

SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO

CONSUMER POLICY FRAMEWORK

Table of Contents

HISTORY	1
OFFICE OF FAIR TRADING	3
PERFORMANCE OF TRIBUNAL AND ITS CONSEQUENTIAL IMPACT	6
Performance of Tribunal	6
The Misleading of the Tribunal	6
Errors at Law by Tribunal	9
Breaches of the Code of Conduct for Members of the Tribunal	10
Denial of Natural Justice	15
Simple Errors.	19
Consequential Impacts.	19
Consequence in Respect to Insurance	19
Consequence in Respect to Disciplinary Action Against the Builder	20
External Assessment of Tribunal Performance	20
Campbell Report	20
McClelland Report	20
IPSOS Customer Satisfaction Survey of Tribunal	21
NSW Upper House Inquiry	21
Approaches to the Tribunal in Respect of Decisions	21
Response to External Assessment	22
INSURANCE	23
Barriers to Submission of Claim under Last Resort Insurance	23
Availability of/ use of damages under last Resort Insurance.	24
Assessment of Claims.	25
My Legal Costs.	29
Liquidated Damages – My Alternate Accommodation Costs.	29
Damages – Rectification Costs.	30
Position of Others	32

History

In September 2002 I entered into a contract with Cavalier Homes (Australia) to build my home. As Cavalier Homes (Australia) would not provide Council with a copy of the home owner warranty insurance a construction certificate was not provided to Cavalier Homes and work on the house was delayed. In February 2003 the contract to build my house was novated to Cavalier Homes (Gold Coast) who started work in March 2003. The work was to be complete by May 2003

Problems with workmanship were apparent from March 2003 and these were brought to the attention of the builder who did nothing about them.

In August 2003 the builder issued a certificate of practical completion. The previously identified defects were not fixed and the house still had doors and steps missing.

In October 2003 as a result of a complaint to the Office of Fair Trading the house was inspected and the builder agreed to do various works. The builder did not undertake the works as agreed.

Due to the unrectified faults and because more defects were identified I took the matter to the CTTT (Tribunal). It took some 12 months before a hearing was held.

The performance of the Tribunal is discussed further below.

I won the matter in the Tribunal and was awarded costs. The builder did not pay so I had to liquidate the builder before I could submit a claim on insurance. A claim was submitted in July 2006.

As the claim was not responded to within 90 days (after 45 days it was deemed as refused and I had another 45 days to lodge an appeal) I made application to the Tribunal.

Vero then provided a response to myclaim. That response means that after seeking consumer protection and winning I will be \$70,000 worse off than if I had accepted the defective house, which cannot be given an occupancy certificate. This is discussed further below.

Office of Fair Trading

I understand and have been through the process for consumer protection in respect to home building as outlined on the Office of Fair Trading web site and in Office of Fair Trading publications.

In my situation I lodged a complaint against the builder of my house, Cavalier Homes (Gold Coast), in respect to three matters being the slab on which the house was constructed, the subfloor brickwork and a timber floor.

An inspection of the house was undertaken with the builder, myself and an inspector from the Home Building Service on 27 October 2003. As a result of that inspection the builder agreed to do various activities and works by 15th Dec 2003 including fixing the slab, the floor and the subfloor brickwork. The builder, Cavalier Homes, did not complete the agreed activities.

In respect to the slab the builder, Cavalier Homes, did not get the agreement of the engineer on rectification measures for the slab. He sought an opinion from a consulting engineer in respect to the subfloor brickwork but did not carry out the works identified as required by the consulting engineer. He did nothing in respect to the floor.

A building report was prepared by the inspector from Home Building Service addressing these matters and provided opinions that that the floor, the slab and the subfloor brickwork were not constructed in a proper and workmanlike manner or in accordance with the plans and specifications and were a breach of S18(b) of the Home Building Act.

Due to other issues with the house, a dispute was lodged with the Consumer Trader and Tenancy Tribunal (Tribunal) in June 2004 six (6) months after the time when the agreed works were to be complete. The dispute included the slab, subfloor brickwork and the floor amongst other items.

The agreement made on 27 Oct 2003 was tendered to the Tribunal as evidence demonstrating the deficiencies in the slab and subfloor brickwork and showing that the builder did not abide by the agreement made. The engineer's opinion on the slab and the report on the subfloor brickwork both sought by the builder were tendered by me as evidence.

The building report completed by the Home Building Service was also tendered as evidence.

In his findings, in respect to the report from the inspector, the Member stated

“I do not propose to disregard the material from the inspector, but in the circumstances I do not propose to give as much weight as I would a properly independent expert report where the expert is available at the hearing to have his or her evidence tested”.

In essence the Member gave the report no weight because he did not find the builder had breached s18(b) of the Home Building Act as claimed by the inspector and unrefuted by the builder, did not find the builder had breached the contract as claimed by the inspector from the Home Building Service and unrefuted by the builder, did not require the builder to rectify the subfloor brickwork, and did not require the builder to determine and implement remedial measures for the slab with the concurrence of the design engineer.

Subsequent attempts by the Office of fair Trading to prosecute the builder, although successful had the penalties imposed reduced because of the Member findings (or lack of findings in respect to “proper and workmanlike manner) in my case.

The actions of the Member demonstrate

- Agreements made between the builder and homeowner though the intervention of Home Building Service inspectors from the Office of Fair Trading are meaningless and are not upheld in the Tribunal.
- Expert reports prepared by the Home Building Service inspectors from the Office of Fair Trading are given no weight and are therefore meaningless and or irrelevant within the Tribunal.
- Determinations made by Home Building Service inspectors such as a builder having breached s18(b) of the Home Building Act are not acted upon by the Tribunal.

It is also apparent from this example that the Office of Fair Trading can be easily undermined by builders by the builders ignoring the directions of OFT and allowing the matter to go to the Tribunal where an unqualified person is making judgement on building matters. Builders can usually afford better legal representation than a home owner who has probably extended themselves financially to get a house built.

Performance of Tribunal and its Consequential Impact

Performance of Tribunal

A review of the findings of the Tribunal in my case raises a number of issues in respect to the ability of the Tribunal, and the Member hearing my case Richard Phillipps, to address building matters and resolve complaints against builders. They centre on

- Attempts by and the ability of persons to mislead the Tribunal;
- Errors of Law by the Member of the Tribunal;
- Breaches of the Code of Conduct for Members by the Member of the Tribunal,
- Denial of Natural Justice by the Member of the Tribunal; and
- Simple errors in the determination of the Tribunal by the Member of the Tribunal.

The Misleading of the Tribunal

The contract required the builder, Cavalier Homes, to provide termite control in accordance with AS 3660 extracts of which were given to the Tribunal. AS 3660 requires the barrier to be visible. The barrier is not visible. The Tribunal was provided with photographs, a site inspection and reports from Hollyoak or Oke in respect to the termite control all stating or showing the termite control was not visible and not in accordance with AS 3660 a requirement of the contract and the development consent.

The Tribunal Member hearing my case was not prepared to rely on photographs, a site inspection and reports from Hollyoak and Oke in respect to the termite control. A report from the White Ant Company was submitted by Cavalier Homes stating the

termite control had been installed in accordance with warranty conditions and that it will issue a 10 year warranty on the installation

“which will be given to the homeowner upon handover and settlement of the house subject to the normal warranty conditions”

even though the White Ant Company did not present themselves for cross examination.

The Member did not rely on two expert reports or the visual inspection even though one expert was cross-examined. The Member was not satisfied that on the balance of probabilities there was a defect.

Subsequently the warranty and a warranty inspection of the house were sought from the White Ant Company. The inspection was undertaken on 30 August 2006. A report from the White Ant Company was prepared. The report prepared as a result of the inspection of 30 August 2006 refutes the first report by identifying a range of defects and it does not provide a warranty on the installation unless various works are done.

On questioning the White Ant Company as to the basis of the first report I was advised the signatory on the first report does not work for the White Ant Company and that the White Ant Company had no record of the report which was submitted to the Tribunal by Cavalier Homes and preferred by the Member in making his determination.

I am now in a situation where I cannot have the termite control certified, or warranty provided, even by the White Ant Company who prepared the evidence on which the Member relied.

Cavalier Homes have misled the Tribunal by, making false claims in respect to the termite control. These false claims were accepted by the Member as true. Further it could be considered that the Member did not fulfil the requirements of the Code of Conduct for Members of the Tribunal in assessing the matter on the weight of evidence or having any knowledge of a substantive matter before him. This is discussed further latter in this submission.

After all evidence had been submitted in accordance with the directions of the Tribunal in June 2004 the member permitted Cavalier Homes to file new material being the report of Rider Hunt by Duckworth that presented argument to cost of repair. There was no opportunity given to respond to that material. The report of Rider Hunt submitted by Cavalier Homes provided estimates for costs that were accepted by the Member. The costs were incorrect. For example the cost of bricks was given in the report of Rider Hunt as \$420 per thousand. The cost for Kunari bricks, the bricks used in the house, as detailed in from Cordell Building Material Index is \$745 per thousand ex Sydney area. The cost for the bricks at Ballina would include further transport costs.

Cavalier Homes have misled the Tribunal by, making false claims to the cost of repairs and materials such as bricks. These false claims were accepted by the Member as true.

These matters are amongst a number of matters now being investigated by the Office of Fair Trading to determine if a criminal prosecution of the builder can be undertaken. It is probable that although there is sufficient evidence to undertake the prosecution any action will be time barred due to the length of time it has taken to go through the dispute resolution process.

Errors at Law by Tribunal

All the evidence to the Tribunal, from both myself and Cavalier Homes in the matter of the subfloor brickwork, was consistent in that the sub floor brickwork did not meet the requirements of AS 3700.

The development consent specifically requires the building to comply with the requirements of the Building Code of Australia and the relevant Australian Standards and AS 3700. Similarly the development consent requires the development to be carried out in accordance with the submitted plans. The contract requires work to be completed in accordance with the plans and specifications and the development consent.

It is agreed by all parties including the builder, his experts and my experts, but not the Member, that the sub floor brickwork does not comply with the requirements of AS 3700. Therefore the position of all parties except the Member is that does not comply with either the contract or the development consent.

It is acknowledged by all parties that the roof is not constructed in accordance with the plans, the slab even if one saw cut joint is placed in the slab will not be in accordance with the submitted plans and the verandahs will not be in accordance with the submitted plans as the posts, joists and bearers are softwood not hardwood. As such the roof, slab, and verandahs do not comply with either the contract or the development consent.

Further the development consent requires termite protection to be provided in accordance with AS 3660. The termite control does not comply with either the contract or the development consent.

Section 76a(1) of the Environmental Planning and Assessment Act (EP&A Act) states

If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which this provision applies unless

(b) the development is carried out in accordance with the consent and the instrument

The Tribunal has no powers in respect to the EP&A Act as confirmed by the Chairperson of the Tribunal yet found the above items either not defective or adequate.

In making the findings it has the Tribunal has placed me in a position I would not have been if the house had been constructed in accordance with the contract and development consent, that is in breach of the EP&A Act. For me to undertake rectification consistent with the findings of the Tribunal would mean I would remain in breach of the EP&A Act.

Such situations demonstrate errors at law by the Tribunal and further demonstrate the lack of competence of the Tribunal and specifically the Member involved in my case in the resolution of home building complaints and consumer protection.

Breaches of the Code of Conduct for Members of the Tribunal

The Code of Conduct for Members of the Tribunal requires Members to maintain a high level of skill and knowledge relevant to the discharge of their duties. Further it requires Members to conduct the proceedings with due rigour, diligence and intellectual honesty and to keep informed of substantive matters within the jurisdiction of the Tribunal.

The matter of termite control was a substantive matter in the case. The contract required the termite control to be done in accordance with AS 3660 that has as a requirement that it be visible. A copy of AS 3660 was provided to the Tribunal. The

Member undertook a site inspection that included inspection of the termite control. It was pointed out at the inspection that the termite barrier was not present or not visible in an engaged pier and was covered by the construction of a wall and as such not visible in that location. Two expert reports provided consistent assessments. One report from the White Ant Company, tendered in evidence to the Tribunal stated the termite control was installed in accordance with AS 3660 and CSIRO –224 (not a requirement of the contract and not tendered in evidence). The Member favoured the evidence from the White Ant Company in spite of what he saw. Now, as discussed above, further correspondence from the White Ant Company shows that the evidence tendered to the Tribunal was wrong.

The substantive matter rested on whether the termite control was visible. It was not and it has been agreed by the White Ant Company that it is not.

The Member did not conduct the proceedings with due rigour, diligence and intellectual honesty, nor, it appears, did he read the evidence, specifically the extracts from AS 3660 provided. The Member has not made a determination consistent with the weight of evidence, nor was he informed or had knowledge in respect to a major substantive matter within the case.

The matter of the slab was a substantive matter in the case. I claimed two joints were missing from the slab and that the builder breached the contract, development consent and s18(b) of the Home Building Act. At the site inspection it was identified that two joints were missing from the slab. One was the joint across the garage the second an “Ell” joint adjacent to the stairs. This was not disputed by the builder.

In Para 94 of the findings of the Tribunal the Member states in respect to the slab

“The saw cut remedy suggested by de Groot Benson should be adopted”.

There is nothing in any of the evidence where de Groot Benson have suggested a saw cut as the complete remedy to the incorrect construction of the slab. To the contrary they have stated their

“opinion is expressed by the design shown in our drawings 02226 1 to 4”.

They continued stating the slab joint should extend the full width of concrete including right to the slab edge. Further the correspondence from de Groot Benson to Cavalier Homes referred to the second “EII” joint which was also referred to in submissions but the Member ignored this.

The Member did not conduct the proceedings with due rigour, diligence and intellectual honesty, and it would appear nor did he read the evidence.

I had claimed that the piers in the subfloor brickwork were not engaged. In Para 133 of the findings of the Tribunal the Member stated,

“I am not satisfied, on the base of evidence in front of me, that the allegedly unengaged pier remains unengaged”.

Photos provided to the tribunal show the bricks in the pier do not enter into the wall and as such the pier is not engaged. The site inspection showed the bricks in the pier do not enter into the wall and as such the pier is not engaged. An expert report stated the piers were not engaged. The claim that the pier was not engaged was not refuted by Cavalier Homes. Notwithstanding the Member was not satisfied that the allegedly unengaged pier remained unengaged and inferred

“that Mr Hollyoak was satisfied, as at September 2003 and in March 2004, that the defect no longer existed”

because Hollyoak did not repeat the findings of an observation. The inference that the piers were engaged was not suggested or made by any party apart from the Member. Simple inspection of the site shows his inference is wrong.

It would appear the Member did not conduct the proceedings with due rigour, diligence and intellectual honesty, as he did not take note of items claimed during the site inspection nor was he informed in respect to a substantive matter within the case and made incorrect and unclaimed inferences.

The Member states in Paragraph 135

“I do not accept the suggestion that the bagging was done without the consent of the applicant”.

There is no evidence at all, nor was there any suggestion during the hearing or provided in evidence , that I provided consent for the bagging. Evidence provided to the Tribunal by the builder, but latter withdrawn, stated that Mr Stephen Ryan, despite requests to the contrary by the builder took it upon himself to perform the works. The statement made by the Member at paragraph 135 of the findings could only be from his own imagination.

Again the Member did not conduct the proceedings with due rigour, diligence and intellectual honesty.

No claimed breaches of s18(b) of the Home Building Act were addressed. No claimed breaches of the development consent were addressed. The Member does not appear to have conducted the proceedings with due rigour, diligence and intellectual honesty.

Prior to the hearing my then solicitor D John rang the Tribunal to confirm the admissibility of evidence. He was informed that a Scott Schedule completed by Mr

Predabon was acceptable. Mr Johnson then submitted the evidence under a coverin
gletter.

The Tribunal found

“it hard to accept that any competent solicitor would give this advice”.

As a consequence the Scott Schedule from Predabon was not accepted into evidence
or given little weight.

Two affidavits were provided to the Tribunal on this matter. One was from a solicitor
who had spoken directly to Mr Johnson, the other from myself. Further the Tribunal
had before it a letter from Mr Johnson submitting the evidence and specifically
referring to the Scott Schedule in question.

The position taken by the Member in this matter has no evidence to support it. To the
contrary, the Tribunal had evidence before it, including a letter from Mr Johnson,
which is diametrically opposed to the position taken by the Member.

Again the comments made by the Member appear to have come from his own
imagination and are unsupported. The Member has not conducted proceedings with
intellectual honesty or fairly.

There are a litany of further breaches of the Code of Conduct ranging from other
items where the Member had no substantive knowledge of building matters, where he
did not make decisions according to the law, or with due regard to fairness and equity
and the substantial merits of the case. From reading the transcripts it also appears the
Member made adverse comments about me during discussion with legal
representatives whilst I was not present in the hearing room.

It is apparent that the Member and or the Tribunal is not competent to resolve disputes
involving building matters

It was also noted that prior to the commencement of the CTTT hearing, the barrister for Cavalier Homes requested the Member not make findings in respect to breaches of Section 18(b) of the Act or work being done in a proper and workmanlike manner as they may prejudice Cavalier Homes position in a subsequent prosecution of Cavalier Homes for breaches of s18(b) of the Home Building Act. Although every item claimed was, in conjunction with other items, claimed as work not being done in a proper and workmanlike manner and in breach of the Act. As can be seen from the transcript of the findings the Member was silent on claims work was not done in a proper and workmanlike manner and breaches of 18(b).

Denial of Natural Justice

The only evidence I submitted in respect to the cost of repair of each item claimed was a Scott Schedule prepared by M Predabon. It was hand written and my solicitor had advised me that the Scott Schedule would be satisfactory to the Tribunal. The Tribunal, despite being provided affidavits stating that D Johnson had advised me the hand written annotations on the Scott Schedule from M Predabon would be sufficient, found

“it hard to accept that any competent solicitor would give this advice”.

As a consequence the Scott Schedule from Predabon was not accepted into evidence or given no weight.

Mr Johnson’s invoice of 23 November 2004 shows he reviewed the evidence on 10th August 2004. The invoice shows that on 12th August 2004 he reviewed a letter from Watersay Pty Ltd, builders and quantity surveyors favouring demolition and rebuilding. The invoice shows Mr Johnson discussed the preparation of the Scott Schedule on 13th August 2004. An email from Mr Johnson on 16th August 2004

shows he had reviewed the evidence and suggested changes to the evidence. Within those suggestions there was no suggestion to neither change the Scott Schedule from Predabon nor include the letter from Vatersay. On 17th August 2004 Mr Johnson called the Tribunal and discussed the requirements for evidence. A letter to the Tribunal on 20th August 2004 shows that Mr Johnson submitted the evidence, including the Scott Schedule from Predabon, to the Tribunal. The letter specifically refers to Item 83 of the evidence submitted to the Tribunal, which is the Scott Schedule from Predabon.

It is apparent that Mr Johnson reviewed the evidence, discussed it with me, chose not to include the letter from Vatersay, considered the evidence adequate and forwarded the evidence to the Tribunal. It is therefore hard to accept Mr Johnson was competent the position taken by the Member.

The position taken by the Member was not proposed by the builder and was contrary to all the evidence provided and available to the Tribunal. The position taken by the Member has severely disadvantaged my case because the position of the Member denied me any opportunity to provide any evidence as to quantum.

It was noted in a Barrister's opinion that I have been denied natural justice due to position taken by the Tribunal.

On 30 June 2005 a procedural hearing was held that directed

- The home owner to file and serve most recent expert report by 30 June 2005
(The Oke Report (Attachment 19))
- The builder to file and serve material in reply by 29 July 2005.

During the procedural hearing the Member advised that no further evidence could be submitted and that Cavalier Homes could respond to the Oke report. There were two further witnesses to the occurrence Mr D Johnson and Mr E Johnson.

The Tribunal did not alter its position from that stated on 30 June 2005 and there is no evidence that it altered its position. The comment made at paragraph 281 of the findings of the Tribunal is therefore wrong.

In response to the direction I filed a report by D Oke that contained no information on costs nor estimated the damages. The builder filed replies to this report being additional material from Moir and Anderson. The builder also submitted new material being the report of Rider Hunt by Duckworth that presented argument to cost of repair. This was not a reply to the report by D Oke but new evidence. No opportunity was given to myself to respond to the new material submitted by the builder. The consequence of this is typified by the estimate for bricks of \$420 per thousand being accepted whereas the cost for Kunari bricks, the bricks used in the house, as detailed in from Cordell Building Material Index is \$745 per thousand ex Sydney. The estimate from Rider Hunt can also be compared to the estimates from Watersay at \$55,996 and Predabon at \$76,750. The brickwork on the house cannot be replaced for the damages awarded for that purpose. I am therefore not placed in a position I would have been had the work been done in accordance with the contract and Home Building Act.

The Member found the verandah not to be structurally sound and built of the incorrect materials but awarded no damages to repair it. Again it would appear I have been denied natural justice due to position taken by the Tribunal and I do not have sufficient money to fix the verandahs.

The Tribunal found that Duckworth's evidence was flawed. A quotation to repair/replace the floor from Timber-Tec flooring was provided to the Tribunal but the Tribunal chose to accept Duckworth's flawed quotation instead of Timber-Tec without reason. The damages awarded are not sufficient to fix the floor.

In his findings, in respect to the report from the inspector of the Home Building Service, the Member stated

"I do not propose to disregard the material from the inspector, but in the circumstances I do not propose to give as much weight as I would a properly independent expert report where the expert is available at the hearing to have his or her evidence tested".

The Member treated evidence inconsistently. He accepted evidence of Cavalier Homes, without question where the author of the evidence was not made available for cross-examination, over evidence where the author was available for cross-examination on the issue. For items such as the roof, termite control and verandah the Member preferred reports from purported experts, who were not available at the hearing to have his or her evidence tested, over an independent expert report where the expert was available for at the hearing for cross examination and an inspector from the Home Building Service (breaches of contract and s18(b) of the Home Building Act). The Member has treated evidence inconsistently and without fairness and equity. The Member has consistently provided weight to expert reports in favour of the builder irrespective of whether the expert was available for cross examination.

The builder has claimed the pre contractual documents were not included in the contract and has used this argument to claim the insulation (included in the quotation), hardwood decking and hardwood stairs (as agreed in subsequent correspondence signed by the builder) were not included in the contract. The claim was upheld by the Tribunal.

At the same time the builder evinced an intention to be bound by the same pre contractual documents by not undertaking various works such as painting, payment of fees, soil testing and construction of the driveway. The builder has not provided the insulation and has not paid the fees, paid for the soil testing or undertaken the painting. The inconsistent position of the builder was pointed out to the Tribunal in submissions but not addressed by the Tribunal. I sought to have Cavalier Homes cross examined so this matter could be addressed but was denied the opportunity by the Member. The findings of the Tribunal are inconsistent in that it has allowed Cavalier Homes to rely on the documents but not I. It would appear that again I have been denied natural justice due to position taken by the Tribunal.

As with the other aspects in the case there are again a litany of issues where it could be considered natural justice has not been applied. It could be considered the Tribunal or at least the Member is not competent to resolve building disputes.

Simple Errors.

The Tribunal has made simple errors in its findings. The summing of the items in the calculation of damages is incorrect. The claim of Cavalier Homes also contained arithmetic and transcription errors as detailed previously.

As to whether the simple errors exist can be checked by reading Item 54 of the evidence submitted to the Tribunal.

Consequential Impacts.

Consequence in Respect to Insurance

The consequence of the Tribunal's performance is that the insurance company Vero has disallowed any item not found to be defective by the Tribunal. They 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 and termite control were considered adequate by the Tribunal.

The actions of the Tribunal have undermined the Home Building Service and its ability to discipline a builder.

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. The report may be viewed on the Tribunal web site and provides a damning assessment of the Tribunal.

NSW Upper House Inquiry

An Inquiry into the Home Building Service was undertaken by General Purpose Standing Committee No2. In respect to the Tribunal it found issues so bad that it strongly suggested a separate inquiry into the performance of the Tribunal.

A copy of the findings can be found on the NSW Parliament web site.

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. In my case I have spent over \$120,000 on rent and legal fees thus making the option of taking the matter to the Supreme Court unaffordable. 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.

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 also effectively blocks most home owners being able to contest the insurers decision in the Tribunal.

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.

It should be noted that if considered fairly a first resort insurance scheme would reduce the costs of alternate accommodation and legal costs during the dispute with the builder hence reducing the liability of the insurance company.

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 as does Regulations 57 to 59 indicate the Insurer will pay if the home owner suffers

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

The Regulations would seem to indicate that there are no exceptions to these items

The Home Owners Charter from Vero 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	\$ Offered
Legal Costs	Legal Costs Cost to Liquidate the builder	\$58,948.34 \$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
Alternate Accommodation 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
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 Cost of repair as estimated by Vero is \$167,150	\$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. Other claims are time barred even though I have had to follow a long and protected system to submit a claim Vero have advised they will not provide me with their assessment of the defects or their cost estimates to fix.	\$43,052.60
TOTAL		\$291,948.34+		\$50,892.73

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.

My Legal Costs.

The Insurance Policy (Attachment 7) under Clause 3.1 as does Regulations 57 to 59 indicate the Insurer will pay if the home owner suffers

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

Under the Regulations there is a specific requirement to any reasonable legal costs.

In my case the Supreme Court determined the reasonableness of my legal costs but Vero has refused to pay anything apart from approximately 7%.

It would appear Vero has the ability to ignore the requirements of the legislation

Liquidated Damages – My Alternate Accommodation 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”

Even though the Regulations specifically state the cost of alternate accommodation is to be met Vero’s position means my costs for alternate accommodation for the period I could not move into the house will not be met.

Damages – Rectification Costs.

The Home Building Act, regulations, Home Owners Charter by Vero and the insurance policy all indicate that I should be indemnified against losses I have incurred due to the performance of the builder. Vero’s inspection has assessed the defects and costed their rectification at \$167,150.

This can be compared with the assessment of my claim for incomplete and defective works where the position Vero 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.

It would be incorrect of Vero or any other party to claim that Home Warranty Insurance as it presently exists provides genuine consumer protection.

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.

A scheme similar to the one in place in NSW has recently been scrapped by Tasmania.

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.

One 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 on NSW 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.

Recommendations

It is recommended that the present system of insurance of last resort be scrapped and be replaced by insurance of first resort.

It is recommended that judicial or quasi judicial bodies be required to be advised by experts in building matters, who will advise on compliance with conditions of development consent and relevant Australian Standards and the decisions of the body be confined to matters of law