also experienced problems with the public register. He advised the Committee that he selected a company to build an extension to his home ‘primarily on the basis of its apparent clean licence record’ on the OFT’s online system. Only after problems with the building process emerged did Mr Nicol discover that the nominated supervisor for the project was also an owner of a building company that had been liquidated in 2002 and

<sup>78</sup> Submission 27, p 20

which had prior statutory warranty claims under the company licence. This information did not present itself during his online search under the supervisor's name as it was attached to the different company name.<sup>79</sup>

- 3.44** Mr Nicol pointed out that the online check is the only resource available to consumers for checking builders' credentials:

To establish the licence credentials of each builder I relied fully on the Office of Fair Trading's web based licence check facility as the only definitive resource available to me as a consumer.<sup>80</sup>

- 3.45** Similarly, another consumer, Ms Luisa Berg, reported that at the time she entered into a contract with a building company, her check of the OFT web-based system did not alert her to the builder's previous company names and history, which she only later discovered were problematic. In addition, after the builder was fined as a result of her case, Ms Berg contended that it took a further six months for a warning not to contract with the builder to appear on the online system.<sup>81</sup>

- 3.46** In addition, after the warning was attached to the builder's licence, the builder disputed the amount of the fine and received a stay of proceedings through the Administrative Decisions Tribunal, which Ms Berg claimed 'resulted in the disappearance of warnings and determinations from the record even when what [was] disputed [was] the size of the fine rather than the fine itself.'<sup>82</sup> Ms Berg advised the Committee:

Warnings and other relevant determinations need to be restored to the licence records. Potential consumers have a right to the information previously shown on the record as its absence could adversely affect them.<sup>83</sup>

- 3.47** Both Mr Nicol and Ms Berg recommended that all the companies the licensee is associated with or supervises should be included in the results of checks on a licence number or name.<sup>84</sup> In addition, Ms Berg recommended that a licence number be constant throughout the life of the licensee, and that all previous determinations, warnings and statutory claims paid should be displayed along with matters pending, for example claims and disciplinary or court proceedings.<sup>85</sup>

- 3.48** The NSW Ombudsman investigation discussed in earlier in this chapter in paragraphs 3.30-3.33 included consideration of the OFT public register. In that case the complainants had also obtained apparently clear checks of a builder's licence, only to later discover that the company director had a history of 'poor management, insurance claims and clear failure with regard to

<sup>79</sup> Submission 17, Mr Gerard Nicol, p 3

<sup>80</sup> Submission 17, p 4

<sup>81</sup> Submission 21a, Ms Luisa Berg, p 2

<sup>82</sup> Submission 21b, Ms Luisa Berg, p 2

<sup>83</sup> Submission 21b, p 2

<sup>84</sup> Submission 17, p 4; Submission 21b, p 2

<sup>85</sup> Submission 21b, p 2

honouring his financial obligations.<sup>86</sup> The Ombudsman concluded that there was a 'lack of accuracy of information on the Public Register', and that the Office of Fair Trading 'failed to take sufficient steps to ensure the records ... on the Public Register' were accurate and timely.<sup>87</sup>

**3.49** The Ombudsman found problems with the reliance of OFT on collecting information from third parties such as insurance companies and with the time taken by OFT to update the public register, noting that there had been a delay of four months in respect of that particular case. The report concluded that 'the absence of performance standards for updating the public register is an area that also needs attention'.<sup>88</sup> In addition, the Ombudsman took issue with the removal of information that a builder had been fined while an appeal against the fine was undertaken.<sup>89</sup>

**3.50** The Ombudsman recommended that the capacity of the public register be enhanced to enable consumers to search the history of other licences a trader may have previously held or been associated with. His report stated, 'This would counter the current weakness of the system which allows multiple licence numbers to exist for related entities without cross-referencing on the public register.' The Ombudsman further recommended that the OFT review its procedures for updating information on the public register and introduce appropriate performance standards.<sup>90</sup>

**3.51** In its submission and in answers to questions taken on notice, the OFT advised that as a result of the NSW Ombudsman's recommendations, the following changes have been made to the public register:

- consumers are now able to make wider searches of the register, and are encouraged to do so by searching the names of individuals, companies and partnerships rather than just the licence number
- information is now provided in a summary page
- a warning is given to indicate that information provided by insurers about insurance claims may be incomplete<sup>91</sup>
- a history of other licences a trader may have previously held or been associated with is provided.<sup>92</sup>

**3.52** In November 2007 the OFT further indicated:

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<sup>86</sup> *NSW Ombudsman Report*, 2006, p 2

<sup>87</sup> *NSW Ombudsman Report*, 2006, p37

<sup>88</sup> *NSW Ombudsman Report*, 2006, p 37

<sup>89</sup> *NSW Ombudsman Report*, 2006, p 37

<sup>90</sup> *NSW Ombudsman Report*, 2006, p 42

<sup>91</sup> Submission 16, p 36

<sup>92</sup> Answers to questions on notice taken during evidence, 20 November 2007, Office of Fair Trading, p 10

Data appears on the public register in real-time, as the public register updates automatically from the internal Building Services System when that database is updated. Significant enhancements have been made to ensure there is no delay in licensing data being updated on the public register.

In addition to this, the Home Building Service has established an Information Unit ... responsible for ensuring that the public register is properly updated with new information relating to the [Consumer, Trader and Tenancy Tribunal] order compliance, disciplinary outcomes, prosecution results, penalty notices issued and other actions taken by the Home Building Service.

This Information Unit has a 48 hour guarantee of service benchmark which is monitored on an ongoing basis. Fair Trading is now consistently meeting this guarantee of service.<sup>93</sup>

- 3.53** When she appeared at the hearing following the Committee's public forum, the Commissioner for Fair Trading, Ms Lyn Baker, responded to the suggestion that the public register also contain information on any unresolved complaints against a builder, as reflected in the case study of Mrs Diana Cornwell, above. Ms Baker pointed out the need for fair processes to be followed in respect of any complaint, stating:

This has come up a number of times over the years while I have been in Fair Trading. It is simply not possible to put complaints on to a public register when they have not been investigated, when they have not been proved and when they could indeed be vexatious, so that is why on our public register we only put prosecutions that have been proven.<sup>94</sup>

### **The Committee's view**

- 3.54** The Committee notes the critical importance of robust systems for assessment and verification of licences, and for maintaining the public register of information about builders.
- 3.55** It is vital that the Home Building Service has in place effective systems to ensure that licences are only issued to builders with the appropriate qualifications, and who conform to strict standards of proof of identity, bankruptcy, criminal record and good character. The licensing system needs to justify the faith which the public places in it.
- 3.56** Similarly, the highest standards need to operate in relation to the public register, so that it operates effectively and is seen to operate effectively in informing the decisions of consumers.
- 3.57** On the basis of the evidence before this inquiry, as well as independent investigations by oversight bodies, it is clear that the credibility of both the licence assessment system and the public register has been undermined by significant and ongoing problems. Notwithstanding the Commissioner for Fair Trading's response to the Ombudsman's findings, the Committee is very concerned by the conclusions and recommendations of both the Ombudsman and the Independent Commission Against Corruption, as well as the evidence of numerous forum participants about failures in the licensing system.

<sup>93</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 6

<sup>94</sup> Ms Baker, Evidence, 2 November 2007, p 2

- 3.58** Individual homeowners have suffered at the hands of unscrupulous and/or poorly skilled builders when this could have been avoided had higher standards operated in the OFT at the time. When the licensing system fails it does so at massive financial and emotional cost to the consumers involved, and the Committee acknowledges the devastating experiences of the consumer participants in this inquiry.
- 3.59** The Committee notes that the Home Building Service has put in place a range of practical measures to enhance the robustness of the licence assessment system and the public register. These include improvements to licence qualifications requirements, the new systems of performance measurement and guarantees of service in relation to licence assessment, along with measures to ensure that the information on the public register is reliable and up to date.
- 3.60** Nevertheless, we consider that ongoing vigilance is essential in this area. Our conclusion is that the Home Building Service should find ways to further improve consumer protection through the licence assessment system and the public register. We consider that it should review its current performance standards in these areas in order to deliver such an outcome.
- 3.61** The Committee also considers that the resourcing of the Licensing Branch of the Home Building Service is an important issue, and we discuss this in greater detail in the final chapter.

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**Recommendation 1**

That the Home Building Service review its performance standards in relation to the licence assessment system and the public register, in order to maximise the:

- rigor of licence assessments
- accuracy and timeliness of information on the public register.

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- 3.62** In addition, while the Committee acknowledges the need to ensure procedural fairness for builders who are the subject of disputes that have not yet reached resolution, we have some sympathy with the view that consumers would benefit from information in respect of such matters, especially in light of the length of time that may pass before a matter is resolved. We consider that further thought should be given to how this could occur.

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**Recommendation 2**

That the Office of Fair Trading, whilst taking account of the need for procedural fairness, investigate potential changes to the public register to alert consumers to builders who are the subject of not yet resolved complaints.

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- 3.63** The Committee further recognises that a number of consumer concerns may potentially be addressed through the recommendations of the Moss review of licensing in the NSW home building industry.



- 3.64** Specifically, we note that the review's recommendations that only individuals (and not companies or partnerships) be required to be licensed,<sup>95</sup> and that licensees be issued with a unique licence number to be kept for life, will have important implications for consumer protection. In particular, as was acknowledged by Ms Moss in evidence to the inquiry,<sup>96</sup> these arrangements would help to address the problem of phoenix companies in the building industry by preventing builders from re-establishing their business under another company name, and by ensuring that their history follows them for life.
- 3.65** The Committee is not yet aware of the NSW Government's decision as to whether these recommendations will be taken up. Given the widespread and serious problem of phoenix companies documented during this inquiry, and the consumer allegations of builders misrepresenting their licences, we encourage the NSW Government to implement them.

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### **Recommendation 3**

That the NSW Government take immediate steps to implement Recommendations 3 and 5 of the Moss review of licensing in the NSW home building industry that:

- the Government require only individuals to be licensed
  - the Government issue a unique licence number to licensees to be kept by the licensee for life.
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### **Industry concerns**

- 3.66** While on the whole, consumer concerns predominated in this inquiry, a number of concerns about the licensing system were also put forward by representatives of the building industry, both builders and unions. The three key areas of concern were:
- the fragmentation and complexity of the licensing system
  - the need to re-write the *Home Building Act*
  - current arrangements for continuing professional development.

#### **Fragmentation and complexity**

- 3.67** The Master Builders Association argued that regulation of the building industry as a whole is fragmented, and that as a result of the numerous inquiries over the last decade or so, additional layers have been built into the regulatory system.<sup>97</sup> It noted that the Departments of Commerce and Planning, as well as WorkCover, the Rural Fire Service and the new Building Professionals Board all play a role in regulation.<sup>98</sup> The Association's submission suggested that

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<sup>95</sup> *Moss Review Final Report*, 2006, pp 54-55

<sup>96</sup> Mrs Moss, Evidence, 20 November 2006, p 47

<sup>97</sup> Mr Peter Meredith, Director of Housing, Master Builders Association, Evidence, 20 November 2006, p 22

<sup>98</sup> Mr Meredith, Evidence, 20 November 2006, p 24

this fragmentation could be addressed through the establishment of an independent building commission, as recommended by the Campbell inquiry, which would deliver better co-ordination and cooperation between government agencies. Such a commission, which would be responsible for the licensing of builders, would also address a perceived conflict of interest between the Office of Fair Trading's roles as industry regulator and consumer protector.<sup>99</sup>

**3.68** As an example of fragmentation and duplication in relation to licensing, the Master Builders Association of NSW pointed to the requirement for builders to also be licensed by the WorkCover Authority for routine work such as asbestos removal and use of explosive power tools. As a result, it called for better co-ordination of licensing through one central authority, as well as the rationalisation of licence categories, an initiative which it noted had been frustrated by anomalies in the legislation.<sup>100</sup>

**3.69** Similarly, the Housing Industry Association argued that 'the current licensing system in NSW is overly complex and cumbersome'<sup>101</sup> and recommended that:

- licensing be limited to contractors who contract directly with consumers only, with the exception of those holding occupation licences such as plumbers and electricians
- licence periods be extended to up to three years
- owner builder permits be abolished on the basis that they provide no protection for subsequent purchasers.<sup>102</sup>

**3.70** The Housing Industry Association, a national body, also noted that licensing varies markedly between jurisdictions, to the point that no two states' licensing systems are alike.<sup>103</sup>

**3.71** Varying views were expressed on the ideal scope of the licensing system: while the Master Builder's Association saw the broadening of licensing to the commercial sector as 'inevitable' although not necessarily welcome,<sup>104</sup> the Housing Industry Association argued that the system should instead be narrowed.<sup>105</sup>

**3.72** For its part, the Construction and General Division of the Construction Forestry Mining and Energy Union (CFMEU) contended that the NSW home building licence scheme is 'an outdated licensing and regulatory system in crisis'.<sup>106</sup> It argued for 'radical change' to improve regulation of the construction industry and recommended a number of reforms including that:

- licensing for the home building industry to be extended across the whole construction industry

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<sup>99</sup> Submission 14, Master Builders Association of NSW, p 10

<sup>100</sup> Submission 14, p 10

<sup>101</sup> Submission 15, Housing Industry Association, p 5

<sup>102</sup> Submission 15, p 5

<sup>103</sup> Submission 15, p 5

<sup>104</sup> Submission 14, p 11

<sup>105</sup> Submission 15, p 5

<sup>106</sup> Submission 6, Construction and General Division, CFMEU, p 3

- license categories be rationalised to three categories only
- sub-contractors be subject to greater regulation.<sup>107</sup>

**3.73** The Committee is aware that the Moss review made recommendations on a number of these issues. Earlier in this chapter we noted that Ms Moss recommended that individuals only be licensed (and no longer companies and partnerships), and that licensees be issued with a unique licence number for life (see paragraphs 3.64 and 3.65).

**3.74** Other relevant Moss review recommendations that may help to address the complexity of the licensing system include that each occupation in the home building industry be assessed against certain risk factors, with those occupations that do not meet the risk factors to be de-licensed, and that licences be issued for three years (except those for electrical work).

**3.75** Finally, and significantly, the Moss review also recommended:

That the Government establish clear objectives for the Home Building Service to assist consumers and the building industry in understanding its role as the licensing authority in NSW.<sup>108</sup>

**3.76** On the issue of co-ordination, following the November 2007 hearing, the Office of Fair Trading provided the Committee with information about the Building Industry Co-ordination Committee. It explained that the Committee was established in 2003 as part of the Government's response to the Campbell inquiry (see paragraph 2.25) and that:

The role of the Committee is to assist in improving the regulatory system impacting on the construction industry in New South Wales across Ministerial portfolios and agencies. The Committee aims to more effectively align the regulation of building services across relevant government agencies ...

Membership of the Building Industry Co-ordination Committee has recently been expanded and now includes representation from the following agencies:

- Department of Commerce, Office of Fair Trading
- Department of Planning
- Building Professionals Board
- Department of Local Government
- WorkCover NSW
- Department of Premier and Cabinet
- NSW Treasury
- Department of Education and Training

<sup>107</sup> Submission 6, pp 4-5

<sup>108</sup> *Moss Review Final Report*, 2006, p 17

- Department of Water and Energy
- State and Regional Development
- Building and Construction Industry Long Service Payments Corporation.<sup>109</sup>

**3.77** The OFT further advised that the Co-ordination Committee will report quarterly to the Premier, and that its strategic agenda addresses such issues as:

- the ongoing suitability of current regulatory arrangements among agencies
- ensuring there is no duplication of administrative or regulatory resources
- strengthening partnerships already established to ensure compliance.<sup>110</sup>

### ***The Home Building Act 1989***

**3.78** The second area of concern among industry representatives was the *Home Building Act* itself. Various representatives argued that the Act is well overdue for re-writing, and that it provided a poor foundation for the home building regulatory regime. As noted in the previous chapter, the Government has announced that it will re-write this legislation.

**3.79** The Master Builders Association of NSW reported that the present Act is overly complex and difficult to work with due to the many changes made to it over time. Mr Peter Meredith, Director of Housing with the Master Builders Association stated in evidence:

I see it as an absolute priority, simply because it is very difficult to work with given the continued layers of amendments that have been dovetailed into the Act.<sup>111</sup>

**3.80** Similarly, the Chair of the Property Law Committee of the Law Society of NSW described the Act as ‘a minefield of complexity and difficulty’, noting that piecemeal changes over time had left it without any rational underpinning framework.<sup>112</sup>

**3.81** The Housing Industry Association of NSW argued that although from its perspective the Act was working reasonably well, improvements could be made for both consumers and the industry.<sup>113</sup>

**3.82** The Moss review recommended that the Government re-write the Act to take into account the range of its recommendations, to consolidate the various amendments that have been made over the years, and to make it simpler and easier to understand for both consumers and

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<sup>109</sup> Answers to questions on notice taken during evidence, 2 November 2007, Office of Fair Trading, pp 2-3

<sup>110</sup> Answers to questions on notice taken during evidence, 2 November 2007, Office of Fair Trading, p 3

<sup>111</sup> Mr Meredith, Evidence, 20 November 2006, pp 22-23

<sup>112</sup> Mr John McIntyre, Law Society of NSW, Evidence, 20 November 2006, p 55 and 60

<sup>113</sup> Mr Graham Wolfe, Executive Director, Housing Industry Association, Evidence, 17 November 2006, p 32

industry.<sup>114</sup> It suggested that the Act would particularly benefit from clear objectives outlining its purpose in relation to licensing and consumer protection.<sup>115</sup>

**3.83** In November 2007 the Committee sought an update from the OFT on progress in developing a new Act. In answers to questions on notice the OFT advised:

Consultation with industry and consumers on the re-write of the legislation has begun. A first draft of the Bill [will be] developed in early 2008. Further consultation with industry and consumer groups on the draft will occur during early 2008 with a final draft in mid 2008. It is anticipated that the Bill will be introduced to Parliament during the spring session of Parliament next year.<sup>116</sup>

### **Continuing professional development**

**3.84** The third key area of concern from the perspective of industry participants was the current system of continuing professional development.

**3.85** Compulsory continuing professional development for licensed builders was recommended by the Campbell inquiry and supported by the Grellman inquiry,<sup>117</sup> and commenced in March 2004.<sup>118</sup> According to the OFT, the scheme is intended to ‘maintain skills and competence, reduce the level of disputes and raise industry standards in the interest of builders and consumers’.<sup>119</sup>

**3.86** Continuing professional development is provided via TAFE and private registered training organisations, and licensees earn points not only for formal training but also for activities including home study, industry association membership, journal subscriptions and having a good licence record. Under the current scheme licensees must earn 100 points every three years.<sup>120</sup>

**3.87** The Housing Industry Association recommended that the current compulsory scheme be replaced with a voluntary system on the basis that it would reduce costs to small business.<sup>121</sup>

**3.88** By contrast, Mr Peter McClelland, State President of the Construction and General Division of the CFMEU, noted his organisation’s strong support for a compulsory system. At the same time, he argued that continuing professional development should be less about providing an advertising platform for suppliers and more focused on essential skills development, for example in business management, bookkeeping and so on.<sup>122</sup>

<sup>114</sup> *Moss Review Final Report*, 2006, p 97

<sup>115</sup> *Moss Review Final Report*, 2006, p 97

<sup>116</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 3

<sup>117</sup> Refer to Chapter 2 for details on the Campbell and Grellman inquiries.

<sup>118</sup> Victoria and Tasmania have voluntary continuing professional development.

<sup>119</sup> Submission 16, p 32

<sup>120</sup> Submission 16, p 32

<sup>121</sup> Submission 15, p 6

<sup>122</sup> Mr McClelland, Evidence, 17 November 2006, p 41

- 3.89** Mr Kevin Rice, an adviser to the Moss review, reported to the Committee that it was apparent during the review that continuing professional development lacks credibility among builders, and that it is difficult to access in rural and regional areas.<sup>123</sup> The review report suggested that continuing professional development should be evidence based, relevant, accessible and easy for licensees to comply with. It recommended that the Home Building Service undertake a comprehensive risk analysis of each licensed category to determine whether continuing professional development is required and the areas within each category where it is required.<sup>124</sup>
- 3.90** In response to comments made in evidence to the inquiry, in December 2006 the OFT defended the current scheme whilst noting that it was being reviewed.<sup>125</sup>
- 3.91** The Committee sought an update on this review of continuing professional development in November 2007. The OFT advised that the Government has accepted the recommendations of the review and will effect a number of changes from January 2008. The changes are intended to make the continuing professional development system 'simpler and more robust'.<sup>126</sup> According to the OFT, the changes to be introduced include:
- the points system is to be simplified from the current 100 points over three years to 12 points per annum
  - core learning topics are to be agreed to by industry and will address current industry issues such as dispute resolution, business management and waterproofing
  - participants will no longer be able to accrue points for private study, purchasing journals and membership of associations or unions.<sup>127</sup>

### **The Committee's view**

- 3.92** The Committee considers it very important that the NSW Government work to minimise fragmentation and duplication in the home building industry, and to deliver co-ordination. We acknowledge that the Building Industry Co-ordination Committee was established in 2003 to improve co-ordination across NSW Government agencies, and note that further changes were recently made in relation to it. Nevertheless, the Committee encourages the Government to consider further ways to improve co-ordination in its regulation of the building industry, and suggests that an independent building commission may be one such mechanism.

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### **Recommendation 4**

That the NSW Government examine ways to improve co-ordination in building industry regulation, including the establishment of an independent building commission.

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<sup>123</sup> Mr Rice, Evidence, 20 November 2006, p 52

<sup>124</sup> *Moss Review Final Report*, 2006, p 16

<sup>125</sup> Submission 16a, p 5

<sup>126</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, pp 3-4

<sup>127</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 4

- 3.93** The Committee also supports the development of a new *Home Building Act* as the foundation for a modern and robust regulatory regime for the home building industry in New South Wales. Re-writing the Act will provide a valuable opportunity to address a number of concerns raised during this inquiry and documented in this report. We consider that the new Act should have clear objectives and should especially provide for strong consumer protection.
- 3.94** The Committee considers that a modern and robust licensing system should be cohesive and user-friendly – both from the perspective of licensees and consumers. We recognise that there is strong potential for the recommendations of the Moss review to deliver such a system. The Committee recommends that in re-writing the *Home Building Act* the NSW Government explicitly consider the need to make the licensing system cohesive and straightforward. In addition, we strongly endorse the Moss review recommendation that clear objectives be established for the Home Building Service.

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### **Recommendation 5**

That in re-writing the *Home Building Act*, the NSW Government:

- explicitly consider the need to make the licensing system cohesive and user-friendly
  - implement Recommendation 25 of the Moss review of licensing in the NSW home building industry that the Government establish clear objectives for the Home Building Service to assist consumers and the building industry in understanding its role as the licensing authority in NSW.
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- 3.95** The Committee considers that the changes the Government has announced in relation to continuing professional development will be important to re-establishing the usefulness and credibility of the scheme. We consider that the scheme should remain compulsory, in order that it raise standards and thereby help to protect consumers. And as a compulsory system, it must also be of significant benefit to builders themselves.
- 3.96** Like the Moss review, we consider that continuing professional development should be evidence based, relevant, accessible and easy for licensees to comply with.

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### **Recommendation 6**

That in reforming the continuing professional development scheme, the Office of Fair Trading ensure that the scheme is evidence based, relevant, accessible and easily complied with.

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## Chapter 4 Complaints resolution

This chapter considers the resolution of home building complaints. It begins by explaining the distinction between complaints resolution and disciplinary processes, the latter of which is discussed in the following chapter. It then describes the current complaints handling structures, before examining the evidence before the Committee on early dispute resolution, the Consumer, Trader and Tenancy Tribunal (CTTT) and the establishment of a home building advice and advocacy service.

### An important distinction

4.1 In its submission the Office of Fair Trading (OFT) made it clear that there is a distinction between complaints resolution and disciplinary processes. The statutory basis for the former is provided under Divisions 1 and 2 of Part 3A of the *Home Building Act 1989* (the Act). The consumer is the focus of the complaints resolution process, which is ‘designed to provide complainants with an effective and inexpensive way of resolving disputes with licensed contractors’.<sup>128</sup>

4.2 By contrast, the contractor or builder is the focus of disciplinary processes, which often commence after the completion of dispute resolution. The statutory basis for disciplinary processes is set out in Divisions 1 and 2 of Part 4 of the Act. According to the OFT:

The disciplinary process plays no part in the dispute resolution process and has no impact on the quantum of redress achieved by consumers. The consumer has no role in the disciplinary process. Disciplinary action is to maintain minimum standards in the residential construction industry and to modify the behaviour of contractors who fail to meet and maintain those standards.<sup>129</sup>

4.3 Inquiry participants’ views on disciplinary processes are dealt with in detail in the following chapter.

### Complaints handling processes

4.4 The Commissioner for Fair Trading, Ms Lyn Baker, advised the Committee that the complaints resolution system in New South Wales has three tiers, with a role for Fair Trading Centres, the Home Building Service and the CTTT.<sup>130</sup>

#### Fair Trading Centres

4.5 Complaints are usually lodged at a local Fair Trading Centre, where staff provide up-front intervention to help consumers and builders resolve the dispute. In certain circumstances the

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<sup>128</sup> Submission 16, Office of Fair Trading, p 40

<sup>129</sup> Submission 16, p 40

<sup>130</sup> Ms Baker, Evidence, 2 November 2007, p 3

dispute may be referred to the Home Building Service or the parties advised of other avenues of resolution, such as an application to the CTTT.<sup>131</sup>

### **Home Building Service**

**4.6** Once the Home Building Service receives a complaint it is assessed and allocated to one of three streams, depending on the nature of the matter and whether it has wider policy, legislative, disciplinary or operational implications. The three streams are:

- complaints to be inspected by a building inspector
- complaints to be dealt with by a compliance investigation
- complaints to be dealt with administratively.<sup>132</sup>

**4.7** If the dispute is referred to a building inspector, their role is to meet the consumer and builder on site, to inspect the items in dispute, and to assist the parties to reach a suitable outcome.<sup>133</sup> Where the parties are unable to agree on a resolution and defective or incomplete work exists, the building inspector may issue a rectification order requiring the contractor to carry out certain work and the consumer to provide access or meet other conditions. The order must be complied with by a given date.<sup>134</sup>

**4.8** Where the order is complied with and the consumer is satisfied with the outcome, the matter is finalised. If the order is not complied with or the consumer is unsatisfied with the decision they may lodge a building claim with the CTTT. Non-compliance by a trader with a rectification order may result in disciplinary action against them. The consumer or contractor may also lodge a building claim with the CTTT for money owed.<sup>135</sup>

### **Consumer Trader and Tenancy Tribunal**

**4.9** The CTTT is a specialist dispute resolution forum whose purpose is 'to resolve consumer, trader and tenancy disputes in an accessible, informal, efficient and inexpensive manner.'<sup>136</sup> Hearings are conducted by CTTT members who determine matters in accordance with the law.<sup>137</sup>

**4.10** The CTTT uses different types of hearings depending on the type of application. Most applications where the amount in dispute is less than \$25,000 are listed for a first hearing in a

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<sup>131</sup> <<http://www.fairtrading.nsw.gov.au/building/homeowners/whenthingsgowrong.html#Dispute%20resolution%20process>>, accessed 9 January 2007

<sup>132</sup> Submission 16, p 40

<sup>133</sup> Submission 16a, Office of Fair Trading, p 43

<sup>134</sup> Submission 16, p 43

<sup>135</sup> <<http://www.fairtrading.nsw.gov.au/corporate/publications/ftb25buildingdisputesandresolution.htm>>, accessed 9 January 2007

<sup>136</sup> <http://www.fairtrading.nsw.gov.au/cttt/corporate/aboutus.html>, accessed 15 November 2007

<sup>137</sup> <http://www.fairtrading.nsw.gov.au/cttt/corporate/aboutus.html>, accessed 15 November 2007

group list where a number of matters are listed together before a CTTT member. Where both parties appear, they are encouraged to resolve their dispute through negotiation. If the parties reach a settlement, the CTTT will make consent orders confirming that agreement. If there is no agreement the matter will either be heard on the day if time permits, or be listed for another day. 'Special fixtures' for formal hearings are used where attempts at settlement have failed. These may run from hours to several days. 'Directions hearings' are used in complex matters and according to the OFT submission are used extensively in large home building matters.<sup>138</sup>

**4.11** The Home Building Division of the CTTT deals with disputes between consumers, traders and insurers concerning residential building work up to the value of \$500,000. The OFT submission stated that legal representation is more common among home building disputes than any other CTTT division 'due to the large sums of money involved and the complex legal issues that often arise in these disputes.'<sup>139</sup>

**4.12** The CTTT can issue orders for the:

- payment of money
- supply of services
- relief from paying money
- delivery, return or replacement of goods
- reversal of an insurer's decision on an insurance claim
- payment of compensation for loss because of a breach of a statutory warranty (for example, work not done in a proper and workmanlike manner).<sup>140</sup>

**4.13** The CTTT cannot hear a building claim over \$500,000 and the following time limits exist for making claims:

- three years for claims for building services supplied or not supplied
- seven years for claims for breaches of a statutory warranty
- ten years for claims regarding insurance contracts.<sup>141</sup>

**4.14** If a person has suffered a loss caused by defective or incomplete work undertaken after 1 May 1997, which the contractor refuses to rectify or compensate, they may be able to make a claim on the private insurer named in the certificate of home warranty insurance.<sup>142</sup> Home warranty insurance is dealt with in detail in Chapter 6.

<sup>138</sup> Submission 16, p 45

<sup>139</sup> Submission 16, p 45

<sup>140</sup> <<http://www.fairtrading.nsw.gov.au/corporate/publications/ftb25buildingdisputesandresolution.html>>, accessed 9 January 2007

<sup>141</sup> <<http://www.fairtrading.nsw.gov.au/corporate/publications/ftb25buildingdisputesandresolution.html>>, accessed 9 January 2007

<sup>142</sup> <<http://www.fairtrading.nsw.gov.au/building/homeowners/whenthingsgowrong.html#Dispute%20resolution%20process>>, accessed 9 January 2007

- 4.15 Inquiry participants raised a number of criticisms in relation to home building complaints resolution. These focused on early dispute resolution and the CTTT.

### Early dispute resolution

- 4.16 Implicit in the three tier complaints resolution system outlined above is an emphasis on early dispute resolution. However, many of the cases raised with the Committee seemed to indicate that early dispute resolution processes are not working as effectively as they should.

#### Consumer concerns

- 4.17 In evidence, BARG members reported that home building complaints resolution processes are difficult for consumers to understand. They also attested to unnecessarily protracted processes which they said exacerbated consumers' hardship. Their allegations included that:

- consumers calling the OFT for advice about where to take their dispute have received unclear advice or have been referred prematurely to the CTTT
- Home Building Service inspectors do not always mediate and/or issue rectification orders when these options might be appropriate
- not all complaints made to the Home Building Service are investigated due to insufficient building inspectors and resources more generally.<sup>143</sup>

- 4.18 Ms Narelle Peters stated at the Committee's public forum:

The only resolution I received was, "Your complaint has been added to our database and, for anything else, go to the CTTT." Only after three months, and after letters copied to members of Parliament, was an inspector sent out to investigate my complaint. My builder lost his licence due to the work on my house, Fair Trading recovered some of its costs in prosecuting the builder, and I was left low and wet: the roof is caving, the floor is sagging, and the building leaks when it rains.<sup>144</sup>

- 4.19 An example of poor advice in relation to a dispute emerged during the Committee's public forum. Mr Glen Condie spoke of how his parents are the owners of a property adjoining a site that was recently developed. He reported that when building work was carried out on his parents' property without their consent, they sought advice from the OFT and were advised that as they did not have a contract with the building company concerned, neither the OFT nor the CTTT could assist them in resolving their dispute.<sup>145</sup> Mr Steve Griffin, General Manager of the Home Building Service, subsequently clarified to the Committee that the OFT dispute resolution process is available to people in this situation, also indicating that front-line OFT staff have now been reminded that this is the case.<sup>146</sup>

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<sup>143</sup> Mrs Irene Onorati, President, BARG, Evidence, 17 November 2006, p3

<sup>144</sup> Ms Peters, Public Forum, 2 November 2007, p 3

<sup>145</sup> Mr Condie, Public Forum, 2 November 2007, p 23

<sup>146</sup> Mr Griffin, Evidence, 2 November 2007, p 11

**4.20** Mr George Vardas, an accredited mediator and dispute resolution adviser with Champion Homes Sales Pty Ltd, suggested that the up-front intervention service provided by the OFT and the Home Building Service ‘is a fiction and ... is usually limited to a few phone calls to the builder which invariably fail to resolve anything’.<sup>147</sup> Mr Vardas provided a number of examples of case studies in which the matters were referred to the CTTT without significant effort by the OFT to resolve the case. One case study stated:

Client A accepts a tender for the construction of a project home and pays a tender fee expressed to be ‘non-refundable’. The builder proceeds to prepare plan and undertake site investigations. The client refuses to sign a building contract and seeks a refund of the tender fee. The “intervention” by the Office of Fair Trading consists of a phone call to the builder who unsuccessfully explains the amount of work undertaken by the builder. The client is advised to make a claim to the Consumer, Trade and Tenancy Tribunal. The matter is settled between parties at the first directions hearing at the Tribunal after conciliation by a Tribunal conciliator.<sup>148</sup>

**4.21** Mr Vardas contended that many disputes, some of a trivial nature, end up in the CTTT where resolution may be achieved via CTTT conciliators. He pointed out that by this stage ‘the relationship between consumer and trader has broken down irretrievably and additional expense may have been incurred in obtaining legal advice and preparing for the hearing.’<sup>149</sup> He proposed that greater focus should be placed on early on-site dispute resolution, with the Home Building Service staff resourced and trained accordingly.<sup>150</sup>

**4.22** Numerous participants highlighted the extra costs to consumers when a dispute escalates, which in turn can reduce the likelihood of a satisfactory outcome. The following case study on Mr Tran illustrates the legalistic and costly nature of the complaints resolution process.

***Case study: Mr Charlie (Minh) Tran\****

In April 2002, Charlie Tran engaged a builder to build a new home. Upon construction of the house Mr Tran found that it had not been built according to the council approved plan, Australian Standards or the Building Code of Australia, resulting in over \$400,000 worth of defects and omissions. Mr Tran refused to pay the builder until the house was completed according to the contract.

Upon advice from the Office of Fair Trading, Mr Tran took the matter to the CTTT. Mr Tran said: ‘[W]hat happened to us at the Consumer Trader and Tenancy Tribunal was a nightmare ... the member heard no evidence from me ... heard no evidence from my wife, did not sight the building contract made between the parties, and did not ask for any submissions from my wife. At the conclusion of the hearing I tried to make a submission but was stopped from doing so by the member.’

The CTTT ordered Mr Tran to pay the builder \$15,000 toward the final payment. On the basis that

<sup>147</sup> Submission 9, p 3; Mr Vardas, Public Forum, 2 November 2007, p 7

<sup>148</sup> Submission 9, p 3

<sup>149</sup> Submission 9, p 4

<sup>150</sup> Submission 9, p 5

he had been denied procedural fairness, Mr Tran applied three times for a rehearing but was refused on each occasion. He then successfully appealed to the Supreme Court, which ordered the builder to pay the cost of Mr Tran's appeal. Due to a legal technicality, however, Mr Tran still lost 30% of his costs.

Mr Tran has since requested that the Office of Fair Trading take disciplinary action against the builder, and has been advised that this may take months or even years. In the meantime, the builder has wound up his company and is operating a new company under his son's name.

Mr Tran described the last five and a half years as 'hell' for him and his family, reporting that they have all suffered 'substantial financial, emotional and physical traumas.' Mr Tran told the Committee that he suffered further anguish when his house was declared unsafe by his local council: 'I spent \$700,000 on my home plus the legal costs and now I have been forced out by my own city council because the house is too dangerous to live in. I am forced to live in a caravan.'

***Office of Fair Trading response\*\****

The OFT advised that Mr Tran entered into a contract with a builder in April 2002 to build a new home. A dispute arose between Mr Tran and the builder as to what was in the contract. Mr Tran refused to make the final payment and the matter was heard by the CTTT, where Mr Tran also alleged that the work was defective.

Mr Tran lodged a complaint with the OFT in August 2006. The OFT and the Government Architect's Office have inspected the property, and the OFT is currently determining whether there is cause to commence disciplinary action against the builder.

The OFT remains active in this matter.

\* Submission 34a; Evidence, Public Forum, 2 November 2007, p 18

\*\* Submission 16b, p 5

- 4.23** Mrs Irene Onorati, President of BARG, spoke of the costly process that many consumers go through in obtaining independent building reports to document defective work, only to find that they are not necessarily taken seriously by the Home Building Service. She suggested that when consumers contact the Home Building Service they may be asked to substantiate the alleged building defects:

So the consumer starts to get reports from building experts. When the reports are submitted to the Home Building Service, they criticize the consultant or engineer. They say, "Your consultant is biased, he is not independent." ... The end result is after the consumers have spent \$10,000, \$20,000 and even \$30,000 in cases on expert reports, the Home Building Service inspector appointed to go and inspect the defects, comes up with his own report, often minimizing the defective work and in some cases, completely absolving the builder and determining there is no evidence of defective work.<sup>151</sup>

<sup>151</sup> Mrs Onorati, Evidence, 17 November 2006, p 4

- 4.24 Mrs Onorati also questioned whether all Home Building Service inspectors are properly qualified for their role in examining the broad range of technical defects they are required to assess.<sup>152</sup> Another BARG Member, Mr Sal Russo, further suggested that while many building inspectors have done a great deal to assist consumers, others do not appear to enforce compliance with the *Home Building Act* as strictly as they might.<sup>153</sup>

### **Building industry perspectives**

- 4.25 Representatives of the building industry indicated that the early dispute resolution processes could be strengthened. Mr Graham Wolfe, Executive Director of the Housing Industry Association, agreed that the OFT could be better resourced and that its inspectors could have greater competencies in the building industry.<sup>154</sup>

- 4.26 Both the Master Builders Association of NSW and the Housing Industry Association noted that only consumers can currently initiate action through the Home Building Service, while builders must go straight to the CTIT.<sup>155</sup> The Housing Industry Association stated:

HIA understands, that currently, the HBS's on-site inspection service is only able to be invoked by the consumer. This creates a perception of bias and removes the option for the licence holder to utilise dispute resolution. At this time the licence holder's legal recourse is through the courts or the CTIT. HIA recommends that the HBS's on-site inspection service be available to all parties to the dispute. In addition, the licence holder must have an express right to attend the inspection, otherwise the inspection should be invalid.<sup>156</sup>

- 4.27 The Master Builders Association also noted this perception of bias and suggested that the ability to resolve disputes early to the satisfaction of both parties would be much improved if builders were given the option to initiate dispute resolution through the Home Building Service.<sup>157</sup> In its submission, the Housing Industry Association also argued that 'consumers should be required to formally communicate with the builder/contractor as a first step in the dispute resolution process rather than going directly to the CTIT.'<sup>158</sup>

### **Office of Fair Trading response**

- 4.28 In response to the stories of many inquiry participants about poor experiences of the complaints resolution process, OFT representatives acknowledged that the processes in place at the time had led to less than optimal outcomes. However they also emphasised that the dispute resolution system had changed significantly since that time. Mr Griffin explained:

<sup>152</sup> Mrs Onorati, Evidence, 17 November 2006, p 4

<sup>153</sup> Mr Sal Russo, Honorary Solicitor, BARG, Evidence, 17 November 2006, p 7

<sup>154</sup> Mr Wolfe, Evidence, 17 November 2006, p 29

<sup>155</sup> Submission 15, Housing Industry Association, p 12; Submission 14, Master Builders Association of NSW, p 18

<sup>156</sup> Submission 15, p 12

<sup>157</sup> Submission 14, p 18

<sup>158</sup> Submission 15, p 12

Firstly, many cases brought forward to this Committee predate the establishment of the Home Building Service. I think that needs to be acknowledged. But the regime has changed markedly since 2003. We now have an extremely effective dispute resolution service, which has a success rate of 89 per cent ... so it is a completely different model that we are looking at.<sup>159</sup>

**4.29** Mr Griffin further stated:

The single point I wish to bring to the attention of the Committee is my experience being General Manager of the Home Building Service in many of these matters is that unfortunately some consumers get bad advice, and that is a particular problem. When they have a dispute with a builder they get advice, be it from a friend, be it from a lawyer, be it from a building consultant or someone else. This sends them down the path of protracted disputes and often litigation. We have heard the stories recounted to you here today, of cases that have ended up in protracted litigation and financial loss. We saw the emotion today; that really does affect them. That is why it is so important that consumers come to Fair Trading first. As I said earlier, these things do not help those people who predate Fair Trading and the dispute resolution service, but it is important they come to us first and come through the dispute resolution process and hopefully we can resolve the matter without going through a protracted dispute with the builder.<sup>160</sup>

**4.30** Emphasising that he did not wish to detract from the difficulties faced by forum participants, he nevertheless stressed that they need to be placed in a broader context:

I am not advocating on behalf of the industry but I am going to reel out some statistics for you. There are 45,000 new homes built in New South Wales every year. There are over 150,000 registered renovations done on homes every year. Today, in essence, we end up getting around 5,000 complaints of which only 100 or 200 are of any substantial matter involving, perhaps, structural elements of a home. So, I am saying to you it is quite apparent that for the vast majority of the citizens of New South Wales the system is working to some degree. Having said that, it is acknowledged that further reform to our system is required, and dispute resolution.<sup>161</sup>

**4.31** Mr Griffin then pointed out that as a result of his experience as Chair of Building Australasia for the past two years, his detailed knowledge of the dispute resolution processes in other states and territories has led him to conclude that New South Wales now has the best dispute resolution regime of all jurisdictions. He stated:

We do have the best. I am not saying it is not without its faults and can be further refined but it is the best, and Tasmania and Victoria visited us recently and they will be implementing the same dispute resolution regime in those States.<sup>162</sup>

**4.32** When the Committee noted that a number of the statements made at the forum seemed to suggest that people are still not being adequately supported to resolve their disputes quickly, Mr Griffin responded:

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<sup>159</sup> Mr Griffin, Evidence, 2 November 2007, p 3

<sup>160</sup> Mr Griffin, Evidence, 2 November 2007, p 3

<sup>161</sup> Mr Griffin, Evidence, 2 November 2007, p 3

<sup>162</sup> Mr Griffin, Evidence, 2 November 2007, p 3



I dispute that. As I said, if people come into Fair Trading we have guarantees of service for us, and I am not speaking on behalf of the Tribunal, but I am sure it also has guarantees of service. We have guarantees of service that we will deal with a dispute within 30 days at a Fair Trading Centre. Our inspectors have a guarantee of service of conducting an on-site field inspection within 20 days of receiving a complaint, and a guarantee of service of finalising the complaint within 40 days. So, we have a guarantee of service and performance monitoring in place to make sure that once consumers come in and engage themselves in the dispute resolution process that we deal with it as quickly as humanly possible to achieve those outcomes.<sup>163</sup>

**4.33** When asked about whether the OFT was taking action in relation to the protracted cases presented to the Committee, Mr Rod Stowe, the Deputy Commissioner for Fair Trading, indicated that in some cases, ex-gratia payment offers had been made to the people affected but had not been taken up. He also explained that the power of the OFT to resolve those cases currently the subject of CTTT and court action was limited.<sup>164</sup>

**4.34** Following the hearing in which this discussion took place, the OFT forwarded to the Committee a supplementary submission responding to each of the consumers who participated in this inquiry, either by giving evidence at a hearing, by speaking at the public forum or by lodging a submission. This document detailed the OFT's action in relation to each case, and indicated whether that action has been completed or is continuing.<sup>165</sup> This information has been incorporated into the case studies presented in this report, and is available for viewing on the Committee's website at [www.parliament.nsw.gov.au/gpsc2](http://www.parliament.nsw.gov.au/gpsc2).

**4.35** The Commissioner for Fair Trading, Ms Lyn Baker, also emphasised the effectiveness of the dispute resolution system, stating:

The dispute resolution system has been very successful since its introduction in 2003 and the results are that almost 80 per cent of all complaints received are resolved through the Fair Trading dispute resolution process at no cost to either party, meaning that consumers and traders have disputes dealt with amicably and in a timely fashion, and they do not have to go through a court process.<sup>166</sup>

**4.36** The OFT's submission, along with answers to questions on notice from November 2007, provided data on home building complaints resolution, as set out in Figure 5.1 on the following page and Table 5.2 on the subsequent page.

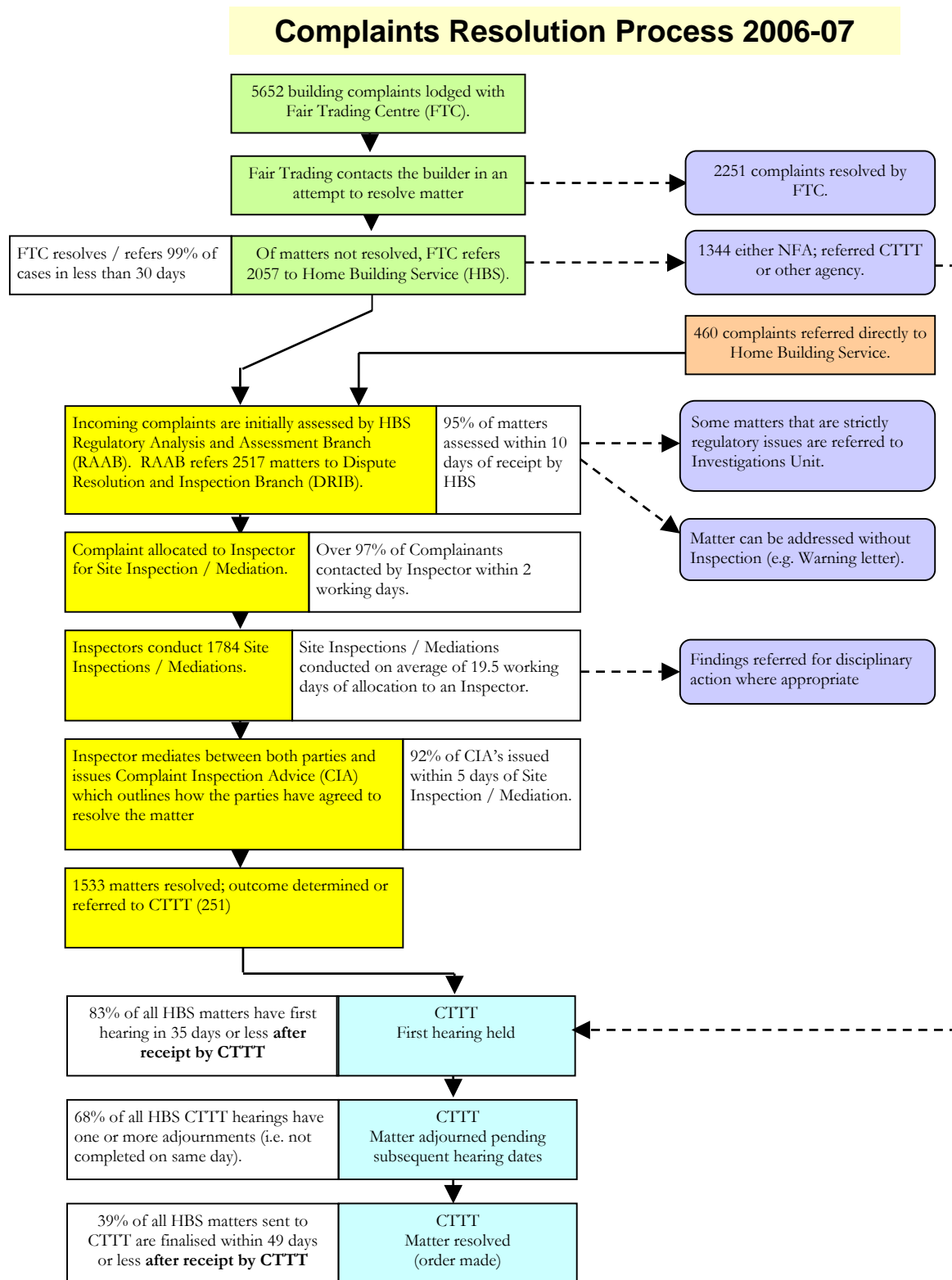
<sup>163</sup> Mr Griffin, Evidence, 2 November 2007, p 4

<sup>164</sup> Mr Stowe, Evidence, 2 November 2007, p 4

<sup>165</sup> Submission 16b, Office of Fair Trading, pp 2-9

<sup>166</sup> Ms Baker, Evidence, 2 November 2007, p 1

**Figure 4.1 Office of Fair Trading complaints resolution process 2006-2007, showing volume of complaints and performance in relation to them**<sup>167</sup>



<sup>167</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 9

**Table 4.2 Resolution of complaints in the first three years of the Home Building Service's operations, in 2005-2006 and 2006-2007<sup>168</sup>**

	Results in three years of HBS operation	2005-2006	2006-2007
No. of complaints referred to HBS for action	7,178	2,349	2,517
No. of site inspections conducted	6,428	1,800	1,784
No. of matters resolved	5,392	1,609	1,533
No. of rectification orders issued	827	221	Not provided
No. of matters referred to CTTT	684	247	251
No. of matters referred for breach investigation	1,289	134	Not provided
<b>% of matters resolved by site inspection</b>	<b>83.8% average</b>	<b>89%</b>	<b>86%</b>

**4.37** When asked during the November 2007 hearing about builders' inability to initiate early dispute resolution through the Home Building Service, Mr Griffin acknowledged that this works to the disadvantage of both builders and consumers. He advised the Committee:

[W]e are looking at widening the dispute resolution service because we know that at present if final payment is withheld a builder has got no other alternative but to head off to the Tribunal. Simultaneously, the consumer comes to us for assistance and because the trader has lodged an application in the Tribunal that stops us from doing the dispute resolution process. So that is something we are looking at to try and see if we can bring the parties together and keep them out of the need to go straight to the Tribunal. We may get to that point early in the new year. Certainly we are looking at it and the feasibility of doing that.<sup>169</sup>

**4.38** In relation to the role of inspectors, Ms Baker pointed to the difference an inspectorate had made to the handling of disputes:

A very important thing that has also happened in the three years since the establishment of the [Home Building] Service is the ... 26-strong home building inspectorate. One of the most often asked about issues in earlier reviews such as Campbell was that both builders and consumers wanted on-site inspections to be able to look at the work and say, "Yes, builder, it is defective" or "No, consumer, it is not defective", and to make rectification orders. That is what we have done. That inspectorate is doing a fine job. They have resolved more than 5,000 disputes.<sup>170</sup>

**4.39** In relation to building inspectors' expertise and qualifications, the OFT advised that inspectors are typically building, construction, or trade specialists who have qualifications and/or experience in the building industry and are experts in building and construction techniques, the Building Code of Australia and the relevant Australian Standards. The basic qualification for a building inspector is that they need to be eligible for a builders licence.<sup>171</sup>

<sup>168</sup> Submission 16, p 42; Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 9

<sup>169</sup> Mr Griffin, Evidence, 2 November 2007, p 11

<sup>170</sup> Ms Baker, Evidence, 20 November 2006, p 14

<sup>171</sup> Submission 16, p 44

- 4.40** In addition the OFT stated that all inspectors undertake a training program during the course of their employment and:

Currently the Inspectorate's staff have qualifications and experience in architecture, project management, building, construction, engineering, electrical contracting, waterproofing and plumbing and related services. All staff are trained in mediation via the LEADR Alternative Dispute Resolution program and some are also accredited.<sup>172</sup>

- 4.41** In its supplementary submission the OFT further indicated that Home Building Service inspectors also receive continuing training to ensure that they are up to date with the latest building technology, practices and codes.<sup>173</sup>

- 4.42** Finally, Mr Griffin advised that there are checks and balances in place to ensure the quality of building inspectors' reports:

We have a system of checking by senior inspectors of an inspector's inspection report to make sure that they have not shortcut or under-defined some defects or incomplete work for the home. We have a system of review: if the consumer remains unsatisfied we will review an inspection report and perhaps send out, if circumstances require, a more senior inspector. We even have offered on several occasions, if the inspector's report is so divergent from a consultant's report the consumer has obtained, to get an independent report from the Government Architect's office—a senior engineer from a senior government agency to come in to give an independent report so that at the end of the day we can rest assured that we have the defects properly tabled and recorded.<sup>174</sup>

### **The Committee's view**

- 4.43** The Committee acknowledges the significant reforms to the home building complaints resolution system achieved through the establishment of the Home Building Service and its inspectorate. We also acknowledge that a number of the cases presented to us by consumers involved building disputes that predated these reforms. We accept the OFT's assertion that the use of performance standards in relation to the handling of disputes is helping to optimise early dispute resolution.

- 4.44** However, we remain very concerned by the stories of inquiry participants and alarmed by the impact that costly and prolonged disputes have had on numerous individuals and families. The Committee noted evidence that inspectors had limited authority in terms of what they could inspect. This sometimes resulted in incomplete or inadequate assessments and substantial problems being overlooked. On this basis the Committee considers that early dispute resolution processes should be improved in a number of ways.

- 4.45** In light of the evidence about consumers lacking an understanding of dispute resolution processes, and of OFT staff providing wrong information to consumers, we consider that further effort should be devoted to both community and staff education, noting that this issue is further considered in relation to the home building advocacy service at the end of this

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<sup>172</sup> Submission 16, p 44

<sup>173</sup> Submission 16a, p 9

<sup>174</sup> Mr Griffin, Evidence, 2 November 2007, p 9

chapter. We note the comments of both consumer and industry representatives that the Home Building Service should be better resourced and that some inspectors should have greater competencies in the industry. The former issue is taken up in the final chapter of this report. We also consider that builders should be able to initiate the Home Building Service's early dispute resolution process, in order to provide further opportunity for people to satisfactorily resolve their dispute as early as possible.

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#### **Recommendation 7**

That the Office of Fair Trading develop and implement a strategy for further improving education for community members about early dispute resolution processes.

#### **Recommendation 8**

That the Office of Fair Trading improve early dispute resolution by ensuring the highest performance standards in this area, both among Fair Trading Centre and Home Building Service staff, including in relation to the provision of information to the public.

#### **Recommendation 9**

That the Home Building Service work to further increase the industry competencies of its building inspectors to ensure that they are better able to investigate and resolve complex building disputes.

#### **Recommendation 10**

That the Office of Fair Trading enable builders to initiate early dispute resolution through the Home Building Service.

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### **Building certification**

**4.46** A number of forum participants raised a range of serious concerns relating to building certification.<sup>175</sup> The Committee notes that improving oversight of the building certification system is one of the recommendations put forward in the November 2007 discussion paper on reforms to the NSW planning system. The Committee urges the Minister for Planning to take note of these consumer concerns.

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#### **Recommendation 11**

That the Minister for Planning take note of consumer concerns in respect of building certification.

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<sup>175</sup> Mrs Diane Condie, Public Forum, 2 November 2007, p 6; Ms Diana Cornwell, Public Forum, 2 November 2007, p 6; Mr Colin Sharp, Public Forum, 2 November 2007, pp 13-14; Mr Con Papanastasiou, Public Forum, 2 November 2007, p 19

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## Consumer, Trader and Tenancy Tribunal

### Consumer and industry concerns

- 4.47** The CTTT was the focus of much dissatisfaction during the inquiry, both in hearings and in submissions. Underscoring many consumer participants' evidence was the sense that they lacked an understanding of home building complaints handling processes, and that they found them alienating and confusing. This was especially the case in relation to the CTTT, but also the Office of Fair Trading.
- 4.48** As noted earlier, BARG members highlighted the protracted timeframes of some disputes considered by the CTTT, as well as the significant costs that can accompany the CTTT process such as legal and building inspection fees. Mrs Onorati stated:
- BARG members' case studies will demonstrate that the Tribunal is taking years to resolve and costing tens of thousands of dollars. This is hardly a determination which is expeditious and inexpensive. Today BARG members' case studies raise great concern not only for the legalistic functioning but for protracted delay. It takes in many cases over two years to resolve matters. The cost is prohibitive and unaffordable.<sup>176</sup>
- 4.49** Consumers have the ability to appeal CTTT decisions, but Mrs Onorati suggested that they are often 'too exhausted and financially destroyed' to do so. She concluded that the Government's endeavours to address inefficiencies, incompetence and delays in the CTTT process have not been realised.<sup>177</sup>
- 4.50** Numerous participants in the public forum including Ms Narelle Peters, Mr Chris Fitzgerald, Mr Con Papanastasiou, Mr Colin Sharp, Mr Robert Siebert and Mr Charlie Tran all recounted stories of major financial costs and/or protracted timeframes associated with the CTTT's handling of their disputes.<sup>178</sup> Mr Papanastasiou alleged that his dispute has gone on for seven years, at the end of which his builder, who had operated without a licence, was fined \$3,000.<sup>179</sup> These participants also highlighted the devastating impact of such disputes on their lives and those of their families. Case studies of Mr Siebert and Mrs Helen Stanojevic are set out below.
- 4.51** Like Mr Papanastasiou, a number of forum participants indicated their dissatisfaction with the CTTT's determination. Mr Siebert's case highlights the circular requirements of the complaints handling process that can leave consumers with no real resolution to their dispute.

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<sup>176</sup> Mrs Onorati, Evidence, 17 November 2006, p 3

<sup>177</sup> Mrs Onorati, Evidence, 17 November 2006, pp 3-4

<sup>178</sup> Ms Peters, Public Forum, 2 November 2007, p 3; Mr Fitzgerald, Public Forum, 2 November 2007, p 4; Mr Papanastasiou, Public Forum, 2 November 2007, p 19; Mr Sharp, Public Forum, 2 November 2007, p 13; Mr Siebert, Public Forum, 2 November 2007, p 8; Mr Tran, Public Forum, 2 November 2007, p 18

<sup>179</sup> Mr Con Papanastasiou, Public Forum, 2 November 2007, p19

***Case study: Mr Robert Siebert\****

The original completion date for Robert Siebert's home was May 2003. Mr Siebert had concerns about the standard of the initial work and sought a building inspection from the OFT, which found that the work was defective and that remedial works were required. The builder did not carry these out and Mr Siebert decided to take the matter to the CTTT.

The CTTT found that the work was adequate and as a result, Mr Siebert had limited opportunity to claim against his building insurance. In its ruling, the CTTT dismissed the evidence from the OFT, relying instead on the evidence from a building inspector engaged by the builder. The builder was ordered to pay Mr Siebert limited damages of approximately \$43,000. However, according to Mr Siebert the cost of rectification works to get the house certified for occupation is estimated to be between \$175,000 and \$200,000.

Mr Siebert advised the Committee that he has since submitted an insurance claim against the builder, which is yet to be determined. He has experienced lengthy delays in dealing with his insurance company. The builder has yet to pay the damages awarded. The company with which the original building contract was held has been liquidated, and the builder has since set up a new company.

Even though the CTTT ruled that the work was adequate, Mr Siebert has not been able to get an occupancy certificate. As a result he estimates that he has spent over \$55,000 on rental accommodation, whilst still paying the mortgage on the house he cannot live in. Mr Siebert has also spent approximately \$65,000 in legal costs and costs to liquidate the builder, telling the Committee that he is now 'in a situation where I may have to sell the house at a loss resulting in having a mortgage and no house even if I am paid the maximum amount payable under the insurance policy.'

Mr Siebert believes that the effectiveness of the Home Building Service in dealing with licensing or disciplinary matters and resolving complaints was 'lost due to the low level of competence of the CTTT.'

***Office of Fair Trading response\*\****

The OFT advised that Mr Siebert lodged a complaint with the OFT in August 2003 and a building inspector undertook an inspection in October that year. Mr Siebert also obtained independent building reports. Due to the seriousness of the defects he decided to apply to have the matter heard before the CTTT.

The matter was heard in August 2005 and the CTTT ordered the builder to pay Mr Siebert \$77,753. The builder did not comply with the order and the company is now liquidated. Mr Siebert made a claim on his home warranty insurance, however the insurance company only agreed to pay the amount awarded by the CTTT.

Disciplinary action has also been taken against the director of the building company, who was ordered to pay a \$10,500 fine. This was reduced on appeal to \$5,000.

The OFT recently met with Mr Siebert and will investigate further issues regarding allegations of fraudulent and misleading evidence presented to the CTTT by the builder. OFT officers have also met with Mr Siebert to discuss what he believes is an inadequate payout.

The OFT remains active in this matter.

\* Submission 1c; Evidence, Public Forum, 2 November 2007, p 3

\*\* Submission 16c, p 3

***Case study: Mrs Helen Stanojevic\****

Mrs Helen Stanojevic made the final payment to the licensed builder of her family home in July 2003. Mrs Stanojevic was unaware that the builder had not obtained an interim or final occupation certificate, telling the Committee: 'I was shocked. I have since discovered that the inspection had failed and there was no interim or final occupation certificate and that the builder was aware of this before they took our final payment.'

After settlement the Stanojevics moved into the house and discovered multiple defects. Water leaked into the house whenever it rained which soon caused one of the ceilings to collapse. There were holes between the eaves and the roof 'so big that normal size birds can enter freely.' As a result of birds entering through those holes and building nests, Mrs Stanojevic's children contracted bird lice. The builder still has not rectified these defects under the three-month maintenance warranty.

After Mrs Stanojevic submitted a complaint to the Office of Fair Trading, an OFT inspector found approximately 29 defects. He advised Mrs Stanojevic to take the matter to the CTTT, which she did in February 2006. The application is still ongoing, much to Mrs Stanojevic's dismay: 'We have been in the Tribunal for almost two years. I was told that the legislation of the CTTT is inexpensive, expeditious, and informal. Quite frankly it is nothing like that, and I am a living example.'

After 15 months in the CTTT, the builder offered Mrs Stanojevic a settlement, which included an offer of \$7,500 towards legal fees. Mrs Stanojevic's legal fees were close to \$30,000. The matter has not been resolved, and the Stanojevics have been 'continuing to pour out our life savings to get reports, get legal advice, and attend CTTT directional hearings.'

Mrs Stanojevic told the Committee: 'I had no idea that a brand new home could cause and continue to cause so much physical, emotional and financial pain to my family ... our anticipated Australian dream of building our home has turned into a nightmare.'

***Office of Fair Trading response\*\****

The OFT advised that the Stanojevics lodged a complaint with the OFT in October 2003 regarding defective work. The Home Building Service contacted the Stanojevics and attempted to mediate the dispute, but was unable to negotiate an outcome.

The OFT advised the Stanojevics to apply to the CTTT to resolve their dispute. Their matter has been listed for a directions hearing in February 2008.

The OFT has completed action in this matter.

\* Submission 40

\*\* Submission 16b, p 5



- 4.52** Housing industry representatives also voiced criticisms of the CTTT. Mr Graham Wolfe, Executive Director of the Housing Industry Association of NSW noted his concerns about CTTT timeframes, as well as a lack of appropriate expertise among CTTT members.<sup>180</sup> Similarly, Mr James Willis, NSW Manager of the Builders Collective of Australia stated:

At the moment the level of consumer protection that we have in New South Wales is simply that if you have a dispute, if you cannot resolve it, it goes to the CTTT. Again, there are issues as to whether the members are suitably qualified to judge these matters, not being building professionals. Then, if the outcome is not suitable, we offer them the chance to go to court and basically litigate each other out of existence.<sup>181</sup>

- 4.53** In its submission, the Master Builders Association of NSW was also critical of the fact that where complaints proceed to the CTTT, Tribunal members have the discretion as to whether they will consider reports already prepared by a Home Building Service inspector. The submission stated:

This ability to disregard the HBS inspector's report, whom it has to be assumed has suitable technical skills and experience to appraise the matters at issue, an accepted level of independence and has actually visited the site, is seen as a significant flaw in the process and a waste of resources.<sup>182</sup>

- 4.54** Finally, the Housing Industry Association questioned the expertise of some CTTT members to resolve building complaints effectively:

The majority of Home Building Division members of the CTTT must be legally qualified and have sufficient industry knowledge. Remaining members must hold a builders' licence, have practical experience and have completed an accredited course in basic contract law.<sup>183</sup>

- 4.55** The Committee sought information from the OFT on requirements in relation to CTTT members' knowledge and expertise. The OFT indicated that:

Most Tribunal members have legal qualifications or other specialist qualifications and skills to assist parties in the resolution of a wide range of disputes the Tribunal deals with. Members require a high level of expertise to conduct proceedings according to law and principles of procedural fairness. Recognised mediation and alternative dispute resolution skills, together with proven ability to make determinations quickly and fairly are vital.<sup>184</sup>

- 4.56** The OFT also advised that CTTT members are required to execute their duties in accordance with a code of conduct, and are subject to performance assessment processes.<sup>185</sup>

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<sup>180</sup> Mr Wolfe, Evidence, 17 November 2006, p 33

<sup>181</sup> Mr Willis, Evidence, 20 November 2006, p 35

<sup>182</sup> Submission 14, p 19

<sup>183</sup> Submission 15, p 13

<sup>184</sup> Answers to written questions on notice, 7 November 2007, Office of Fair Trading, p 5

<sup>185</sup> Answers to written questions on notice, 7 November 2007, Office of Fair Trading, p 5

4.57 The Committee sought information on whether the CTTT keeps data on the time taken for matters to be resolved. The OFT indicated on behalf of the CTTT that the CTTT aims to resolve disputes as quickly as possible, and that in 2005-2006 70% of disputes were finalised within 35 days of lodgement. In addition:

In home building matters, where the claim is less than \$25,000, 51% of matters were finalised in under 50 days and 68% of matters were finalised at the first hearing.

In 2005/2006, the home building division clearance ratio was 106%. The clearance ratio relates to incoming volume with the Tribunal's capacity to finalise its cases. This indicates no backlog of home building matters.<sup>186</sup>

### *Operations review of the CTTT*

4.58 The Committee is aware that there have recently been two formal reviews of the CTTT. A statutory review was completed in March 2006, and an operations review was finalised in December 2006.

4.59 While the statutory review focused on the legislation underpinning the CTTT, the operations review focused on CTTT procedures and administration and its ability to meet its objective to resolve disputes in an accessible, informal, efficient and inexpensive manner. The review made a total of 67 recommendations and identified the need for:

a strategic focus and framework ... to provide the basis for the Tribunal to move to a new integrated performance-based culture, with a focus on client service and the achievement of quality outcomes consistent with the objectives of the legislation.<sup>187</sup>

4.60 The review report canvassed a broad range of issues and noted that recommendations of 'particular significance' were made in respect of matters including:

- improvements in the provision of information to parties to assist them in preparing for CTTT hearings and to minimise the number of adjournments
- new arrangements to improve CTTT complaints handling processes and to align them to best practice standards
- improvements in the arrangements for performance management of members
- the introduction of improved data collection and monitoring and reporting regimes to enhance the CTTT's capacity to monitor and evaluate its performance
- the development of a comprehensive strategic plan and an information and communications strategy.<sup>188</sup>

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<sup>186</sup> Answers to questions on notice taken during evidence, 2 November 2007, Office of Fair Trading, p 4

<sup>187</sup> Jan McClelland and Associates, *Operations Review of the Consumer, Trader and Tenancy Tribunal (CTTT): Report to the Minister for Fair Trading*, December 2006, (hereafter *Operations Review of the CTTT*), p 3; <<http://www.fairtrading.nsw.gov.au/corporate/aboutus/2007/20070713ctttreview.html>> (accessed 16 November 2007)

<sup>188</sup> *Operations Review of the CTTT*, 2007, p 4

4.61 A media release from the Minister for Fair Trading, The Hon Linda Burney MP, dated July 2007 indicated that at that time the CTTT had commenced implementing three quarters of the recommendations, with some completed and a number undergoing further consideration or consultation. Work was underway in response to recommendations aimed at:

- increasing the quality of the CTTT's educational materials and community awareness programs
- improving member performance.<sup>189</sup>

### ***Ipsos Ten Top Tips Research Report***

4.62 The Committee is also aware of qualitative research undertaken by the Ipsos consultancy on ways that the CTTT might 'gain a better level of engagement with its clients'.<sup>190</sup> The study utilised focus groups with CTTT clients as well as peak bodies and industry groups. Following a request by the Committee, the OFT released the report to us.<sup>191</sup>

4.63 Key findings of the report included that:

- Understanding of the role and function of the CTTT was generally poor among first time applicants as well as respondents.
- The information provided to help clients prepare for a hearing was considered inadequate, especially for those using the CTTT for the first time. For example, information about the type of documents they needed to support their case was too vague and too general.
- Applicants and respondents lacked a clear understanding of what to expect on the day. They were apprehensive and felt intimidated when they arrived.
- Clients of the Home Building Division were frustrated that they did not find out until the day concerned whether their application would be heard or adjourned.
- Uncertainty and lack of confidence with CTTT processes was felt to place clients at a significant disadvantage. Several clients felt that CTTT outcomes were driven more by participants' level of comfort and experience than the actual merits of their case.
- Some clients reported that the member handling their case did not spend enough time reviewing their supporting materials and lacked the expertise to handle more complex cases, particularly in the Home Building Division.
- Whilst most clients said that they understood the order(s) that were made at the hearing, information about how and by when the order needed to be carried out was less clear.<sup>192</sup>

<sup>189</sup> <<http://www.fairtrading.nsw.gov.au/corporate/aboutus/2007/20070713ctttreview.html>> (accessed 16 November 2007)

<sup>190</sup> Ipsos, *Consumer, Trader and Tenancy Tribunal: Ten Top Tips Research – Final Report*, June 2007, p 2

<sup>191</sup> The report is available on the Committee's website at [www.parliament.nsw.gov.au/gpsc2](http://www.parliament.nsw.gov.au/gpsc2)

<sup>192</sup> Ipsos, *Consumer, Trader and Tenancy Tribunal: Ten Top Tips Research – Final Report*, June 2007, pp 2-4

**The Committee's view**

- 4.64** Without having taken evidence from representatives of the CTTT, the Committee is not able to document their perspectives on the evidence put forward during this inquiry, nor the action they are taking in light of the Operations Review and Ipsos research report.
- 4.65** Nevertheless, the Committee was very concerned by the evidence put forward by consumer participants and building industry representatives about the costs and protracted timeframes associated with dispute resolution through the CTTT, as well as their questions about the expertise of CTTT members to resolve matters satisfactorily.
- 4.66** Our concerns were strengthened by the findings of the CTTT operations review report, and particularly the Ipsos research report which echoes many of the issues raised by inquiry participants. Both the evidence before the inquiry, as well as these reports, indicate that the CTTT is not fulfilling its objective to resolve disputes 'in an accessible, informal, efficient and inexpensive manner.'<sup>193</sup>
- 4.67** The Committee acknowledges that the CTTT is taking action in relation to various review recommendations, including educating the community about the CTTT's role and managing the performance of CTTT members. However, on the basis of the issues raised by inquiry participants in relation to the CTTT, we consider that the OFT should initiate discussions with the CTTT about its effectiveness. There is a critical need for substantial and timely action to improve the operations of the CTTT and thereby deliver better outcomes for parties involved in building disputes.
- 4.68** Further, the need to achieve change in this area is so strong that the Committee will consider establishing an inquiry specifically focusing on the CTTT.
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**Recommendation 12**

That the Office of Fair Trading initiate discussions with the Consumer, Trader and Tenancy Tribunal (CTTT) about the need for substantial and timely action to fully implement the recommendations of its 2006 Operations Review and the Ipsos Top Ten Tips Research Report and thereby ensure that the CTTT meets its objective of resolving disputes in an accessible, informal, efficient and inexpensive manner.

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**Home Building Advocacy Service**

- 4.69** As noted above in relation to early dispute resolution and the CTTT, the evidence before the inquiry is that consumers find these processes confusing, alienating and disempowering.
- 4.70** The need for an independent body to provide one-stop advice and advocacy to consumers about home building disputes was recognised by the Joint Select Committee on the Quality of Buildings chaired by Mr David Campbell MP in 2002. In response the NSW Government

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<sup>193</sup> <<http://www.fairtrading.nsw.gov.au/cttt/corporate/aboutus.html>>, accessed 15 November 2007

announced that a pilot service would be trialled in a discrete geographical location to assess the likely patronage of such a service.<sup>194</sup>

**4.71** Following the launch of a commercial organisation with a similar brief, the proposed pilot service was reconsidered:

so that it is focussed on advocacy for home building consumers, a function which cannot be provided by the Office of Fair Trading because of its need to maintain an impartial stance when dealing with consumer/trader disputes.<sup>195</sup>

**4.72** In their submissions to the inquiry, both the Housing Industry Association and the Law Society noted their support for an independent advocacy service for consumers.<sup>196</sup>

**4.73** In its submission the OFT advised the Committee that the Macquarie Legal Centre received \$100,000 for a 12 month pilot program that commenced services on 1 January 2007 (including a 3 month establishment period from October 2006). While priority is given to clients within the catchment area, people from other areas are assisted where workload permits.<sup>197</sup>

**4.74** This service, known as the Home Building Advocacy Service or HOBAS, assists consumers by:

- providing advice and assistance in gathering evidence for a CTTT hearing
- providing advice on what legal arguments support a consumer's side of a building dispute
- assisting with representation at the CTTT
- providing professional legal support.<sup>198</sup>

**4.75** The OFT advised the Committee that a review of the pilot was to be undertaken in October 2007 to identify:

- the level of demand for the service
- consumer perceptions of the effectiveness of Macquarie Legal Centre in providing the service
- OFT and CTTT perceptions of the effectiveness of Macquarie Legal Centre in providing the service
- the costs of operating the service and how these costs could be off-set by a regime of fees for some services
- feasibility of the service being self funded through the application of fees for specific services.<sup>199</sup>

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<sup>194</sup> Submission 16, p 56

<sup>195</sup> Submission 16, p 58

<sup>196</sup> Submission 15, p 15; Submission 20, p 5

<sup>197</sup> Submission 16, pp 58-60

<sup>198</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 19

- 4.76** In November 2007 the Committee sought an update on the status of the pilot and its review. The OFT indicated that a report on the operations of the pilot over the period January to September 2007 was provided by the Macquarie Legal Centre in October, and that this report was expected to be reviewed by the OFT's grants assessment committee in November, with the Government determining the service's future after that. As an interim measure, funding was provided to enable the service to continue to operate pending finalisation of the review.<sup>200</sup>
- 4.77** At the hearing in November 2007, Mr Rod Stowe, Deputy Commissioner for Fair Trading, advised that the pilot had delivered pleasing results to date, with its advocacy role recognised as especially valuable:

It is being run by a professional organisation that has a track record of good outcomes when it comes to providing legal advice and assistance to consumers. Importantly, it works with the Office of Fair Trading. So, we see it as a complementary service that works with us, but independently. One of the things that has been interesting in talking to the case managers is that they have found they have been able to negotiate with the legal representatives of builders and get results without having their clients going into the court ... By the same token, HOBAS has also been able to do something that Fair Trading cannot do, and that is act as an advocate for people in the Tribunal and in courts.<sup>201</sup>

- 4.78** In August 2007 BARG noted its support for HOBAS but advised that it:

Has limited powers to meet current advisory needs. In particular, the Centre is only available to consumers from one geographical area; it is means tested and cannot represent consumers who have complex matters and/or in matters where the builder has initiated legal proceedings.<sup>202</sup>

### **The Committee's view**

- 4.79** On the basis of the evidence before this inquiry, the Committee believes that there is a strong need for an independent body to provide advice and advocacy to consumers in respect of home building disputes. We consider that better access to professional advice and assistance will help to prevent many of the adverse experiences and outcomes brought to the Committee's attention.
- 4.80** While we understand that the pilot service was necessarily focused on one geographical area, we consider that such a service should soon be available to people throughout New South Wales. We are also sceptical about a possible fee-for-service model and whether such a model would be affordable to all consumers. The Committee considers it vital that any funding model ensure that the service is very broadly accessible and suggests that there may be merit in a service that is based in Sydney but also has a rotating or mobile regional presence.

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<sup>199</sup> Submission 16, p 60

<sup>200</sup> Answers to questions on notice, 1 November 2007, Office of Fair Trading, p19; Mr Stowe, Evidence, 2 November 2007, p 9

<sup>201</sup> Mr Stowe, Evidence, 2 November 2007, p 9

<sup>202</sup> Submission 27b, BARG, p 3

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**Recommendation 13**

That Office of Fair Trading publish the report completed in October 2007 on the pilot of the Home Building Advocacy Service operated by the Macquarie Legal Centre.

**Recommendation 14**

That the Office of Fair Trading establish a home building advice and advocacy service on a long term basis which is affordable and accessible for home building consumers throughout New South Wales. In doing so, it should investigate models to enable the service to have a regional presence, for example on a rotating or mobile basis.

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## Chapter 5      Discipline of builders

This chapter considers the Home Building Service's activities in relation to the discipline of builders. It explains the Service's disciplinary powers under the Act and the penalty system before examining the evidence put forward by consumers and industry representatives about the Home Building Service's performance in this area.

### Disciplinary powers

- 5.1**      Aside from its licensing and complaints handling functions, the Home Building Service also has an important role to play in ensuring builders' compliance with the *Home Building Act 1989* (NSW)(the Act) and in disciplining them when they are in breach of the Act.
- 5.2**      The Office of Fair Trading (OFT) submission states that the objectives of enforcement action are to:
- discipline building contractors when they breach the Act
  - deter contractors from further breaches of the Act
  - encourage greater compliance with the Act on the part of both individual contractors and the industry more generally
  - maintain a high standard of competency among contractors
  - remove incompetent or otherwise unfit contractors from the building industry.<sup>203</sup>
- 5.3**      Compliance measures include disciplinary action, prosecution, penalty notices, written trader warnings, Supreme Court injunctions and public warnings.<sup>204</sup> Under Section 62 of the Act, penalties which may be imposed include:
- cancelling a contractor's licence
  - disqualifying a licensee from holding a contractor licence
  - suspending the contractor licence
  - varying the authority of the contractor licence
  - imposing a monetary penalty
  - issuing a caution or reprimand.<sup>205</sup>
- 5.4**      According to the OFT, the current approach to investigating alleged breaches of the Act begins with gathering sufficient evidence to make an assessment of the alleged breach. All complaints containing evidence of possible breaches of the Act are subject to a formal

<sup>203</sup> Submission 16, Office of Fair Trading, p 47

<sup>204</sup> Submission 16, p 47

<sup>205</sup> Section 62 of the *Home Building Act 1989* (NSW)

assessment process to determine whether they warrant investigation, and if so, the appropriate response. The criteria used in this assessment are based on:

- whether the contractor is licensed or not
- the seriousness of the breach
- the level of consumer detriment
- whether the contractor has breached the Act previously
- whether any action has previously been taken against the contractor
- health and safety issues.<sup>206</sup>

**5.5** Thus some complaints which are identified as involving breaches of the Act are not investigated, but are dealt with by administrative action where appropriate, for example through warning letters or discussions with the trader. The circumstances where this would occur are detailed in the OFT submission and include when the:

- matter is not a high priority in relation to consumer protection
- alleged breach is assessed as being minor in nature in terms of detriment to the consumer or to the community as a whole
- contractor has a clean record and has not previously been investigated for similar breaches, or has not previously received warnings nor been a party to other OFT disciplinary proceedings.<sup>207</sup>

## **Participants' views**

**5.6** Inquiry participants, both consumers and builders, raised a number of issues in relation to the Home Building Service's disciplinary processes.

### **Consumer concerns**

**5.7** In its supplementary submission, the Building Action Review Group (BARG) argued that many of its members' case studies 'indicate that policing is simply not taking place; there is [a] lack of accountability and failure to police the system to ensure that "shoddy" practitioners are rigorously prosecuted'.<sup>208</sup>

**5.8** In evidence, Mrs Irene Onorati, President of BARG, contended that the Home Building Service is does not act on some complaints as vigorously as it should, and that there is a pattern of leniency and delay in disciplinary matters.<sup>209</sup>

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<sup>206</sup> Submission 16, p 47

<sup>207</sup> Submission 16, p 48

<sup>208</sup> Submission 27c, BARG, p36

<sup>209</sup> Mrs Onorati, Evidence, 17 November 2006, p 4

**5.9** Mr Sal Russo, BARG's Honorary Solicitor, also claimed that that penalties are not sufficiently high to deter those inclined towards breaching the Act, and that again they are not applied consistently:

The other issue is the way in which fines, sanctions and penalties are administered. When one looks at the quantum with which most of the people who have been prosecuted are living, you will see that there is not a real deterrent at all for a lot of them, and what you find is that the monetary amounts are very small ...<sup>210</sup>

**5.10** As a result, BARG called for revised offences and stronger penalties.<sup>211</sup> Mr Russo suggested that the insufficient level of enforcement is due to a shortage of resources within the Home Building Service, and argued that it allows problems to continue within the industry:

The policing of the legislation is critical and in every item that [Mrs Onorati] raised, most of the problems are ongoing and continuing in the industry because there are insufficient resources to be able to police the legislation. No one is saying that we have to have a zero tolerance. No one is saying that we have to be 100% perfect, but the current scenario that we have does not even get close ...<sup>212</sup>

**5.11** BARG's supplementary submission also accused the Home Building Service of undue secrecy in relation to investigations, and bias towards builders:

The Home Building Service proceedings in relation to prosecution and disciplinary action [are] being conducted with undue secrecy and [with] reliance [on] oral evidence unilaterally given by the builder. Unscrupulous builders receive protection and minimal penalties for their wrongdoing. There is a perceived reluctance by the Home Building Service to enforce the legislation and the regulations hence creating an apprehension that the Home Building Service is not free to make decisions which are objective.<sup>213</sup>

**5.12** BARG also called for a review of the system of licence breaches and penalties, suggesting that the review consider:

- that the use of warnings be limited to minor licence breaches and inadvertent errors
- use of on the spot penalties
- increased use of license suspensions and cancellations for repeated serious breaches
- scaled penalties according to business turnover.<sup>214</sup>

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<sup>210</sup> Mr Russo, Evidence, 17 November 2006, p 6

<sup>211</sup> Submission 27c, p 37

<sup>212</sup> Mr Russo, Evidence, 17 November 2006, p 6

<sup>213</sup> Submission 27b, BARG, p 3

<sup>214</sup> Submission 27c, p 37

### **Building industry perspectives**

- 5.13** By contrast, the Master Builders Association of NSW argued that compliance and disciplinary activities had increased significantly following the establishment of the Home Building Service in 2003:

There has been a significant increase in field compliance operations since the establishment of the HBS ... These operations and other investigations have resulted in substantial penalties, including custodial sentences for repeat offenders. Master Builders has posted the press releases of these prosecutions on our website as a warning, but more importantly to indicate to members that the regulator has been active in responding to the industry's request to be active against unlicensed contractors.<sup>215</sup>

- 5.14** When he appeared at a hearing in November 2006, the Master Builders Association's Director of Housing, Mr Peter Meredith, reiterated that Home Building Service activity had increased, whilst also noting criticisms that those activities could perhaps be more comprehensive:

At present we really do not have an issue. As I said, we have in the past, and certainly our members are crying out that they were just sick of competing against unlicensed contractors but we have seen, certainly over the past 18 months, a substantial increase in compliance activity. Whether it is enough, I guess, when is enough is enough? There is certainly a higher level of activity. We know that there were some comments made to the Moss inquiry that some of these campaigns are questionable. They go in and do a campaign for a couple of days and then go away, and then the unlicensed contractors move back into town. At present we believe that the intelligence that is going back to the Home Building Service can take care of that. We certainly provide intelligence to the Home Building Service.<sup>216</sup>

- 5.15** In its supplementary submission the Housing Industry Association noted its support for a disciplinary regime whilst arguing that penalties should be proportionate:

In relation to compliance, HIA supports disciplinary action by the OFT against those builders and/or contractors who are found to have breached the Home Building Act. HIA maintains that any disciplinary actions should be in proportion to [the] offence.<sup>217</sup>

- 5.16** Accordingly, Mr Graham Wolfe, Executive Director of the Housing Industry Association (NSW), pointed out the serious consequences of penalties for builders:

In terms of exercising disciplinary powers, the revoking or suspending of a licence is an extremely serious matter. It has the potential to take away someone's livelihood. This inquiry should consider carefully the consequences of removing a person's capacity to earn an income in their chosen trade.<sup>218</sup>

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<sup>215</sup> Submission 14, Master Builders Association of NSW, p 20

<sup>216</sup> Mr Meredith, Evidence, 20 November 2006, p 30

<sup>217</sup> Submission 15a, Housing Industry Association, p 3

<sup>218</sup> Mr Wolfe, Evidence, 17 November 2006, p 25

- 5.17** Like consumer representatives, Mr Wolfe also suggested that the Home Building Service may require increased resources to carry out its work in this area more effectively.<sup>219</sup> The Housing Industry Association submission further suggested that an external body independent of the Home Building Service might be better placed to hear and respond to more serious matters.<sup>220</sup>
- 5.18** Mr Kevin Rice, advisor to the Moss review of builder licensing in NSW, acknowledged that compliance had emerged as a serious issue during the review, and also linked this to the adequacy of resources:

Lack of enforcement goes to another very broad question, which is the way in which the relevant agency is funded and whether it has sufficient resources to do that. You will also find in the report that we draw attention to the fact that, relative to the number of projects under construction at any one time, there is a relatively small number of inspectors to cover all of that. Certainly the apprehension of unlicensed contractors doing all sorts of work is something that desperately needs attention.<sup>221</sup>

- 5.19** In terms of how compliance activities might be improved, the Housing Industry Association argued that should builders be audited, processes should be genuinely random, fair, transparent and subject to appeal.<sup>222</sup>
- 5.20** The Master Builders Association argued for penalties to be directed towards builders who actually do the faulty work, and not just the contractor who is legally responsible:

An area for improvement identified by Master Builders is for greater compliance action to be taken against licensed trade contractors where these contractors have clearly been identified as being the cause of a defect or have significantly contributed to defective or incomplete work. We are most concerned that findings can be made against the principal contractor, without the relevant party who physically did the work being at the site investigation meeting and as appropriate being held accountable. A view that the principal contractor is entirely responsible for the work of their contractors is a simplistic and an incomplete approach.<sup>223</sup>

### **Office of Fair Trading response**

- 5.21** In response to allegations that the Home Building Service was not using its disciplinary powers as effectively and comprehensively as it might, the OFT argued that these accusations were not borne out by the evidence. Instead, it contended that it had demonstrated a substantial increase in enforcement activity since the Home Building Service was established in 2003. It summarised its achievements over the period 2003 to 2006 as including:
- ten major compliance programs resulting in the issue of 1,056 penalty notices
  - the completion of over 1,600 compliance investigations

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<sup>219</sup> Mr Wolfe, Evidence, 17 November 2006, p 29

<sup>220</sup> Submission 15, Housing Industry Association, p 13

<sup>221</sup> Mr Rice, Evidence, 20 November 2006, pp 50-51

<sup>222</sup> Submission 15a, p 2

<sup>223</sup> Master Builders association of NSW, Submission14, p 21

- the prosecution of 289 offences resulting in fines and penalties totaling over \$500,000
- the issuing of penalty notices to 1,300 individuals for more than 1,700 offences totaling over \$720,000
- 206 disciplinary actions resulting in 39 individuals having their licenses suspended, cancelled or disqualified.<sup>224</sup>

**5.22** The OFT also highlighted that successful prosecutions had been achieved in relation to five individual contractors with the following serious penalties:

- Supreme Court injunction plus licence disqualification for 10 years
- Supreme Court injunction plus weekend detention
- Supreme Court injunction plus 12 month good behaviour bond plus 150 hour community service order
- Supreme Court injunction plus imprisonment of 9 months plus 9 months parole
- fine of \$71,000 including costs.<sup>225</sup>

**5.23** The OFT provided an interstate comparison of compliance activities between NSW, Victoria and Queensland over the period 2005-2006. The results are outlined in Table 5.1 on the following page.

**5.24** The OFT argued that the table indicated that ‘the Home Building Service has been, in real terms and comparatively, rigorous in its use of disciplinary powers conferred by the legislation.’<sup>226</sup>

**5.25** In relation to the Home Building Service’s performance in 2006-2007, the Commissioner for Fair Trading, Ms Lyn Baker, reported at the November 2007 hearing:

We have had significant results during 2006-07. We did 646 investigations; we carried out 1784 mediations in response to building complaints; we finalised 63 disciplinary determinations where there were 16 disqualifications and fines to the value of \$116,250; we issued penalty notices for 813 offences to the value of just over half a million dollars; we undertook successful prosecutions for 141 offences totalling fines of just over \$300,000; and we conducted 3,391 audit field inspections as part of compliance activities within the building industry.<sup>227</sup>

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<sup>224</sup> Submission 16a, p 10

<sup>225</sup> Submission 16, p 54

<sup>226</sup> Submission 16a, p 10

<sup>227</sup> Ms Baker, Evidence, 2 November 2007, pp 1-2

**Table 5.1 Office of Fair Trading interstate comparison of compliance activities, 2005-2006<sup>228</sup>**

<b>BUILDING COMPLIANCE STATISTICS</b>			
	<b>NSW Home Building Service</b>	<b>VIC Building Commission</b>	<b>QLD Building Services Authority</b>
	<b>2005-06</b>	<b>2005-06</b>	<b>2005-06</b>
No. successful prosecutions completed (defendants)	21	22	101
Total \$ value of fines	\$204,460	\$46,967	\$148,750
No. disciplinary inquiries completed	45	38	68
No. of licences cancelled/disqualified	12	2	2
No. of licences suspended	5	1	
No. of licences fined	17	26	66 (demerit points)
Total \$ fines	\$117,750	\$59,564	
Average \$ fines	\$6,926	\$2,291	
No. of complaints received	2,349 <sup>229</sup>	538 <sup>230</sup>	5,012
No. of onsite inspections	1801	350	2,967
% of complaints successfully resolved	89% (on-site)	85%	74%
No. of compliance investigations (breaches of legislation)	509	395	204
No. of penalty notices issued (breaches of legislation)	237	33	356
\$ value	\$159,500	WARNINGS ONLY	N/A
No. of onsite compliance inspections (breaches of legislation)	1,741	588	5,141

**5.26** In respect of the level of fines, and whether these are sufficient to deter breaches of the Act, the OFT advised that:

- certain penalties have increased from \$1,500 in 2002 to \$2,500 in 2005 and can now result in the suspension of licenses
- penalties in respect of breach of statutory warranties have increased from \$2,000 in 2004 to \$10,000 against an individual and \$20,000 against a corporation
- in 2005 the penalty notice provisions were substantially widened to include a range of new offences, while penalty amounts were increased by up to 50%.<sup>231</sup>

<sup>228</sup> Submission 16, p 55

<sup>229</sup> The OFT received 5,891 building complaints of which 2,349 were referred to the Home Building Service. The remainder either required no further action, were referred to the CTTT or another agency.

<sup>230</sup> This does not include building complaints received and dealt with by the Victorian Department of Consumer Affairs

<sup>231</sup> Submission 16, pp 48-49

**5.27** Mr Steve Griffin, General Manager of the Home Building Service, further advised that in keeping with an election commitment, the NSW Government had recently raised certain penalties from \$11,000 to \$22,000 for an individual and from \$55,000 to \$110,000 for a company.<sup>232</sup>

**5.28** In response to concerns about the consistency of penalties, Ms Baker noted that in certain areas the OFT has no power or discretion over the penalties imposed. For example, when disciplinary matters are prosecuted in court, the level of a penalty is determined by the judiciary. She further indicated that the Office of Fair Trading had recently liaised with the Attorney General's Department in order to educate the judiciary about the seriousness of home building matters and encourage them to set higher penalties.<sup>233</sup>

**5.29** In relation to Home Building Service procedures for disciplinary matters, the OFT indicated in its submission that it has a system of performance targets for the completion of disciplinary investigations:

- preliminary investigations – in which matters appearing to meet the criteria for investigation require some initial work – are to be completed within one month of receipt
- minor investigations – which are of a routine nature such as unlicensed activity – are scheduled for completion within three months of receipt
- major investigations – which are typically of a complex nature and may involve multiple breaches of the legislation, recalcitrant offenders and covert surveillance, with a view to instituting Supreme Court proceedings – are scheduled for completion within six months.<sup>234</sup>

**5.30** The OFT submission reported:

During 2005/06 approximately 70% of investigations were completed by the due date. Delays can occur if the evidence available at the time is incomplete and problems may arise during the evidence gathering process which [are] often unforeseeable. Complications such as the availability of witnesses, offender identification, the need to conduct complex covert surveillance operations and competing priorities can all contribute to performance targets not being met on some occasions.<sup>235</sup>

**5.31** Finally, in relation to OFT procedures for disciplinary matters, in answers to questions on notice, the Office advised that it had recently developed guidelines to operate across the OFT to assist decision makers to determine appropriate penalties to be applied in disciplinary matters. In addition:

Internal to the Home Building Service, operational procedures have been reviewed and timeframes implemented aimed at improving the management of the disciplinary

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<sup>232</sup> Mr Griffin, Evidence, 2 November 2007, p 5

<sup>233</sup> Ms Baker, Evidence, 2 November 2007, p 10

<sup>234</sup> Submission 16, p 50

<sup>235</sup> Submission 16, p 50



process. Benchmark timeframes for the completion of disciplinary determinations have also been introduced and monitored on an ongoing basis.<sup>236</sup>

### **The Committee's view**

- 5.32** The Committee considers that the evidence provided by the OFT indicates that the level of effort in relation to enforcing builders' compliance with the *Home Building Act* has improved since the establishment of the Home Building Service. We also note the increased penalties that are now available and the work that the OFT has done to improve compliance procedures.
- 5.33** The Committee also considers that the fact that Home Building Service makes a determination as to whether an alleged breach will be investigated, and does not investigate some complaints, will trouble some stakeholders.
- 5.34** Moreover, the Committee is concerned by the evidence from both consumer and industry representatives that the Home Building Service could be more active and consistent in the discipline of builders. This concern was strengthened by the evidence arising from the Moss review that more needs to be done in this area, particularly in relation to the apprehension of unlicensed builders, and also by the OFT's report that only 70% of investigations in 2005-2006 were completed by their due date. While we recognise that some delays are out of the control of the Home Building Service, we consider that the Service should take greater steps to deliver on its performance standards.
- 5.35** Like a number of inquiry participants, the Committee is inclined to attribute this to a need for greater resources. This issue is taken up in the report's final chapter.

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### **Recommendation 15**

That the Home Building Service further improve its results in meeting performance standards in relation to the discipline of builders.

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- 5.36** In addition, the Committee considers that there is merit in BARG's suggestion that the penalty system be reviewed to consider the need for further improvement in policing and encouraging compliance with the Act.

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<sup>236</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 18

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### **Recommendation 16**

That the Office of Fair Trading review the current system of breaches and penalties to establish how it might be further improved. The review should include consideration of the use of:

- warnings
  - penalties (including on-the-spot penalties)
  - licence suspensions and cancellations for repeated serious breaches.
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**5.37** Finally, the Committee also sees merit in the Master Builders Association's suggestion that not only contractors be prosecuted for breaches of the Act, but also the individual builders responsible for the work concerned, and suggests that this be further considered during the re-writing of the *Home Building Act*.

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### **Recommendation 17**

That in re-writing the *Home Building Act* the NSW Government consider whether individual builders responsible for breaches of the Act, and not just the contractors overseeing the work, should be subject to disciplinary processes.

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## Chapter 6 The home warranty insurance scheme

This chapter considers the NSW home warranty insurance scheme, commencing with a brief overview of the development of the scheme and how it currently operates. It then explores a number of concerns raised by inquiry participants including a range of issues associated with consumer protection, along with a number of criticisms associated with the privatised nature of the current scheme. The chapter then considers the home warranty insurance model operating in Queensland, before noting a number of complexities and gaps in the legislation underpinning the scheme.

### A brief overview and history

**6.1** Part 6 of the *Home Building Act 1989* establishes the home warranty insurance scheme. The scheme applies to building work done or to be done under a contract entered into on or after 1 May 1997.<sup>237</sup> Issues concerning home warranty insurance are the responsibility of the Minister for Commerce as opposed to the Minister for Fair Trading.

**6.2** In its submission the Insurance Council of Australia (ICA) explained that home warranty insurance is effectively a third party policy:

Although the builder arranges the insurance policy, the beneficiary of the policy is the consumer of the residential building services, and it is the consumer who makes the claim against the insurer in relation to an event covered by the policy.<sup>238</sup>

**6.3** The Office of Fair Trading (OFT) advised that a number of different home warranty insurance schemes have operated in New South Wales over the years and claims are managed under the particular scheme operating when the building work was undertaken.<sup>239</sup> Table 4.1 on the following page sets out the different schemes and their time of operation.

**6.4** Prior to 1997 home warranty insurance in New South Wales was government sponsored, but was privatised following the recommendations of the inquiry into the NSW Building Services Corporation (the Dodd inquiry).<sup>240</sup> The inquiry report found:

That there was no reason for the Government to continue in its monopoly of the insurance market and moreover its political ownership leaves it vulnerable to pressures not faced by private insurance.<sup>241</sup>

**6.5** Following privatisation a number of insurance companies entered the market including HIH Casualty and General Insurance Limited and FIA General Insurance Company Limited, which subsequently collapsed in 2001. This prompted the NSW Government to establish the HIH rescue package and precipitated a number of reviews of home warranty insurance in NSW and

<sup>237</sup> Part 6 of the *Home Building Act 1989*

<sup>238</sup> Submission 12, Insurance Council of Australia, p 1

<sup>239</sup> Submission 16, Office of Fair Trading, p 15

<sup>240</sup> Further details on the Dodd inquiry are provided in paragraphs 2.17 and 2.18 of Chapter 2

<sup>241</sup> Commissioner Peter Dodd, *Report on the NSW Building Services Corporation*, 1993, quoted in Submission 16, p 16

across Australia.<sup>242</sup> In 2005 a range of amendments were made to the NSW scheme based on the recommendations of the 2003 Grellman Inquiry. These now constitute the current system. The amendments included the establishment of the Home Warranty Insurance Scheme Board, a government structure comprised of people with insurance expertise. The Board advises the Minister on the scheme and monitors the scheme's operations.<sup>243</sup>

**Table 6.1 Home warranty insurance schemes in NSW<sup>244</sup>**

Period	Status	Scheme	Administered by	Threshold	Type of cover	Indemnity coverage
Prior to 1997	Claims closed April 2004	Comprehensive insurance schemes	Originally by the Building Services Corporation, now by the Fair Trading Administration Corporation		<ul style="list-style-type: none"> <li>• First resort</li> <li>• 7 years - structural damage</li> <li>• 3 years - non-structural</li> </ul>	<ul style="list-style-type: none"> <li>• \$100,000 freestanding dwelling</li> <li>• \$50,000 each in a duplex dwelling</li> <li>• \$20,000 each dwelling where three or more in the building</li> </ul>
1997 to July 2001	Tail remains open	Private home warranty insurance	Private insurers	\$5,000	<ul style="list-style-type: none"> <li>• First resort</li> <li>• 7 years - structural damage</li> <li>• 7 years - non-structural</li> </ul>	\$200,000
March 2001 to present	Open	HHH Rescue Package	Building Insurers Guarantee Corporation	\$12,000	<ul style="list-style-type: none"> <li>• First resort</li> <li>• 7 years - structural damage</li> <li>• 2 years - non-structural</li> </ul>	\$200,000
July 2001 to present	Open	Private home warranty insurance	Private insurers	\$12,000	<ul style="list-style-type: none"> <li>• Last resort</li> <li>• 6 years - structural damage</li> <li>• 2 years - non-structural</li> </ul>	\$300,000 <sup>245</sup>

### The current scheme

**6.6** Under the scheme the primary responsibility for ensuring that residential building work is properly and adequately performed lies with the builder contracted to undertake the work. The home warranty insurance scheme provides last resort cover for homeowners, where this responsibility has not been honoured by the builder. Claims may be made with insurers where dispute resolution cannot take place because of the death, disappearance or insolvency of the builder.<sup>246</sup>

**6.7** Home warranty insurance cover:

- is sold by private insurance companies
- is required for any residential building work where the work requires a licence and is valued at over \$12,000

<sup>242</sup> Ms Carolyn Conner, General Manager Policy, Insurance Council of Australia, Evidence, 17 November 2006, p 50

<sup>243</sup> Submission 16, p 19; Mr Steve Griffin, then Acting General Manager, Home Building Service, Evidence, 20 November 2006, p 16

<sup>244</sup> Submission 16, p 15

<sup>245</sup> Maximum coverage increased from \$200,000 to \$300,000 on 1 March 2007: Submission 16a, Office of Fair Trading, p 8

<sup>246</sup> Submission 16, p 17

- must be obtained by the contractor and a certificate given to the homeowner prior to taking any money on the contract and prior to commencing the work<sup>247</sup>
- is sold by the private insurance company, but claims may be recovered from the builder under the deeds of indemnity and/or bank guarantees held by the insurer.<sup>248</sup>

**6.8** Under the present scheme:

- a policy must provide cover of at least \$300,000 (this rose from \$200,000 on 1 March 2007), however, claims may be subject to limitations relating to deposits, progress payments and other limitations specified in the policy
- claims for incomplete work are limited to 20% of the contract price, up to a maximum of \$200,000
- cover is provided for structural defects for a period of six years from completion of the work, and non-structural defects for a period of two years from completion of the work
- where the claim is for incomplete work the home owner is covered up to 12 months after failure to commence or cessation of work.<sup>249</sup>

**6.9** There are currently six insurers providing home warranty cover in NSW and another firm that offers specialist cover for owner-builder work.<sup>250</sup>

## Concerns about the scheme

**6.10** Inquiry participants made a range of criticisms of the current home warranty insurance scheme, each of which is discussed below in terms of:

- consumer protection
- privatisation
- the Queensland model
- complexities and gaps.

<sup>247</sup> <[www.fairtrading.nsw.gov.au/building/builderstradespeople/homewarrantyinsurance.html](http://www.fairtrading.nsw.gov.au/building/builderstradespeople/homewarrantyinsurance.html)>, accessed 9 January 2007

<sup>248</sup> Mr Joseph, Secretary, Builders Collective of Australia, Evidence, 20 November 2006, p38

<sup>249</sup> <[www.fairtrading.nsw.gov.au/building/builderstradespeople/homewarrantyinsurance.html#The%20threshold%20for%20insurance](http://www.fairtrading.nsw.gov.au/building/builderstradespeople/homewarrantyinsurance.html#The%20threshold%20for%20insurance)>, accessed 9 January 2007

<sup>250</sup> Mr Michael Coutts-Trotter, then Director General, Department of Commerce, Evidence, 20 November 2006, p 3

## Consumer protection

**6.11** Evidence received by the previous Committee in 2006 indicated that there was an issue in relation to builders being required to provide to the insurer deeds of indemnity and/or bank guarantees.<sup>251</sup> This may further restrict the amount of work undertaken.<sup>252</sup>

**6.12** Perhaps the strongest and most widespread criticisms of the current scheme concerned the limited extent to which it serves its purpose in protecting consumers. While this view was most strongly put forward by consumers, it was also shared by a number of industry representatives.

**6.13** Several consumers who took part in the Committee's public forum in November 2007 highlighted this issue. Ms Narelle Peters stated in evidence:

What is the point of having insurance if no-one can make a claim? ... There is no insurance of any worth to consumers in this State. Yes, there is insurance and insurance companies make a large deal of money, but the consumer is left to fight the giants in claiming any redress at a time when most consumers are fighting to stay within a budget ... Home warranty insurance is not worth the paper that it is written on. It is a con perpetrated on innocent and naïve consumers.<sup>253</sup>

**6.14** Mr Robert Siebert, whose case study is provided in Chapter 4 in relation to dispute resolution, also detailed significant problems in relation to home warranty insurance. Like Ms Peters, Mr Siebert reported that insurance payouts can be disproportionately small relative to the costs incurred by consumers, not just the direct losses associated with the poor building work, but also in terms of the legal costs of pursuing the matter and making a claim:

My total costs to this point, including the cost of fixing the house, are \$290,000. The insurance company has said it will pay \$50,000. The reason for the \$50,000 is that claims are time-barred, because of the time it has taken. The CTTT did not award damages for many items. The insurance is not going to pay my rent for the last four years. The insurance company is saying it will pay 7 per cent of my legal fees.<sup>254</sup>

**6.15** Appearing at a hearing in November 2006, Ms Lydia Chakouch, Secretary of BARG, described the protracted delays she and her family experienced trying to resolve their building dispute, saying:

Our pain continues though with the home owners warranty insurance. Home owners warranty is a farce ... Not all the defective work is accepted or covered as the insurer minimises and trivialises the defects. The insurers have the power and resources to cause protracted delay to court systems, causing consumers exorbitant financial expenses, mental stress and trauma and bleeds them dry of hope, confidence and their spirit, causing both health and relationship problems.<sup>255</sup>

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<sup>251</sup> Mr Ray Brown, National President, Building Designers Association of Australia, Evidence, 20 November 2006, p 36; Mr Joseph, Evidence, 20 November 2006, p 38

<sup>252</sup> Submission 16, p 18

<sup>253</sup> Ms Peters, Public Forum, 2 November 2007, p 3

<sup>254</sup> Mr Siebert, Public Forum, 2 November 2007, p 8

<sup>255</sup> Ms Chakouch, Evidence, 17 November 2006, pp 9-10

- 6.16** Both consumers and builders' representatives criticised the 'last resort' feature of the scheme instituted in 2001, whereby claims may only be made in the extreme circumstances of a builder having died, become insolvent, or disappeared. Contrary to the widespread perception that the scheme protects against faulty workmanship, Ms Carolyn Conner, General Manager of Policy with the Insurance Council of Australia, explained that the 'last resort' feature provides protection only once all other avenues have been exhausted and only in those situations of death, insolvency or disappearance.<sup>256</sup>
- 6.17** The Committee heard that the requirement to exhaust those other avenues prior to claiming insurance places a significant onus on the consumer, often at substantial financial and emotional cost. As Mr Peter Meredith, Director of Housing with the Master Builders Association of NSW, explained:
- Under the previous scheme effectively a consumer could determine the contract and put a claim straight onto the insurance scheme. Effectively under the current scheme you have now, that cannot happen. While the builder is still around, so to speak, the concerns have to be resolved between the builder and the consumer going through the [Consumer, Trader and Tenancy Tribunal], the court process or some other mediation process. You simply cannot make a claim on the insurance scheme. I guess that is what we are referring to when we say that the consumer has lost ground.<sup>257</sup>
- 6.18** At the same time, Mr Meredith argued that the previous 'first resort' scheme was not ideal from builders' perspective as in some cases the contract between a homeowner and builder was terminated simply because of a disagreement. A homeowner who did not want to deal with the builder any more could simply make a claim on insurance.<sup>258</sup>
- 6.19** Mr Phil Dwyer, National President of the Builders Council of Australia also highlighted the costs to both consumers and builders, arguing that the scheme escalates disputes rather than resolving them:
- When a consumer is faced with a building dispute, he is faced with costly civil action. He finds out that his warranty insurance does not cover him, except for death, insolvency and disappearance. Even insolvency comes with qualifications. If a builder declares himself bankrupt he is not insolvent, so therefore no claim. We do not know where the value is in the current arrangements. The builder suffers the same fate; he cannot achieve resolution to a dispute. What might start as a small problem escalates to a very significant problem with the involvement of many and all endeavouring to avoid responsibility.<sup>259</sup>
- 6.20** The enormous financial and emotional toll of not being able to make what seems a reasonable claim, and of having to exhaust other avenues before an insurance claim can be made, was highlighted by a number of consumer participants. These participants include Mr Kamal Boules, and Mr Colin Sharp and Ms Mary Ellen McCue, whose case studies are set out below. A broad range of issues in relation to dispute resolution were discussed in detail in the previous chapter.

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<sup>256</sup> Ms Conner, Evidence, 17 November 2006, p 49

<sup>257</sup> Mr Meredith, Evidence, 20 November 2006, pp 24-25

<sup>258</sup> Mr Meredith, Evidence, 20 November 2006, pp 24-25

<sup>259</sup> Mr Dwyer, Evidence, 20 November 2006, p 39

***Case study: Mr Kamal Boules\****

In 1998 Kamal Boules and his wife contracted a builder to construct their new family home. During construction Mr Boules engaged an independent consultant to report on what he believed to be defective works. Notwithstanding the defects, Mr Boules told the Committee that he was convinced to pay for the house in full and move in. Since that time he has been involved in a protracted process to seek rectification of the defects. This has involved action in the CTIT and complaints to the OFT. Mr Boules' situation has been further complicated by the 2001 HIH insurance collapse following which his claim was taken over by another insurer.

In January 2007 Mr Boules' insurer made an offer of \$80,000 to settle the matter. Mr Boules rejected this offer; he estimated rectification costs alone at over \$200,000, not including the \$100,000 spent to date on professional and legal assistance. As Mr Boules told the Committee: 'Surely an offer of \$80,000 would seem like an insult in anyone's language.'

***Office of Fair Trading response\*\****

The OFT advised that Mr Boules lodged a private home warranty insurance claim which proceeded to the CTIT in 2001. In 2002 Mr Boules complained to the OFT; the insurance claim continued. There were significant differences in the assessment of the defective work between the consultant engaged by Mr Boules, and the consultant engaged by the insurer. The matter returned to the CTIT in 2004.

Following disciplinary action in December 2004 the building company was fined \$10,000, the company supervisor \$5,000 and the company director \$2,500.

The matter was listed in the CTIT in October 2007 for a directions hearing. The OFT advised: 'Mr Boules has failed on a number of occasions to lodge a scott schedule with costings and is in breach of the Tribunal's timetable. The builder [...] is co-joined in this action and will be seeking a notice of motion to strike out Mr Boules' claim. If this is successful Mr Boules could face significant legal costs incurred by [...], in addition to his own costs.' A settlement of \$80,000 was offered to Mr Boules in January 2007.

The OFT is awaiting further contact from Mr Boules.

\* Submissions 25 and 25a

\*\* Submission 16b, pp 7-8

***Case study: Mr Colin Sharp and Ms Mary Ellen McCue\****

In September 2001, Colin Sharp and Mary Ellen McCue entered into a contract with a recommended builder to carry out a renovation of their home. Soon after construction began, site inspections revealed that the builder was failing to comply with the local council's regulations. The builder submitted a claim of practical completion five months after the work was scheduled for completion, even though the work was not finished. After unsuccessful attempts to rectify the situation, Mr Sharp and Ms McCue paid others to finish the work.

Shortly after moving in with their new baby they found that the new work leaked and flooded when it rained. They also discovered termites. Upon obtaining a copy of the termite certificate they



discovered that the builder had not provided the treatment required under the Building Code of Australia, Australian Standards, the contract or the local council's Conditions of Consent. Despite this, the council had accepted the certificate.

Mr Sharp and Ms McCue lodged a claim against the builder's home warranty insurance in June 2003. They felt that the inspector sent by the insurer to investigate the claim was biased toward the insurer, as he failed to uncover multiple defects and omissions. Those defects and omissions were later identified by an independent inspector hired by Mr Sharp and Ms McCue at a significant additional cost.

In December 2003, their claim against the home warranty insurance was denied. Even though the builder had not provided the correct termite treatment, as recorded in the termite certificate, the insurer told them that 'as long as things were certified it did not matter that they were not properly certified.'

Mr Sharp and Ms McCue then lodged a claim against the home warranty insurer in the CTTT for \$80,000. The builder offered to settle for \$7,500, which Mr Sharp and Ms McCue's legal team eventually persuaded them to accept. Mr Sharp said: 'We were devastated that an \$80,000 claim, in support of which we had ample documentation, had been reduced to this ... We have been left with a house which is full of defective work which we will never be able to afford to rectify properly.'

Mr Sharp told the Committee that 'it is extremely difficult, if not impossible, to make a successful claim'; '[t]he effect of Home Warranty insurance is to protect the builder rather than the consumer.'

***Office of Fair Trading response\*\****

The OFT advised that this matter was first brought to their attention in October 2004. After several unsuccessful attempts to contact Mr Sharp and Ms McCue, the OFT closed the file.

The matter was opened again in August 2006 when Mr Sharp and Ms McCue contacted the OFT to provide a consultant's report regarding their building complaint. The OFT conducted an inspection and has commenced disciplinary proceedings against the builder. A determination is yet to be made.

Mr Sharp and Ms McCue also lodged a claim against the home warranty insurance and their case was also heard by the CTTT in 2004. The claim was settled by commercial agreement between the parties.

The OFT is nearing completion in this matter.

\* Submission 5; Evidence, Public forum, 2 November 2007, pp 13-14

\*\* Submission 16b, pp 4-5

**6.21** Mr Siebert argued that a first resort scheme would have prevented the chain of difficulties he experienced:

All those problems could have been avoided if the home warranty insurance was the insurance of first resort. I would not have had to go through the CTTT; I would not have had all the hassles. The insurance company agreed that they are defects, but it

will not pay for them. If it were a scheme of first resort, the problems could be avoided.<sup>260</sup>

- 6.22** In response to the various cases presented at the public forum, the Insurance Council of Australia noted that many of these related to building works undertaken during the operation of the former home warranty insurance scheme, and that significant changes have been made to the subsequent scheme.<sup>261</sup> Its supplementary submission further stated:

In relation to the concern that the last resort scheme provides limited benefit to consumers, the Insurance Council submits that home warranty insurance is only one part of a broader package of consumer protection. Ultimately a builder should be the first resort for rectification of any defective building works so as to fulfil their contractual obligations to the consumer. In addition, the eligibility criteria for builders to obtain home warranty insurance provides a consumer protection mechanism by ‘filtering’ high risk builders out of the system – thus improving the scheme for the benefit of the consumer.<sup>262</sup>

- 6.23** During the November 2007 hearing the Committee sought the OFT’s response to these issues in respect of home warranty insurance and consumer protection. In relation to the costs that Mr Siebert reported arising from having to have his builder liquidated before he could claim on insurance, Mr Steve Griffin, General Manager of the Home Building Service, acknowledged that the onus placed on consumers in such circumstances puts them at significant disadvantage. He also indicated that the Home Warranty Insurance Scheme Board had conducted research into this issue and had recently made recommendations to the Government to address it. Mr Griffin was not able to disclose the details of the recommendations, but explained:

“Additional triggers” is the term that is used. While you have only death, disappearance and insolvency at the moment, the scheme board is looking at an additional trigger that will allow a consumer access to the home warranty product without having to go through that process of bankruptcy and insolvency.<sup>263</sup>

- 6.24** Mr Griffin also argued that consumer protection had recently been significantly enhanced through the increase of maximum payouts from \$200,000 to \$300,000 to cover the worst case scenario of having to knock a dwelling down and rebuild.<sup>264</sup>

- 6.25** In earlier evidence in November 2006, Mr Michael Coutts-Trotter, then Director General of the Department of Commerce, also reported that the Home Warranty Insurance Scheme Board was making improvements to the NSW system:

As a result of the market practice guidelines and claims handling procedures, both consumers and builders get more openness from insurers about why they take the decisions they take. There are mandated timetables in which insurers must make decisions about claims. So if they do not deal with a claim within 90 days of its being

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<sup>260</sup> Mr Siebert, Public Forum, 2 November 2007, pp 8-9

<sup>261</sup> Submission 12a, Insurance Council of Australia, p 2

<sup>262</sup> Submission 12a, p 3

<sup>263</sup> Mr Griffin, Evidence, 2 November 2007, p 6

<sup>264</sup> Mr Griffin, Evidence, 2 November 2007, p 7

lodged, it is deemed to be accepted. So there is some pressure on the insurance industry to do its job consistently, and consistently well. There is good information available publicly to consumers about what is on offer—the range of products and the costs associated with those products. More can be done; it can get better. But we think we have seen pretty significant progress in the last couple of years.<sup>265</sup>

### Privatisation

**6.26** Aside from the ‘last resort’ feature of the scheme, some participants argued that consumer protection has suffered as a result of home warranty insurance having been privatised. Mrs Irene Onorati, President of BARG, called the privatisation of insurance a ‘failure’ for consumer protection, pointing to the inherent interests of insurance companies in minimising claims.<sup>266</sup>

**6.27** A forum participant, Mr Colin Sharp, told the Committee:

It seems to us that the home warranty insurance does not exist to protect ordinary people who are on the receiving end of the work of bad builders who flout legal regulations and ignore standards. Rather, it seems to us that home warranty insurers will say and do anything to avoid paying out any money, even if this means that they end up protecting bad builders from the consequences of their actions. They hire their own inspectors to investigate claims and these inspectors produce reports which, if they want to continue getting such work from the insurers, end up favouring the insurers in denying the claims.<sup>267</sup>

**6.28** It was not only consumers who expressed concerns about the interests of insurers, but also industry representatives. The submission from the Master Builders Association of NSW stated:

The privatisation of consumer protection insurance in NSW has had a devastating impact on the NSW residential building industry. The consumer has lost considerable ground ... Other than for insurers, it is difficult to identify who has benefited from the introduction of a privatised scheme in NSW.<sup>268</sup>

**6.29** Mr Andris Blum, a consumer advocate, also pointed to the interests of bodies such as the Housing Industry Association who act as agents for home warranty insurance. He stated at the Committee’s public forum that he had recently read a report in *The Australian* which said that the Housing Industry Association was gaining \$20 to \$30 million in commission out of the current system.<sup>269</sup>

**6.30** Mr James Willis, NSW Manager of the Builders Collective of Australia, also expressed strong reservations about insurers’ interests, reporting that very little information about specific schemes is publicly available. He recounted that when his organisation tried to gain

<sup>265</sup> Mr Coutts-Trotter, Evidence, 20 November 2006, p 16

<sup>266</sup> Mrs Onorati, Evidence, 17 November 2006, p 5

<sup>267</sup> Mr Colin Sharp, Public Forum, 2 November 2007, p 13

<sup>268</sup> Submission 14, Master Builders Association of NSW, p 12

<sup>269</sup> Mr Andris Blum, Public Forum, 2 November 2007, p 12

information about how premiums are calculated, the number of claims made and so on, such requests have been refused on the grounds of commercial in confidence. On this basis, the Builders Collective of Australia pointed to the need for an independent umpire to ensure greater accountability and transparency within the scheme.<sup>270</sup>

**6.31** By contrast, Mr Graham Wolfe, Executive Director of the Housing Industry Association of NSW, argued that consumers have benefited from the private scheme as insurers have helped to stabilise the industry by financially vetting builders, which in turn has led to a drop in the number of insolvent builders:

In fact the role that warranty insurers play in maintaining an industry that is well equipped and financially stable should not be underwritten. In fact, if you have a look at the level of building activity that we see at the moment in New South Wales, which is about 25 to 30% lower than it has been in previous years, we are not seeing the level of insolvencies that we have seen in past cycles. The level of insolvency is in fact very low ... The major reason for that is the fact that the financial stability of builders in New South Wales has been vetted and checked by insurers and that has provided us with a very solid environment.<sup>271</sup>

**6.32** The role of private insurance in vetting builders was also highlighted by the Insurance Council of Australia, which contended that the current system is improving the financial strength of builders, increasing standards and reducing the likelihood of disputes and claims.<sup>272</sup>

**6.33** Mr Coutts-Trotter defended privatisation as having brought more insurers into the market, thereby delivering reduced premiums and improving builders' access to cover.<sup>273</sup> According to the Insurance Council of Australia, average premiums have reduced by 10 to 15% since 2004.<sup>274</sup> He also argued that insurers were starting to respond to builders' needs with greater innovation and flexibility.<sup>275</sup>

**6.34** However, Mr Peter Meredith, Director of Housing with the Master Builders Association of NSW noted the difficulties confronting builders in moving between insurers.<sup>276</sup>

**6.35** The OFT submission stated:

The current home warranty arrangements are considered to provide fair and reasonable protection for consumers while ensuring the long term viability of the scheme. A government underwritten scheme is not considered a panacea for solving all concerns expressed by industry groups advocating such a model and would not guarantee that premiums would be significantly lower than current market rates, as any such scheme would need to operate on a commercial basis.<sup>277</sup>

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<sup>270</sup> Mr Willis, Evidence, 20 November 2006, p 35

<sup>271</sup> Mr Wolfe, Evidence, 17 November 2006, p 36

<sup>272</sup> Submission 12, p 4

<sup>273</sup> Mr Coutts-Trotter, Evidence, 20 November 2006, pp 14-16

<sup>274</sup> Submission 12, p 3

<sup>275</sup> Mr Coutts-Trotter, Evidence, 20 November 2006, pp 14-16

<sup>276</sup> Mr Meredith, Evidence, 20 November 2006, pp 25-26

<sup>277</sup> Submission 16, p 24

- 6.36** While the Insurance Council of Australia and the Master Builders Association agreed that coverage had improved, the latter reported that certain trade sectors and swimming pool builders continue to have some difficulties in this area.<sup>278</sup>
- 6.37** In relation to transparency, in November 2007 the OFT indicated to the Committee that the Home Warranty Insurance Scheme Board had recently released its first data report on the operation of the NSW scheme. In addition, it will release a further report shortly and will continue to release such reports on a quarterly basis.<sup>279</sup> The Insurance Council of Australia noted that to its knowledge, New South Wales is the only privately underwritten jurisdiction that publishes data on the performance of the scheme, and pointed out that this increased transparency will benefit consumers and other stakeholders.<sup>280</sup>

### **The Queensland model**

- 6.38** On the basis of their criticisms of the current NSW home warranty insurance scheme, a number of inquiry participants argued that the model operating in Queensland provides greater consumer protection and more effective complaints resolution than that in New South Wales.
- 6.39** The Queensland scheme is a first resort government (that is, a non privatised) scheme which integrates the functions of licensing, home warranty insurance and dispute resolution. It provides cover up to a maximum of \$200,000.<sup>281</sup> According to the body administering the scheme, the Queensland Building Services Authority:
- The scheme's uniqueness centres on its non-profit structure, ease of access for contractors and consumers and extensive free cover which is afforded to all Queenslanders who contract to do residential construction work in Queensland. The scheme covers non-completion of contracted work, rectification of defective work and protection against settlement or subsidence ... The scheme continues to provide affective protection for consumers against loss arising from contractor non-performance with 98.3% of consumers fully compensated for their loss.<sup>282</sup>
- 6.40** The Builders Collective of Australia strongly argued for the Queensland model on the basis that it offers greater consumer protection and transparency, more effective complaints resolution and cheaper and more accessible premiums.<sup>283</sup>
- 6.41** Mr Meredith of the Master Builders Association pointed out the significant differences between the Queensland and New South Wales models, suggesting that they are not necessarily comparable. In relation to dispute resolution he noted:

<sup>278</sup> Ms Conner, Evidence, 17 November 2006, p59; Submission 14, p12

<sup>279</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 19

<sup>280</sup> Submission 12a, Insurance Council of Australia, p 2

<sup>281</sup> Submission 4, Queensland Building Services Authority, p 20

<sup>282</sup> Submission 4, p 20

<sup>283</sup> Mr Russell Joseph, Secretary, Builders Collective of Australia, Evidence, 20 November 2006, pp 37-38

The dispute resolution process in Queensland really underpins the insurance scheme up there. They try to deal with disputes up front before they move to making an insurance claim. In Queensland, under the dispute resolution process, they make orders against builders, but they will also make orders against the consumer. In New South Wales we do not have that process in the early dispute resolution process.<sup>284</sup>

- 6.42** When asked to respond to the claim that a more effective model for insurance is operating in Queensland, Mr Coutts-Trotter argued that NSW premiums are more competitive than those in Queensland, with NSW builders paying different rates based on their track record and level of risk rather than a 'one size fits all' premium.<sup>285</sup> Appearing at the hearing in November 2007, Ms Lyn Baker, Commissioner for Fair Trading, stated:

the Queensland system is basically a replication of the old Building Services Authority in New South Wales, which was roundly discredited by the Crawford inquiry in the late 1990s. The reason for that was the conflict of interest between the Building Services Authority being the insurer, the licence regulator, and the person looking after the consumer.<sup>286</sup>

- 6.43** However, the Builders Collective of Australia had a contrary view, and defended the Queensland scheme.<sup>287</sup> According to Mr Phil Dwyer, National President of the Builders Collective of Australia:

It is transparent, accountable and cost-effective. It adjudicates for and is fair to both parties and it delivers genuine and timely first resort protection to consumers. Its benefits will satisfy all criteria of consumer protection within the New South Wales building industry.<sup>288</sup>

- 6.44** Mr Griffin, Manager of the Home Building Service, also noted that should an additional trigger be introduced to the NSW scheme, as discussed above in paragraph 6.23, a key point of difference between the two schemes will be eliminated:

[I]f we implement the new changes that were just outlined, the two schemes would not be vastly different. In Queensland, the Building Services Authority is like the Home Building Service: You will come to the authority and make your complaint; they will do a dispute resolution with their building inspector, the same as we do in New South Wales; and they will then issue a rectification order which, unlike in New South Wales, the builder in Queensland can appeal. Nevertheless, once they get to a point where they can see that the builder is insolvent, because they are also the insurer, or the builder is technically incapable of completing the work or rectifying the work, that is when they have the ability more quickly than our regime to step in, as the insurer, to rectify the home or complete the work. As I said earlier, with this initiative

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<sup>284</sup> Mr Meredith, Evidence, 20 November 2006, p 25

<sup>285</sup> Mr Coutts-Trotter, Evidence, 20 November 2006, pp 14-15

<sup>286</sup> Ms Baker, Evidence, 2 November 2007, p 7

<sup>287</sup> Mr Joseph, Evidence, 20 November 2006, p 38 and 41; Mr Dwyer, Evidence, 20 November 2006, pp 38-41

<sup>288</sup> Mr Dwyer, Evidence, 20 November 2006, p 39

put forward by the scheme board to create an additional trigger, that will close that gap.<sup>289</sup>

### Complexities and gaps

- 6.45** The Law Society of NSW reported that of all the matters in the inquiry terms of reference, problems with the *Home Building Act's* provisions for home warranty insurance are the greatest issue for its members and their clients.<sup>290</sup> Mr John MacIntyre, Chair of the Law Society's Property Law Committee stated in evidence:

It is without doubt that there have been frequent complaints to our members by clients in relation to the difficulties of the warranty scheme and the inadequacies and gaps in it. Complexity and inconsistency are just two of a number of things which we have experienced and which we have highlighted to some degree in the [submission].<sup>291</sup>

- 6.46** Issues in the Act related to home warranty insurance documented in the Law Society's submission include:

- some key concepts within the Act in respect of home warranty insurance are poorly defined or not defined at all
- various provisions were poorly drafted and require clarification
- provisions for owner builders are different to and more onerous than those for other builders
- there are gaps in coverage in relation to multi-story buildings and comatose builders.<sup>292</sup>

### The Committee's view

- 6.47** The Committee was concerned by the evidence presented by inquiry participants about the poor consumer protections offered by the current home warranty insurance scheme. We consider it highly desirable that coverage be extended beyond the 'last resort' circumstances of a builder's death, disappearance or insolvency. We are similarly concerned by reports that the current scheme leads to the escalation of disputes rather than their early resolution, and that payouts are sometimes inadequate while the consumer costs associated with exhausting other avenues before claiming on insurance can be exorbitant. The fact that both consumer and industry representatives highlighted these deficits attests to the weight of the problem.
- 6.48** For these reasons the Committee welcomes the advice of the Home Building Service that approval has been sought from the NSW Government to introduce an additional trigger to

<sup>289</sup> Mr Griffin, Evidence, 2 November 2007, p 6

<sup>290</sup> Submission 20, Law Society of NSW, p 2

<sup>291</sup> Mr McIntyre, Evidence, 20 November, 2006, p 56

<sup>292</sup> Submission 20, pp 2-5

home warranty insurance to enable consumers to access insurance without having to pursue bankruptcy or insolvency. We recommend that the Government adopt such a policy.

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### **Recommendation 18**

That the NSW Government adopt the recommendation of the Home Warranty Insurance Scheme Board to introduce an additional trigger to enable consumers to access insurance without having to pursue a builder's bankruptcy or insolvency.

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- 6.49** At the same time, without the details of the Home Warranty Insurance Scheme Boards' submission to the Government, we are not able to ascertain how well the proposal will promote early dispute resolution and prevent protracted and costly disputes. The Committee is concerned that any additional trigger may still require the consumer to exhaust all other avenues of redress before being able to resort to the scheme. For this reason and in light of the evidence more generally about the impact of current arrangements on consumers, the Committee also recommends that both the Board and the Office of Fair Trading consider additional mechanisms to further increase consumer protection and promote early and fair dispute resolution in respect of home warranty insurance.
- 6.50** On the issue of privatisation, while the Committee accepts that New South Wales is operating under a privatised home warranty insurance model, we are nonetheless concerned by the evidence about the perceived vested interests of insurers and industry bodies within that model. We consider that the recent moves towards publishing information on the scheme on a quarterly basis will go some way to improving transparency of the scheme. However, we also consider that again in the interests of consumer protection, further effort should be devoted to promoting the accountability of insurers and the transparency of the scheme.
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### **Recommendation 19**

That the Home Warranty Insurance Scheme Board and the Office of Fair Trading consider additional mechanisms in relation to home warranty insurance to further:

- increase consumer protection
  - promote early and fair dispute resolution
  - promote the accountability of insurers and the transparency of the scheme.
- 

- 6.51** The Committee also considers that in light of the evidence of the Law Society of NSW, there is a need to address gaps and unnecessary complexities in the *Home Building Act's* provisions for home warranty insurance. It is logical that this should occur as part of the re-writing of the *Home Building Act* that will shortly commence.
- 6.52** Finally, it is clear to the Committee from the evidence put forward by consumers, and to a lesser extent by industry representatives, that there is a mismatch between many consumers' understanding and expectations in relation to home warranty insurance and their entitlements under the current scheme. This suggests a need not only for improvements to those
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entitlements, but also for better education of consumers about the scheme. On this basis we consider that the Home Warranty Insurance Scheme Board should work with the Office of Fair Trading to improve consumer information about the home warranty insurance scheme.

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**Recommendation 20**

That the Home Warranty Insurance Scheme Board and the Office of Fair Trading develop a strategy to improve consumer information about the home warranty insurance scheme.

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## Chapter 7 Conclusion

This chapter concludes the Committee's report by considering the evidence documented in previous chapters that the Home Building Service is under-resourced.

### The need for more resources

- 7.1 The suggestion that the Home Building Service requires more resources to effectively fulfil its role was made by inquiry participants in relation to licensing, complaints resolution and the discipline of builders. This claim was strengthened by the fact that it was made not only by consumers but also by industry representatives and other parties.
- 7.2 The Committee sought the Office of Fair Trading's (OFT) response to this suggestion in both written answers to questions on notice and at the November 2007 hearing. Mr Steve Griffin, General Manager of the Home Building Service stated in evidence:

A restructure of the Home Building Service has been approved and recruitment for the new structure is underway. The new structure has additional positions in the Licensing and Mediation Services and Compliance Branches. The new structure also reallocates existing staff and resources to make more effective utilisation of those resources, redefines roles, and streamlines the operational functions and procedures of the Home Building Service. The overall staffing figure in [the] Home Building Service increased from 137 to 140, while the establishment in [the] Licensing Branch increased from 48 to 52 in a more effective organisational structure.<sup>293</sup>

- 7.3 The OFT's written answer further indicated that:

There are plans to further improve [the] efficiency and effectiveness of the Home Building Service via the better use of technology and streamlining of administrative processes.<sup>294</sup>

### The Committee's view

- 7.4 On the basis of the evidence presented by consumers, industry representatives and the OFT during this inquiry, the Committee considers that the home building licensing, complaints handling and disciplinary systems in New South Wales have improved since the establishment of the Home Building Service in 2003. However, we also consider that further significant improvements are needed in order to ensure better industry compliance with the *Home Building Act*, and thereby, better consumer protection.
- 7.5 The majority of the Committee's recommendations focus on legislative and policy changes to achieve these improvements. In addition, some have focused on the need for further effort to improve the Home Building Service's track record against its performance standards, particularly in relation to early dispute resolution and the discipline of builders. The

<sup>293</sup> Mr Griffin, Evidence, 2 November 2007

<sup>294</sup> Answers to written questions on notice, 1 November 2007, Office of Fair Trading, p 20

Committee notes the OFT's endeavours to make better use of its resources by restructuring the Home Building Service, adding new positions in certain areas and reallocating other roles, along with the potential for information technology to further improve efficiency and effectiveness. However, on the basis of the evidence of both consumers and builder representatives, the Committee considers that additional resources are required to enable the Home Building Service to effectively fulfil its roles in respect of licensing, complaints resolution and discipline, and calls on the NSW Government to deliver these resources.

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### **Recommendation 21**

That the NSW Government provide additional resources to enable the Home Building Service to effectively fulfil its licensing, complaints resolution and disciplinary roles.

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## Appendix 1 Submissions

No	Author
1	Mr Robert Siebert
1a	Mr Robert Siebert
1b	Mr Robert Siebert
1c	Mr Robert Siebert
1d	Mr Robert Siebert
2	Mr Chris Fitzgerald
2a	Mr Chris Fitzgerald
2b	Mr Chris Fitzgerald
2c	Mr Chris Fitzgerald
2d	Mr Chris Fitzgerald
3	Confidential
4	Mr Ian Jennings (Queensland Building Services Authority)
4a	Mr Ian Jennings (Queensland Building Services Authority)
5	Mr Colin Sharp
5a	Mr Colin Sharp
6	Mr John Sutton (Construction Forestry Mining Energy Union)
7	Mr Giles Harden Jones (hardenjonesarchitects)
8	Confidential
8a	Confidential
9	Mr George Vardas (Champion Homes)
10	Confidential
10a	Confidential
11	Confidential
11a	Confidential
11b	Confidential
12	Ms Carolyn Conner (Insurance Council of Australia)
12a	Mr John Driscoll (Insurance Council of Australia)
13	Mr Phil Dwyer (Builders' Collective of Australia)
14	Mr Brian Seidler (Master Builders Association of NSW)
14a	Mr Peter Meredith (Master Builders Association of NSW)
15	Ms Anita Campbell (Housing Industry Association (HIA))
15a	Mr Graham Wolfe (Housing Industry Association (HIA))

<b>No</b>	<b>Author</b>
16	Ms Lyn Baker (Office of Fair Trading)
16a	Mr Michael Coutts-Trotter (Department of Commerce)
16b	Ms Lyn Baker (Office of Fair Trading)
17	Mr Gerard Nicol
18	Confidential
19	Ms Clover Moore
20	Ms June McPhie (The Law Society of New South Wales)
21	Ms Luisa Berg
21a	Ms Luisa Berg
21b	Ms Luisa Berg
21c	Ms Luisa Berg
22	Confidential
23	Confidential
24	Confidential
24a	Confidential
25	Mr and Mrs Boules
25a	Mr and Mrs Boules
26	Confidential
26a	Confidential
26b	Confidential
27	Mrs Irene Onorati (Building Action Review Group) Confidential
27a	Mrs Irene Onorati (Building Action Review Group)
27b	Mrs Irene Onorati (Building Action Review Group)
27c	Mrs Irene Onorati (Building Action Review Group)
28	Ms Dilber Salih
29	Ms Diane Condie
29a	Ms Diane Condie
30	Mrs Kalavati Magan
30a	Mrs Kalavati Magan
30b	Mrs Kalavati Magan
31	Mr Duncan Kennedy
31a	Mr Duncan Kennedy
32	Mr Andris Blums
32a	Mr Andris Blums
33	Confidential

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<b>No</b>	<b>Author</b>
33a	Confidential
34	Mr Minh Ai Tran
34a	Mr Minh Ai Tran
35	Confidential
35a	Confidential
36	Confidential
37	Confidential
37a	Confidential
38	Confidential
39	Ms Narelle Peters
40	Mrs Helen Stanojevic
41	Ms Jane Prince
42	Mrs Diana Cornwell

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## Appendix 2 Witnesses

A total of three public hearings and one public forum were conducted for this inquiry. Two public hearings were held at Parliament House in November 2006 as part of the General Purpose Standing Committee No 4 inquiry into the operations of the Home Building Service. As part of the current General Purpose Standing Committee No 2 inquiry, a public hearing and forum were held on 2 November 2007. Transcripts of these hearings and forum are available on the Committee's website at [www.parliament.nsw.gov.au/gpsc2](http://www.parliament.nsw.gov.au/gpsc2).

### Public hearings

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
<b>Friday 17 November 2006</b> Jubilee Room, Parliament House	Mrs Irene Onorati	President, Building Action Review Group
	Mr Sal Russo	Honorary Solicitor, Building Action Review Group
	Ms Jana Magan	Member, Building Action Review Group
	Mr Gerard Nicol	Member, Building Action Review Group
	Ms Lydia Chakouch	Member, Building Action Review Group
	Mr Graham Wolfe	Executive Director, Housing Industry Association NSW
	Mr Stuart Collins	Assistant Director, Business Compliance, Housing Industry Association NSW
	Mr Peter McClelland	NSW President, Construction and General Division, Construction, Forestry, Mining and Energy Union
	Ms Carolyn Conner	General Manager, Policy, Insurance Council of Australia
	Mr Allan Hansell	Government Relations Manager, Insurance Council of Australia
<b>Monday 20 November 2006</b> Room 814-815, Parliament House	Mr Michael Coutts-Trotter	Director General, Department of Commerce
	Ms Lyn Baker	Commissioner, Office of Fair Trading
	Mr Rod Stowe	Deputy Commissioner, Policy and Strategy, Office of Fair Trading
	Mr Steve Griffin	Acting General Manager, Home Building Service, Office of Fair Trading
	Mr Brian Seidler	Executive Director, Master Builders Association of NSW
	Mr Peter Meredith	Director, Housing, Master Builders Association of NSW
	Mr Phil Dwyer	National President, Builders Collective of Australia
Mr Russell Joseph	Secretary, Builders Collective of Australia	

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Mr James Willis	NSW Manager, Builders Collective of Australia
	Mr Ray Brown	National President, Building Designers Association Of Australia
	Ms Irene Moss	Chair, Review into Licensing of the Home Building Industry in NSW
	Mr Kevin Rice	Review into Licensing of the Home Building Industry in NSW
	Mr Liam Young	Senior Policy Officer, Department of Commerce
	Mr John McIntyre	Chair, Property Law Committee, Law Society of NSW
	Mr Tony Cahill	Member, Property Law Committee, Law Society of NSW
<b>Friday 2 November 2007</b>	Ms Lyn Baker	Commissioner, Office of Fair Trading
Jubilee Room, Parliament House	Mr Rod Stowe	Deputy Commissioner, Policy and Strategy, Office of Fair Trading
	Mr Steve Griffin	General Manager, Home Building Service, Office of Fair Trading

## Public forum

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
<b>Friday 2 November 2007</b>	Ms Narelle Peters	Consumer
Jubilee Room, Parliament House	Mr Chris Fitzgerald	Consumer
	Mrs Diane Condie	Consumer
	Mrs Diana Cornwell	Consumer
	Mr George Vardas	Business Manager, Champion Homes
	Mr Robert Siebert	Consumer
	Mr Albert Falzon	Consumer
	Mr Andris Blum	Consumer
	Mr Colin Sharp	Consumer
	Mrs Helen Stanojevic	Consumer
	Mr Garry Wells	Consumer
	Mr Charlie Tran	Consumer
	Mr Con Papanastasiou	Consumer
	Ms Adelesa Hon	Consumer
	Mr David Bryan	Consumer
	Dr Glenn Condie	Consumer

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<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Ms Lydia Chakouch	Consumer

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## Appendix 3 Tabled documents

### General Purpose Standing Committee No.4 inquiry

**Friday 17 November 2006**

**Public hearing, Parliament House**

1. Correspondence from the Hon Diane Beamer MP to Ms Noreen Hay MP on 1 August 2006 – *tabled by Mr Peter McClelland of the Construction, Forestry, Mining and Energy Union.*
2. Correspondence from the Building Action Review Group to Mr L. Le Compte, General Manager of the Home Building Service on 29 May 2004– *tabled by Mr Sal Russo of the Building Action Review Group*
3. Correspondence from the Building Action Review Group to Mr L. Le Compte, General Manager of the Home Building Service on 25 October 2004 – *tabled by Mr Sal Russo of the Building Action Review Group*

**Monday 20 November 2006**

**Public hearing, Parliament House**

1. Submission by the Queensland Master Builders Association to the National Review of the Home Builders Warranty Insurance and Consumer Protection – *tabled by Mr Russell Joseph of the Builders' Collective of Australia*
2. Master Builders Association of NSW, Policy Priorities 2006-2007 - *tabled by Mr Brian Seidler of the Master Builders Association of NSW*

### General Purpose Standing Committee No.2 inquiry

**Friday 2 November 2007**

**Public hearing, Parliament House**

1. Information about asbestos inspection at private residence – *tabled by Mr Gary Wells*
2. Previous submission and complete forum speech – *tabled by Mr Minh Ai Tran*
3. Complete forum speech – *tabled by Mr Colin Sharp*
4. Photograph and complete forum speech – *tabled by Mrs Helen Stanojevic*
5. Notes for forum speech and PowerPoint slides – *tabled by Mr Robert Siebert*
6. Correspondence with Mr Phil Dwyer, National President of the Builders' Collective of Australia – *tabled by Mr Andris Blums*
7. PowerPoint slides of residence – *tabled by Ms Narelle Peters*

- Inquiry into the operations of the Home Building Service

## Appendix 4 Minutes

### GPSC No. 4

### 53rd Parliament

### Minutes No. 98

Wednesday 27 September 2006

The Parkes Room, 6.30pm

#### 1. Members Present

Ms Jenny Gardiner (*Chair*)  
 Ms Sylvia Hale (*Deputy Chair*)  
 Ms Jan Burnswoods  
 Mr David Clarke  
 Mr David Oldfield  
 Ms Kayee Griffin  
 Mr Greg Donnelly

#### 2. Minutes

Resolved, on the motion of Mr Clarke: That Minutes No 91 be confirmed.

#### 3. Correspondence

The Committee noted the following items of correspondence:

##### *Received*

- Letter to the Committee Director, from four members of GPSC4, regarding a proposed self reference into the Operation of the Office of Fair Trading and the Home Building Service (21 September 2006)

#### 4. Proposed self reference

The Committee discussed proposed terms of reference for an inquiry into the Home Building Service of the Office of Fair Trading

Ms Burnswoods moved: That the proposed terms of reference for an inquiry into the Home Building Service be rejected because over the past four years there have been a number of inquiries relating to the regulation of home building. These are:

- 2002 – Campbell Inquiry – Inquiry into the quality of construction in NSW
- June 2002, Allen Percy, National Review of Home Builders Warranty Insurance and Consumer Protection; Report prepared for the Ministerial Council on Consumer Affairs
- September 2002, Parliament of NSW: Legislative Council Standing Committee on Law and Justice: Report on the Home Buildings Amendment (Insurance) Act 2002
- February 2003, TRH Cole, Final Report of the Royal Commission into the Building and Construction Industry
- September 2003, Richard Grellman, NSW Home Warranty Insurance Inquiry, Final Report
- November 2004, Productivity Commission Report, Reform of Building Regulation
- January 2005, statutory review of *Home Building Act 1989*
- 2005 Independent Commission Against Corruption Inquiry into the obtaining of home building licences

- Inquiry into the operations of the Home Building Service

- 2006 Moss Inquiry into Home Building Licensing in NSW
- COAG Skills Shortage Task Force (2005-2006) – Inquiry into the licensing of builders, bricklayers, carpenters and joiners, plumbers and electricians.

Question put.

Committee divided

Ayes: Ms Burnswoods, Mr Donnelly, Ms Griffin

Noes: Mr Clarke, Ms Gardiner, Ms Hale, Mr Oldfield

Question resolved in the negative.

Mr Donnelly moved: That the terms of reference be amended by the deletion of items (a) and (f)

Question put.

Committee divided.

Ayes: Ms Burnswoods, Mr Donnelly, Ms Griffin

Noes: Mr Clarke, Ms Gardiner, Ms Hale, Mr Oldfield

Question resolved in the negative.

Resolved, on the motion of Ms Hale, that the Committee adopt the following terms of reference:

That General Purpose Standing Committee No. 4 inquire into and report on:

The operations of the Home Building Service of the Office of Fair Trading, with particular reference to:

- a) The builder licensing system
- b) The Home Warranty Insurance Scheme
- c) The resolution of complaints
- d) The exercise of disciplinary powers
- e) The enforcement of relevant legislative and regulatory provisions
- f) The establishment of a Home Building Advice and Advocacy Centre
- g) Any other relevant matters

That the Committee report by 26 February 2007.

Resolved, on the motion of Mr Clarke: That the Committee accept the following inquiry timeline provided by the secretariat:

- **11 October** Advertise terms of reference and call for submissions in Sydney Morning Herald and Daily Telegraph with a 4 week submission period. Send letters out to stakeholders inviting participation.
- **8 November** Submissions close
- **Fri 17 &/or 20 Nov** Hearing(s) in sitting weeks in November
- **6 February** Draft report to Chair
- **12 February** Report to Members
- **16 February** Deliberative to adopt report
- **26 February** Tabling



**5. Adjournment**

The Committee adjourned at 6:50pm *sine die*.

**Beverly Duffy**  
Clerk to the Committee

**GPSC No. 4**

**53rd Parliament**

**Minutes No. 104**

Friday 17 November 2006

Parliament House at 9:30am

**1. Members Present**

Ms Jenny Gardiner (*Chair*)  
Ms Sylvia Hale (*Deputy Chair*)  
Dr Arthur Chesterfield-Evans (*Oldfield*)  
Mr John Ryan (*Clarke*)  
Mr Greg Donnelly  
Ms Jan Burnswoods  
Ms Kayee Griffin

**2. Substitute Members**

The Committee noted advice of the following substitutions:

- Dr Arthur Chesterfield-Evans to substitute for Mr David Oldfield;
- Mr John Ryan to substitute for Mr David Clarke.

**3. Minutes**

Resolved, on the motion of Mr Donnelly: That minutes no. 98, 102 and 103 be confirmed.

**4. Correspondence**

The Committee noted the following items of correspondence:

*Received*

- Email from Mr Greg McCarthy, Chair, Home Warranty Insurance Scheme Board, declining initiation to appear at the public hearings for the Home Building Inquiry (7 November 2006).
- Email from Ms Carolyn Conner, General Manager, Policy, Insurance Council of Australia, declining initiation to appear at the public hearings for the Home Building Inquiry (13 November 2006).
- Letter from the NSW Ombudsman providing a copy of a report relating to Case Study No. 13 in the NSW Ombudsman Annual Report 2005-2006 (8 November 2006).

**5. Conduct of Hearing**

Ms Hale moved: That for this hearing, the return date for answers to questions taken on notice be two weeks from 21 November 2006.

Ms Burnswoods moved: That the motion be amended by extending the return date for answers taken to questions on notice, to four weeks from the 21 November 2006.

Question: That the amendment of Ms Burnswoods be agreed to.

Question put.

Committee divided.

Ayes: Ms Jan Burnswoods, Mr Greg Donnelly, Ms Kayee Griffin.

Noes: Ms Jenny Gardiner, Ms Sylvia Hale, Dr Arthur Chesterfield-Evans, Mr John Ryan.

Question resolved in the negative.

Original question put.

Committee divided.

Ayes: Ms Gardiner, Mr Ryan, Dr Chesterfield-Evans, Ms Hale

Noes: Ms Burnswoods, Mr Donnelly, Ms Griffin.

Question resolved in the affirmative.

The Clerk to the Committee advised that a person under 18 years of age has requested to give evidence during the time allocated to BARG.

Resolved, on the motion of Ms Hale, that the person under the age of 18 years who has requested to appear before the Committee be permitted to give evidence but that her identify remain confidential and the media instructed not to identify her by name or film or photograph her during or after her evidence.

Resolved, on the motion of Ms Hale, that the Insurance Council of Australia be permitted to give evidence at 2:15pm, at the hearing on 17 November 2006.

#### **6. Public Hearing: Inquiry into operations of the Home Building Service**

The witnesses, public and media were admitted.

The Chair made an opening statement about procedural matters for the hearing.

The following witnesses were sworn and examined:

- Ms Irene Onorati President, Building Action Review Group
- Mr Sal Russo, Honorary Solicitor, Building Action Review Group
- Ms Lydia Chakouch, Member, Building Action Review Group
- Name suppressed
- Mr Gerard Nicol, Member, Building Action Review Group
- Ms Jana Magan, Member, Building Action Review Group.

Ms Griffin left the room at 10.15am.

Mr Russo tabled several documents relating to building complaints and undertook to ascertain whether complainants named in the documents would agree to provide this information to the Committee.

The evidence concluded and the witnesses withdrew.

Ms Griffin returned to the room.

The following witnesses were sworn and examined:

- Mr Graham Wolfe, Executive Director, Housing Industry Association
- Mr Stuart Collins, Assistant-Director, Business Compliance, Housing Industry Association

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Peter McClelland, State President, Construction & General Division, CFMEU

Mr McClelland tabled a letter to the Hon Diane Beamer.

The evidence concluded and the witnesses withdrew.

Witnesses, the media and the public withdrew.

**7. Deliberative meeting**

Resolved, on the motion of Ms Hale: That the Committee's deliberative meeting be rescheduled to 2.15pm.

**8. Questions on notice**

Resolved, on the motion of Mr Ryan: That written questions on notice for this hearing be submitted to the secretariat by 5pm Monday 20 November 2006.

Resolved, on the motion of Mr Ryan: That written questions on notice for this hearing on Monday 20 November be submitted to the secretariat by 5pm Wednesday 22 November 2006.

***Publication of NSW Ombudsman Report***

Resolved, on the motion of Ms Hale: That the report from the NSW Ombudsman regarding Case Study No 13 be published with identifying details of department officers removed.

***Publication of submissions***

Resolved, on the motion of Ms Burnswoods: That submissions, for which a request of confidentiality has been made by their author, remain confidential.

Resolved, on the motion of Ms Hale: That submissions from industry associations, government departments and other organisations be made public, unless there is a request for confidentiality.

Resolved, on the motion of Mr Ryan: That in order to assist the Committee to determine the publication status of submissions which include possible adverse mentions, the secretariat will:

- attempt to remove identifying information from these submissions
- in those submissions for which this exercise proves problematic, the secretariat will advise the Committee accordingly for their future consideration.

It was agreed that the Committee hold a short deliberative to discuss submissions on Wednesday or Thursday next week.

***Letter from Ms Griffin***

Ms Griffin tabled a letter to the Chair advising she was the Mayor of Canterbury Council during the construction of a development referred to by a witness in a confidential submission.

Resolved, on the motion of Mr Donnelly: That the letter be noted and that Ms Griffin's absence from the room during that evidence be noted in the minutes.

**9. Public Hearing: Inquiry into operations of the Home Building Service**

The witnesses, public and media were re-admitted.

The following witnesses were sworn or affirmed, and examined:

- Ms Carolyn Conner, General Manager Policy, Insurance Council of Australia
- Mr Allan Hansell, Government Relations Manager, Insurance Council of Australia

Witnesses, the media and the public withdrew.

**10. Adjournment**

The Committee adjourned at 3.40 pm.

**Rebecca Main**  
**A/Principal Council Officer**

**GPSC No. 4****53rd Parliament****Minutes No. 105**

Monday 20 November 2006

Parliament House, Room 814/815 at 9:40 am

**1. Members Present**

Ms Jenny Gardiner (*Chair*)  
Ms Sylvia Hale  
Dr Arthur Chesterfield-Evans (*Oldfield*)  
Mr Greg Pearce (*Clarke*)  
Mr Greg Donnelly  
Ms Jan Burnswoods  
Ms Kayee Griffin

**2. Substitute Members**

The Committee noted advice of the following substitutions:

- Dr Arthur Chesterfield-Evans to substitute for Mr Oldfield
- Withdrawal of substitution advice: Mr Ryan to substitute for Mr Clarke
- New advice of substitution: Mr Pearce to substitute for Mr Clarke

**3. Public Hearing: Inquiry into operations of the Home Building Service**

The witnesses, public and media were admitted.

The Chair made an opening statement about procedural matters for the hearing.

The following witnesses were sworn and examined:

- Mr Michael Coutts-Trotter, Director General, Department of Commerce
- Ms Lyn Baker, Commissioner, Office of Fair Trading
- Mr Rod Stowe, Deputy Commissioner, Policy & Strategy, Office of Fair Trading
- Mr Steve Griffin, A/General Manager, Home Building Service, Office of Fair Trading

Mr Coutts-Trotter tabled his opening statement.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Brian Seidler, Executive Director, Master Builders Association of NSW
- Mr Peter Meredith, Director of Housing, Master Builders Association of NSW

Mr Seidler tabled document titled '*Master Builders Association of NSW Policy Priorities 2006-2007*'.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Phil Dwyer, National President, Builders Collective of Australia
- Mr James Willis, Manager NSW, Builders Collective of Australia
- Mr Ray Brown, National President, Building Designers Association Australia
- Mr Russell Joseph, Member, Builders Collective Australia.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Irene Moss, Chair, Review of NSW building licensing scheme
- Mr Kevin Rice, Assistant to the Chair, Review of NSW building licensing scheme
- Mr Liam Young, Project Manager, Home Building Licensing Review, Office of Fair Trading

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr John McIntyre, Chair, Property Law Committee, Law Society of NSW
- Mr Tony Cahill, Member, Property Law Committee, Law Society of NSW

The evidence concluded and the witnesses withdrew.

Witnesses, the media and the public withdrew.

#### **4. Deliberative**

##### ***Minutes***

Resolved, on the motion of Mr Donnelly, that item No 5 of Minutes no.104 be amended by noting that the return date for answers to questions of notice from the hearing on 17 November, be two weeks from 22 November 2006.

Resolved, on the motion of Mr Donnelly, that Minutes no 104, be confirmed, as amended.

##### ***Questions on notice***

Resolved on the motion of Mr Donnelly, that for this hearing, the return date for answers to questions on notice be two weeks from 23 November 2006 and any additional written questions on notice be provided to the secretariat by 5:00 pm on 22 November 2006.

##### ***Future conduct of inquiry***

Ms Hale moved that a further public hearing be held on a date mutually satisfactory to Committee Members from 9.30am to 1.00pm, in which members of the public who wish to speak at a forum do so and a second hearing for similar length of time be scheduled to allow for the Office of Fair Trading to respond to this evidence and answer further questions.

Question put and negatived.

Resolved, on the motion of Mr Donnelly: That the Committee meet on Thursday 23 November 2006 at 2.00pm to consider the publication status of submissions.

#### **5. Adjournment**

The Committee adjourned at 4:40pm.

**Rebecca Main**  
**A/Principal Council Officer**

**GPSC No. 4**

**53rd Parliament**

**Draft Minutes No. 106**

Thursday 23 November 2006

Parliament House, Parkes Room at 2:00pm

\*GPSC No. 4 did not meet to confirm these minutes prior to the inquiry lapsing on the prorogation of Parliament.

**GPSC No. 2**

**54th Parliament**

**Minutes No. 2**

Friday 27 July 2007

Room 1102, Parliament House, Sydney, at 12.40 pm

**1. Members present**

Mr Michael Veitch (*Catanzariti*)

Mr Greg Donnelly

Ms Marie Ficarra

Revd Dr Gordon Moyes

Ms Robyn Parker

Ms Lee Rhiannon

Ms Christine Robertson

**2. Substitutions**

The Chair advised that she had received written advice from the Government Whip that Mr Veitch would be substituting for Mr Catanzariti, for the purpose of this meeting.

**3. Previous minutes**

Resolved, on the motion of Ms Ficarra: That draft Minutes No.1 be confirmed.

**4. Correspondence**

The Committee noted the following items of correspondence received:

***Proposed inquiry into the operations of the Home Building Service of the Office of Fair Trading***

- 23 July 2007 – From Ms Parker, Ms Rhiannon and Revd Dr Moyes, dated 6 July 2007, requesting a meeting of GPSC 2 to consider a proposed self reference into the Home Building Service of the Office of Fair Trading (previously circulated).

**5. Consideration of proposed self reference – the operations of the Home Building Service of the Office of Fair Trading**

The Chair tabled a letter to the Clerk of the Committee signed by Ms Parker, Ms Rhiannon and Rev Moyes, requesting a meeting of the Committee to consider proposed terms of reference into the operations of the Home Building Service.

Resolved, on the motion of Rev Moyes: That the Committee adopt the following terms of reference

That General Purpose Standing Committee No. 2 inquire into and report on:

- 1) The operations of the Home Building Service of the Office of Fair Trading, with particular reference to:
  - a) The builder licensing system
  - b) The Home Warranty Insurance Scheme
  - c) The resolution of complaints
  - d) The exercise of disciplinary powers
  - e) The enforcement of relevant legislative and regulatory provisions
  - f) The establishment of a Home Building Advice and Advocacy Centre
  - g) Any other relevant matters.

Resolved, on the motion of Ms Robertson: That the following paragraph be placed on the Committee's website to explain the background to the inquiry:



‘An inquiry into the Home Building Service was commenced but not completed by GPSC 4 in the final session of the last Parliament. During this time the committee received 36 submissions and held two public hearings.

When the Parliament resumes in September, GPSC 2 will seek agreement from the House that the evidence generated by the previous inquiry be available for use by GPSC 2 in undertaking the new inquiry.

GPSC 2 will not conduct any formal inquiry activities in relation to this reference, such as seeking submissions or holding public hearings, or formally consider previous evidence, until the House considers this request.

The Committee will write to all participants in the previous inquiry in September to advise them of the House’s decision and the future conduct of the inquiry.’

Resolved, on the motion of Mr Donnelly: That the Committee meet during the lunch recess on Thursday 27 September 2007 to discuss the conduct of the inquiry into the Home Building Service.

## **6. Adjournment**

The Committee adjourned at 1pm.

**Beverly Duffy**  
**Clerk to the Committee**

**GPSC No. 2**

**54th Parliament**

**Minutes No. 3**

Friday 28 September 2007

Room 1136, Parliament House, Sydney, at 9.30 am

**1. Members present**

Mr Michael Veitch (*Catanzariti*)

Mr Greg Donnelly

Ms Marie Ficarra

Ms Robyn Parker

Ms Sylvia Hale (*Rhiannon*)

Ms Christine Robertson

**2. Apologies**

Revd Dr Gordon Moyes

**3. Substitutions**

The Chair advised that she had received written advice from Ms Rhiannon that Ms Hale would be substituting for Ms Rhiannon for the duration of the inquiry into the operations of the Home Building Service, and from the Government Whip that Mr Veitch would be substituting for Mr Catanzariti for the purpose of this meeting.

**4. Previous minutes**

Resolved, on the motion of Mr Donnelly: That draft Minutes No.2 be confirmed.

**5. Correspondence**

The Committee noted the following items of correspondence received:

***Inquiry into the operations of the Home Building Service***

- Various dates – 8 emails from Mr Andris Blum regarding builders warranty insurance
- 29 November 2006 – From Mr Colin Sharp and Ms Mary Ellen McCue, retracting their original request for their submissions (No. 5 and 5a) to be kept confidential
- 13 December 2006 – From Ms Beryl Glasson, regarding alleged fraud by an insurance company
- 13 December 2006 – From Ms Clover Moore MP, forwarding information from a constituent, Ms Mairead Paolacci, in respect of a building
- 19 December 2006 – From Mr Kamal Boules and Ms Angela Boules, retracting their original request for their submission (No. 25) to be kept confidential
- 15 January 2007 – From Mr Phillip Dwyer, Builders Collective of Australia (also cc'd to GPSC4 Members) concerning litigation by the Housing Industry Association
- 18 June 2007 – Email from Mr Rob Siebert requesting the re-establishment of the inquiry.

**6. Inquiry into the operations of the Home Building Service**

**6.1 Procedural issues concerning submissions and correspondence**

Resolved, on the motion of Ms Robertson: That GPSC2 adopt the same broad approach to determining the publication status of submissions as that adopted by GPSC4 in the previous inquiry into the operations of the Home Building Service.

Resolved, on the motion of Ms Robertson: That submissions, for which a request of confidentiality has been made by their authors, remain confidential.

Resolved, on the motion of Ms Robertson: That submissions from industry associations, government departments and other organisations be made public, unless there is a request for confidentiality.

Resolved, on the motion of Ms Robertson: That in order to assist the Committee to determine the publication status of submissions which include possible adverse mentions, the secretariat will:

- attempt to remove identifying information from these submissions
- in those submissions for which this exercise proves problematic, the secretariat will advise the Committee accordingly for their future consideration.

Resolved, on the motion of Ms Hale: That the Committee publish the following submissions: Submissions 2c, 21a, 21b, 27, 27a, 30, 30a, 30b and 34 with the deletion of names of adversely mentioned parties and other identifying information, and without lengthy attachments.

Resolved, on the motion of Ms Ficarra: That the following submissions remain confidential as requested by their authors: Submissions 26a, 35 and 36.

Resolved, on the motion of Mr Donnelly: That the Committee publish the answers to questions on notice received from the Office of Fair Trading (OFT) with the deletion of the names of the complainants and builder involved in the NSW Ombudsman case study; the Insurance Council of Australia; the Builders Collective of Australia; the Master Builders Association NSW and the Building Action Review Group (BARG).

Resolved, on the motion of Ms Ficarra: That the Committee publish the following submissions: Submissions 5, 5a and 25 with the deletion of names of adversely mentioned parties and without lengthy attachments.

Resolved, on the motion of Ms Hale: That the Committee write to the people who sent correspondence or submissions to the inquiry during the period 5 March 2007 – 26 July 2007, informing them of the re-establishment of the inquiry and asking them to confirm in writing/email if they wish their submission or correspondence to be considered as a submission to GPSC2.

Resolved, on the motion of Ms Ficarra: That the Committee publish submissions 27b, 1b and 37 with the deletion of names of adversely mentioned parties.

## **6.2 Future conduct of the inquiry**

Resolved, on the motion of Ms Hale: That the Committee write to the authors of all submissions received up to 5 March 2007 to:

- inform them of the re-establishment of the inquiry
- advise that their submission will become part of the new inquiry
- invite them to provide a supplementary submission if they wish to advise the Committee of any recent developments relevant to the terms of reference and not covered in their original submission.

Resolved, on the motion of Ms Robertson: That the Committee:

- hold a one hour hearing with Department of Commerce representatives to gain information on Government action in respect of the inquiry terms of reference since the Department's hearing with GPSC4 in November 2006
- write to the OFT identifying specific areas to be addressed at the hearing

- Inquiry into the operations of the Home Building Service

- on the same day as the hearing, hold a two hour forum for members of the public to address the Committee in respect of the terms of reference, with approximately 5 minutes to be provided to each speaker, and with preference to be given to those who did not give evidence during the GPSC4 inquiry
- include an invitation to participate in the forum in the letter to the authors of all submissions.

**7. Adjournment**

The Committee adjourned at 10.00 am until Monday 15 October 2007.

**Beverly Duffy**  
**Clerk to the Committee**

**GPSC No. 2**  
**54th Parliament**  
**Minutes No. 9**

Friday 2 November 2007

Jubilee Room, Parliament House, Sydney, at 10.00am

**1. Members present**

Mr Tony Catanzariti  
Mr Greg Donnelly  
Ms Sylvia Hale  
Ms Marie Ficarra  
Revd Dr Gordon Moyes  
Ms Robyn Parker  
Ms Christine Robertson

**2. Public forum – inquiry into the operations of the Home Building Service**

Forum participants, the public and the media were admitted.

The Chair made an opening statement welcoming participants and explaining procedures for participants' statements and the broadcasting of proceedings.

The following participants made a statement to the Committee:

- Ms Narelle Peters
- Mr Chris Fitzgerald
- Mrs Diane Condie
- Mrs Diana Cornwell
- Mr George Vardas
- Mr Robert Siebert
- Mr Albert Falzon
- Mr Andris Blum
- Mr Colin Sharp
- Mrs Helen Stanojevic
- Mr Garry Wells
- Mr Minh Ai (Charlie) Tran
- Mr Con Papanastasiou
- Ms Adelesa Hon
- Mr David Bryan
- Mr Glenn Condie
- Ms Lydia Chakoush

Documents were tendered by the following participants:

- Ms Narelle Peters
- Mr Robert Siebert

- Inquiry into the operations of the Home Building Service

- Mr Andris Blum
- Mr Colin Sharp
- Mrs Helen Stanojevic
- Mr Minh Ai (Charlie) Tran
- Mr Garry Wells

Statements concluded and the participants withdrew.

### **3. Public hearing – inquiry into the operations of the Home Building Service**

The following witnesses were sworn and examined:

- Ms Lyn Baker, Office of Fair Trading
- Mr Rod Stowe, Office of Fair Trading
- Mr Steve Griffin, Home Building Service, Office of Fair Trading

Questioning concluded and the witnesses withdrew.

The public hearing concluded at 12.25 pm. The public and media withdrew.

### **4. Deliberative meeting**

#### **4.1 Previous minutes**

Resolved, on the motion of Ms Robertson: That draft Minutes No. 3 and 5 be confirmed.

#### **4.2 Correspondence**

The Committee noted the following items of correspondence received:

##### ***Inquiry into the operations of the Home Building Service***

- 29 October 2007 – Email from Duncan Kennedy concerning correspondence with the Office of Fair Trading

The Committee noted the following items of correspondence sent:

##### ***Inquiry into the operations of the Home Building Service***

- 5 October 2007 – letter to Mr Phil Dwyer, Builders Collective of Australia, from the Secretariat, advising him of the reopening of the Inquiry and inviting him to participate at the public forum and submit a supplementary submission
- 5 October 2007 – letter to Mr Chris Fitzgerald, from the Secretariat, advising him of the reopening of the Inquiry and inviting him to participate at the public forum and submit a supplementary submission
- 5 October 2007 – letter to Mr Robert Siebert, from the Secretariat, advising him of the reopening of the Inquiry and inviting him to participate at the public forum and submit a supplementary submission
- 8 October 2007 – letter to Mr John Lee, Director General for the Department of Commerce, from the Chair, advising him of the reopening of the Inquiry and providing an indication of the areas which the Committee would like the Department to address at the hearing
- 10 October 2007 – letter from the Chair to all previous submission writers and hearing participants advising them of the reopening of the Inquiry and inviting them to participate at the public forum and submit a supplementary submission

- 10 October 2007 – letter to The Hon Eric Roozental MLC, the Minister for Commerce, from the Secretariat, advising him of Department witnesses that will be appearing at the 2 November 2007 hearing
- 10 October 2007 – letter to The Hon Linda Burney MP, the Minister for Fair Trading, from the Secretariat, advising her of Department witnesses that will be appearing at the 2 November 2007 hearing.

#### **4.3 Submissions**

Resolved, on the motion of Mr Donnelly: That the Committee publish supplementary submissions 1c, 31a and 37a with the deletion of names of adversely mentioned parties and without lengthy attachments.

#### **4.4 Matters arising from the public hearing**

Resolved, on the motion of Mr Donnelly: That the transcript of evidence of participant No.15 be amended by omitting from the published transcript certain comments made at the end of the participant's presentation.

#### **5. Adjournment**

The Committee adjourned at 1:40 pm until 9.30 am, Friday 7 December 2007.

**Beverly Duffy**  
Clerk to the Committee

**GPSC No. 2**

**54th Parliament**

**Draft Minutes No. 11**

Monday 10 December 2007

Room 1102, Parliament House, Sydney, at 10.05am

**1. Members present**

Ms Robyn Parker (*Chair*)  
Ms Christine Robertson (*Deputy Chair*)  
Mr Tony Catanzariti  
Mr Greg Donnelly  
Ms Marie Ficarra  
Ms Sylvia Hale  
Dr Gordon Moyes

**2. Previous minutes**

Resolved, on the motion of Ms Ficarra: That draft Minutes No. 9 be confirmed.

**3. Correspondence**

The Committee noted the following items of correspondence:

***Received***

- 29 October 2007 – From Mr Michael Tidball, CEO of the Law Society of NSW thanking the Committee for the offer of making a supplementary submission to the inquiry
- 1 November 2007 – From Ms Lyn Baker, Commissioner for Fair Trading, providing answers to written questions on notice submitted in advance of the hearing
- 13 November 2007 – From Ms Lyn Baker, Commissioner for Fair Trading, including:
  - Answers to questions taken on notice during the hearing on 2 November
  - Answers to an additional set of questions on notice forwarded to the OFT on 6 November
  - Report prepared by Ipsos on the Consumer, Trader and Tenancy Tribunal
  - Supplementary submission containing additional information about cases raised in evidence that are known to the OFT
- 15 November 2007 – From Mr Andris Blums regarding the Queensland model of the building service
- 28 November 2007 – From Mr Robert Seibert to the Commissioner for Fair Trading regarding his attempt to resolve legal issues relating to his house
- 28 November 2007 – From Mr Andris Blums discussing Mr Robert Seibert's correspondence to the Commissioner for Fair Trading.

***Sent***

- 7 November 2007 – Correspondence between the Chair and the Clerk Assistant – Procedural Support regarding Mr David Bryan's submission and statement to the inquiry.
- 28 November 2007 – From the Chair to the Hon Jenny Gardiner MLC, Chair of GPSC 4, advising that the minutes of GPSC 4 relating to its inquiry into the Home Building Service would be included as an appendix to the GPSC 2 report on the Home Building Service.

Resolved, on the motion of Ms Robertson: That the Committee publish the following correspondence from the Commissioner for Fair Trading:

- Answers to written questions on notice submitted in advance of the hearing on 2 November



- Answers to questions taken on notice during the hearing on 2 November
- Answers to an additional set of written questions on notice forwarded on 6 November
- Report prepared by Ipsos on the Consumer, Trader and Tenancy Tribunal.

#### 4. Publication of submissions

Resolved, on the motion of Ms Hale: That the Committee publish submissions 1d, 4a, 12a, 15a, 25a and 29a without lengthy attachments.

Resolved, on the motion of Mr Donnelly: That the Committee publish submissions 2d, 21c, 27c, 32a, 34a, 39, 40, 41 and 42 with the deletion of names of adversely mentioned parties, other identifying information and without lengthy attachments.

Resolved, on the motion of Ms Robertson: That the Committee keep confidential submissions 8a, 24a, 26b, 33a, 35a, 37, 37a and 38, as requested by their authors.

Resolved, on the motion of Mr Catanzariti: That the Committee publish submission 16b subject to the:

- Secretariat ascertaining if the authors of submissions 22 and 37 wish the OFT's response to their cases be kept confidential
- removal of the sections relating to the authors of submissions 22 and 37, if that is the wish of the submissions' authors; however, if the authors have no objection to publication, the sections will not be omitted
- deletion of names of adversely mentioned parties.

#### 5. Publication of tendered documents

Resolved, on the motion of Ms Ficarra: That the Committee publish the following documents tendered at the Public Forum on 2 November 2007, without lengthy attachments:

- Information about asbestos inspection at private residence – tendered by Mr Gary Wells
- Previous submission and complete forum speech – tendered by Mr Minh Ai Tran
- Complete forum speech – tendered by Mr Colin Sharp
- Photograph and complete forum speech – tendered by Mrs Helen Stanojevic
- Notes for forum speech and PowerPoint slides – tendered by Mr Rob Siebert
- Correspondence with Phil Dwyer, National President of the Builders; Collective of Australia – tendered by Andris Blums
- PowerPoint slides of residence – tendered by Narelle Peters.

#### 6. Consideration of Chair's draft report – Operations of the Home Building Service

The Chair tabled her draft report entitled Operations of the Home Building Service, which, having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Mr Donnelly: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Ms Robertson: That Chapter 2 be adopted.

Chapter 3 read.

Resolved, on the motion of Ms Robertson: That Recommendation 1 be adopted.

Resolved, on the motion of Ms Robertson: That Recommendation 2 be amended to move 'whilst also taking account of the need for procedural fairness' following 'That the Office of Fair Trading,' and to omit 'also'.

Resolved, on the motion of Mr Donnelly: That Recommendation 3 be adopted.

Resolved, on the motion of Ms Ficarra: That Recommendation 4 be adopted.

Resolved, on the motion of Mr Catanzariti: That Recommendation 5 be adopted.

Resolved, on the motion of Ms Hale: That Recommendation 6 be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Ms Robertson: That paragraph 4.26 be amended to omit 'they are also dissatisfied with early' and insert 'early', and to insert 'could be strengthened' following 'dispute resolution arrangements.'

Resolved, on the motion of Ms Hale: That paragraph 4.45 be amended following the first sentence, to insert: 'The Committee noted evidence that inspectors had limited authority in terms of what they could inspect. This sometimes resulted in incomplete or inadequate assessments and substantial problems being overlooked.'

Resolved, on the motion of Ms Robertson: That Recommendations 7, 8, 9 and 10 be adopted.

Resolved, on the motion of Mr Donnelly: That paragraph 4.50 be amended to omit 'the Tribunal fined' in line 5 and insert 'was fined' following 'without a licence.'

Resolved, on the motion of Mr Donnelly: That whenever the Consumer, Trader and Tenancy Tribunal is mentioned in the report, it be referred to as the CTTT.

Resolved, on the motion of Ms Ficarra: That Recommendation 11 be adopted.

Resolved, on the motion of Ms Hale: That Recommendations 12 and 13 be adopted.

Resolved, on the motion of Ms Robertson: That Chapter 4, as amended, be adopted.

The Committee adjourned at 11am until 1.10pm.

Resolved, on the motion of Ms Robertson: That the Committee recommit Chapter 4 for consideration.

Chapter 4 read.

Resolved, on the motion of Ms Robertson: That the following words be inserted after Recommendation 10, under a new level 1 heading entitled 'Building certification': 'A number of forum participants raised a range of serious concerns relating to building certification (footnote: Ms Diane Condie, Public Forum, 2 November 2007, p 6; Mrs Diane Cornwell, Public Forum, 2 November 2007, p 6; Mr Colin Sharp, Public Forum, 2 November 2007, pp 13-14; Mr Con Papanastasiou, Public Forum, 2 November 2007, p19). The Committee

notes that improving oversight of the building certification system is one of the recommendations put forward in the November 2007 discussion paper on reforms to the NSW planning system. The Committee urges the Minister for Planning to take note of these consumer concerns.'

Resolved, on the motion of Ms Robertson: That a recommendation be inserted following the new section on building certification: 'That the Minister for Planning take note of consumer concerns in respect of building certification.'

Resolved, on the motion of Mr Donnelly: That Chapter 4, as amended, be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Donnelly: That Recommendation 14 be adopted.

Resolved, on the motion of Mr Donnelly: That Recommendation 15 be amended to omit the last dot point, and that the second dot point be amended to read 'penalties (including on-the-spot penalties)'.

Resolved, on the motion of Ms Ficarra: That Recommendation 16 be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 5, as amended, be adopted.

Chapter 6 read.

Resolved, on the motion of Ms Hale: That subject to Ms Hale providing an accurate reference (to be verified by the Secretariat), and subject to the reference being circulated to the Committee, that a fourth dot point be inserted at the end of paragraph 6.7, as follows: 'is sold by the private insurance company, but claims may be recovered from the builder under the deeds of indemnity and/or bank guarantees held by the insurer.'

Resolved, on the motion of Ms Hale: That subject to Ms Hale providing an accurate reference (to be verified by the Secretariat), and subject to the reference being circulated to the Committee, a new paragraph be inserted after paragraph 6.10, under the heading 'Consumer protection'. That the paragraph read: 'Evidence received by the previous Committee in 2006 indicated that there was an issue in relation to builders being required to provide to the insurer deeds of indemnity and/or bank guarantees. This may further influence the structure of a builder's business, its annual turnover, and the size of projects the builder can undertake.'

Resolved, on the motion of Ms Hale: That a new paragraph be inserted after paragraph 6.33, as follows: 'However, Mr Peter Meredith, Director of Housing with the Master Builders Association of NSW, noted the difficulties confronting builders in moving between insurers.' (footnote: Mr Meredith, Evidence, 20 November 2006, pp25-26)

Resolved, on the motion of Ms Hale: That a new paragraph be inserted after paragraph 6.41, as follows: 'However, the Builders Collective of Australia had a contrary view, and defended the Queensland scheme (footnote: Mr Joseph, Evidence, 20 November 2006, p38 and 41; Mr Dwyer, Evidence, 20 November 2006, pp38-41). According to Mr Phil Dwyer, National President of the Builders Collective of Australia: "It is transparent, accountable and cost-effective. It adjudicates for and is fair to both parties and it delivers genuine and timely first resort protection to consumers. Its benefits will satisfy all criteria of consumer protection within the New South Wales building industry."' (footnote: Mr Dwyer, Evidence, 20 November 2006, p39)

Resolved, on the motion of Ms Hale: That paragraph 6.47 be amended following the first sentence to insert: 'The Committee is concerned that any additional trigger may still require the consumer to exhaust all other avenues of redress before being able to resort to the scheme.'

Resolved, on the motion of Ms Robertson: That Recommendation 17 be adopted.

Resolved, on the motion of Ms Ficarra: That Recommendation 18 be adopted.

Ms Hale moved: That paragraph 6.50 be omitted and the following paragraphs inserted:

‘As is evident from the numerous inquiries into operations of the privatized home warranty insurance scheme and the on-going failure to offer timely, appropriate and adequate protection to consumers, the Committee doubts that any additional tinkering with the scheme will result in any fundamental improvement to its operations.

It is apparent that the HWI scheme is constructed so as to ensure that there are few claims against it – a protection for insurers that is further bolstered by requiring builders to provide to insurers deeds of indemnity and/or bank guarantees.

NSW taxpayers, moreover, provide additional protection to private insurers under arrangements introduced on 1 July 2002, whereby the government underwrites large builders for claims exceeding \$10 million.

The Committee is, therefore, of the view that the HWI scheme should be abandoned and a scheme modelled on the first resort scheme operating in Queensland be adopted.’

Question put and negatived.

On the question being put, Ms Hale, being the only member voting for the ayes, asked for her vote to be recorded in the minutes.

Resolved, on the motion of Ms Ficarra: That Recommendation 19 be adopted.

Mr Catanzariti moved: That Chapter 6, as amended, be adopted.

Question put and passed.

On the question being put, Ms Hale, being the only member voting for the noes, asked for her vote to be recorded in the minutes.

Chapter 7 read.

Resolved, on the motion of Ms Ficarra: That Recommendation 20 be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 7 be adopted.

Executive Summary read.

Resolved, on the motion of Mr Donnelly: That the first paragraph on p2 be amended to omit ‘the credibility of both’ and insert ‘there are ongoing problems with’, and to omit ‘have ... ongoing problems’ and insert ‘which undermine their credibility’.

Resolved, on the motion of Mr Donnelly: That the Executive Summary, as amended, be adopted.

Resolved, on the motion of Mr Catanzariti: That the report, as amended, be the report of the Committee.

Resolved, on the motion of Mr Catanzariti: That the report be presented to the House, together with transcripts of evidence, submissions, tabled documents, minutes of proceedings and correspondence relating to the Inquiry, except for documents kept confidential by resolution of the Committee.

Resolved, on the motion of Mr Moyes: That the Committee thank the Secretariat for their work in preparing the report.

Resolved, on the motion of Ms Ficarra: That dissenting statements be submitted to the Secretariat by 9 am Wednesday 12 December.

**7. Adjournment**

The Committee adjourned at 2.50pm *sine die*.

Madeleine Foley

**Clerk to the Committee**



## Appendix 5 Dissenting statement

### Ms Sylvia Hale MLC, The Greens

Privatised home warranty insurance is a failure, as is clear from the numerous inquiries into its operation in this and other States and from the disturbing evidence provided to this Inquiry. It not only fails to offer timely, appropriate or adequate protection to consumers, it is also a source of profound dissatisfaction within the building industry itself. As the Master Builders Association commented:

The privatisation of consumer protection insurance in NSW has had a devastating impact on the NSW residential building industry.

... Other than for insurers, it is difficult to identify who has benefited from the introduction of a privatised insurance scheme in NSW.<sup>295</sup>

It is a scheme that is fundamentally flawed because its design ensures that few claims can be made against it. A consumer seeking rectification or compensation for unsatisfactory work cannot claim against an insurer unless the builder is dead, has disappeared or is insolvent (and even bankruptcy does not always meet the last criterion).<sup>296</sup>

The scheme is one of 'last resort' and the onus falls on the consumer, who may already have suffered ruinous financial losses, to exhaust all other avenues of redress including expensive and time-consuming litigation (which few are able to afford) before lodging a claim. Even then, as evidence to the Inquiry indicated, there is a marked resistance on the part of insurers to settle.

A stark illustration of this was provided by a witness who has been 'left with a house I cannot live in, cannot have fixed or get fixed through Home Owners Warranty Insurance nor can I sell it because it does not comply with the conditions of development consent'.<sup>297</sup> His legal, rental and rectification costs are \$290,000, yet Vero, his insurer, has said it will pay only \$50,000.<sup>298</sup>

In contrast to NSW's privatised, profit-driven scheme of last resort is Queensland's scheme, which the Builders' Collective of Australia commended:

There are no profit driven brokers, Trade Associations or insurers that can exploit any systemic weakness in the Queensland system whatsoever. It is fully transparent, accountable and audited by the Auditor General on an annual basis.

... it is the only system in Australia that delivers genuine first resort protection ... a consumer can make a claim against the warranty policy without the last resort triggers of death, disappearance and insolvency. ...

<sup>295</sup> Submission 14, p 12

<sup>296</sup> Mr Phil Dwyer, Evidence, 20 November 2006, p 39

<sup>297</sup> Submission 1c, p 7

<sup>298</sup> See para 6.13 above

Fundamentally, if the builder will not fix the adjudicated defect then the accreditation arm of the QBSA can and does take action against that builder and will inevitably lead to suspension and/or deregistration. All this occurs while the defect or incomplete work is fixed and the home owner gets on with their life.<sup>299</sup>

Some contend that insurance premiums in Queensland are higher than in NSW,<sup>300</sup> although others dispute this claim.<sup>301</sup> The critical issue, however, is not so much the size of the premium as the protection it offers. Any premium, however cheap, that does not provide adequate protection is too expensive.

Consumer satisfaction with the public Queensland scheme appears to be high: 'The consumer rate of approval for the Queensland BSA as measured by a McNair Anderson survey done for the Government rated the scheme at 96 per cent approval two years ago [2004]'.<sup>302</sup> In contrast, the view of the Australian Consumers' Association about schemes such as NSW's is scathing:

Basically our view is that home warranty insurance makes a mockery of consumer protection. It's not worth the paper that it's written on. It's completely useless and particularly the last resort clause makes it a junk insurance.<sup>303</sup>

Professional builders have additional concerns. The Master Builders Association doubted whether the entry of more insurers into the home warranty market had increased competition or reduced premiums:

... the question remains whether in reality there is true competition. Builders being blocked from registering with all insurers in the market is not consistent with 'free movement' in this specific market. This barrier prevents builders from capitalising on any competition in premiums offered by the seven insurers, effectively denying the client or consumer the benefits of competitive premiums.

Indeed, a builder is required to cancel their eligibility with the current insurer, should they wish to gain eligibility with a new insurer. Not only does this cause difficulties and increase administration for the builder, it also denies the builder a contingency should an insurer choose to withdraw from the scheme.<sup>304</sup>

Mr Russell Joseph of the BCA commented that insurance cover 'is sold by the private insurance company but claims may be recovered from the builder under the deeds of indemnity and/or bank guarantees held by the insurer'.<sup>305</sup> In effect, the burden of underwriting insurance is transferred from the insurer to the builder. Mr Joseph also noted that, unlike Queensland where they are not required, indemnities and bank guarantees are 'a huge problem' for builders in NSW.<sup>306</sup>

Mr Ray Brown, Past President of the Building Designer Association, spoke of the difficulties some of his members experienced 'because of caps and the inability of those builders to attain warranty

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<sup>299</sup> Submission 13, p 2

<sup>300</sup> Submission 16a, p 6

<sup>301</sup> Mr Russell Joseph, Evidence, 20 November 2006, p 40

<sup>302</sup> Mr Phil Dwyer, Evidence, 20 November 2006, p 41

<sup>303</sup> ABC TV 7.30 Report, 8 January 2007. The interview is referred to in submission 32a, p 2

<sup>304</sup> Submission 14, p 15

<sup>305</sup> Evidence, 20 November 2006, p 38

<sup>306</sup> Evidence, 20 November 2006, p 38



insurance. ... Many such as myself and others still have indemnities in place and are unable to have them released'.<sup>307</sup>

The power to refuse insurance, which a builders must obtain, affords the insurer an opportunity to exert significant influence over the builder's business.

Because of its profit-driven, last-resort nature, no amount of tinkering will result in any fundamental improvement to the NSW scheme. It should be abandoned and a scheme modelled on the first-resort, not-for-profit, publicly administered Queensland scheme adopted. As Mr William Meredith of the MBA commented, 'when you look at the Queensland scheme, which is a scheme of first resort, I guess a scheme of first resort can work and, indeed, it is working up there'.<sup>308</sup>

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<sup>307</sup> Evidence, 20 November 2006, p 36

<sup>308</sup> Evidence, 20 November 2006, p 25