

**Supplementary  
Submission  
No 1c**

**INQUIRY INTO INQUIRY INTO THE OPERATIONS OF  
THE HOME BUILDING SERVICE**

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# **SUPPLEMENTARY SUBMISSION TO THE PARLIAMENTARY INQUIRY INTO THE OPERATIONS OF THE HOME BUILDING SERVICE**

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## **Performance of Tribunal and its Consequential Impact**

In my first submission to the Inquiry I described the performance of the Tribunal and highlighted issues including

- The misleading of the Tribunal;
- Errors at law
- Breaches of the Code of Conduct for Members
- Denial of Natural Justice

My matter has now progressed and this portion of my submission deals with the consequences of the Tribunal's decisions and how they are impacting on me. Examples are given below

### **Examples of Performance**

#### **Termite Control**

The facts associated with the termite control are:

- submitted a report from the White Ant Company, dated 27 October 2004 and signed by a Terry J Trapnell as part of their evidence in the matter Siebert v (Included in Submission 1).
- As part of my evidence I submitted two reports both opining the termite control was not in accordance with the relevant Australian Standards and photos showing the termite control was not visible. A photo showing an example of where the termite control is covered is included as Attachment 1.

- Based on the report submitted by \_\_\_\_\_ the Tribunal was satisfied on the balance of probabilities that the termite control was not defective.
- When I was given access to the house I sought a Certificate of Compliance and an inspection from the White Ant Company. They directed me to a franchisee named the White Ant Company but trading as R Jeffery Holdings Pty Ltd.
- An inspection was completed by R Jeffery Holdings on 30 August 2006 and they found that the termite control did not meet the relevant Australian Standards and could not be certified. Significant remedial works were identified as being required. A copy of this report was included in Submission 1.
- Given the difference of opinion I sought a meeting with all parties. The meeting was held on site in October 2006. At the meeting Mr Peter Dunn from the White Ant Company expressed agreement with the report done by R Jeffery Holdings Pty Ltd, stated the termite control did not meet the relevant Australian Standards and stated significant work was required to get it to comply.
- I advised the White Ant Company that evidence purported to be from them was used in the Tribunal and based on that evidence the Tribunal determined the termite control was not defective. A copy of the Trapnell report was provided to them. They advised me that the signatory to the report, T Trapnell, did not work for them and reiterated

the termite control did not meet the requirements of the relevant Australian Standard.

- I asked the White Ant Company to complete the works required to have the termite control comply with the requirements of the Australian Standards and conditions of consent but they refused to do the work unless I paid for it.

During this period I also sought an inspection by Ballina Council as I sought an occupancy certificate for the house. At that inspection Mr Vince Hunt of Ballina Council advised that an occupancy certificate could not be issued as the termite control did not comply with the relevant Australian Standards or the conditions of development consent.

Although the builder is in liquidation the relevance of this matter is that the insurance company have indicated at Attachment 2 , 2A and 10 that they will not pay to have the termite control fixed because the Tribunal found that termite control was not defective and awarded no damages to fix it.

#### Subfloor Brickwork.

All evidence before the Tribunal confirmed the sub floor brick work did not comply with the relevant Australian Standards. Notwithstanding the Tribunal found the brickwork shown in Attachment 3 "adequate". The brickwork does not meet the requirements of the relevant Australian Standards and as such has not been constructed in accordance with the conditions of development consent. The insurance company Vero have indicated at Attachment 2, 2A and 10 that they will not pay to have the brickwork fixed because the Tribunal found that brickwork was adequate and awarded no damages to fix it.

### Roof

As can be seen from the photo at Attachment 4 the roof has a bend in it. The roof does not meet the requirements of the relevant Australian Standards or the conditions of development consent. Again the insurance company Vero have indicated at Attachment 2, 2A and 10 that they will not pay to have the roof fixed because the Tribunal awarded no damages to have the roof fixed.

### Back Stairs

As can be seen from the photos at Attachment 5 the back stairs are missing and as such the house does not meet the requirements of the conditions of development consent. The insurance company Vero will not pay damages to have the back steps installed because the Tribunal awarded no damages to have the installed. The Tribunal did not accept my estimates of cost for rectification work and the builder did not include a cost to install the stairs so no damages were awarded.

### Other items

The majority of the other defects discussed in my previous submission have a similar status where the findings of the Tribunal have placed me in breach of the law. As the Tribunal made no findings in respect to the items or found items adequate the insurance company Vero will neither fix the defect nor pay damages to have the defect fixed.

### Proper and Workmanlike Manner

Although claimed that work such as that shown in Attachments 1, 3, 4, 5 and 6 was not done in a proper and workmanlike manner the Tribunal made no findings on these matters as discussed in Submission 1 due to a "deal" made

with the builder's barrister by the Member that he would make no findings in respect to S18b of the Home Building Act and as such the clauses in the contract requiring work to be done in a proper and workmanlike manner. As the Tribunal made no findings relating to s18b and the Contract in this matter the insurance company Vero will not rectify the items based on Clause 8 of their policy (Attachment 7). Vero have confirmed this in Attachment 2, 2A and 10.

#### **Consequence in Respect to Insurance**

The consequence of the Tribunal's performance is that the insurance company Vero will not fix the house such that I can get an occupancy certificate nor provide damages to allow me to get the house fixed such that an occupancy certificate can be provided.

Neither will Vero fix items in the house that are not done in a proper and workmanlike manner and/or have not been done in accordance with the plans and specifications.

I am 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.

#### **Consequence in Respect to Disciplinary Action Against the Builder**

As a result of the builders performance on my house the Home Building Service prosecute the builder. The Builder then appealed the decision against him in the Administrative Decisions Tribunal and had the fines imposed reduced because, amongst other items the brickwork as shown in

Attachment 1 and other items shown in Attachments 3, 4 and 5 were considered adequate by the Tribunal.

The actions of the Tribunal have undermined the Home Building Service and its ability to discipline a builder, as predicted in my first submission.

### **External Assessment of Tribunal Performance**

#### **Campbell Report**

In 2002 a report (the Campbell Report) was commissioned. It made various recommendations including recommendations that some decisions of the Tribunal be reviewed. The recommendations have never been implemented.

#### **McClelland Report**

In 2006 the then Minister commissioned Jan Mc Clelland and Associates. The report identified the need for a review panel. It also identifies that Members are not trained and it can be inferred that members do not have knowledge of substantive matters before them.

The report makes various recommendations including the development and implementation of a training program. Advice from the Tribunal is that the report has not been acted upon.

It is also noted in the report that there is a complaints process but this process has not been widely publicised by the Tribunal. There is no mention of it on their web site.

#### **IPSOS Customer Satisfaction Survey of Tribunal**

In approximately March 2007 a survey of applicants and respondents appearing before the Tribunal was undertaken by IPSOS. As can be seen in



Attachment 8 I have sought advice on the status of the report, where it is in government, what's to be done with the report and will it be made public.

The response I received was that if I wanted any of that information I would have to seek it through Freedom of Information.

I specifically asked what was the status of the report and was again told that if I wanted an answer to my question I would have to seek it through Freedom of Information (Attachment 8).

#### Approaches to the Tribunal in Respect of Decisions

In my case I have made numerous approaches to the Tribunal in respect to the determination in my case. I have been told that

- The Tribunal does not discuss specific decisions or cases
- The avenue for appeal is the Supreme Court.

Due to financial barriers the option of the Supreme Court is not available to anyone, except the most wealthy. The Tribunal's "closed door" attitude to specific cases means that the Tribunal is effectively stopping criticism or review, even internally, of itself and as such demonstrates an unwillingness to change, improve or address concerns raised.

#### Response to External Assessment

It is evident that the Tribunal does not respond to recommendations for improvement or the raising of issues through which problems could be identified and improvements occur. It maintains a "closed door" to criticism and issues raised, effectively stopping any engagement with those it supposedly serves.

Without resiling from recommendations made in my first submission it is also recommended that the recommendations in respect to review of decisions and training of Members from the reports be implemented. Further it is recommended an affordable review process for decisions questioned be implemented. In the alternate building matters should be heard by the Courts.

### **Insurance**

At present NSW has a Home Owner Warranty Insurance scheme based on "last resort". The system creates a number of issues that could otherwise be avoided if the insurance was based on a first resort system as in QLD.

The issues are

- Barriers to Submission of Claim
- Availability and use of damages
- Assessment of Claims

Further the Regulations and the wording of the policy create "loopholes" such that homeowners may remain having to meet a significant portion of the costs incurred in the resolution of their matter.

### **Barriers to Submission of Claim under Last Resort Insurance**

How the present Home Owner Warranty Insurance scheme has been applied in my case is that I had to go through the Tribunal to be awarded damages to rectify defects in my house, I then had to liquidate the builder before I could claim against the home Warranty Insurance.

The cost of these steps have been

Legal costs

\$59,000 approx

Cost to liquidate the builder

\$6,000 approx

**Total**

**\$65,000 approx**

As the insurance is last resort insurance I have had to meet these costs before I could submit a claim against the insurance. Having to meet such costs creates a financial barrier to home owners needing to claim on insurance.

My situation has been exacerbated because I have not been able to move into the house because an occupancy certificate cannot be given for the house. As such I have had to incur rental costs of \$55,000.

As described in my earlier submission after meeting the cost of building a house most people are not in the position to be able to overcome the financial barrier, in my case \$120,000, to submit and insurance claim.

Having the insurance scheme based on last resort, with significant costs having to be incurred before a claim can be made, may effectively block many home owners accessing the scheme.

It is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD.

**Availability of/ use of damages under last Resort Insurance.**

In my case whatever the settlement with the insurance company, some \$65,000 has been spent on legal cost and liquidation of the builder, and \$55,000 on rent waiting for damages to be determined and paid. There has also been expenditure by the builder in defending his position. This \$120,000+ has been spent on items other than fixing the house.

This expenditure has benefited neither the builder nor me. The only beneficiaries of the \$120,000+ have been lawyers, landlords and to a much lesser extent building inspectors. It is my opinion that it would have been more appropriate to have the monies spent on rectifying the house.

The situation is exacerbated if the cost of fixing the house, plus legal costs, plus rent exceeds the cap on liability (now \$300,000). In such a case monies which should have been available to fix the house would have had to be used to pay legal costs and rent leaving the homeowner out of pocket for the repairs and possibly unable to fix the house. This seems to be at odds with the intention of the legislation. Further it does not seem to comply with the principals of award of damages being that a person should, in so far as money can, be placed in a position he or she would have been if the work was completed properly.

Again it is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD.

#### **Assessment of Claims.**

Section 99 of the Home Building Act requires a contract of insurance to insure

- (a) a person on whose behalf the work is being done against the risk of loss resulting from non-completion of the work because of the insolvency, death or disappearance of the contractor, and*
- (b) a person on whose behalf the work is being done and the person's successors in title against the risk of being unable, because of the insolvency, death or disappearance of the contractor:*
  - (i) to recover compensation from the contractor for a breach of a statutory warranty in respect of the work, or*

(ii) to have the contractor rectify any such breach

Regulation 56 of the Home Building Regulations defines the losses indemnified.

*An insurance contract must indemnify beneficiaries under the insurance contract for the following losses or damage in respect of residential building work covered by the insurance contract:*

- (a) loss or damage resulting from non-completion of the work because of the insolvency, death or disappearance of the contractor,*
- (b) loss or damage arising from a breach of a statutory warranty, being loss or damage in respect of which the beneficiaries cannot recover compensation from the contractor or owner-builder or have the contractor or owner-builder rectify because of the insolvency, death or disappearance of the contractor or owner-builder.*

The Insurance Policy (Attachment 7) under Clause 3.1 indicates the Insurer will pay if the home owner suffers

- Loss or damage due to breach of statutory warranty
- Alternate accommodation
- Any legal cost

The Home Owners Charter (Attachment 9) states

*"We will provide you with a scope of works for the completion of your claim"*

And

*"Upon acceptance of your claim and with your agreement we will arrange for satisfactory completion or rectification. The work will be completed to the specifications and standard in the original building contract and in accordance with the Building Coded of Australia, relevant Australian Standards and the Guide to Standards and Tolerances"*

The application of the Charter, the Policy the Act and the Regulations in my case can be summarised in the following table

Item	Item Claimed	\$ Claimed	What Vero the Insurer said (Attachment 2, 2A and 10)	\$ Offered
Legal Costs	Legal Costs Assessment of Costs Cost to Liquidate the builder	\$58,948.34 \$1,443.75 \$5,986.06	Agreed Vero have not agreed Vero have not agreed even though Vero advised I had to liquidate the builder before I could submit a claim	\$7,840.13 Attach 10
Rental costs	\$220 /week from June 2003 \$250 /week from 26 July 2006  I was determined by the CTTT that the house should have been finished in June 2003. Liquidated damages were awarded based on that date.  The house still cannot be lived in.	\$55,000 approximately	Vero acknowledged I had paid the rent for the alternate accommodation I had to live in due to the house not being adequate for an occupancy certificate to be given.  Vero stated the contract included and I claimed liquidated damages. Vero was informed that the liquidated damages were a reasonable estimate of the cost I incurred due to the non completion of the building (the purpose of liquidated damages) and that the amount was based on the rent I had paid.  Vero advised that because I had claimed liquidated damages instead of rent in the Tribunal hearing, even though I incurred the expense, they would not pay the rental costs.	Nil Attach 10
Rectification Costs	\$178,000 + or balance of \$200,000  The estimate of \$178,000 was made in 2004 on a lesser list of defects. The estimate is in Submission 1	\$178,000+	Vero advised that even if the cost of rectification was above that awarded in the Tribunal they would not pay the amount required to have the item fixed, only the lesser amount awarded by the Tribunal. If their estimate was less than the award from the Tribunal they would pay the lesser amount. If the Tribunal awarded nothing I get nothing even though the defect exists and the house cannot be lived in.  Vero have advised they will not provide me with their assessment of the defects or their cost estimates to fix.	\$43,052.60 Attach 10
<b>TOTAL</b>		<b>\$291,948.34+</b>		<b>\$50,892.73</b>

It is difficult to believe the Act and Regulations were written to preclude a homeowner recovering damages that would place him or her in a position that they would have been if the work was completed properly. Notwithstanding the Regulations have been used, by in my case Vero, to preclude me from recovering damages to meet my all my legal costs, my rental costs and the costs of rectifying the defects in the house.

Liquidated Damages – Rental Costs.

Liquidated damages are defined as a reasonable estimate of the loss which will be incurred by the Principal, in this case the home owner, if the works are not completed on time. In my case they were set at \$250 per week being a reasonable estimate of the rent I would pay if the house was not completed.

I considering the term liquidated damages for delay in the contract and insurance policy it would appear it has initially been interpreted as liquidated damages for a delay, not liquidated damages to meet the costs incurred due to the delay. In that sense liquidated damages for a delay when no costs are incurred due to the delay are simply punitive damages and should not be paid.

But, due to the lack of definition it would appear insurance companies have sought, and been successful in a number of cases, to extend the definition of liquidated damages for delay to include liquidated damages for all costs incurred due to the delay. This is diametrically opposed to both the principal of liquidated damages and principals of damages in general as enunciated in *Hadley v Baxendale* and virtually all law originating from that decision.

In my case the fact that I claimed liquidated damages in the Tribunal hearing and was awarded liquidated damages allows the insurance company to take a position where in respect to my rental cost of

*"The amounts were not claimed in the CTTT proceedings against the builder and we are therefore unable to pursue our subrogated rights in relation to them"*

Which means my rental costs for the period I could not move into the house will not be met.

The situation can be resolved, that is allow homeowners to claim the costs incurred by the non completion of the building and protecting the builder from unreasonable claims, by changing Clause 58(1) (k) (ix) of the Regulations to read

*"Punitive damages"*

Alternatively if the Home Owner Warranty Insurance was first resort insurance the problem would not arise.

Again it is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD. In the alternate it is recommended Clause 58 of the Regulations be amended.

#### Damages – Rectification Costs.

The Home Building Act, regulations, Home Owners Charter ny Vero and the insurance policy all indicate that I should be indemnified against losses I have incurred due to the performance of the builder.

This can be compared with the assessment of my claim for incomplete and defective works which although not yet determined by Vero but for which Vero



has taken a position as enunciated in Attachments 2, 2A and 10. Specifically the Vero position as stated is:

*Any items claimed against Vero which have been denied by the CTTT will be denied"*

It goes on to say

*"However Vero's liability is limited to the amount awarded by the CTTT which was \$61,111.00. Further to this you have confirmed that there was an outstanding balance of \$20,895.53 which is greater than the amount determined by the CTTT"*

If this is the position taken by Vero, the house will not be able to be repaired such that I can gain an occupancy certificate. I will be left with a house I cannot live in nor sell because it does not comply with the conditions of development consent.

The issue would not arise if the insurance scheme was a scheme of first resort not last resort.

Secondly, as described previously, because of the performance of the Tribunal I am limited in the damages I can recover.

Again it is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD. In the alternate it is recommended the regulations and legislation be changed such that the home owner can recover damages through the insurance or have the insurance company do works such that the conditions of the Contract and development consent are met.

### **Position of Others**

Australian Consumer Association (Choice), builders activist groups such as the Australian Builders Collective, consumer groups such as BARG, the

Master Builders Association and every builder or home owner I have spoken to who has had dealings with Home Warranty Insurance except one all agree the system needs reform. All indicate they would prefer the QLD model over the NSW system.

As can be seen from my submission insurance companies have been provided loopholes so that they do not have indemnify an owner against all the losses the owner may incur due to the poor performance of a builder despite what appears to be the intent of the Act and Regulations.

For the consumer there is no requirement for a builder to take out insurance for works under \$12,000. Most consumers would insure any other possession worth \$10,000 so it seems ludicrous that insurance is not required for building work of \$10,000.

In case heard before the Tribunal at which I attended a homeowner engaged a tiler for approximately \$2,800 to lay tiles supplied by the owner. The tiling was laid without expansion joints and the tiles "exploded". The cost of repair is estimated by the Tribunal at \$22,000. As there was no insurance it is most probable the home owner will not recover damages.

At the high end, if the cost of legal fees, rent and rectification cost over \$300,000 the owner pays that amount even though he or she is not at fault.

For the small to medium builder they generally have to put up their home as equity in order to get insurance.

It is ironic that consumers and builders both agree the system needs to be reformed. They can even agree on options to do so and have done so for some time but at this stage no reform has occurred.

Again it is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD.

## **Recommendations**

The recommendations made in the first submission remain. Further to those it is recommended that the Home Owner Warranty Insurance scheme be changed to a first resort scheme such as that which exists in QLD.

Further it is recommended that the Regulations be amended so that home owners can receive damages in accordance with the principals of Hadley v Baxendale.

It is recommended that the recommendations of the Campbell Inquiry and the McClelland Report be implemented by the Tribunal and that the IPSOS report be made public.

While not resiling from the recommendations relating to the resolution of complaints, it is recommended that members receive training in substantive matters before them. In the alternate home building matters should be heard before the Courts.

It is recommended that a review process, apart from an appeal to the Supreme Court, be developed and implemented.