Public Accounts and Estimates Committee

Housing Guarantee Fund Limited

Eighth Report to the Parliament
September 1994
PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

EIGHTH REPORT TO PARLIAMENT

HOUSING GUARANTEE FUND LIMITED


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Industry associations, consumer groups and the Housing Guarantee Fund Limited have been calling for reform of the *House Contracts Guarantee Act* 1987 for some time.

In November 1990 a set of three discussion papers was released by the former Ministry of Consumer Affairs that sought to address issues relating to construction contracts, dispute resolution and the operations of the Act. The papers were intended to promote discussion on these issues to enable the Ministry to develop legislative amendments. Ultimately, however, significant legislative amendments have not been passed by the Parliament.

The Trade Practices Commission released a report in November 1993 which addressed the domestic building guarantee systems on a nationwide basis and highlighted the same issues requiring reform as those previously identified by the Ministry.

Despite these efforts to bring about reform, few key improvements have been made to address the shortcomings. More recently a major review of the *House Contracts Guarantee Act* 1987 was commenced by the Office of Fair Trading and Business Affairs with the intention of enacting legislation in the Autumn sitting of 1995.

Given the ongoing nature and significance of the problems, the Committee believed that it was important to give the Parliament a Parliamentary Committee's perspective on the *House Contracts Guarantee Act* 1987 and related domestic building industry matters. This report considers key issues and makes recommendations in respect of dispute resolution mechanisms, standard form domestic building contracts, the guarantee, builder registration and the role of the Office of Fair Trading and Business Affairs.
I thank the other members of the Public Accounts and Estimates Committee for their contributions to this Inquiry. On behalf of the Committee, I thank Mr Craig Burke, Director of Research and Miss Kathy Hogg, a seconded research officer, for their briefing of the Committee, advice, analyses and drafting of the report, and Mrs Helena CyruI for providing administrative support.

Hon. G. Graeme Weideman, MP, JP
Chairman
Overview

- The *House Contracts Guarantee Act 1987* (the Act) provides a guarantee for domestic building work, as defined. The Act nominates the Housing Guarantee Fund Limited (the Fund) as the sole approved guarantor. (Page 7)

- This report is in response to the many calls over several years for reform of the Act and other domestic building industry matters. Its recommendations, if implemented (some of which require legislative amendment), are intended to have four key outcomes:

  (i) significantly greater supervision of the operation of the guarantee;

  (ii) a reduction in the level of disputes;

  (iii) a better understanding by both parties to a domestic building contract of their rights and obligations; and

  (iv) fair, inexpensive and quick dispute resolution mechanism.
Housing Guarantee Fund Limited

• The Fund, which is an unlisted public company, has a legislative monopoly for the provision of the guarantee, and is not subject to review by the Auditor-General or the Ombudsman nor subject to the Freedom of Information Act 1982. The operation of the guarantee is a matter of significant public interest. Consequently the Office of Fair Trading and Business Affairs (the Office) should take a significantly greater role in the regulation and supervision of the operations of the Fund than it currently does. This recommendation is not intended, and should not be taken as questioning the integrity or otherwise of the Fund and its officers. The Committee's position is based solely on what is considers to be adequate and appropriate public accountability. (Pages 116 - 122)

• Whilst the Fund remains the monopoly provider of the guarantee, the Office must satisfy itself that the Fund is meeting its objectives and obligations under the Act effectively and is doing so economically and efficiently. The Office should include a statement to this effect in each departmental annual report tabled in the Parliament. (Pages 15 - 22)

• Competition, through the introduction of several providers of the guarantee, should benefit both consumers and builders. There are, however, a number of practical issues that currently stand in the way of achieving competition. Other options, such as using a different sole provider or the introduction of variable fees based on risk also need detailed examination. The Office should fully investigate the benefits and implementation issues relating to the introduction of competition and other alternatives in the provision of the guarantee, and report to the Parliament upon the best possible guarantee provider(s) and fee structure. (Pages 15 - 22)

• In order to avoid any perceived or real bias in the operations of the Fund its board of directors should comprise equal building industry and consumer representation. (Pages 10 - 14)
Appeals Committee  (Pages 28 - 31)

- The Act requires the Fund to establish an appeals committee. Parties to a claim on the Fund may appeal to the appeals committee in connection with the determinations of the Fund.

- The appeals committee should be reformed so that the Fund will no longer have any influence or control in the committee's establishment, rules or resourcing. In addition the Office should accommodate and control the appeals committee and determine the level of funding that is to be contributed by the Fund to finance the appeals committee's operations.

- When an independent building disputes tribunal for domestic building work is established, as recommended by the Committee, all appeals against the decisions of the Fund should be dealt with by that tribunal and the appeals committee disbanded.

Building Disputes Tribunal  (Pages 31 - 45)

- An independent domestic building disputes tribunal should be established in Victoria, which:

  (i) is administered by the Office;

  (ii) is empowered to hear all disputes relating to domestic building work, including those that are not subject to a guarantee and any appeals against decisions made by the Fund;

  (iii) is made up of independent legally qualified chairpersons, builder representatives and consumer representatives, with one from each of these categories comprising the tribunal panel for any particular hearing. All appointments to the tribunal should be made by the Minister;
(iv) uses mediation as the first step in the dispute resolution process and nominates persons to act as mediators. Appeals against the Fund's decisions however, should be heard by the tribunal panel in the first instance;

(v) makes enforceable decisions that are binding on both parties and appeals against such awards are to be limited to jurisdictional challenges or significant points of law;

(vi) denies legal representation to parties before the tribunal but can grant legal representation only in limited circumstances. Each party must bear its own legal costs regardless of the outcome;

(vii) is funded by a combination of fees and a levy, to be set by the Office, being:

a) a levy on the Fund (which would meet the majority of the tribunal's operating costs);
b) fees from parties to a dispute; and
c) fees from unsuccessful applicants to appeals against decisions made by the Fund;

(viii) is able to waive fees in cases of extreme financial hardship; and

(ix) accepts disputed amounts from owners in trust, pending resolution of a dispute.
Domestic Building Work Contracts  (Pages 45 - 69)

• There is widespread dissatisfaction towards arbitration, a common feature of domestic building contracts, because of its failure to provide fair, cheap and quick resolution to domestic building disputes. Clearly there is a need for domestic building work contracts to specify an effective alternative dispute resolution mechanism.

• All standard form contracts produced by industry associations should be registered with the Committee’s proposed building disputes tribunal. A condition of this registration is that the contract complies with the requirements and spirit of the Act. The proposed building disputes tribunal should also publish its own standard form contract that complies with the spirit and requirements of the Act. This contract is to be made available, upon request, to builders and owners.

• The Act should be amended to extend existing requirements in respect of domestic building work contracts to include the following.

   (i) a requirement that all disputes be referred to the proposed building disputes tribunal for resolution;

   (ii) compulsory arbitration clauses to be prohibited;

   (iii) summary information to be provided to owners at the front of the contract should include:

       (a) advice concerning the availability of registered contracts should the contract not be a registered standard form contract or standard form contract published by the proposed building disputes tribunal;

       (b) details of the guarantee;

       (c) where advice can be obtained;

       (d) how to check whether a builder is registered and obtain information regarding their claims history;

       (e) the rights and obligations of both parties; and

       (f) dispute resolution mechanisms.
(iv) total contract price to be clearly shown at the front of the contract together with details of the circumstances under which it may vary. Also to be included in the contract is an owner's right to terminate a contract where, as a result of unforseen contingencies (not relating to mutually agreed variations or prime cost items), the original contract price increases by greater than 10% or delays are experienced that will extend the contract period by more than 30%;

(v) contracts to be written in 'plain English' with explanatory notes (particularly for any clauses which retain a level of complexity);

(vi) contracts to contain a checklist for owners similar to that used in the New South Wales 'Plain English Home Building Contract';

(vii) all variations are to be in writing, including details of the works to be performed, their cost, and whether such prices are subject to change;

(viii) contracts to provide a three working day cooling off period; and

(ix) plans and specifications to be attached to the contract.
Guarantee

- The minimum contract value requiring a guarantee should be increased from $3,000 to $5,000. (Pages 72 - 74)

- The maximum liability of the guarantee should be increased from $40,000 to $100,000 with optional gap insurance available where the contract exceeds this value. (Pages 75 - 79)

- The defect claim limits as prescribed by the Act are in need of review. The Committee sees merit in retaining the existing claim limits for the first three years, and providing for structural or major defects for the balance of the guarantee period. A precise definition of structural or major defects would, however, need to be established if this approach were to be adopted. (Pages 81 - 86)

- Parties to a claim on the guarantee should be allowed a period of 14 days rather than the current 60 day period, from the date of notification of the Fund's decision on a claim, in which to lodge an appeal. (Pages 86 - 92)

- Section 16(2) of the Act should be amended so that a claim is deemed to be accepted, rather than rejected as is currently the case, should the Fund not make a determination within the specified time period, currently three months. (Pages 86 - 92)

Builder Registration   (Pages 99 - 114)

- A key element of a successful domestic building industry is the existence of an approved builder register which only includes builders who are competent and reliable.

- The Office should regularly review the procedures employed by the Fund in registering, monitoring and deregistering builders. The Office should ensure that such procedures are adequate and complied with in order to satisfy itself that the approved builder register comprises only builders worthy of registration.
• Upon request, the Fund should provide certain information concerning claims upheld against builders by the Fund, the existing appeals committee or the proposed building disputes tribunal, for a period of five years prior to such enquiry. Information to be released should include the dates and values of judgements and/or directions to rectify defects.

• The restrictions that are imposed on builders’ activities as part of the current registration process, such as type of work and job limits that may be undertaken, are appropriate and should be maintained. More stringent restrictions should apply to the amount and type of work to be undertaken by all builder registration applicants who have been previously deregistered or have been a partner/director of a previously deregistered organisation.

• The Fund should continue to monitor all registered builders on an ongoing basis and act on all indicators of problems. In particular the Fund should undertake extensive evaluation processes with a view to deregistering builders when:

(i) they are unable to provide satisfactory evidence that they are financially sound;
(ii) they do not abide by contracts;
(iii) their work is not of the required standard; or
(iv) there are a number of valid complaints made against them.

• The Fund should be pro-active in the scrutiny of builders. Such scrutiny should include the periodic and systematic review of a sample of builders to ensure their competency and financial status satisfies the required standards to maintain registration. These reviews would occur as a matter of procedure and not as a consequence of a potential or known problem coming to light.
FINDINGS AND RECOMMENDATIONS

Finding 2.1  (Page 13)

The Committee finds that the current Board structure of the Housing Guarantee Fund Limited is inappropriate as it does not comprise equal industry and consumer representation.

Recommendation 2.1  (Page 13)

The Committee recommends that the Housing Guarantee Fund Ltd Board of Directors be reduced to five members comprising:
Chairperson, selected by the Minister and independent of consumer and industry interests;
2 Members appointed by the Minister to represent consumers;
1 Member selected by the Minister from at least two names put forward by the Housing Industry Association Limited; and
1 Member selected by the Minister from at least two names put forward by the Master Builders Association of Victoria.

Finding 2.2  (Page 14)

The Committee finds that even if the Board of the Fund is balanced with equal representation of consumer and industry groups, it may still develop a real or perceived bias over time. Staggered appointments, based on non-renewable set time periods, of persons to the Board and to the position of Chief Executive Officer may minimise the development of a perceived or real bias within the Fund's operations.
Recommendation 2.2 (Page 22)

The Committee recommends that while the Housing Guarantee Fund Ltd remains the monopoly provider of the guarantee, the Office of Fair Trading and Business Affairs (the Office) must satisfy itself that the Fund is meeting its objectives and obligations under the House Contracts Guarantee Act 1987 effectively and is doing so economically and efficiently. The Office should include a statement in each departmental annual report tabled in Parliament that it has satisfied itself in this respect and outline what steps it took to do so.

Alternatively, should the Office be unable to determine that the Housing Guarantee Fund is meeting its obligations effectively and doing so economically and efficiently, it should report this to the Parliament as soon as it becomes apparent, together with the recommended action to overcome identified problems.

Finding 2.3 (Page 22)

The Committee finds that competition, through the introduction of several providers of the guarantee, should benefit both consumers and builders. A number of practical issues, however, currently stand in the way of achieving competition. Other options such as using a different sole provider or the introduction of variable fees based on risk need detailed examination.

Recommendation 2.3 (Page 22)

The Committee recommends that the Office of Fair Trading and Business Affairs, as part of its current review, fully investigate the benefits and implementation issues relating to the introduction of competition and other alternatives in the provision of the housing guarantee, and report to the Parliament upon the best possible guarantee provider(s) and fee structure.
Finding 3.1 (Page 25)

The Committee finds that domestic building work contracts should provide access to a dispute resolution process that is:

- fair to both parties;
- able to resolve disputes quickly;
- able to make enforceable decisions;
- cost efficient; and
- capable of handling technical issues.

Finding 3.2 (Page 27)

The Committee finds that there is widespread dissatisfaction towards arbitration because of its failure to provide fair, cheap and quick resolution to domestic building disputes. A clear need exists for domestic building work contracts to specify an effective alternative dispute resolution mechanism.

Finding 3.3 (Page 30)

The Committee finds that while the current appeals committee is unable to operate independently of the Housing Guarantee Fund its ability to effectively deal with appeals against the Fund’s decisions is dramatically reduced.
Recommendation 3.1  (Page 31)

The Committee recommends that an independent building disputes tribunal for domestic building work be established, all appeals against the decisions of the Housing Guarantee Fund should be dealt with by that tribunal and the existing appeals committee disbanded.

Recommendation 3.2  (Page 31)

The Committee recommends that in the absence of an independent building disputes tribunal, the appeals committee be reformed whereby the Housing Guarantee Fund has no influence or control in the committee's establishment, rules or resourcing. The Office of Fair Trading and Business Affairs should accommodate and control the appeals committee and determine the level of funding that is to be contributed by the Housing Guarantee Fund to finance the appeals committee's operations.

Recommendation 3.3  (Page 33)

The Committee recommends that an independent building disputes tribunal be established in Victoria.

Recommendation 3.4  (Page 33)

The Committee recommends that the proposed building disputes tribunal be administered by the Office of Fair Trading and Business Affairs.

Recommendation 3.5  (Page 34)

The Committee recommends that the proposed building disputes tribunal be empowered to hear all disputes between builders and owners relating to domestic building works, including those that are not subject to a guarantee, and any appeals against decisions made by the Housing Guarantee Fund Limited.
Recommendation 3.6  (Page 35)

The Committee recommends that the proposed building disputes tribunal have no upper or lower monetary limits placed on the disputes that it can handle.

Recommendation 3.7  (Page 37)

The Committee recommends that the proposed building disputes tribunal should be made up of independent legally qualified chairpersons, builder representatives and consumer representatives, with one from each of these categories comprising the tribunal panel for any particular hearing. All appointments to the tribunal should be made by the Minister.

Recommendation 3.8  (Page 39)

The Committee recommends that all domestic building work contracts require disputes to be referred to the proposed building disputes tribunal for resolution.

Recommendation 3.9  (Page 39)

The Committee recommends that mediation be the first step in the dispute resolution process operated by the proposed building disputes tribunal. The tribunal should nominate persons to act as mediators. In the event that a mediated settlement is not reached between the parties, the dispute should then be heard by the tribunal panel. Appeals against the Fund's decisions however, should be heard by the tribunal panel at the first instance.

Recommendation 3.10  (Page 39)

The Committee recommends that at an appeals hearing, both the owner and the builder be entitled to present their case.
Recommendation 3.11  (Page 39)

The Committee recommends that the decisions of the proposed building disputes tribunal be enforceable.

Recommendation 3.12  (Page 40)

The Committee recommends that the decisions of the building disputes tribunal be binding on both parties and appeals against such awards be limited to jurisdictional challenges or significant points of law.

Recommendation 3.13  (Page 42)

The Committee recommends that parties to a dispute be denied legal representation at the building disputes tribunal except with the consent of the building disputes tribunal. The consent of the party not requesting legal representation should be sought and their reply taken into account by the tribunal when determining whether to grant the request for legal representation. Further, the tribunal's consent should be granted only in limited circumstances. Each party to the dispute must bear its own costs regardless of the outcome.

Recommendation 3.14  (Page 44)

The Committee recommends that the funding for the proposed building disputes tribunal be sourced from:

a) a levy on the Housing Guarantee Fund Limited;
b) fees from parties to a dispute; and
c) fees from unsuccessful applicants to appeals against decisions made by the Housing Guarantee Fund Limited.
Recommendation 3.15 (Page 44)

The Committee recommends that the majority of the building disputes tribunal's operating costs be borne by the Housing Guarantee Fund Limited. The Office of Fair Trading and Business Affairs should determine the levy to be placed on the Housing Guarantee Fund and other fees to be charged by the tribunal.

Recommendation 3.16 (Page 44)

The Committee recommends that in cases of extreme financial hardship, the building disputes tribunal be able to waive the fees to be paid by a party to a dispute or an appeal.

Recommendation 3.17 (Page 45)

The Committee recommends that owners be permitted to pay disputed amounts to the building disputes tribunal to be held in trust pending resolution of a dispute.

Finding 3.4 (Page 49)

The Committee finds that the introduction of domestic building work contracts written in 'plain English', with explanatory notes, will increase the understanding of contracts and lead to a reduction in disputes.

Recommendation 3.18 (Page 50)

The Committee recommends that compulsory arbitration clauses be prohibited from all domestic building work contracts.
Finding 3.5  (Page 55)

The Committee finds that disputes over price variations may be reduced if all domestic building work contracts:

(a) contain a clear warning that prices may vary;

(b) clearly identify those aspects of the contract that are subject to price change; and

(c) require written variations to include details of the works to be performed and the cost thereof, stating whether the price is subject to change.

Finding 3.6  (Page 56)

The Committee finds that owners should have a right to terminate a contract where, as a result of unforeseen contingencies, the original contract price increases by greater than 10% or delays are experienced that will extend the contract period by more than 30%. This right to terminate by owners should not extend to mutually agreed variations or prime cost items.

Finding 3.7  (Page 56)

The Committee finds that the ability to vary contract prices or to terminate a contract should not absolve a builder from his obligation to prepare reasonable cost estimates at the time of contracting. Consequently any substantial price variations which arise from contingencies, that could have been reasonably foreseen by a builder at the time of contracting, should not be permitted.
Recommendation 3.19  (Page 68)

The Committee recommends that:

a) the House Contracts Guarantee Act 1987 be amended to require all standard form contracts produced by industry associations to be registered with the proposed building disputes tribunal. A condition of this registration is that the contract complies with the requirements and spirit of the House Contracts Guarantee Act 1987; and

b) the proposed building disputes tribunal should publish its own standard form contract that complies with the spirit and requirements of the Act. This contract is to be made available upon request to builders and owners.

Recommendation 3.20  (Page 68)

The Committee recommends that the House Contracts Guarantee Act 1987 be amended to extend existing requirements in respect of domestic building work contracts to include the following:

- Contracts to be written in 'plain English' with explanatory notes (particularly for any clauses which a retain a level of complexity);

- Contract to contain a checklist for owners similar to that used in the New South Wales 'Plain English Home Building Contract';

- Summary information to be provided to owners at the front of the contract should include:
  - advice concerning the availability of registered contracts should the contract not be a registered standard form contract or standard form contract published by the proposed building disputes tribunal;
  - details of the guarantee;
  - where advice can be obtained;
  - how to check whether a builder is registered and obtain information regarding their claims history;
• the rights and obligations of both parties; and
• dispute resolution mechanisms.

• Total contract price to be clearly shown at the front of the contract together with details of the circumstances under which it may vary. Also to be included in the contract is the owner's right to terminate a contract where, as a result of unforseen contingencies (not relating to mutually agreed variations or prime cost items), the original contract price increases by greater than 10% or delays are experienced that will extend the contract period by more than 30%;

• All variations to be in writing, including details of the works to be performed, the cost of them, and whether such prices are subject to change;

• Contracts to provide a three working day cooling off period;

• Plans and specifications to be attached to the contract;

• Compulsory arbitration clauses to be prohibited; and

• The Committee's prescribed dispute resolution clause.

Finding 4.1 (Page 74)

The Committee finds that the existing contract value of $3,000, above which the guarantee is provided should be increased. An increase in the minimum contract value appears to have general support and should remove an apparent anomaly whereby the guarantee is currently required for contracts with a value deemed to represent a small claim under the Small Claims Tribunals Act.

Recommendation 4.1 (Page 74)

The Committee recommends that the minimum contract value requiring a guarantee be increased to $5,000.
Finding 4.2  (Page 79)

The Committee finds that the existing claim limit of $40,000 is inadequate as it fails to provide adequate consumer protection.

Recommendation 4.2  (Page 79)

The Committee recommends that the maximum liability of the guarantee be increased to $100,000 with optional gap insurance available where the contract exceeds this value.

Finding 4.3  (Page 81)

The Committee has not identified a compelling argument for an increase in the guarantee period.

Finding 4.4  (Page 86)

The Committee finds that the defect claim limits as prescribed by the House Contracts Guarantee Act 1987 should be reviewed. The Committee sees merit in retaining the existing claim limits for the first three years, and providing for structural or major defects for the balance of the guarantee period. A precise definition of structural or major defects would need to be established if this approach were to be adopted.

Recommendation 4.3  (Page 86)

The Committee recommends that the Office of Fair Trading and Business Affairs as part of its current review, reconsider the defect claim limits which are in operation.
Recommendation 4.4  (Page 89)

The Committee recommends that any disputes arising prior to the completion of a contract should be referred to the proposed building disputes tribunal.

Finding 4.5  (Page 90)

The Committee finds that Section 16(2) of the House Contracts Guarantee Act 1987 which provides for claims to be deemed rejected should the Fund not make a determination within three months, inappropriate.

Recommendation 4.5  (Page 90)

The Committee recommends that Section 16(2) of the House Contracts Guarantee Act 1987 be amended so that a claim is deemed to be accepted should the Housing Guarantee Fund not make a determination within the specified time period, currently three months.

Finding 4.6  (Page 92)

The Committee finds that it is unreasonable for consumers to have to wait for up to an additional 60 days before payment of a successful claim is made. This 60 day period allows appeals against the Fund’s decisions to be lodged.

Recommendation 4.6  (Page 92)

The Committee recommends that parties to a claim on the Fund should be allowed a period of 14 days, from the date of notification of the Fund’s decision, in which to lodge an appeal.
Finding 4.7  (Page 97)

The Committee finds that upon the rejection of a claim, owners should be advised by the Fund of their right to appeal, including the time limit by which they need to do so should they choose to later apply for a discretionary payment.

Recommendation 4.7  (Page 97)

The Committee recommends that the Housing Guarantee Fund Limited, at the time of notification of its decision, advise owners of the time limit by which they must lodge an appeal should the owner choose to apply for a discretionary payment.

Finding 4.8  (Page 97)

The Committee finds that it is inappropriate for the House Contracts Guarantee Act to require owners to lodge an appeal prior to making a discretionary payment claim for loss resulting from the work of an unregistered builder.

Recommendation 4.8  (Page 97)

The Committee recommends that the House Contracts Guarantee Act 1987 be amended to repeal the requirement for consumers to go through the appeals process when seeking a discretionary payment as a result of loss caused by an unregistered builder.

Recommendation 4.9  (Page 98)

The Committee recommends that the House Contracts Guarantee Act 1987 be amended to allow a claimant the right to appeal, to the existing appeals committee or proposed building disputes tribunal, against the approved guarantor's decision on an application for a discretionary payment.
Finding 5.1    (Page 100)

The Committee finds that a key element of a successful domestic building industry is the existence of an approved builder register which only includes those builders who are competent and reliable. Consumer reliance may then be placed on this register.

Recommendation 5.1    (Page 100)

The Committee strongly recommends that the Office of Fair Trading and Business Affairs regularly review the procedures employed by the Housing Guarantee Fund in registering, monitoring and deregistering builders. The Office should ensure that such procedures are adequate and complied with in order to satisfy itself that the approved builder register contains only builders worthy of registration.

Finding 5.2    (Page 102)

The Committee finds that it is appropriate for the Housing Guarantee Fund to release certain information to consumers regarding a builder's claims history.

Recommendation 5.2    (Page 103)

The Committee recommends that upon request, the Housing Guarantee Fund provide certain information concerning claims upheld against builders by the Housing Guarantee Fund, the existing appeals committee or the proposed building disputes tribunal, for a period of five years prior to such enquiry. Information to be released should include the dates and values of judgements and/or directions to rectify defects.
Finding 5.3  (Page 106)

The Committee finds that it is essential for the Housing Guarantee Fund to adequately scrutinise all builders applying for registration to ensure the protection of the consumer and builder.

Finding 5.4  (Page 106)

The Committee finds that the builder registration procedures as set out in the Housing Guarantee Fund publications "How to become registered as an HGF-Approved builder or supervisor" and "Company Rules" are adequate, if properly implemented, to enable the Fund to evaluate a builder's suitability for registration.

Finding 5.5  (Page 106)

The Committee finds that the restrictions that are imposed on builders' activities, such as type of work and job limits, are appropriate and should be maintained.

Finding 5.6  (Page 106)

The Committee finds that any applicant for registration as a builder who has been formerly deregistered or was a partner/director of a deregistered organisation, should be subjected to a detailed examination to ensure past shortcomings have been resolved.

Recommendation 5.3  (Page 107)

The Committee recommends that more stringent restrictions should apply to the amount and type of work to be undertaken by all builder registration applicants who have been previously deregistered or have been a partner/director of a previously deregistered organisation.
Finding 5.7 (Page 111)

The Committee finds that the Fund should continue to monitor all builders on an ongoing basis and act on all indicators of problems. In particular the Fund should undertake extensive evaluation processes with a view to deregistering builders when:

- they are unable to provide satisfactory evidence that they are financially sound;
- they do not abide by contracts;
- their work is not of the required standard; or
- there are a number of valid complaints made against them.

Recommendation 5.4 (Page 111)

The Committee recommends that upon the removal of a builder from membership of an industry association, the Housing Guarantee Fund review the registration of that builder to determine whether he/she remains fit to be an approved builder.

Recommendation 5.5 (Page 111)

The Committee recommends that the Housing Guarantee Fund be pro-active in the scrutiny of builders. It is recommended that such scrutiny include the periodic and systematic review of a sample of builders to ensure their competency and financial status is of the required standard. These reviews would occur as a matter of procedure and not as a consequence of a potential or known problem coming to light.

Finding 5.8 (Page 113)

The Committee finds that whilst the Housing Guarantee Fund is the sole provider of the guarantee, the builder registration function should be linked to the provision of the warranty on the grounds of efficiency, and should remain with the Fund.
Recommendation 5.6  (Page 114)

The Committee recommends that the Office of Fair Trading and Business Affairs consider as part of its review the introduction of a demerit point system for builders similar in principle to the motor vehicle drivers' demerit point system.

Finding 6.1  (Page 122)

The Committee finds that the Office of Fair Trading and Business Affairs should take a significantly greater role in the regulation and supervision of the operations of the Housing Guarantee Fund. That role, for example, should extend to the regular review of the adequacy of the approved claims handling procedures employed by the Housing Guarantee Fund and ensure that they are complied with.

A strong regulative and supervisory function is necessary because the Housing Guarantee Fund, currently a legislative monopoly, is a public company and not subject to the Ombudsman, the Freedom of Information Act or audit by the Auditor-General. Further, responsibility for the operation of the guarantee rests with the Minister for Fair Trading and its operation is a matter of significant public interest.

Finding 6.2  (Page 122)

The Committee finds that it is important for the Office of Fair Trading and Business Affairs to pursue matters that are referred to it for prosecution or investigation on a timely basis to ensure that owners are not disadvantaged by unsatisfactory builders continuing to trade.
FUNCTIONS OF THE PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

The Public Accounts and Estimates Committee is constituted under the Parliamentary Committees Act 1968, as amended. It presently consists of nine members of Parliament drawn from the Legislative Council and the Legislative Assembly.

The Committee carries out investigations and reports to Parliament on matters associated with State financial management. Its functions under the Act are to inquire into, consider and report to the Parliament on -

a) any proposal, matter or thing connected with public administration or public sector finances;

b) the annual estimates or receipts and payments and other Budget papers and any supplementary estimates of receipts and payments presented to the Assembly and the Council;

if the Committee is required or permitted so to do by or under the Act.
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<td>Office of Fair Trading and Business Affairs</td>
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<td>VOBSG</td>
<td>Victims of Builders Support Group Incorporated</td>
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</tbody>
</table>
Tuesday 10 November 1992

PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE - The Honourable R.I. Knowles moved, by leave, That, contingent upon the Royal Assent being given to the Parliamentary Committees (Amendment) Bill, the Honourables P.R. Hall, T.C. Theophanous and D.R. White be members of the Public Accounts and Estimates Committee.

Question - put and resolved in the affirmative.

Friday 13 November 1992

JOINT INVESTIGATORY COMMITTEES - Motion made, by leave, and question - That contingent on the coming into operation of the Parliamentary Committees (Aménagement) Act 1992 -

Mr Baker, Mr Hyams, Mr Plowman (Benambra), Mr Smith (Glen Waverley), Mr Thomson (Pascoe Vale) and Mr Weideman be members of the Public Accounts and Estimates Committee.

(Mr Gude) - put and agreed to.
CHAPTER ONE: INTRODUCTION TO THE COMMITTEE'S INQUIRY

1.1 BACKGROUND

The Public Accounts and Estimates Committee was alerted to significant problems within the domestic building industry during early 1994. The Committee noted that the problems had been in existence for a long period of time and remained unresolved.

Interested groups within the building industry, including the Housing Guarantee Fund Limited (the Fund), have called for reform of the House Contracts Guarantee Act 1987 (the Act) and related domestic building industry matters for many years. In particular, the Fund indicated the need for legislative change in its 1991-92 and 1992-93 annual reports. The 1992-93 report stated:

"we have been looking forward to participating in discussion of reform of the House Contracts Guarantee Act, particularly in the area of the proposed new Building Disputes Tribunal and in dispute resolution procedures. I am disappointed that this process has not yet been started."\(^1\)

The former Ministry of Consumer Affairs had also expressed concern about the Act for some time. In its 1990-91 annual report it was stated:

"The existence of this legislation has addressed a range of problems in relation to domestic building. However, the following problems remain:

- the existing domestic building contract is unfair to consumers;
- the system of dispute resolution (ie arbitration), is too costly for both builders and consumers; and
- the structure of the Board of the HGFL is seen as biased in favour of builders."\(^2\)

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1 Housing Guarantee Fund Limited; Annual Report; 1992-93; Page 2
2 Ministry of Consumer Affairs; Annual Report; 1990-91; Page 14
In November 1990 a set of three discussion papers was released by the Ministry that sought to address the issues relating to construction contracts, dispute resolution and the operations of the Act. The papers were intended to promote discussion on these issues to enable the Ministry to develop legislative amendments. Ultimately, however, no legislative amendments have been passed by the Parliament.

The Trade Practices Commission released a report in November 1993 titled 'Home building - consumer problems and solutions'. This report, which addressed the domestic building guarantee systems on a nationwide basis, highlighted the same issues as those identified by the Ministry. The report stated:

"the Commission's review of the industry (like individual State inquiries before it) isolated numerous areas for reform, of which the main ones are:

- contracts that consumers and many builders simply do not understand and that are also biased in builders' favour;
- significant construction delays and substantial increases in price during the life of contracts;
- the failure of existing dispute resolution mechanisms to provide inexpensive, fair and quick resolution of disputes;
- inadequate insurance cover; and
- poor performance and reputation of many of the regulatory agencies."

Despite the numerous calls for reform and recommendations put forward by many parties, inadequate action has been taken to address the shortcomings.

Whilst the majority of consumer criticism received by the Committee relates to the handling of claims and dispute resolution, the Committee believed that in order to effectively address these issues it must also

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3 Ministry of Consumer Affairs; Discussion Papers on the Issues Related to the House Contracts Guarantee Act 1987; November 1990; Foreword

4 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 3
consider the procedures for the registration of builders and standard form contracts used in the industry which are at the base of the dissatisfaction.

Accordingly, the Committee determined that the following areas should be a key focus of an Inquiry:

- dispute resolution mechanisms;
- standard contracts which are used in the industry;
- the form of the guarantee; and
- builder registration.

Reform is expected to benefit both consumers and builders irrespective of the fact that the Inquiry was initiated primarily due to the receipt of complaints from consumers.

The purchase of a home is generally the largest financial commitment a consumer makes and accordingly any problems that are experienced will have a significant impact. Equally, builders encountering disputes with consumers risk great financial loss.

Given the on-going nature of the problems and the impact they have on consumers and builders alike, the Committee believed that an inquiry into the Housing Guarantee Fund Limited would provide stimulus in the reform of the domestic building industry.

The scope of the Inquiry does not include owner-builders or approved supervisors.
1.2 THE COMMITTEE'S METHODOLOGY

1.2.1 Terms of Reference

In accordance with the Parliamentary Committees Act 1968, the Public Accounts and Estimates Committee resolved to conduct an inquiry with the following terms of reference:

To inquire into, consider and report to Parliament on the Housing Guarantee Fund Limited's annual reports for 1991-92 and 1992-93, as they relate to:

- the House Contracts Guarantee Act 1987, including claim limits and thresholds and the period of guarantee;

- the operations of the Housing Guarantee Fund Ltd as approved guarantor under the Act, including registration of builders;

- the regulative role played by the Office of Fair Trading and Business Affairs; and

- other related domestic building work matters, including dispute resolution mechanisms and standard contracts in use in the domestic building industry.

1.2.2 Method of Investigation

The Committee inquired into the issues affecting the Housing Guarantee Fund Limited through:

- seeking written and oral submissions;

- an examination of submissions received by the Committee;

- consideration of issues at several public hearings;
• attendance at a Housing Guarantee Fund Appeals Committee hearing; and

• an analysis of reports prepared by other organisations and individuals; certain submissions and evidence made to the Economic Development Committee as part of a separate inquiry and other relevant information.

The Economic Development Committee sought evidence and submissions from interested parties in the domestic building industry as part of its Inquiry into the Victorian Building and Construction Industry. As part of that inquiry the Economic Development Committee have to date considered "The Corruption of the Tendering Process", "Productivity" and "Code of Tendering". This Committee continues to liaise with the Economic Development Committee to ensure that the inquiries are not in conflict and work is not duplicated.

1.3 LEGISLATIVE REQUIREMENTS

Section 40(2) of the Parliamentary Committees Act 1968 provides that:

"Where a report to the Parliament of a Joint Investigatory Committee other than the Public Bodies Review Committee recommends that a particular action be taken by the Government with respect to a matter, the appropriate responsible Minister of the Crown shall, within six months of the report of the Committee being laid before both Houses of the Parliament, report to the Parliament as to the action (if any) proposed to be taken by the Government with respect to the recommendations of the Committee."
1.4 INQUIRY BY THE OFFICE OF FAIR TRADING

The Office of Fair Trading and Business Affairs advised the Committee that it is currently conducting a major review of the House Contracts Guarantee Act 1987 with an examination of:

(i) the role of the Housing Guarantee Fund as sole guarantor of domestic building work under the Act and possible alternative insurance/warranty systems;

(ii) alternative dispute resolution systems and a mechanism for resolving mid-contractual disputes;

(iii) the form of domestic building contracts with the aim of ensuring that consumers are not subject to improper practices or mandatory arbitration proceedings; and

(iv) other changes to the Act as required to ensure that the Government's overall objective of providing protection to consumers against deficient or incomplete building work is achieved in an efficient and consistent manner with a minimum of regulation.\(^5\)

At public hearing the Office of Fair Trading and Business Affairs advised that the review was at an early stage and submissions had not yet been sought.\(^6\) Its intention is to take legislation to the Autumn sitting of Parliament (1995).

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\(^5\) Office of Fair Trading and Business Affairs; Letter to Interested Parties; 15 April 1994
\(^6\) Office of Fair Trading and Business Affairs; Minutes of Evidence; 8 June 1994; Page 3
CHAPTER TWO: OVERVIEW OF THE HOUSING GUARANTEE FUND LIMITED OPERATIONS

2.1 FORMATION

The *House Contracts Guarantee Act* 1987 (the Act) regulates the Victorian home building guarantee system and was introduced with the following purposes:

"(a) to reform the law relating to house builders' liability; and
(b) to provide for guarantees to be given in relation to house improvement work; and
(c) to specify requirements to be complied with in relation to domestic building work contracts."\(^1\)

The Act is administered by the Minister for Fair Trading and is intended to provide consumers with a guarantee against builders' defective work, financial demise and failure to abide by contracts in relation to domestic building work. Domestic building work is defined in the Act and includes:

"(a) the work of constructing a dwelling-house; or
(b) the work of improving a dwelling-house ..."\(^2\)

The Housing Guarantee Fund Limited (the Fund) was formed in 1984 from the amalgamation of the Master Builders' Housing Fund Ltd and the Housing Builders' Association Ltd. The Act provides that guarantees for domestic building work are to be given by the approved guarantor. Section 22 of the Act nominates the Fund, an unlisted public company, as the sole approved guarantor.

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1 *House Contracts Guarantee Act 1987*: Section 1
2 Ibid; Section 3(1)
The Fund's corporate mission as set out in its 1992-93 annual report is:

"in co-operation with the building industry and government, to ensure that every buyer of a new home or home improvements receives a quality product backed by a Housing Guarantee Fund guarantee."

2.2 ROLE

The Fund has two main roles, being to register builders and to act as the builders' guarantor.

Section 23(3) of the Act requires builders to apply to and be approved by the Fund before they carry out domestic building work. The Act prohibits a person from entering into a domestic building work contract, being a contract for domestic building work with a price above $3,000, unless a guarantee is given under the Act. The Fund describes such a guarantee as:

"a guarantee to the consumer of certain of the builder's obligations under a contract".

"the builder is the one giving the seven year guarantee. We back it up. In the first instance we say 'You go and fix up your problems'. If the builder cannot, that is when the Fund steps in and pays. It is not insurance to the consumer, it is a guarantee of the builder's obligations."

Accordingly, builders provide owners with a guarantee for a specified period. The Fund acts as the approved guarantor of these guarantees. The

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3 Housing Guarantee Fund Limited; Annual Report; 1992-93; Page 1
4 Housing Guarantee Fund Limited; Submission to the Office of Fair Trading and Business Affairs; June 1994; Page 4
5 Housing Guarantee Fund Limited; Minutes of Evidence; 8 June 1994; Page 29
Act defines the guarantee period as:

"in relation to domestic building work, ... the period of 7 years from the time when the contract for the performance or the management or supervision of the performance of that work was entered into or building approval was granted for that work, whichever occurred first."\(^6\)

The liability of the Fund as approved guarantor is:

"to make good loss or damage suffered by the building owner or purchaser or a successor in title of the building owner or purchaser on account of -

(a) ... the failure of the builder to fulfil the builder’s obligations under the contract; or ...
(b) ... a defect caused by bad workmanship that appears in the building during the guarantee period."\(^7\)

When an owner and a builder are unable to resolve an issue, the owner may make a claim, limited to $40,000, on the Fund. Further restrictions which are placed on an owner making a claim are discussed in Chapter 4.

Upon payment of a claim to an owner, the Fund attempts to recover the amount paid from the builder. The Fund will often hold some form of security from the builder, such as a cash redeemable bank guarantee, to assist in its recoveries. The Fund advises builders that the cash redeemable guarantee is:

"a guarantee that an amount of money will be paid to HGF if you get into financial difficulties and can’t finish your jobs or fix defects."\(^8\)

Should the Fund refuse some or all of an owner's claim or a builder is dissatisfied with the determination, the aggrieved party may lodge an

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\(^6\) House Contracts Guarantee Act 1987; Section 3(1)
\(^7\) Ibid; Section 7(3)
\(^8\) Housing Guarantee Fund Limited; How to Become Registered as an HGF-Approved Builder or Supervisor; July 1993; Page 13
appeal and a hearing will be held by the Appeals Committee which is also set up under the Act. If either party is then dissatisfied a further appeal may be made to the Administrative Appeals Tribunal.

2.3 BOARD OF DIRECTORS

Section 22 of the House Contracts Guarantee Act 1987 sets out conditions which the Fund must comply with in order to be the approved guarantor and includes the composition of the Board of Directors. The Act requires that there be seven directors, of which the Chairman and one other are to be appointed by the Minister for Fair Trading and one is to be appointed by the chief administrator of the Department of Justice. There are also two directors appointed by each of the Master Builders Association of Victoria and the Housing Industry Association Limited. The directors representing the industry associations are selected by the Minister from nominees (two for each position) submitted by the associations.

The current Board comprises: 9

<table>
<thead>
<tr>
<th>Appointed/Nominated By</th>
<th>Director</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minister for Fair Trading</td>
<td>Ms Marilyn Head - Chairperson</td>
</tr>
<tr>
<td>Minister for Fair Trading</td>
<td>Ms Patricia Faulkner</td>
</tr>
<tr>
<td>Director of Fair Trading</td>
<td>Vacant</td>
</tr>
<tr>
<td>Housing Industry Association Ltd</td>
<td>Mr Alec Fuller</td>
</tr>
<tr>
<td>Housing Industry Association Ltd</td>
<td>Mr David Piggott</td>
</tr>
<tr>
<td>Master Builders Association of Victoria</td>
<td>Mr Howard Armstrong</td>
</tr>
<tr>
<td>Master Builders Association of Victoria</td>
<td>Mr Brian Wansbrough</td>
</tr>
</tbody>
</table>

Mr Nugent, the Chief Executive Officer of the Fund advised at public hearing that the vacant position had not been able to be filled for some

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9 Australian Securities Commission; Company Search; 18 May 1994; Housing Guarantee Fund Limited; Annual Report; 1991-92; and Housing Guarantee Fund Limited; Minutes of Evidence; 8 June 1994; Page 24
"That position has been vacant now for some months because they cannot find anybody who is prepared to take on the obligations of a director of a public company. They want protection, we believe, from government, and that is certainly foreign to a public company."\textsuperscript{10}

The Ministry of Consumer Affairs in its 1990 discussion papers and through the House Contracts Guarantee (Miscellaneous Amendment) Bill (defeated in May 1991) sought to amend the composition of the Board. The Ministry proposed to increase the number of directors to nine, comprising five, including the Chairperson, appointed by the Minister and two appointed by each the Housing Industry Association and the Master Builders Association of Victoria (again each to be selected by the Minister from two nominees submitted by the associations).

Hon B W Mier, MLC, in his position as Minister for Consumer Affairs stated in the second reading speech of the House Contracts Guarantee (Miscellaneous Amendment) Bill:

"Public confidence in the guarantee scheme requires the guarantor, the Housing Guarantee Fund Ltd, not only to be impartial but also to be seen as impartial. The industry majority on the company’s board of directors does not promote that perception."\textsuperscript{11}

In a submission made to the Office of Fair Trading by the Fund, it stated:

"On a board of nine it is recommended that the four industry representatives remain, that four independent positions be created and the company be chaired by an independent person."\textsuperscript{12}

\textsuperscript{10} Housing Guarantee Fund Limited; Minutes of Evidence; 8 June 1994; Page 24
\textsuperscript{11} Legislative Council; Hansard; 8 May 1991; Page 1363
\textsuperscript{12} Housing Guarantee Fund Limited; Submission to the Office of Fair Trading and Business Affairs; June 1994; Page 10
The submission does not state who the four independent persons should be appointed by, however the Ministry made some comment on this issue in one of its discussion papers:

"It has been suggested that provision be made for additional consumer representatives being appointed independently of the Minister or Director. Ensuring that broad consumer representation was achieved would be difficult without reference to the responsible Minister."\(^{13}\)

The Committee agrees that the Board of Directors must comprise a balance of consumer and builder representation in order to be unbiased. Rather than increase the number of directors on the Board, the Committee proposes that it be reduced to five members being a reduction of two industry association representatives. The proposed structure would then be:

<table>
<thead>
<tr>
<th>Chairperson</th>
<th>Deemed to be independent</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Appointed by the Minister</td>
</tr>
<tr>
<td>2 Directors</td>
<td>Consumer Representatives</td>
</tr>
<tr>
<td></td>
<td>Appointed by the Minister</td>
</tr>
<tr>
<td>1 Director</td>
<td>Building Representative</td>
</tr>
<tr>
<td></td>
<td>Selected by the Housing Industry Association Ltd</td>
</tr>
<tr>
<td></td>
<td>Appointed by the Minister from at least two nominees</td>
</tr>
<tr>
<td>1 Director</td>
<td>Building Representative</td>
</tr>
<tr>
<td></td>
<td>Selected by the Master Builders Association of Victoria</td>
</tr>
<tr>
<td></td>
<td>Appointed by the Minister from at least two nominees</td>
</tr>
</tbody>
</table>

The Committee's overriding concern is the balance of consumer and industry representation on the Board of Directors. The structure proposed would balance the representation without increasing the administrative function. The Committee is also mindful that one non-industry position is currently vacant and is not confident that a further two positions could

be filled. A board of nine directors is not considered necessary by the Committee to effectively manage the Fund and accordingly it is recommended that a reduction in number occur to achieve the objective of balance.

Balanced or equal representation of consumer and industry groups on the Board is a major factor which reduces perceived or real bias in the operations of the Fund. Having achieved the appointment of a balanced Board however, a real or perceived bias may still develop over time. If appointments to the Board, and that of the Chief Executive Officer, were made on a non-renewable set time period, of perhaps five years, any potential for the development of a perceived or real bias within the Fund’s operations may be minimised. It is important that non-renewable appointments be staggered to maintain continuity of operations.

Finding 2.1

The Committee finds that the current Board structure of the Housing Guarantee Fund Limited is inappropriate as it does not comprise equal industry and consumer representation.

Recommendation 2.1

The Committee recommends that the Housing Guarantee Fund Ltd Board of Directors be reduced to five members comprising:
Chairperson, selected by the Minister and independent of consumer and industry interests;
2 Members appointed by the Minister to represent consumers;
1 Member selected by the Minister from at least two names put forward by the Housing Industry Association Limited; and
1 Member selected by the Minister from at least two names put forward by the Master Builders Association of Victoria.
Finding 2.2

The Committee finds that even if the Board of the Housing Guarantee Fund is balanced with equal representation of consumer and industry groups, it may still develop a real or perceived bias over time. Staggered appointments, based on non-renewable set time periods, of persons to the Board and to the position of Chief Executive Officer may minimise the development of a perceived or real bias within the Fund's operations.

2.4 FINANCIAL STATUS

Approved builders are required to register themselves annually with the Fund and also to register each domestic building work contract that they enter into. Both of these registrations require the payment of a fee to the Fund (currently $130 for a builder's annual registration and $235 for the majority of contracts). This, along with interest earned and monies recovered from builders following the payment of a successful claim to an owner, represents the vast majority of the Fund's income.

The Fund's annual report for the year ended 30 June 1993 stated that there were 14,031 registered builders and in excess of 56,000 registered jobs.

As at 30 June 1993 the Fund disclosed total assets of $47,213,788 and net assets of $7,857,582. The difference between these is predominantly represented by a provision for future claims on jobs currently registered with the Fund.
2.5 NUMBER OF APPROVED GUARANTORS

There have been suggestions made that the guarantee system may operate more efficiently if there were to be more than one provider.

The Trade Practices Commission reported:

"The benefits to be gained from private insurance are those which competition has to offer. Where premiums are competitive, builders with a good track record will be encouraged to maintain that record. On the other hand, builders with a poor track record may find it more difficult to obtain compulsory insurance cover. Where builders are motivated by lower premiums to adopt practices that minimise insurance claims, both the consumer and the builder's more quality conscious counterpart will benefit.

The Commission endorses the entry of new competitors, and hence it supports the introduction of private sector schemes to compete with the existing statutory insurance schemes."\(^{14}\)

The Fund in a submission to the Office of Fair Trading stated:

"There has been some suggestion that the consumers and possibly builders would be better served by an open market system where insurers offered the warranty and where registration was replaced by insurers using normal commercial practice to determine suitability of builders. In the alternative, it has also been suggested that a statutory authority or Government department might better be able to provide the same service as HGFL.

It should be noted that HGFL is a private company and as such the scheme in Victoria is already privatised.

\(^{14}\) Trade Practices Commission; Home building - consumer problems and solutions; November 1993: Page 43
On the point of open market, we have recently confirmed our understanding that nowhere in the world do insurers offer guarantee or warranty insurance directly to builders or consumers. The only states, territories or provinces that have quasi (sic) open-market insurance in fact have insurance operations sponsored by and/or controlled by industry associations. This is hardly an open market.

Notwithstanding and assuming that open market is possible the first threat is that some builders, currently registered, will not be acceptable to the insurance companies. This will alter the structure of the industry. Victoria has the highest number of small builders (as a proportion of the total number of builders) of all states. We don’t believe true open market is viable in this instance.

Previous studies have shown that HGFL is better placed to handle both warranty and builder registration than statutory authorities - refer to the 1986 discussion paper on this topic put out by the Ministry of Consumer Affairs.

It is our strong recommendation that the warranty and registration has to be free of the influence or control of either builders or owners.

Equally, the company should stand on its merits and not be subject to any further interference from government. There is no evidence we believe that HGFL is not meeting its obligations. The company stands on its 9 year record. Any criticism levelled at HGFL should on analysis show that the real problem lies in the issues referred to in this submission."15

At public hearing the Housing Industry Association Limited expressed the

15 Housing Guarantee Fund Limited; Submission to the Office of Fair Trading and Business Affairs; June 1994; Page 9
following view regarding the approved guarantor:

"If the Housing Guarantee Fund were streamlined to make it efficient and non-bureaucratic, we would support its continuing existence. We believe most of its problems and its bureaucracy result from poor legislation, which it lives with in a very unfavourable way. Our preferred option would be to have legislation to make that possible. If, however, the Housing Guarantee Fund is to be thrown open to competition, we would most certainly be in there ourselves, suggesting we run our own warranty scheme."\(^{16}\)

The Committee considered the operations of the other Australian states and territories. The systems vary significantly between the states and are summarised in Table 2.1.
## Table 2.1
Australia Wide Comparison

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Guarantee/Insurance</th>
<th>Licensee (Builder Registration)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australian Capital</td>
<td>Housing Indemnity (HIA)</td>
<td>Building Control (Dept of Urban Services)</td>
</tr>
<tr>
<td>Territory</td>
<td>Master Builders Association</td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New South Wales</td>
<td>Building Services Corporation (Government Dept)</td>
<td>Building Services Corporation (Government Dept)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Queensland</td>
<td>Queensland Building Services Authority (Government Dept)</td>
<td>Queensland Building Services Authority (Government Dept)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Australia</td>
<td>Home Owners Warranty (SA) P/L (HIA)</td>
<td>Commercial Tribunal (Dept of Public &amp; Consumer Affairs)</td>
</tr>
<tr>
<td></td>
<td>Master Builders Association</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Swimming Pools Association</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tasmania</td>
<td>Housing Industry Association</td>
<td>Based on negative licensing, that is, any builders who meet obligations under indemnity legislation may trade</td>
</tr>
<tr>
<td></td>
<td>Master Builders Association</td>
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Table 2.1 indicates that in those jurisdictions where some form of competition exists the guarantee is provided by industry associations.

The Committee supports the view of the Trade Practices Commission that competition in the provision of the guarantee can benefit both consumers and builders. Those benefits depend upon the removal of existing flat fees and the introduction of variable fees based on risk as would apply in an insurance arrangement. The assessment of risk could take into account a builder's claims history, contract value, financial standing and many other factors. In this way efficient and competent builders are rewarded and given a competitive advantage. Consumers also benefit through lower fees which are passed on by builders. Inefficient or incompetent builders may be priced out of the market or unable to obtain the required insurance cover.

The Committee notes, however, that a number of practical issues need to be overcome if competition is to be introduced and the greatest possible benefits achieved, such as:

- evidence before the Committee suggests that the only likely alternative guarantee providers would be industry associations. This would be a return to the former Victorian system. Industry associations would not be seen as independent providers by consumers and could also, in effect, become monopoly providers by linking association membership and the housing guarantee;

- competition in the provision of the guarantee may create the need for, and additional cost of, a separate body to handle the registration of builders. This function could not be retained by the Fund as it would have a competitive advantage as a guarantee provider. Alternatively, there could be no registering body and builders would be required to obtain insurance. Should builders have a poor claims history or not be of good financial standing, insurance may not be obtainable and builders would be unable to perform domestic building work. This approach may, however, lead to inconsistent standards and criteria being used by the various insurance providers to assess builders;
the potential duplication of systems and data by guarantee providers and the introduction of a profit motive may offset the benefits of competition;

the size of the Victorian market may be such that it cannot support several competitors which may allow one provider to dominate the market; and

a competitive system using variable fees would make it more difficult for new builders to enter the market or small builders to remain in it, as guarantee fees would be set on the basis of risk and may be higher for builders without an extensive work history. This would not be in the long term interests of either the industry or consumers.

Some of these difficulties have also been expressed by Ms Marilyn Head, Chairperson of the Fund who stated:

"Experience overseas and in other States indicates that the market is not big enough to support more than one insurer and that competition would not necessarily follow by allowing others to enter. There is also evidence to show that where insurance only is offered the costs to consumers are increased."\textsuperscript{17}

The scope of the Committee's inquiry does not permit a complete assessment of the issue of competition in the provision of the guarantee. The Committee notes that the review currently under way within the Office of Fair Trading and Business Affairs (the Office) includes in its terms of reference (refer Chapter 1):

"the role of the Housing Guarantee Fund as sole guarantor of domestic building work under the Act and possible alternative insurance/warranty systems".

The Committee expects that this aspect of the Office's review would include an analysis of the introduction of competition. To undertake this

\textsuperscript{17} Victorian Consumer Affairs Committee; Consumer Rights in the Domestic Building Industry, Report on Seminar Held 24 June 1993; Page 6
task the Office would need to determine whether the Fund is operating at a high level of efficiency and effectiveness and if not, whether the introduction of competition, greater regulation or a different sole provider of the guarantee would produce the best possible result for the industry and consumers.

A number of alternative models for the provision of the guarantee exist, including:

- the Fund continuing as sole provider with flat fees;
- appointment of an alternative sole provider with flat fees;
- introduction of variable fees based on risk by a sole provider;
- introduction of several providers with variable fees based on risk; or
- introduction of several providers having the same flat fees.

The last option appears to be the least attractive as the benefits of competition would not be experienced.

It is not possible to reach a fully informed conclusion on the best possible method of providing the guarantee in the absence of a detailed understanding of the efficiency and effectiveness of the Fund's current operations and that achievable by other potential providers.

The Committee believes that while the Fund is a monopoly provider of the guarantee the Office of Fair Trading and Business Affairs should satisfy itself that the Fund is meeting its obligations under the Act and is doing so economically and effectively. The results of such scrutiny should be reported in each of the Office's annual reports, including what approach was taken to the review of the Fund's activities. The Committee expects that as part of the Office's scrutiny of the Fund it would arrange a performance audit of the Fund at least once in every five years.
Recommendation 2.2

The Committee recommends that while the Housing Guarantee Fund Ltd remains the monopoly provider of the guarantee, the Office of Fair Trading and Business Affairs (the Office) must satisfy itself that the Fund is meeting its objectives and obligations under the House Contracts Guarantee Act 1987 effectively and is doing so economically and efficiently. The Office should include a statement in each departmental annual report tabled in Parliament that it has satisfied itself in this respect and outline what steps it took to do so.

Alternatively, should the Office be unable to determine that the Housing Guarantee Fund is meeting its obligations effectively and doing so economically and efficiently, it should report this to the Parliament as soon as it becomes apparent, together with the recommended action to overcome identified problems.

Finding 2.3

The Committee finds that competition, through the introduction of several providers of the guarantee, should benefit both consumers and builders. A number of practical issues, however, currently stand in the way of achieving competition. Other options such as using a different sole provider or the introduction of variable fees based on risk need detailed examination.

Recommendation 2.3

The Committee recommends that the Office of Fair Trading and Business Affairs, as part of its current review, fully investigate the benefits and implementation issues relating to the introduction of competition and other alternatives in the provision of the housing guarantee, and report to the Parliament upon the best possible guarantee provider(s) and fee structure.
CHAPTER THREE: DISPUTE RESOLUTION AND DOMESTIC BUILDING WORK CONTRACTS

3.1 DISPUTE RESOLUTION

3.1.1 Background

It is important to both builders and owners that contracts provide for disputes to be dealt with fairly, economically and quickly. Builders often operate on low profit margins which may be eroded by expensive dispute resolution processes and time spent resolving disputes prevents builders from undertaking other projects. Owners on the other hand, frequently borrow funds to finance the costs to build or renovate their home and rarely have sufficient resources to meet significant costs in resolving disputes.

In a submission to the Committee, the Master Builders Association of Victoria stresses the importance of an appropriate dispute resolution mechanism, stating:

"... dispute resolution is the major cause of financial cost to individual consumers and builders, and to provide a cost effective, fair and timely method of resolving disputes will achieve more real savings than will any other single reform, although such savings will of course be confined to those parties who become involved in intractable disputes."\(^1\)

Consumers are often not aware of the alternative dispute resolution mechanisms that are available to them, as a result of inadequate consumer information, limited experience in domestic building works and the compulsory arbitration clauses that are contained in standard domestic building work contracts (refer to paragraph 3.1.2).

The dispute resolution mechanisms that are currently available include the Courts, Small Claims Tribunal, a conciliation service offered by the

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\(^{1}\) Master Builders Association of Victoria; Submission to the Public Accounts and Estimates Committee; 27 July 1994; Page 2
Office of Fair Trading and Business Affairs and arbitration services offered by the industry associations, the Fund and the Institute of Arbitrators.

The Committee believes that an effective dispute resolution mechanism must contain the following elements:

- be and be perceived to be fair to both parties;
- be able to resolve disputes quickly;
- make enforceable decisions;
- cost efficient; and
- be capable of handling technical issues that may arise.

The Master Builders Association of Victoria summarised these elements:

"To put the matter in a context of reality, a system which enables an aggrieved party to have a knowledgeable adjudicator hear the complaint (and perhaps view the work), read their contract and other project documents, then give a binding and generally fair decision, all in the space of a day or so, and at a cost of a few hundred dollars, is a system which can truly be said to provide justice, and is one which our members will support wholeheartedly."²

² Master Builders Association of Victoria; Attachment to a submission to the Public Accounts and Estimates Committee: 27 July 1994; Page 8
Finding 3.1

The Committee finds that domestic building work contracts should provide access to a dispute resolution process that is:

- fair to both parties;
- able to resolve disputes quickly;
- able to make enforceable decisions;
- cost efficient; and
- capable of handling technical issues.

3.1.2 Arbitration

Arbitration has been the prescribed method of dispute resolution in standard domestic building work contracts for many years and is a feature of the current standard form contract issued by the Housing Industry Association Limited.

Arbitration has not proved to be a satisfactory dispute resolution mechanism for either builders or owners.

The process of arbitration is intended to be quite simple and includes the following steps:

- one party serves on the other a notice of dispute once a dispute arises;
- an arbitrator is appointed to hear the case and resolve the matter;
- a preliminary conference may be held followed by discovery of documents and other interrogatory procedures; and
• a hearing is held and the arbitrator assesses the evidence and makes an award that is binding on both parties. This award may only be appealed on a point of law.

In addition to the expertise arbitrators are expected to have, arbitration was intended to be a quick and relatively inexpensive alternative to litigation. Arbitration has, however, been criticised as being untimely and costly to both parties. Owners are also dissatisfied with arbitration as they consider it to be biased toward builders.

Victims of Builders Support Group Incorporated (VOBSG) claimed, at public hearing, that some arbitrators "have no legal knowledge and no formal training, even in building."³

In a submission made to the Premier of Victoria, VOBSG stated that one day of arbitration can cost at least of $8,000 and the losing party must pay the costs of both parties in full.⁴ As a result of these high costs it is difficult for builders and owners to accurately predict the cost of arbitration at the outset. The Trade Practices Commission (the Commission) reported that submissions they received suggested:

"that many consumers are motivated to settle a dispute by a fear of the anticipated financial consequences of arbitration, rather than by a genuine desire to reach a negotiated settlement."⁵

In a submission to the Commission, the Housing Industry Association Limited stated:

"HIA is of the view that arbitration has failed. Alternative mechanisms for dispute resolution, especially mediation, are likely to be cheaper, quicker, more effective and relevant."⁶

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³ Victims of Builders Support Group Inc; Minutes of Evidence; 11 May 1994; Page 9
⁴ Victims of Builders Support Group Inc; Submission to the Premier of Victoria; 18 January 1993; Page 2
⁵ Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 39
⁶ Ibid; Page 28
The Commission summarised these shortcomings of arbitration, stating:

"The Commission's inquiry found general agreement that arbitration in particular has failed because:

1. *It can take as long and cost as much as going to Court.*

2. *Rightly or wrongly it is widely seen as inherently biased against consumers because arbitrators are nominated by the industry.* ...

* Arbitration clauses in standard form residential building contracts usually provide for an arbitrator to be nominated by the head of a building industry body. It is often the case that all parties except the consumer have been intimately linked in a professional way. A perception of bias, whether supported by facts or not, is enough to diminish the effectiveness of any dispute resolution process."\(^7\)

The Committee does not believe that arbitration is satisfactorily meeting the requirements of either builders or owners. Accordingly, the Committee believes that arbitration clauses should be prohibited from domestic building work contracts (refer to paragraph 3.2.3).

**Finding 3.2**

The Committee finds that there is widespread dissatisfaction towards arbitration because of its failure to provide fair, cheap and quick resolution to domestic building disputes. A clear need exists for domestic building work contracts to specify an effective alternative dispute resolution mechanism.

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\(^{7}\) Ibid; Pages 5 and 28
3.1.3 Appeals Committee

The *House Contracts Guarantee Act 1987* requires the Fund to have in force rules relating to the establishment of an appeals committee.\(^8\) Parties to a claim on the Fund may appeal to the appeals committee should they be dissatisfied with the Fund’s determination. This requires lodging an application form along with $200 to the appeals committee Registrar. The Committee understands that the fee is refundable to the applicant where they are successful. A hearing is heard by a panel of three representatives, being a legal chairperson, a builder and a consumer representative. Further appeals may be made to the Administrative Appeals Tribunal.

The Fund’s 1992-93 annual report stated that 175 appeals were heard during the financial year of which:

- 64 were dismissed;
- 50 were upheld;
- 12 of the Fund’s decisions were varied; and
- 49 were adjourned/settled.

Accordingly the appeals committee upholds, in part at least, approximately 50% of those appeals which are actually heard by the committee and not adjourned or settled between the parties. The percentage of successful appeals would be even higher if the number of appeals lodged by appellants seeking rejection in order to be eligible to request a discretionary payment was taken into account (as discussed in paragraph 4.7).

The current appeals system is unable to operate effectively in its existing structure, predominantly due to its lack of independence from the Fund. Whilst the appeals committee comprises independent persons, it is unable to be perceived as independent as it is established, accommodated and resourced by the Fund. Accordingly, claimants are not able to place their trust in the appeals process as it is controlled or at the very least perceived to be controlled by the party whom they are appealing against. For the appeals committee to be effective it must operate and be seen to operate

\(^8\) *House Contracts Guarantee Act 1987*: Section 22(1)(f)
with complete independence of the organisation who's decisions it reviews.

A representative of the Appeals Committee has noted their frustrations on this issue stating:

"The Committee will continue not to have the appearance of independence and will not operate effectively and independently unless it is accommodated and funded separately. ..."

The provision of staff for the Appeals Committee has always been at the whim and prerogative of the Company ...

Their personal difficulty has been to maintain their employment when placed in a position of conflict of interest by the demands made upon them by the Committee and the Company."\(^9\)

The Fund sets the rules and procedures for the conduct of the appeals committee with the approval of the Minister for Fair Trading. This power cannot be considered as appropriate for the operation of an independent appeals committee. Submissions to this Committee have claimed that the Fund has changed its rules/practices in favour of itself. Examples provided are:

- the Fund's rules now provide that only the appellant and the Fund itself are entitled to be present at an appeal hearing. The other party to the contract, unless called as a witness, is no longer entitled to present its case despite being affected by any decision made by the appeals committee. The Fund is deemed to represent this party as it is a decision in their favour that it is defending. This Committee believes that all parties, the builder, owner and the Fund, should have a right to present their case to the appeals committee; and

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\(^9\) Mr Rowland Hassall; Attachment to a letter to the Public Accounts and Estimates Committee; 14 June 1994; Pages 1 and 2
the Fund revised its practices in November 1991 to cease providing copies of its files (or part thereof) to the appeals committee and appellant.\textsuperscript{10}

A further difficulty with the current appeals system is that the appeals committee does not have powers to enforce its decisions.\textsuperscript{11} Should the decisions of such a committee not be enforceable or binding they are of little value.

The Committee recommends in paragraph 3.1.4 that a building disputes tribunal be established. Upon its creation, the Committee anticipates that all appeals will be heard by the tribunal and that a separate appeals committee will not be necessary. The Committee believes that the difficulties that are currently prohibiting the appeals system from operating effectively will be overcome if appeals are heard by the proposed building disputes tribunal.

Prior to the adoption of the Committee's recommendations legislative amendments may be required in order for the appeals committee to operate effectively as an independent body. The new arrangements would need to ensure that the Fund has no influence or control over the appeals committee. Further, this Committee believes that the Office of Fair Trading and Business Affairs should accommodate and control the committee. This Committee considers that as part of this role the Office should determine the level of funding that is to be contributed by the Fund to finance the appeals committee operations.

Finding 3.3

The Committee finds that while the current appeals committee is unable to operate independently of the Housing Guarantee Fund its ability to effectively deal with appeals against the Fund's decisions is dramatically reduced.

\textsuperscript{10} Ibid; Page 3
\textsuperscript{11} Mr Rowland Hassall; Letter to the Public Accounts and Estimates Committee; 14 June 1994; Page 2
Recommendation 3.1

The Committee recommends that should an independent building disputes tribunal for domestic building work be established, all appeals against the decisions of the Housing Guarantee Fund should be dealt with by that tribunal and the existing appeals committee disbanded.

Recommendation 3.2

The Committee recommends that in the absence of an independent building disputes tribunal, the appeals committee be reformed whereby the Housing Guarantee Fund has no influence or control in the committee's establishment, rules or resourcing. The Office of Fair Trading and Business Affairs should accommodate and control the appeals committee and determine the level of funding that is to be contributed by the Housing Guarantee Fund to finance the appeals committee's operations.

3.1.4 Building Disputes Tribunal

3.1.4.1 Establishment

The Committee does not believe that any of the mechanisms currently available in Victoria adequately satisfy the criteria that are required for an effective dispute resolution process (refer to paragraph 3.1.1) and accordingly has considered other alternatives.

In Queensland a Building Tribunal was formed to overcome the difficulties that were being experienced. The Trade Practices Commission reported that this system appears to have met the requirements of most consumers and builders.12

12 Trade Practices Commission, Home building - consumer problems and solutions; November 1993; Page 40
The establishment of a building disputes tribunal has been proposed in Victoria on many occasions. The Fund has expressed a desire for such a tribunal:

"In the 1991 report I indicated the Fund's support for a building disputes tribunal. It is disappointing that such a tribunal has not been established when all major interest groups in the home building area appear to agree that it would greatly reduce the cost of building disputes. ... The benefits of this includes the perception by both owners and builders that such a tribunal is independent."13

The Trade Practices Commission reinforced these views in its 1993 review, stating:

"The comparatively recent development and establishment of a specialist building disputes tribunal in some jurisdictions has been welcomed across the board by industry associations, builders and consumers. The perceived advantages of the structure and procedural requirements of a specialist tribunal include:

- the ability to deal with claims quickly and with minimal formality, avoiding the costs and delays of the Courts and arbitration; and
- the enhancement of public confidence in the industry and the impartiality of the dispute resolution process."

The Victorian Consumer Affairs Committee and the Master Builders Association of Victoria have also expressed support for the establishment of a building disputes tribunal.

In 1992 a draft building disputes tribunal Bill was prepared, a copy of which is attached as Appendix 1. The purpose of this proposed legislation

13 Housing Guarantee Fund Limited; Annual Report; 1991-92; Pages 2 and 12
14 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 40
was to establish a building disputes tribunal with jurisdiction to hear and determine disputes arising from domestic building work contracts and certain appeals under the Act.

The Committee proposes that a building disputes tribunal be established as an independent body to ensure that all domestic building disputes are effectively handled by persons with the required expertise and without industry or consumer bias.

The Committee believes that the tribunal should form part of the Office of Fair Trading and Business Affairs (the Office). It is accepted that the tribunal may be criticised as having a consumer bias while it is administered by the Office, however, the Committee notes that other alternatives such as the Department of Planning and Development may be perceived to have an industry bias. On balance, the Committee considered that the Office was best placed to administer the building disputes tribunal based on its experience with other tribunals and its existing responsibility for the House Contracts Guarantee Act 1987.

The Committee believes that a properly formed and operated building disputes tribunal will resolve many of the problems currently being encountered and satisfy those elements that are required for a successful dispute resolution mechanism (refer to paragraph 3.1.1).

**Recommendation 3.3**

The Committee recommends that an independent building disputes tribunal be established in Victoria.

**Recommendation 3.4**

The Committee recommends that the proposed building disputes tribunal be administered by the Office of Fair Trading and Business Affairs.
3.1.4.2 Jurisdiction

The Committee proposes that the building disputes tribunal be empowered to hear all disputes between builders and owners relating to the domestic building industry and any appeals against decisions made by the Fund. This will enable all disputes relating to the domestic building industry to be handled efficiently by the one body and with the required level of expertise. This approach will therefore allow disputes to be heard by the tribunal that relate to works which are not currently covered by the Act, such as swimming pools, multi level dwellings and garages and also works for less than the amount above which a guarantee is provided.

The Committee does not consider it appropriate to apply a monetary limit on the awards that may be made by the building disputes tribunal. The draft building disputes tribunal Bill (refer Appendix 1) proposed that an upper limit equal to the guarantee limit be applied, however, the Committee sees no basis for this link. The Committee expects that the tribunal will hear all domestic building matters including those that are not covered by the guarantee or dealt with by the Fund, such as within contract disputes. Accordingly the Committee does not consider that the link to the guarantee limit is appropriate and believes that all owners and builders should be able to refer their dispute to the tribunal regardless of value.

The Committee notes that the Queensland Building Tribunal does not have an upper monetary limit imposed upon it.

**Recommendation 3.5**

The Committee recommends that the proposed building disputes tribunal be empowered to hear all disputes between builders and owners relating to domestic building works, including those that are not subject to a guarantee, and any appeals against decisions made by the Housing Guarantee Fund Limited.
Recommendation 3.6

The Committee recommends that the proposed building disputes tribunal have no upper or lower monetary limits placed on the disputes that it can handle.

3.1.4.3 Structure

The creation of an appropriate structure for the proposed building disputes tribunal is essential for it to satisfy many of the elements required for a successful dispute resolution mechanism including independence, accessibility and technical expertise.

Few interest groups within the domestic building industry have expressed detailed views to the Committee on a preferred structure for the tribunal. Victims of Builders Support Group Inc recommended that:

"It (the tribunal) should be presided over by a Chairperson drawn from the legal profession. The board should also include a government nominee, not associated with the building industry and one nominee from the major building associations."

This structure is very similar to that of the existing Appeals Committee.

At public hearing, the Fund commented on the structure proposed by Victims of Builders Support Group Inc, stating:

"Some of the states that have moved to that format suggest that it is too cumbersome. Others suggest that having a single member on a tribunal is another way, but that has its faults, too. We have to look seriously at the types of disputes to decide whether having a tribunal means having a three people panel or only one. ... Cost would be the main concern."

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15 Victims of Builders Support Group; Submission to the Premier of Victoria; 18 January 1993; Page 6
It is a matter of overkill (having a committee of three) to make what can be reasonably simple decisions."\footnote{16}

The Housing Industry Association also expressed its view at public hearing:

"We have been talking about a legally qualified person and a technically qualified person sitting as a two-person tribunal - if that makes sense. Or you could have, as some states do, a third person - a consumer sitting with those two technical persons. But as long as you have the legal and technical persons sitting together, that is the important aspect."\footnote{17}

In a submission to the Committee, the Master Builders Association of Victoria commented:

"Whilst we do not wish to see lawyers excluded from sitting on the Tribunal (there are lawyers who are highly competent in building cases), there should be no absolute requirement for such a qualification."\footnote{18}

The Committee believes that to best meet its objectives the tribunal should consist of independent legal chairpersons with no interest in the building industry or consumer groups, builder representatives and consumer representatives. The Committee intends that one person from each of these groups would comprise the panel for any tribunal hearings. This structure ensures that all parties are represented, there is no bias (real or perceived) and that the required level of expertise is available to handle any technical and legal issues that may arise.

The co-ordinating chairperson of the appeals committee believes that the current appeals committee (which has the Committee's recommended structure) could be expanded to cover the full range of functions that it is intended a building disputes tribunal would perform, if it was financially

\footnotetext{16}{Housing Guarantee Fund Limited; Minutes of Evidence; 8 June 1994; Page 4}
\footnotetext{17}{Housing Industry Association; Minutes of Evidence; 8 June 1994; Page 5}
\footnotetext{18}{Master Builders Association of Victoria; Attachment to a submission to the Public Accounts and Estimates Committee; 27 July 1994; Page 8}
and physically independent from the Fund. Consequently, the Committee is confident that its proposed structure is viable and effective.

**Recommendation 3.7**

The Committee recommends that the proposed building disputes tribunal should be made up of independent legally qualified chairpersons, builder representatives and consumer representatives, with one from each of these categories comprising the tribunal panel for any particular hearing. All appointments to the tribunal should be made by the Minister.

3.1.4.4 Procedure

The Committee sees great merit in mediation, that is an informal conference with an independent third person, as the first stage of its recommended dispute resolution process. The mediator's function is to bring the disputing parties together so that they can reach a settlement between themselves. This procedure enables many disputes to be resolved quickly and with minimal expense. The Committee proposes that the building disputes tribunal would elect persons to act as mediators.

The Queensland Building Tribunal uses mediation as the first stage in its dispute resolution process. The Trade Practices Commission reported that 50 to 60 per cent of dispute applications were resolved through mediation.\(^\text{20}\)

Parties to a mediated settlement are not bound by its terms.

In the event that the mediation process fails to resolve the dispute, then it should be referred to the full tribunal panel, comprising a legal chairperson, a builder representative and a consumer representative. The

\(^{19}\) The Appeals Committee; Attachment to a letter to the Public Accounts and Estimates Committee; 13 July 1994; Page 1 and Mr Rowland Hassall; Letter to the Public Accounts and Estimates Committee; 14 June 1994

\(^{20}\) Trade Practices Commission; Home Building - Consumer Problems and Solutions; November 1993; Page 41
use of mediation as a pre-requisite to a full tribunal hearing is to minimise costs for all parties involved. The Committee expects these hearings will be conducted with minimal formality and that the tribunal will not be bound by rules of evidence. The Victorian Consumer Affairs Committee agrees with this process.21

All applications that are made to the tribunal appealing a decision made by the Fund should be heard by the full tribunal panel in the first instance, not via mediation. The Committee believes that in addition to the Fund, both the builder and the owner should be entitled to present their case at these hearings.

Awards that are made by the proposed building disputes tribunal are to be enforceable should either party not comply with them.

The Committee, whilst believing that there are advantages where all domestic building disputes are handled by the one tribunal as proposed, for example efficiency, it is concerned that such an approach may be viewed as adversely restricting disputing parties who would both prefer to engage another dispute resolution mechanism. The Committee is, however, also concerned that should parties be given access to other mechanisms, even in the event that they both agree, one or both may do so without being fully aware of the implications. The Master Builders Association of Victoria expressed its view that parties to a dispute should have the ability to select the resolution mechanism.22 On balance, the Committee believes that to allow parties to opt out of the proposed dispute resolution mechanism, that is the building disputes tribunal, may undermine those reforms and allow a continuation of the existing problems.

21 Victorian Consumer Affairs Committee; Consumer Rights in the Domestic Building Industry, Report on Seminar Held 24 June 1993; Page 7
22 Master Builders Association of Victoria; Attachment to a submission to the Public Accounts and Estimates Committee; 27 July 1994; Page 8
Recommendation 3.8

The Committee recommends that all domestic building work contracts require disputes to be referred to the proposed building disputes tribunal for resolution.

Recommendation 3.9

The Committee recommends that mediation be the first step in the dispute resolution process operated by the proposed building disputes tribunal. The tribunal should nominate persons to act as mediators. In the event that a mediated settlement is not reached between the parties, the dispute should then be heard by the tribunal panel. Appeals against the Fund's decisions however, should be heard by the tribunal panel at the first instance.

Recommendation 3.10

The Committee recommends that at an appeals hearing, both the owner and the builder be entitled to present their case.

Recommendation 3.11

The Committee recommends that the decisions of the proposed building disputes tribunal be enforceable.

3.1.4.5 Right of Appeal

The Committee does not believe that there should be any right of appeal against the decisions made by the building disputes tribunal except on significant points of law or in regard to jurisdictional challenges.

This view is supported by the existing appeals committee and the Trade
Practices Commission which stated:

"a right of appeal against the referee's decision should be limited to jurisdictional challenges or where an important principle of law is involved."²³

The decisions of the tribunal should be binding on both parties. The Committee believes that the allowance of appeals would protract dispute resolution and significantly increase the costs incurred.

Recommendation 3.12

The Committee recommends that the decisions of the building disputes tribunal be binding on both parties and appeals against such awards be limited to jurisdictional challenges or significant points of law.

3.1.4.6 Legal Representation

In order to minimise the costs that are incurred by the parties to a dispute and retain a low level of formality at tribunal hearings, the Committee proposes that legal representation be denied without the consent of the building disputes tribunal. Upon one party to a dispute requesting leave to be legally represented the agreement of the other party should also be sought and their reply taken into account by the tribunal when determining whether to grant the request. Both parties should be notified of the tribunal's decision. The Committee intends that consent by the tribunal is to be granted only in limited circumstances, for example where the other party has legal training.

Each party must bear their own legal costs regardless of the outcome in the event that a request for legal representation was granted.

There is support in restricting legal representation at the tribunal. The

²³ Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 42
Master Builders Association of Victoria stated:

"the exclusion of a right to be legally represented, in the absence of the consent of the other party and the Tribunal, is an eminently pragmatic and commendable starting point, if disputes are ever to be resolved within the means of the average person."\(^\text{24}\)

Victims of Builders Support Group Incorporated, the Trade Practices Commission and the Queensland Building Tribunal all support legal representation only in limited circumstances.

The Master Builders Association of Victoria quantified the costs of legal representation, stating:

"We can say, with very considerable authority, that most disputes concerning amounts of less than $10,000 (and more, in many cases) do not reach a hearing stage, purely and simply because of the cost of legal representation.

We have available for consideration the results of a survey conducted among all of our housing members, where we sought evidence of breach of payment conditions.

The response was confirmation of our anecdotal evidence that many millions of dollars every year is denied to builders, who are effectively prevented from pursuing the only available means of recourse, because of the cost of engaging legal representation, which becomes cost crippling, should the action be lost and costs awarded.

Even successful actions can leave the "victor" in financial ruin.

We are now advising our members to amend the standard arbitration clause in the Uniform Housing Contract to

\(^{24}\) Master Builders Association of Victoria; Attachment to a submission to the Public Accounts and Estimates Committee; 27 July 1994; Page 7
exclude the right to be legally represented, so that should a dispute arise, the agreement is already in place."  

An advantage of legal representation is that a third party assess the dispute and can advise whether or not it is in their client’s best interests to pursue the matter and if so, how best to do that. The Committee, however, believes that the cost and other implications of legal representation at tribunal hearings, including the potential to unduly disadvantage one party over the other outweighs any advantage. The restriction proposed does not and could not prevent parties engaging a solicitor to provide advice outside the tribunal’s hearings.

**Recommendation 3.13**

The Committee recommends that parties to a dispute be denied legal representation at the building disputes tribunal except with the consent of the building disputes tribunal. The consent of the party not requesting legal representation should be sought and their reply taken into account by the tribunal when determining whether to grant the request for legal representation. Further, the tribunal’s consent should be granted only in limited circumstances. Each party to the dispute must bear its own costs regardless of the outcome.

### 3.1.4.7 Funding

The Committee acknowledges that there will be a cost in operating an independent building disputes tribunal. It is envisaged by the Committee that funding for the proposed tribunal will be obtained from various sources, including:

- a levy on the Housing Guarantee Fund (which currently funds the appeals committee in total);

- fees paid by the parties to a dispute; and

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25 Ibid
• amounts lodged by parties appealing against a decision of the Fund.

The Housing Industry Association expressed its view regarding the funding of the tribunal at public hearing:

"I must say there is a cost implication; they are not cheap to run. But there has to be some means around that. I believe it is not beyond our abilities to find some means of funding those sorts of tribunals by perhaps a levy on registration fees or by contributions or something of that nature. The Housing Guarantee Fund may indicate that - I do not know - but it is currently costing it something like $300,000 a year to operate an appeals tribunal. That money could quite easily go into an independent building disputes tribunal."26

The Committee agrees with the view of the Housing Industry Association that some funds could be contributed by the Fund, perhaps based on a set amount per contract that is registered with it. The Committee believes that the majority of the tribunal's operating costs should be borne by the Fund.

The Committee also considers it reasonable for the parties to a dispute to contribute to the costs of the tribunal. It is after all, their disputes that give rise to the costs incurred.

Applicants to an appeal against the Fund currently pay a $200 fee to the appeals committee. This amount is refundable in the event that they are successful. The Committee believes that this system is also appropriate for appeals that are heard by the tribunal.

The Committee is not in a position to quantify the costs that should be contributed by each party. The Committee believes that in cases of extreme financial hardship, the tribunal should have the power to waive the fee which is to be paid by the applicant. It is important to ensure that persons are not excluded from the tribunal as a result of their inability to pay the application fee.

26 Housing Industry Association Limited; Minutes of Evidence; 8 June 1994; Page 5
Recommendation 3.14

The Committee recommends that the funding for the proposed building disputes tribunal be sourced from:

a) a levy on the Housing Guarantee Fund Limited;
b) fees from parties to a dispute; and
c) fees from unsuccessful applicants to appeals against decisions made by the Housing Guarantee Fund Limited.

Recommendation 3.15

The Committee recommends that the majority of the building disputes tribunal's operating costs be borne by the Housing Guarantee Fund Limited. The Office of Fair Trading and Business Affairs should determine the levy to be placed on the Housing Guarantee Fund and other fees to be charged by the tribunal.

Recommendation 3.16

The Committee recommends that in cases of extreme financial hardship, the building disputes tribunal be able to waive the fees to be paid by a party to a dispute or an appeal.

3.1.4.8 Monies to be held in trust

Owners withholding payment from builders are often advised to pay the amounts outstanding to prevent builders from becoming entitled to terminate the contract and claim damages. In addition, the Fund currently requires that all amounts owing to builders be paid before it will consider a claim. On the other hand the withholding of payment by owners provides them with financial leverage until defects are rectified or disputes are resolved. Owners are understandably reluctant to pay builders for works that are not satisfactory, however, contracts rarely provide them with the opportunity to withhold payment. To assist owners and builders, the Committee proposes that owners be permitted to pay disputed amounts to
the building disputes tribunal to be held in trust pending resolution of the matter.

Recommendation 3.17

The Committee recommends that owners be permitted to pay disputed amounts to the building disputes tribunal to be held in trust pending resolution of a dispute.

3.2 DOMESTIC BUILDING WORK CONTRACTS

3.2.1 Background

Disputes often arise in the domestic building industry as a result of consumers not understanding their contract. Many consumers have failed to recognise that it is critical for them to fully understand the terms of contract at the outset, in order to reduce the likelihood of disputes that may arise in the future.

The Trade Practices Commission (the Commission) noted:

"Few consumers can foresee the impact of the terms of the contract on ... (the rights of the parties) should the building process not follow the path anticipated by the parties at the time of signing."27

Reform of the standard contracts that are commonly used in the domestic building industry has been called for on many occasions.

The former Ministry of Consumer Affairs was one of the many parties to

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27 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 34
criticise standard form contracts:

"A revised domestic building and renovations contract is essential if disputes in this area are to be reduced. The existing standard domestic building contract is too complex and is unfair. Work to improve dispute resolution mechanisms and to improve the operation of the guarantor body alone will assist but will not solve the basic problems which consumers face in this area."\(^{28}\)

The Fund stated in its 1992-93 annual report:

"As in previous years, the Fund would welcome a review of the House Contracts Guarantee Act (1987) legislation. Any such detailed review would be likely to indicate that a package of amendments is required, namely, the introduction of a standard form contract, the development of an independent dispute resolution process... The Fund believes such changes are essential in order to appropriately protect consumers and builders."\(^{29}\)

Victims of Builders Support Group Incorporated, in a submission made to the Premier of Victoria, set out its criticisms of standard form contracts:

"Industry supported contracts presume that
i the builder rather than the owner is in greater need of contractual protection
ii the builder should be contractually protected from loss when, for whatever reason, it incurs greater costs in completing the agreed works than originally advised."\(^{30}\)

The majority of domestic building work contracts currently used are standard contracts produced by the industry associations, either the Housing Industry Association Limited or the Master Builders Association of Victoria, for use by their members.

\(^{28}\) Ministry of Consumer Affairs; Annual Report; 1990-91; Page 2
\(^{29}\) Housing Guarantee Fund Limited; Annual Report; 1992-93; Page 8
\(^{30}\) Victims of Builders Support Group Inc; Submission to the Premier of Victoria; 18 January 1993; Page 2
The House Contracts Guarantee Act 1987 sets out certain requirements in relation to domestic building works contracts, including:

- the contract must be signed by both parties;

- the owner is to be given a legible copy of the contract as soon as practicable; and

- the contract must set out in writing:
  (i) the names of the parties;
  (ii) the subject matter of the contract;
  (iia) the date of commencement of work or the method such a date will be determined;
  (iib) the estimated date of completion of work or the estimated number of days from the date of commencement;
  (iii) contract price, or manner in which price is to be determined; and
  (iv) date of contract.\textsuperscript{31}

Criticisms relating to the standard contracts have centred on the complex language used, compulsory arbitration clauses, perceived builder bias and the provision for potentially significant price increases.

The main criticisms of domestic building work contracts are discussed below.

3.2.2 'Plain English' Contracts

For many years most parties to the domestic building industry have called for the introduction of a 'plain English' contract to enable owners and builders to better understand the transactions that they enter to.

The aim of a 'plain English' approach is to remove complexity and technical language from contracts to enable a greater understanding by all parties. The use of 'plain English' should encourage owners to review contracts prior to entering into them.

\textsuperscript{31} House Contracts Guarantee Act 1987; Section 18
In its 1990 discussion paper the former Ministry of Consumer Affairs noted:

"Many of the forms of contract (in use) are difficult to read and structured in ways that disadvantage consumers simply because they are unfamiliar with the building industry."\(^\text{32}\)

The Fund's 1991-92 and 1992-93 annual reports stated respectively:

"The Fund's view is that the standard contracts currently being used need to be replaced or substantially altered to improve relations between builders and consumers and thus resulting in fewer claims and disputes.

During the year, a draft contract was drawn up for discussion between the parties. By year-end, while all parties remain in principle committed to developing a new contract, the content has not yet been agreed upon."\(^\text{33}\)

"It was a disappointing year for the development of a simple contract for domestic building projects. While considerable progress had been made over the past two years, the change of government and the abolition of the Law Reform Commission which was overseeing the review, saw this process come to a halt. It remains for building industry and consumer groups to continue to push for this review to be reopened."\(^\text{34}\)

The Trade Practices Commission reported that:

"the development and widespread use of 'plain language' standard form contracts is necessary as the cornerstone of reform in the home building industry. (The Commission)"

\(^{32}\) Ministry of Consumer Affairs; Discussion Papers on the Issues Related to the House Contracts Guarantee Act - Draft House Construction Contract and Explanatory Notes; November 1990; Page 1

\(^{33}\) Housing Guarantee Fund Limited; Annual Report; 1991-92; Page 8

\(^{34}\) Ibid; Page 7
welcomes attempts by the industry to introduce a suitable document."

The Committee considers that it is essential for standard contracts to be phrased in a manner which assists rather than detracts from the ability of both parties to understand it. Accordingly, the Committee believes that contracts written in 'plain English' should be introduced and used in respect of all domestic building work.

The Committee recognises the view that there will be a point where "the document is not capable of further simplification or reduction without adversely affecting its clarity or completeness" as stated by the Master Builders Association of Victoria. Consequently, there is a limit to which a 'plain English' approach can be taken. The Committee considers that the introduction of explanatory notes will help overcome the limitations of a 'plain English' approach and further enhance the understanding of both parties. This is in line with the Trade Practices Commission's report which noted:

"Although a 'plain language' contract will do much to facilitate the parties' understanding of their rights and obligations, in the Commission's opinion there nevertheless remains a need for further explanation of the operation of the terms of the contract."

Finding 3.4

The Committee finds that the introduction of domestic building work contracts written in 'plain English', with explanatory notes, will increase the understanding of contracts and lead to a reduction in disputes.

35 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 34
36 Master Builders Association of Victoria; Attachment to a Submission to the Public Accounts and Estimates Committee; 27 July 1994; Page 1
37 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 34
3.2.3 Dispute Resolution Clauses

Standard form contracts used for domestic building work have generally contained a clause prescribing arbitration as the dispute resolution mechanism should a dispute arise. Owners are often not fully aware of the implications of the dispute resolution mechanism provided for in their contract at the time of entering into it. The Committee determined in paragraph 3.1.2 that the use of arbitration for resolving all disputes arising from domestic building work contracts is not appropriate predominantly due to the costs that are incurred and the perception of bias towards builders. Accordingly, the Committee believes that compulsory arbitration clauses should be prohibited from domestic building work contracts.

The Committee's preferred method of dispute resolution was set out in paragraph 3.1.4.

Recommendation 3.18

The Committee recommends that compulsory arbitration clauses be prohibited from all domestic building work contracts.

3.2.4 Perceived Builder Bias in Standard Contracts

The majority of domestic building work contracts used are prepared by industry associations and have been criticised as being biased towards builders. The Trade Practices Commission is one of the parties to have expressed such concerns, stating:

"... many, if not all, of the standard form contracts presently in use in the industry are weighted significantly in favour of builders."

38 Ibid; Page 19
The Commission went on to note:

"There is always a risk that standard form contracts drawn up by the provider of services will place the purchaser at a relative disadvantage... After all, it is the function of industry associations, such as the HIA and the MBA to serve the interests of their members."^39

The Housing Industry Association Limited in a submission to the Commission stated:

"Building a home is a commercial transaction - it should be treated as such. It is inherent in such a relationship that the expectations of each party will be different. It is incumbent upon each party to act reasonably and to look after their own interests. It would not be fair to impose on one party responsibility for the well-being of the other party as well. For either party, help and/or professional assistance is readily available where doubt or uncertainty exist."^40

Consumers however, often do not have the same understanding of contracts as builders nor do they have access to an industry association to protect their interests. In addition, entering into a building contract may be a once in a lifetime event for consumers. Accordingly, the Committee believes it is necessary for the contract to consider the requirements of both parties to better protect the interests of consumers and builders.

The Committee acknowledges that consumers will continue to perceive that standard contracts are biased towards builders while they are prepared by industry associations. Any real or perceived bias in standard contracts could be minimised if the Committee’s recommendations, which are discussed fully in paragraph 3.2.6, are adopted, one of which is the requirement for all standard contracts produced by industry associations to be registered by the proposed building disputes tribunal. A condition of this registration is that standard contracts must comply with the requirements and spirit of the Act.

^39 Ibid; Page 20
^40 Ibid
3.2.5 Price Variations and Contract Termination

Disputes often arise where consumers are not aware that their contract allows for price increases. Owners rely on the builder's expert knowledge in costing their work to include all foreseeable matters and may not anticipate that the contract price or the timetable for completion can vary significantly.

The House Contracts Guarantee Act 1987 sets out certain requirements in relation to price increases. Examples of these provisions are:

- prime cost items or provisional sums must not be less than could be reasonably estimated (Section 18); and

- variations to be in writing and signed by the builder and the owner unless they were made necessary by directions given by a building surveyor or circumstances that could not have been reasonably foreseen at the time the contract was entered to. In this case, the builder must give the owner within seven days a statement setting out the reason for and cost of such variation (Section 19).

In addition, general precautions can be taken to assist in avoiding this misunderstanding of the variability of certain contracted prices, and may include:

- insertion of a warning in the contract that the price may vary;

- identification of any specific items contained in the contract that may be subject to price variation; and

- ensuring that all written variations include details of the work to be performed and the cost thereof, stating whether the price is subject to change.

Domestic building work contracts usually allow the price of a contract to be
altered in respect of:

- prime cost items, which usually relate to the supply and installation of fixtures and fittings. An allowance is made in the contracts for these items as they have often not been selected at the time of contracting;

- provisional sums, which are an allowance for items that could not be adequately identified or specified during costing, for example, rock excavation works; and

- mutually agreed variations to the contracted works.

The owner's right to terminate a contract on the basis of a price increase depends upon its quantum and which of the above categories the increase relates to. For example, mutually agreed variations to the works should not enable an owner to avoid the contract. This is particularly so for any variations instigated by owners. Equally, as noted in a July 1994 discussion paper prepared by the Office of Fair Trading and Business Affairs, prime cost items are generally controlled by the owner and they therefore should not be a factor in an owner's right of termination.

The Trade Practices Commission in its report addressed the issue of when the right to terminate should arise, stating:

"Consumers with insufficient funds to pay for the completion of the project due to unforeseen contingencies should have the option to pull out of the contract. The builder should be given written notice of the intention and the reason for termination.

Opinion in the industry differs as to the degree of variation of price or time for completion which should trigger the right to terminate. The Law Reform Commission/H1A contract addresses this issue by stating that if a variation to the contract price is greater than 15 per cent of the contract price or extends the period of completion by more than 50 per cent,

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41 Ibid; Page 23
42 Office of Fair Trading and Business Affairs; Review of the House Contracts Guarantee Act 1987 - Background and Discussion Paper; 28 July 1994; Appendix 8; Page 6
The owner may bring the contract to an end, or the builder may do so if the owner is unable to give written evidence of capacity to pay for the variation.

The Commission views these figures as the upper limits. However, whatever termination thresholds are adopted, it is essential that the contract recognise that neither party should be forced to bear the burden of a contract for which they cannot pay or be paid, where the variation occurred as a result of contingencies which were not reasonably foreseeable."43

The Committee agrees with the Commission's view in regard to the termination of a contract where prices increase or delays are incurred that were not reasonably foreseeable and do not relate to mutually agreed variations or prime cost items. Accordingly, the Committee believes that owners should have a right to terminate a contract where as a result of unforeseen contingencies, the original contract price increases by greater than 10% or delays are experienced that will extend the contract period by more than 30%. The Committee has adopted lower thresholds than those proposed by the Law Reform Commission and the Housing Industry Association. This approach is consistent with the Trade Practices Commission's comments above and having regard to what may generally be viewed as a substantial change in percentage terms.

Importantly, the expectations of owners and the Act that builders must make reasonable cost estimates in the contract should not be avoided through a builder's ability to vary or terminate a contract should those estimates prove to be substantially inadequate due to reasonably foreseeable circumstances. Consequently, the Committee does not propose that the builder has that ability. This approach increases the onus on builders to ensure that they adequately use their expertise and judgement when costing work. The former Ministry of Consumer Affairs in its 1990

43 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 37
discussion paper summarised this issue stating:

"Requiring builders to abide by their estimates in the absence of unforeseeable factors must improve the structural efficiency and competitiveness of the building industry."\(^{44}\)

The Committee has not sought to identify all conceivable circumstances under which a contract should be able to be terminated by owners, builders or both. Rather it has elected to focus on one key factor, that is price variations, which under certain circumstances should lead to contract termination.

Finding 3.5

The Committee finds that disputes over price variations may be reduced if all domestic building work contracts:

(a) contain a clear warning that prices may vary;

(b) clearly identify those aspects of the contract that are subject to price change; and

(c) require written variations to include details of the works to be performed and the cost thereof, stating whether the price is subject to change.

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Finding 3.6

The Committee finds that owners should have a right to terminate a contract where, as a result of unforeseen contingencies, the original contract price increases by greater than 10% or delays are experienced that will extend the contract period by more than 30%. This right to terminate by owners should not extend to mutually agreed variations or prime cost items.

Finding 3.7

The Committee finds that the ability to vary contract prices or to terminate a contract should not absolve a builder from his obligation to prepare reasonable cost estimates at the time of contracting. Consequently any substantial price variations which arise from contingencies, that could have been reasonably foreseen by a builder at the time of contracting, should not be permitted.

3.2.6 Contractual Reform - Past and Proposed

In response to the problems encountered, numerous attempts have been made to produce a new standard form contract. As yet no contract appears to have been developed which addresses all the problems and that is satisfactory to interest groups.

Efforts to develop a new standard form contract in Victoria have been made by the:

- Ministry of Consumers Affairs;
- Law Reform Commission of Victoria; and
- Housing Industry Association Limited.

A standard form 'plain English' contract has recently been released in New South Wales.
Ministry of Consumers Affairs - prescribed standard form contract

The former Ministry of Consumer Affairs (the Ministry) issued a discussion paper on domestic building work contracts in 1990 which included a proposed standard contract. The aims of the Ministry in preparing the contract were to ensure that:

- matters which are important to consumers and builders stand out clearly in the structure and drafting of the contract;

- the contract operates fairly and does not disadvantage consumers simply because they are unfamiliar with the building industry; and

- consumers who read the contract are not disadvantaged by being unfamiliar with building industry and legal terminology.\(^{45}\)

The main features of the contract developed by the Ministry were:

- use of plain English and avoidance of legal terminology wherever possible;

- a cooling off period of three days after signing the contract;

- warnings to the owner and the builder of the things they should do before signing the contract;

- staged payments and a warning that they should not be altered except in special circumstances;

- owner may end the contract should the provisional sum or prime cost items cost more than 15% over that allowed for in the contract;

- owner can terminate a contract where a variation for an unforeseeable matter increases price 15% or more or delays time by 50% or more;

\(^{45}\) Ibid; Page 1
• completion defined as complete without defects. This overcomes the need for a retention fund and the complaints with the term practical completion;

• if a dispute occurs the parties have seven days to decide on a dispute resolution mechanism. If they fail to agree they are locked into a predetermined mechanism;

• information booklet to accompany the contract.46

The Ministry's contract was never finalised.

Ministry of Consumer Affairs - optional model contract

The House Contracts Guarantee (Miscellaneous Amendment) Bill of 1991 sought, amongst other things, to introduce an optional model contract. This contract was deemed to comply with the House Contracts Guarantee Act 1987 and regulations concerning the form and content of contracts.

In the second reading speech of this Bill, Hon B. W. Mier MLC stated:

"it has become obvious that the standard contracts used in the domestic building industry are not appropriate for the 1990's. ... The new powers will not give government the ability to say to people: "Here is the one and only building contract you are allowed to use". But the power to prohibit certain types of clauses and require certain warnings to be included will help steer builders away from using contracts which include terms that are manifestly unfair, fail to cover important issues, or bury them in small print. This should stop at the source many of the kinds of problems which can currently escalate to the disadvantage of the owner, the builder or both."47

The Bill was not passed by the Parliament.

46 Ibid; Page 2
47 Hansard; 8 May 1991; Page 1364
Law Reform Commission/Housing Industry Association Limited

In 1992 the Law Reform Commission of Victoria attempted to develop a new contract after the Law Institute of Victoria withdrew its support of the uniform contract in existence at the time. Following the disbandment of the Law Reform Commission, the Housing Industry Association Ltd continued to develop the contract and have now released it. The contract published attempts to use 'plain English' throughout and provides explanations of some clauses.

The Fund commented, at public hearing, that:

"we have put our endorsement on that contract because it is a substantial move in the right direction."\(^{48}\)

The contract however, does not have the support of Victims of Builders Support Group Inc which stated at public hearing:

"It has been accepted by industry but soundly condemned by consumers."\(^{49}\)

The grounds of disapproval were set out in a submission made by Victims of Builders Support Group Inc to the Premier of Victoria:

"It remains grossly inequitable in that it:

i includes damage and determination clauses which could have the effect of providing greater rewards to the builder if it fails to complete the contract, than if it meets all its obligations to the works.

ii Fails to provide the owner protection from losses consequent on undue delays not of the owner's making, or caused by default of the builder.

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\(^{48}\) Housing Guarantee Fund Limited; Minutes of Evidence; 8 June 1994; Page 11

\(^{49}\) Victims of Builders Support Group Inc; Minutes of Evidence; 11 May 1994; Page 6
iii Fails to provide for adequate compensation to the owner where works are completed in contravention of agreed plans and specifications.

iv Misleads the parties as to the owner’s rights under the House Contracts Guarantee Act.

v Retains industry dominated arbitration.\textsuperscript{50}

The contract published by the Housing Industry Association provides for disputes to be first handled by an agreed mediator and should such a mediator not be agreed upon, the mediator referred to in the contract will be used. If the dispute is not settled by mediation the contract provides for it to be referred to the building disputes tribunal if in existence and if not, to arbitration.

The Committee agrees that the first step in dispute resolution should be mediation, however, it is concerned that at the time of entering into the contract the owner may be unaware of the implications of the prescribed dispute resolution clause and nominated mediator. It is expected that in most instances, the mediator named in the contract will be nominated by the builder and will probably be a representative of the builder’s industry association. Accordingly, the Committee questions whether the perceived independence of such a mediator will be satisfactory to consumers.

\textit{New South Wales}

A ‘plain English’ home building contract has been developed in New South Wales by the Building Services Corporation with the support of industry associations and consumer groups.

\textsuperscript{50} Victims of Builders Support Group Inc; \textit{Submission to the Premier of Victoria}; 18 January 1993; Page 2
DISPUTE RESOLUTION AND DOMESTIC BUILDING WORK CONTRACTS

The publication, 'Government Officer' reported:

"A THREE MONTH campaign to encourage councils around NSW to promote a new Plain English Home Building Contract as the prime residential building contract within the state has reportedly brought good feedback. Building Services Corporation stated 'We are trying to get people to communicate with one another. The whole thing is about clearly defining builder's and owner's responsibilities, and to provide a contract to let people work together through the building process. It's like any contract, enforceable by civil law, but by using this contract we hope to provide an appropriate and simple means of resolving disputes.'"51

This contract in addition to being written in 'plain English' contains explanatory notes and advice. It also provides a list of matters for the owner to check prior to signing the contract. Included at the front of the contract is a warning that certain clauses allow the contract price to vary.

The dispute resolution mechanism provided for in this contract is:

"If the owner or contractor considers that a dispute has arisen in relation to any matter covered by this contract, either during the progress of the work or after it has been ended, that person must give to the other party written notice of the items of dispute.

If the dispute is not resolved informally following such notification, the parties may confer with a mutually agreed third party whose role will be to assist in the resolution of the dispute by mediation or expert appraisal of the work.

If the dispute cannot be resolved by negotiation or by mediation, the owner or contractor may give written notice to the other party advising that they intend to resolve the

51 Government Officer; May 1994, Page 8
matter through the Building Disputes Tribunal, if appropriate, or by litigation."\textsuperscript{52}

The New South Wales Building Disputes Tribunal has a jurisdictional limit of $25,000.

\textit{Office of Fair Trading and Business Affairs}

The Office of Fair Trading and Business Affairs in its current review has addressed the issue of contracts and presented the following options for reform:

- prescribed form of contract - This would entail prescribing a mandatory contract for use in relation to all domestic building work;

- Office of Fair Trading endorsed contract - This option is based on the development of a contract that is endorsed by the Office of Fair Trading and possibly other groups. Any contracts without such endorsement would be required to provide a warning about the risks of not using an endorsed contract; and

- industry/Government endorsed contract - This alternative seeks to reopen discussions between the industry associations in an endeavour to develop a contract that overcomes the problems encountered in the past.\textsuperscript{53}

\textit{Proposed Reform}

Suggestions have been made that a standard form contract should be developed in consultation with all relevant interest groups, with its use being mandatory. As previously noted, the Ministry's 1990 discussion paper recommended the introduction of a compulsory contract however the House Contracts Guarantee (Miscellaneous Amendment) Bill ultimately did not seek to do this. The use of a mandatory contract was,

\textsuperscript{52} The Plain English Home Building Contract: Clause 25
\textsuperscript{53} Office of Fair Trading and Business Affairs; Review of the House Contracts Guarantee Act 1987; 28 July 1994; Pages 24 and 25
however, one of the recommendations made by the Victorian Consumer Affairs Committee in June 1993.

The Master Builders Association of Victoria has expressed its dislike of the introduction of a mandatory contract, stating in a submission:

"this Association has always strongly defended its right to publish its own contract documents ...
We would most emphatically reject any proposal to enforce the adoption of a single contract ..."\(^{54}\)

It is anticipated that the development of a single contract satisfactory to all interested parties would be difficult, based on the past experiences of the Law Reform Commission.

To overcome these difficulties, the Committee's approach has been styled to ensure that contracts remain fair to all parties, whilst not being restrictive on the industry.

The Committee supports the view that contracts should continue to be developed by industry associations and any other interested parties. Two reforms are proposed by the Committee to address contractual problems. Firstly, in order to ensure that standard form contracts are not unfair to either the builder or the owner, the Committee suggests that these contracts be registered by the proposed building disputes tribunal. The proposed building disputes tribunal has been selected by the Committee to be the party to register the contracts to ensure that there is consumer, builder and legal input into the registration process. Further, as the tribunal will handle all domestic building disputes its expertise will place it in a good position to review standard form contracts. The granting of registration is intended to be conditional upon contracts satisfying both the written requirements and the spirit of the Act.

The Committee was mindful of the potential increase in workload should the proposed tribunal be required to register all domestic building work contracts. In order to overcome this, the Committee proposes that only

\(^{54}\) Master Builders Association of Victoria; Submission to the Public Accounts and Estimates Committee: 27 July 1994; Page 2
standard form contracts produced by the industry associations be required to be registered. The Committee believes that the contracts produced by the industry associations comprise the vast majority of those used in the domestic building industry. To enable builders, who are not members of an industry association, and owners access to a registered standard contract the Committee also proposes that the tribunal publish its own standard form contract.

The second reform proposed by the Committee is intended to ensure that certain standards are met by recommending that there be certain mandatory and prohibited clauses for all domestic building work contracts. One proposed mandatory clause is that all contracts which do not obtain registration, that is not produced by the industry associations or building disputes tribunal, be required to refer to the availability of registered standard form contracts.

The House Contracts Guarantee Act 1987 currently sets out the following specific requirements for contracts:

- the contract must be in writing setting out:
  i) names of the parties;
  ii) subject matter;
  iii) date of commencement of the work;
  iv) estimated date of completion;
  v) contract price or the manner in which it will be calculated;
  vi) date of the contract. (Section 18(1)(a))

- the building owner must be given a legible copy of the contract as soon as reasonably practicable. (Section 18(1)(d) and (e))

- the builder must not enter into a contract that contains an amount or an estimated amount for a prime cost item or a provisional sum if the amount or estimated amount is less than the least that it could reasonably cost to supply the item or perform the work to which that item relates. (Section 18(5))

- the builder must not enter into a cost plus contract that does not set out a fair and reasonable estimate of the contract price. (Section 18(6))
• a contract that includes work other than domestic building work, must identify and state the amount payable for the domestic building work. (Section 18(6A))

• builders are not entitled to recover in court any cost for a variation unless it is in writing and signed by the builder and the owner, unless directed lawfully by a surveyor or in circumstances that could not have been reasonably foreseen by the builder when the contract was entered to. (Section 19(1) and (2))

• the deposit on a contract must not exceed more than 3% where the contract price is $20,000 or more, or 10% where the contract price is less than $20,000. (Section 20(1))

• a builder must charge an owner in accordance with the prescribed schedule based on completion of construction stages unless agreed otherwise in writing. (Section 21(3))

In addition to these existing requirements the Committee proposes that further restrictions/requirements should be placed on contracts via the House Contracts Guarantee Act 1987, being:

• entire contract to be written as simply and clearly as possible, that is use 'plain English'.

   As proposed in paragraph 3.2.2.

• contracts to contain explanatory notes of clauses, especially those that retain a level of complexity.

   As proposed in paragraph 3.2.2.
- the contract should include, at the front, summary information to consumers regarding:

  i) the availability of registered contracts should such a contract not be a registered standard form contract;

  ii) the guarantee provided, including the guarantee period, upper claim limit, claim process, the coverage of the guarantee including items that can be claimed and any restrictions imposed;

  iii) where advice can be obtained;

  iv) how to check whether the builder is registered;

  v) how to obtain details of the builder's claims history (as recommended in Chapter 5);

  vi) the rights and obligations of both parties; and

  vii) information about dispute resolution mechanisms.

- total contract price to be clearly shown at front of contract along with a warning that the price may vary. The aspects of the contract which are subject to price change should be clearly identified. The contract should provide the owner with a right of termination where as a result of unforeseen contingencies (not relating to mutually agreed variations or prime cost items), the original contract price increases by greater than 10% or delays are experienced that will extend the contract period by more than 30%.

  As proposed in paragraph 3.2.5.

- all variations are to be in writing, including details of the works to be performed, the cost thereof and whether such prices are subject to change.

  As proposed in paragraph 3.2.5.
• a cooling off period of three working days must be allowed.

The Committee believes that a cooling off period should be provided for in all contracts. The former Ministry of Consumer Affairs draft contract allowed for a three day cooling off period. This contract had a notice in it which was to be signed by an owner and given to the builder should they have decided to end the contract. The builder was entitled to retain, as a penalty $100 of any deposit paid.

• plans and specifications to be attached to the contract.

The Trade Practices Commission along with other parties believe that the attachment of the plans and specifications to the contract will lead to a decrease in disputes. The architectural drawings or plans should show the dimensions of the works and full details of the materials to be used.

• compulsory arbitration clauses to be prohibited and prescribed dispute resolution clause to be inserted.

As discussed in 3.2.3 and 3.1.4.

The Committee also sees merit in the introduction of a checklist similar to that used in New South Wales (refer Appendix 2). It is believed that this provides owners and builders with a safeguard to ensure that they do not enter into a contract which they do not fully understand.
Recommendation 3.19

The Committee recommends that:

a) the *House Contracts Guarantee Act 1987* be amended to require all standard form contracts produced by industry associations to be registered with the proposed building disputes tribunal. A condition of this registration is that the contract complies with the requirements and spirit of the *House Contracts Guarantee Act 1987*; and

b) the proposed building disputes tribunal should publish its own standard form contract that complies with the spirit and requirements of the Act. This contract is to be made available upon request to builders and owners.

Recommendation 3.20

The Committee recommends that the *House Contracts Guarantee Act 1987* be amended to extend existing requirements in respect of domestic building work contracts to include the following:

- Contracts to be written in 'plain English' with explanatory notes (particularly for any clauses which a retain a level of complexity);

- Contract to contain a checklist for owners similar to that used in the New South Wales 'Plain English Home Building Contract';

- Summary information to be provided to owners at the front of the contract should include:

  - advice concerning the availability of registered contracts should the contract not be a registered standard form contract or standard form contract published by the proposed building disputes tribunal;
  - details of the guarantee;
  - where advice can be obtained;
  - how to check whether a builder is registered and obtain information regarding their claims history;
• the rights and obligations of both parties; and
• dispute resolution mechanisms.

• Total contract price to be clearly shown at the front of the contract together with details of the circumstances under which it may vary. Also to be included in the contract is the owner's right to terminate a contract where, as a result of unforeseen contingencies (not relating to mutually agreed variations or prime cost items), the original contract price increases by greater than 10% or delays are experienced that will extend the contract period by more than 30%;

• All variations to be in writing, including details of the works to be performed, the cost of them, and whether such prices are subject to change;

• Contracts to provide a three working day cooling off period;

• Plans and specifications to be attached to the contract;

• Compulsory arbitration clauses to be prohibited; and

• The Committee's prescribed dispute resolution clause.
4.1 BACKGROUND

 Builders are required to provide owners with a guarantee issued under the House Contracts Guarantee Act 1987 (the Act) for domestic building work contracts valued in excess of $3,000. Section 7(1) of the Act sets out the nature of the guarantee, being:

 "A guarantee given under this Act by the approved guarantor in relation to domestic building work performed or to be performed by an approved builder under a domestic building work contract is a guarantee to the building owner and the owner's successors in title of the performance of the builder's obligations under the domestic building work contract."

 Accordingly, should the builder not fulfil his/her obligations, for example, not complete the contract due to financial difficulties or fail to rectify defects, the Housing Guarantee Fund Limited (the Fund) as approved guarantor will take action.

 There are a number of aspects regarding the guarantee that have been the subject of criticism or comment. These include:

 - contract value above which the guarantee is provided (currently $3,000);
 - guarantee limit (currently $40,000);
 - length of guarantee period (currently seven years);
 - defect claim limits;
 - the Fund's claims handling procedures; and
 - discretionary payments.

 Each of these points are individually considered below.
4.2 Contract Value Above Which The Guarantee Is Provided

The Act provides that a guarantee must be given for all domestic building work contracts with a value of more than $3,000. There have been suggestions that this $3,000 entry level to the guarantee should be increased.

At public hearing, the Fund advised that when the Act was created the $3,000 entry level was tied to the maximum level of the Small Claims Tribunal. It further stated:

"We put in a submission that, if for no other reason, it should have moved to $5000 when that tribunal did. But nonsense prevailed and the recommendation to go to $5000 did not eventuate.

... I hold that it ought to be at least $5000 for exactly those same reasons. There is a suggestion that it ought to be $10,000. The reviews we have done from time to time on the number of claims we have received in the various categories for work under $5000, $8000, $10,000, $20,000 and $30,000 respectively suggests to us that it is probably appropriate at either $5000 or $10,000. That would be a decision that would be made after a compromise of the views of consumers and builders."\(^1\)

In a submission to the Office of Fair Trading and Business Affairs made by the Fund, it recommended, based on claims experience, that

"all domestic building works ... be covered if a building approval is required or if the contract exceeds $10,000."\(^2\)

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1 Housing Guarantee Fund Limited; Minutes of Evidence; 8 June 1994; Page 7
2 Housing Guarantee Fund Limited; Reforms to House Contract Guarantee Act 1987 and Related Matters; June 1994; Page 7
The Master Builders Association of Victoria in its submission stated:

"In view of the relatively minor amount of building work which can be carried out for even $10,000, we would regard this figure as a more appropriate minimum contract price for guarantee/registration purposes than any smaller sum."3

The Committee believes that it is necessary for the contract value above which the guarantee applies, to be equal to or less than the upper limit of the Small Claims Tribunal in order for all domestic building industry consumers to have some form of simple and relatively inexpensive protection. Without this link or overlap, there may be some consumers who are unable to utilise the avenues of either the Small Claims Tribunal or the guarantee. Consumers whose claim/contract fell between these two jurisdictions would be forced to rely on the Courts and potentially incur increased costs.

The Master Builders Association of Victoria suggested that contracts for less than the minimum sum "could include a simple, cost effective arbitration provision for dispute resolution."4 Consumers with contracts of less than the proposed $10,000 minimum would therefore be dependent on their contract and arbitration proceedings. Further, they would have no body/authority to turn to for assistance with the arbitration or enforcement of the decision. The issue of compulsory arbitration was discussed in Chapter 3.

The Committee believes that the contract value above which a guarantee is provided should be set at the upper claim limit of the Small Claims Tribunal. This approach recognises and links what is deemed to comprise a small claim under the Small Claims Tribunals Act, with the contract value that warrants a guarantee.

The Housing Industry Association Limited (HIA) advised the Committee that an increase in the level at which the guarantee was provided would

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3 Master Builders Association of Victoria; Letter to the Public Accounts and Estimates Committee: 27 July 1994; Page 3
4 Ibid
lead to an increase in the fees charged as:

"the claims experience of jobs between $3,000-$5,000 now is low, and therefore this area subsidises higher cost bands".  

The Committee does not consider it equitable for consumers with low value contracts to subsidise other consumers who are more likely to claim on the Fund.

Despite their expectation of a rise in fees, the HIA stated that they believe an increase of the minimum contract value for the guarantee to $5,000 is desirable.

Overall, there appears to be support for an increase in the contract value beyond which the guarantee is provided.

Finding 4.1

The Committee finds that the existing contract value of $3,000, above which the guarantee is provided should be increased. An increase in the minimum contract value appears to have general support and should remove an apparent anomaly whereby the guarantee is currently required for contracts with a value deemed to represent a small claim under the Small Claims Tribunals Act.

Recommendation 4.1

The Committee recommends that the minimum contract value requiring a guarantee be increased to $5,000.

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5 Housing Industry Association Limited; Letter to the Public Accounts and Estimates Committee; 27 July 1994; Page 1
4.3 Guarantee Limit

Section 7(4) of the House Contracts Guarantee Act 1987 prescribes that the maximum liability of the approved guarantor is $40,000 per guarantee. For many years this limit has been criticised as inadequate.

The former Ministry of Consumer Affairs in its 1990 discussion paper stated:

"VOBSG (Victims of Builders Support Group Incorporated) has proposed the abolition of the existing $40,000 limit to the guarantor’s liability under a guarantee. It contends that the guarantee should cover the full value of the relevant contract. This liberalisation of the scheme, in itself, is likely to be too expensive, but a significant increase in the limit is certainly due. Under the amendments to come into effect on 1 January 1991, it will be possible to achieve this by regulation, and it is anticipated that regulations will be made in the early months of the new year."\(^6\)

The limit remains at $40,000 despite this call for an increase in 1990.

The Trade Practices Commission (the Commission) recommended that the guarantee limit be increased to $200,000 (indexed for inflation) with gap insurance available where the contract price exceeds this limit. It supported this recommendation with the following observation:

"Most of the building insurance schemes in Australia have maximum claim amounts of around $50 000. In New South Wales the figure is $100 000, but even this is fast becoming unrealistic, as the average price of a building contract is now around $100 000. What this means is that there are still extreme cases where homes costing more than $100 000 are required to be demolished and consumers are left with

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considerable expenses and no way of completing their homes."

The Commission noted that the level of cover differed between the states and territories across Australia. At the time of its report, November 1993, these levels were:

<table>
<thead>
<tr>
<th>State</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>Nil</td>
</tr>
<tr>
<td>Victoria</td>
<td>$40,000</td>
</tr>
<tr>
<td>Queensland</td>
<td>$45,000</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>$50,000</td>
</tr>
<tr>
<td>Western Australia</td>
<td>$50,000</td>
</tr>
<tr>
<td>New South Wales</td>
<td>$100,000</td>
</tr>
</tbody>
</table>

The Commission's report made further comment on the guarantee limit:

"It would seem that only in New South Wales do the majority of owners have access to a reasonable level of cover against faulty work resulting in defects which can be rectified. Even there the cover would not be adequate in all of the rare (but not unknown) occurrences where the structure may need to be demolished entirely. In other States/Territories owners would certainly not have adequate protection in this situation."

The Fund has also commented on the inadequacy of the existing $40,000 limit. In a submission to the Office of Fair Trading and Business Affairs it recommended that the amount of the guarantee be increased to $100,000. At public hearing when questioned about the $200,000 limit proposed by the Commission the Fund stated:

"It ($200,000) is more appropriate than $40,000. In our dealings with the Office of Fair Trading and Business Affairs and its forerunner, the Ministry of Consumer Affairs, we are on the record as saying since 1989 that the amount of $40,000

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7 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 44
8 Ibid; Page 30
9 Ibid
should be regularly reviewed and should now be $100,000. The recommendations we have made to date - there have been many in writing - is that $100,000 is appropriate. If you make it $100,000 or $200,000, you are playing with the premium - i.e. what the builder charges in his contract."\(^{10}\)

In regard to the effect an increased limit would have on builders, the Fund went on to state:

"Certainly, if the amount increased I would be confident that the builders would need to consider the potential claim paid by the Housing Guarantee Fund and then its right to recover. With some builders that could certainly destabilise their businesses - if they were being asked to repay the $200,000 as against the $40,000."\(^{11}\)

There are many arguments in favour of raising the claim limit including:

- the $40,000 limit is out of date;

- $40,000 does not provide adequate consumer protection as many domestic building work contracts well exceed this amount;

- builders would have an added incentive to increase their standards of workmanship as they would be exposed to a significantly higher level of potential liability; and

- consumers are entitled to a guarantee of equal, or near to, contract value.

The former Ministry of Consumer Affairs, in addition to stating that the $40,000 limit should be raised, made the following comments:

"Compulsory payment of fees to fund a guarantee at a certain level has been accepted. However, it is extremely unlikely that the increases necessary to provide full insurance would

\(^{10}\) Housing Guarantee Fund Limited; Minutes of Evidence; 8 June 1994; Page 5

\(^{11}\) Ibid
be generally acceptable to consumers. Some people would
undoubtedly be prepared to pay a large amount to have the
peace of mind of being insured. Others would much prefer to
put the money towards the house and risk further expense
later, in the event of something going wrong. “12

The Housing Industry Association Limited advised the Committee that
the Fund estimated the registration fee would rise by $140 per job, being
$235 to $375 should the claim limit be increased to $200,000. It went on to
further quantify this increase:

"On say, 45,000 jobs per year, this would amount to an
additional cost of $6.5 million - a totally unwarranted impost
to supposedly rectify a situation which is not really a
problem."13

The Committee does not expect that there would be a high incidence of
claims made on the Fund above the existing $40,000 limit. This
expectation is based on the belief that few consumers would pay builders
in excess of the $40,000 limit for incomplete or defective works.
Accordingly, the Committee believes that the increased limit is to cover
exceptional and not common claims. Based on this, the Committee does
not accept that costs should increase by $140 per contract.

Notwithstanding the Committee's belief that few claims are expected to be
made in excess of the existing limit, owners are entitled to receive
protection for problems which they may encounter. Accordingly, the
Committee recommends that the guarantee limit be increased to cover
those potentially fewer instances where consumers have high value
claims.

The Committee also believes that the claim limit should be increased to
ensure that potential claims arising from a high value contract will be
covered.

12 Ministry of Consumer Affairs; Discussion Papers on the Issues Related to the House
1990; Page 10
13 Housing Industry Association Limited; Letter to the Public Accounts and Estimates
Committee; 27 July 1994; Page 1
The overriding consideration in determining the claim limit is to provide adequate protection to consumers without unreasonable cost. An alternative to increasing the limit to cover the vast majority of contracts would be for consumers who wish to have protection in excess of the upper claim limit to pay an additional premium for the extra cover.

In a document produced by the Housing Industry Association Limited it was reported that the average value of houses approved for 1993 approximated $90,000. Given this average, the Committee does not consider it necessary for the guarantee limit to be raised to $200,000.

The Committee proposes that a maximum liability for the guarantee of $100,000 with optional gap insurance would be appropriate. This conclusion is made on the basis that contract registration fees continue to be determined without reference to the contract value. This approach is expected to provide the majority of owners with a guarantee, whilst not restricting those with contracts in excess of the limit.

Finding 4.2
The Committee finds that the existing claim limit of $40,000 is inadequate as it fails to provide adequate consumer protection.

Recommendation 4.2
The Committee recommends that the maximum liability of the guarantee be increased to $100,000 with optional gap insurance available where the contract exceeds this value.
4.4 Length Of Guarantee Period

The guarantee provided by a builder is valid for seven years. Victims of Builders Support Group Incorporated commented at public hearing that this guarantee period should be extended to 10 years. The justification provided was:

"after six years about 55 per cent of construction defects are known. After 10 years it is 95 per cent so the Housing Guarantee Fund is covering you only to the extent of $40 000 and to 55 per cent of defects."15

The Committee has not examined the basis of this contention, however believes that such figures would be difficult to determine and be judgemental.

Concerns have been raised about increasing the length of cover, particularly if the defects covered by the guarantee are not limited. Refer to paragraph 4.5 for further discussion regarding this concern.

The Master Builders Association of Victoria expressed concern over this proposal:

"This Association has serious concerns as to the ability of any guarantor body to fairly and accurately assess causation and liability in "defects" which appear in a dwelling after so many years of occupation, and to increase that period further will significantly add to the uncertainty and disputation which presently exists."16

The Committee appreciates that the cause of defects after 10 years would in many instances be difficult to determine.

Setting the guarantee period is a matter of balance and judgement between what represents adequate protection for consumers as against a reasonable obligation to impose on builders.

15 Victims of Builders Support Group Inc; Minutes of Evidence; 11 May 1994; Page 13
16 Master Builders Association of Victoria; Letter to the Public Accounts and Estimates Committee; 27 July 1994; Page 4
There appears to be insufficient support for the increase of the guarantee period, and the Committee believes that any estimate of the successful claims that may be made during an extended period would be speculative.

Finding 4.3

The Committee has not identified a compelling argument for an increase in the guarantee period.

4.5 Defect Claim Limits

The House Contracts Guarantee Act 1987 sets out individual defect claim limits which may be claimed by an owner during the guarantee period. These are:

- For the first three months from occupancy  
  Any value
- For the balance of one year from occupancy  
  More than $100
- For the remainder of the guarantee period  
  More than $500

Builders in particular, have called for these limits to be increased predominantly because they consider them to be too low. Some builders have represented that they do not believe they ought to be liable for defects with rectification costs of $500 seven years after the completion of the contract.

One consumer based criticism of the existing limits is that an owner may have defects which are individually of a lower value than the prescribed limits yet collectively higher. Should a builder refuse to rectify such defects the consumer would not be able to claim under the guarantee.

The Ministry in its 1990 discussion paper also highlighted this problem:

"It is certainly true that the minimum amount provisions can work against an owner faced with a number of small defects representing a substantial aggregate loss. If rectification of each defect taken individually would be
relatively inexpensive (i.e. less than $100 or $500, depending on the point reached in the guarantee period), the guarantor has no liability for any of them."\textsuperscript{17}

A further fault of the existing system is that owners may obtain quotes from builders for specific values to ensure that the individual defect claim limits are met.

The guarantee that existed prior to the introduction of the \textit{House Contracts Guarantee Act} 1987 provided for all defects to be claimed within the first guarantee year and major defects for the subsequent five years. The Housing Industry Association Limited (HIA) represented that there was some disputation regarding the definition of major defects but it considered that overall the former system worked well and called for a return to it. The former Ministry of Consumer Affairs reported that the difficulties experienced with the former system resulted from the Fund's adoption of a technical definition of "major" defect.\textsuperscript{18} In a discussion paper prepared by, the HIA, in conjunction with the Master Builders Association of Victoria and the Fund, stated:

"There is a strong belief that the Victorian system has got out of balance and the consumer protection is far more than is reasonably required. ... It has been suggested that the previous system ... would be a more appropriate system."\textsuperscript{19}

The main advantage to be gained from the former system is that of cost reduction. By excluding long term claim for low value items the Fund should be in a position to reduce its claims handling costs. Further, the Committee expects that builders would strongly oppose any extension of the guarantee period unless the individual defect claim limits are either significantly increased or limited to major structural defects after the first year of occupancy.

\textsuperscript{18} Ibid; Page 11
\textsuperscript{19} Housing Guarantee Fund Limited; Housing Industry Association Limited and Master Builders Association of Victoria; \textit{Future Directions for Warranty Legislation//Consumer Protection in the Housing Industry}; September 1992; Page 17
Should claims be limited to major or structural defects after a set period, it is essential for the terms "major" and "structural" to be defined as clearly as possible in order to avoid the problems previously experienced. The Committee believes that the Office of Fair Trading as part of its current review must address the problems of the existing individual defect claim limits.

In most domestic work contracts there is a defect liability period, being a specified period in which the builder is required to rectify defects. The Committee does not consider that the defect limit for the first three months should be increased as the builder's defect liability period under the contract will usually be operative throughout this time. Consumers should be able to have low value claims dealt with during the initial occupancy period.

The former Ministry of Consumer Affairs, in its 1990 discussion paper, unsuccessfully attempted to address this issue of defect claim limits, stating:

"A simple solution would be to abolish distinctions between categories of defects altogether. However, the costs of claims processing under a system covering the owner for any defect arising over seven years would be high. Is it in the interests of owners in general to bear increased guarantee fees for the right to have the guarantor devote multiple employee hours attending to some trivial imperfection which may appear in the future?

One compromise that suggests itself is to base coverage on the total value of a claim, i.e. the total loss (which, in the first instance, would be determined by the guarantor). On this system, for a claim lodged after a given point in the guarantee period, the total cost of rectification would have to exceed a certain threshold for the guarantee to come into play.

The obvious difficulty here is that a threshold set high enough to exclude multiple small items would also exclude single defects of some significance. Owners would be faced
with a choice between risking a claim when their own estimate of their potential loss put it just above the threshold and delaying to see if more problems would occur and bring the claim to a clearly "acceptable" level. Only if the owner took the risk of claiming and succeeded would the builder be under any pressure from the guarantor, despite what might be a clearly sub-standard piece of work.

*Despite its shortcomings, a workable alternative to the current approach is not immediately obvious.*

The Committee believes that the Office of Fair Trading and Business Affairs should assess as part of its current review, the effectiveness of the limits imposed in other states. Such a review is considered to be valuable as many of the other state guarantees cover structural defects only after an initial period.

The guarantee of other Australian states and territories are set out in Table 4.1 below.

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Table 4.1
Analysis of Guarantee Coverage Around Australia

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Cover</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australian Capital Territory</td>
<td>All defects first 9 months</td>
</tr>
<tr>
<td></td>
<td>Structural defects remainder of 6 year period</td>
</tr>
<tr>
<td></td>
<td>($500 excess)</td>
</tr>
<tr>
<td>New South Wales</td>
<td>General defects 3 years from commencement of work</td>
</tr>
<tr>
<td></td>
<td>Major structural defects 7 years</td>
</tr>
<tr>
<td>Queensland</td>
<td>All defects first 6 months</td>
</tr>
<tr>
<td></td>
<td>Structural defects for remainder of 6 year period</td>
</tr>
<tr>
<td>South Australia</td>
<td>All defects first 9 months</td>
</tr>
<tr>
<td></td>
<td>Structural defects remainder of 6 year period</td>
</tr>
<tr>
<td></td>
<td>($500) excess</td>
</tr>
<tr>
<td>Western Australia</td>
<td>All defects first 9 months</td>
</tr>
<tr>
<td></td>
<td>Structural defects remainder of 6 year period</td>
</tr>
<tr>
<td></td>
<td>($200) excess</td>
</tr>
</tbody>
</table>

Source: Housing Guarantee Fund Limited, Housing Industry Association Limited and Master Builders Association of Victoria; *Future Directions for Warranty Legislation/Consumer Protection in the Housing Industry; September 1992*

Table 4.1 indicates that all of the other states and territories listed provide a guarantee or insurance for only structural defects after a certain period of time. The Committee sees merit in retaining the existing claim limits for the first three years in Victoria and then providing for major and structural defects until the end of the guarantee period.
Finding 4.4

The Committee finds that the defect claim limits as prescribed by the House Contracts Guarantee Act 1987 should be reviewed. The Committee sees merit in retaining the existing claim limits for the first three years, and providing for structural or major defects for the balance of the guarantee period. A precise definition of structural or major defects would need to be established if this approach were to be adopted.

Recommendation 4.3

The Committee recommends that the Office of Fair Trading and Business Affairs as part of its current review, reconsider the defect claim limits which are in operation.

4.6 Claim Handling Procedures

The timeliness of claim handling is important to consumers and builders. Consumers, in particular, require claims to be dealt with and/or defects rectified quickly as their homes (or part thereof) may not be occupiable until such action is taken. It is also possible that further costs and/or damage may be incurred should claims not be dealt with promptly.

The Fund's claim handling procedures are set out in a document entitled "Procedures for resolving complaints and claims". These procedures, which detail how claims are to be handled on a step by step basis, are approved by the Minister for Fair Trading.

The procedures were criticised in a submission to the Committee by Miss Elsie Johnson, owner, who stated:

"Little recognition is made of the intention of the House Contracts Guarantee Act that owners should be protected from losses arising out of any failure of the builder to meet its obligations to the contracted works and that HGF was incorporated as statutory guarantor to bring this about."
Rather HGF in its procedures and policies acts to uphold the terms of standard building contracts and the rights of builders as defined by HIA.21

There a number of aspects regarding the handling of claims that warrant discussion, including:

- The Fund's role whilst contracts are ongoing or where arbitration/court action has been commenced;

- Timeliness of claim rejection/acceptance; and

- Timeliness of payments on accepted claims.

The Fund's role whilst contracts are ongoing or where arbitration/court action has been commenced

The Fund will not accept a claim made by an owner whilst a contract remains ongoing or the parties are involved in arbitration or court proceedings. This has caused dissatisfaction to some consumers who, for example, attempt to have defects rectified prior to the completion of the contract.

One reason put forward by the former Ministry of Consumer Affairs in support of the Fund's treatment of such claims was:

"It is an easier and more certain process for HGFL to assess the loss caused to an owner once the contract has been completed or terminated. It is even easier for HGFL to await resolution of a contractual dispute by a court or arbitrator, as it is then only obliged to

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21 Johnson, Elsie; Submission to the Public Accounts and Estimates Committee; July 1994; Page 1
guarantee any obligation that the court or arbitrator determines the builder to have."²²

Whilst recognising the difficulties, including determining the rights and obligations of the parties, the Ministry stated that a change of approach by the Fund would not solve the problems experienced in handling within contract claims.²³

The Committee acknowledges the difficulties experienced by the Fund in handling claims before the completion of a contract. The current arrangement however, may provide the builder with an incentive to delay completing the works so as to also delay the claim. It is therefore recommended that all disputes which occur whilst a contract is still operative be considered by the proposed building disputes tribunal.

A further criticism raised by owners is that they are unable to make a claim on the Fund at the conclusion of arbitration. The rationale behind this restriction is that the arbitrator's decision is final and binding on both parties. The issue for owners is whether the Fund is nevertheless liable to them for any loss suffered in excess of that recovered from a settlement between the consumer and the builder at arbitration. Should owners be able to make such a claim, builders would be dissatisfied as the Fund may later seek to recover from them any amounts paid to owners. This may occur despite the fact that the owner had signed a settlement releasing the builder from any further claims. The Committee has been advised that this issue is currently being tested in the Courts.

Recommendation 4.4

The Committee recommends that any disputes arising prior to the completion of a contract should be referred to the proposed building disputes tribunal.

Timeliness of claim rejection/acceptance

Consumers have criticised the length of time taken by the Fund in making a determination on a claim.

Section 16(2) of the House Contracts Guarantee Act 1987 states:

"If, within three months after making a claim for loss or damage, a claimant has not received notice from the approved guarantor of its decision on the claim, the approved guarantor is to be treated as having made, on the last day of that period, a decision to reject the claim."

The Committee acknowledges that this section forces the Fund to take some sort of action within a specified period of time otherwise they are deemed to have rejected the claim. Such a clause, however, is not favourable to claimants. The timeliness of claim handling is important and a three month delay before a determination is made by the Fund may be very costly to some claimants. Further, claimants should be provided with an explanation as to why their claim has been rejected.

The Fund's procedures provide for claimants to be advised of the grounds for rejection of claims. The Committee is aware of circumstances where the Fund has not advised the owner of the outcome within the three month period, resulting in the claim being deemed to be rejected.

The Committee believes that the reverse outcome should apply, that is, should a determination not be provided to the claimant within a specified time period, the claim is deemed to be accepted. The allocated time period should be as short as possible in order for all claims to be dealt with in a timely manner to minimise the adverse effect on claimants whilst
allowing a reasonable period within which the Fund can make its decision.

The Committee expects that by reversing the deemed outcome, the Fund would be encouraged to take greater action to resolve claims before the expiration of the set period as it will be required to make payment on those claims deemed to be accepted. In addition, it is currently the claimants responsibility to lodge an appeal if they are dissatisfied with the deemed rejection. With the deemed outcome reversed, owners will not be required to incur that additional expense or delay as a consequence of untimely handling of claims by the Fund.

**Finding 4.5**

The Committee finds that Section 16(2) of the *House Contracts Guarantee Act* 1987 which provides for claims to be deemed rejected should the Fund not make a determination within three months, inappropriate.

**Recommendation 4.5**

The Committee recommends that Section 16(2) of the *House Contracts Guarantee Act* 1987 be amended so that a claim is deemed to be accepted should the Housing Guarantee Fund not make a determination within the specified time period, currently three months.

*Timeliness of payments on accepted claims*

Parties to a claim on the Fund are given 60 days in which to appeal after a decision has been made. The Committee has received advice from consumers that the Fund will not pay successful claimants during these 60 days in case the builder appeals.
Section 16(6) of the House Contracts Guarantee Act 1987 states:

"If a builder appeals ... but at any time between the time when the decision was made and the time when the appeal is determined -
(a) the approved guarantor has made a payment or payments to the claimant in respect of the claim; or
(b) the approved guarantor has informed the claimant of its decision not to reject the claim and the claimant has acted on that information so that, if the decision were to be varied or quashed the claimant would be affected detrimentally; or
(c) the builder has begun to rectify the defect -
the appeals committee does not have the power to vary or quash the decision of the approved guarantor not to reject the claim."

Accordingly, this section does not allow the appeals committee to alter or reject a decision to accept a claim where the Fund has already made payment, the claimant has acted on the advice of acceptance or a builder has begun to rectify defects. The appeals committee's only power in these circumstances is to therefore determine whether the builder should be liable for the loss suffered by the claimant. Should the appeals committee determine that the builder was not liable, the Fund would then have no right of recovery for any amounts paid to the owner.

The former Ministry of Consumer Affairs commented on this criticism in its 1990 discussion papers:

"Changing the system to prevent the committee reconsidering a builder's liability in the circumstances described in section 16(6) would obviously be unfair to builders. The question is whether claimants should be obliged to forgo or return money to which they are entitled under a decision subsequently found by the appeals committee to be
unjustified, or whether the guarantor should carry the cost in these circumstances."24

The Committee is concerned about this alleged practice, predominantly because consumers may have to wait up to five months before receiving payment of a successful claim from the Fund.

Consumers claims should be dealt with promptly. Equally it does not seem appropriate for successful claimants to be subsequently required to repay amounts awarded or for builders to lose their right of appeal. If the Fund was compelled to pay promptly and risk loss, should an appeal overturn its decision, this may cause the Fund to be more conservative in accepting claims. The key to this issue rests on the excessive time allowed for appeals to be lodged. It is the Committee's view that parties to a claim should have only 14 days from the date of notification of the Fund's decision within which to appeal.

Finding 4.6

The Committee finds that it is unreasonable for consumers to have to wait for up to an additional 60 days before payment of a successful claim is made. This 60 day period allows appeals against the Fund's decisions to be lodged.

Recommendation 4.6

The Committee recommends that parties to a claim on the Fund should be allowed a period of 14 days, from the date of notification of the Fund's decision, in which to lodge an appeal.

4.7 Discretionary Payments

The Fund may make discretionary payments to owners in circumstances that would otherwise be outside the scope of the guarantee. Section 17 of the House Contracts Guarantee Act 1987 which sets out the criteria for such payments, provides:

"(1) Subject to sub-section (2), the approved guarantor may make a payment or payments in respect of a claim made to it which it is not liable to make but which it would have been liable to make if-

(a) the builder or supervisor had been an approved builder or an approved supervisor (sic); or

(b) the defect had been caused by bad workmanship on the part of the builder or of a person working under the management or supervision of the supervisor.

(2) The approved guarantor may only make a payment under sub-section (1) if-

(a) the appeals committee established by the approved guarantor under its rules has affirmed the decision of the approved guarantor to deny liability on one or both of the grounds referred to in sub-section (1); and

(b) the chairman of the meetings of directors of the approved guarantor has recommended that the payment be made."

The former Ministry of Consumer Affairs noted that:

"Discretionary payments are provided for in the legislation as a means of allowing people whose cases come within the spirit but are excluded by the letter of the guarantee scheme to be compensated."25

The Trade Practices Commission report supported discretionary payments and recommended that insurance contracts provide for them in cases of

25 Ibid; Page 28
severe hardship. In support of this view, its report stated:

"The building of a home is a unique and expensive experience for the owner. Faulty work of any sort, but particularly any which results in a partially completed or uninhabitable home, brings with it financial, emotional and personal costs.

Any unnecessary delay in processing of a valid claim may force the owner to bear the burden of additional costs for alternative housing, borrowed funds, in contacting various authorities, legal advice, and in loss of productive time.

The hidden costs to the owner and the owner’s family, although more difficult to quantify, are however, no less real. These personal costs may include stress and anxiety from the state of the home and a burgeoning debt; from living in cramped temporary accommodation; from disruption to family life; and from a perceived inequality of bargaining power between the parties."\(^{26}\)

The Fund’s stance in relation to discretionary payments was commented on by the Ministry which stated:

"HGF has tended, understandably, to take the position that the legislation ought to be framed precisely enough to allow it to operate on the basis that if something isn’t covered it was not intended that it be covered. The Ministry’s view is that no amount of drafting skill can create the certainty that every deserving case which might arise has been provided for."\(^{27}\)

The main criticism relating to discretionary payments results from the procedures that are required to be complied with.

\(^{26}\) Trade Practices Commission; Home building - consumer problems and solutions; November 1993; page 44

In regard to the problems the Ministry noted that:

"Difficulties with this approach were not unanticipated when its introduction was first contemplated. The Ministry's 1986 discussion paper acknowledged that it 'would mean a considerably enhanced scope for political pressure on the guarantor, which is not desirable,' but suggested that it 'may be necessary to achieve a greater good.'"28

In order to be eligible for a discretionary payment an owner must have first lodged a claim on the Fund and for it to have been rejected. They must also have appealed to the Appeals Committee, requiring the payment of a $200 fee, and had this rejected.

The Fund's view of these requirements were set out by the Ministry who noted:

"HGF contends that this cumbersome procedure is necessary to prevent large numbers of applications for discretionary payment from people without any real reason to expect special consideration, imposing a costly and time-consuming burden on its administration. In the Ministry's view, those with genuine "hard luck" cases are as likely to be put off by the current obstacles as anyone else."29

The Ministry expressed its view on the appeal requirements:

"The Ministry is inclined to acknowledge the necessity of an appeal to establish the claimant's bona fides where the builder is approved. There would not seem to be any way of separating out cases where the defect could not possibly have been caused by bad workmanship on the builder's part and an appeal could not conceivably succeed.

However, forcing an appeal where the owner has dealt with an unregistered builder and is therefore, indisputably,

28 Ibid
29 Ibid: Page 29
without guarantee coverage seems quite unjustified. It is therefore proposed that the appeal requirement be removed for such cases.”

The Committee concurs with these views of the Ministry.

Another matter raised by the Ministry concerned owners who may be excluded from receiving a discretionary payment because appeals were not lodged within 60 days of the claim being rejected as required. Its basis for such concern was that some consumers may not realise their potential entitlement to a discretionary payment and therefore not lodge their appeal within the prescribed time. The Ministry commented:

“This is a particular problem in cases where the owner knows HGF’s rejection of the claim to have been correct but is considering making application for a discretionary payment. One doesn’t normally think of appealing against a clearly correct decision, but, under the Act, an application for discretionary payment cannot be made unless an appeal has been heard and rejected by the Appeals Committee.”

In order to overcome this, the Committee believes that upon the rejection of a claim consumers should be advised of their right to appeal against the Fund’s decision, including the need to do so if they wish to apply for a discretionary payment.

Further, the Committee considers that owners whose application for a discretionary payment was rejected should have the right of appeal to either the existing appeals committee or to the proposed building disputes tribunal.

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30 Ibid
31 Ibid; Page 25
Finding 4.7

The Committee finds that upon the rejection of a claim, owners should be advised by the Fund of their right to appeal, including the time limit by which they need to do so should they choose to later apply for a discretionary payment.

Recommendation 4.7

The Committee recommends that the Housing Guarantee Fund Limited, at the time of notification of its decision, advise owners of the time limit by which they must lodge an appeal should the owner choose to apply for a discretionary payment.

Finding 4.8

The Committee finds that it is inappropriate for the House Contracts Guarantee Act to require owners to lodge an appeal prior to making a discretionary payment claim for loss resulting from the work of an unregistered builder.

Recommendation 4.8

The Committee recommends that the House Contracts Guarantee Act 1987 be amended to repeal the requirement for consumers to go through the appeals process when seeking a discretionary payment as a result of loss caused by an unregistered builder.
Recommendation 4.9

The Committee recommends that the House Contracts Guarantee Act 1987 be amended to allow a claimant the right to appeal, to the existing appeals committee or proposed building disputes tribunal, against the approved guarantor's decision on an application for a discretionary payment.
CHAPTER FIVE:  BUILDER REGISTRATION

5.1 BACKGROUND

As set out in earlier chapters, under the House Contracts Guarantee Act 1987 builders are required to be registered with the Housing Guarantee Fund Limited (the Fund) before entering into a contract for domestic building work valued in excess of $3,000.

One purpose of such registration, as stated in the Trade Practices Commission report,

"is to protect the consumer from unscrupulous builders and the consequences of sub-standard building work, by requiring a basic level of competency."

Until the introduction of the Employee Relations Act 1992 builders were required to be members of an industry association, that is either the Housing Industry Association Limited or the Master Builders Association of Victoria, in order to obtain registration. The Fund was reliant on these memberships for the maintenance of builders' standards as industry associations require builders to undergo training courses and also scrutinise the builders work performance on an ongoing basis. The Fund's 1992-93 annual report noted that in response to the change brought about by the Employee Relations Act 1992 it has:

"now put in place a requirement that new builders undertake a course accredited by the Fund to satisfy the educational requirements which we had previously expected would be policed by association membership."

Registration of builders is relied upon by consumers as an indicator of competency and reliability as consumers are generally unable to evaluate the competency of builders they may wish to engage. The building of a home is a one off transaction for most consumers, consequently few have

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1 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 45
2 Housing Guarantee Fund Limited; Annual Report; 1992-93; Page 2
the experience or expertise to make such an evaluation. Accordingly consumers are reliant on the Fund to scrutinise builders and ensure that the approved builder register does not contain builders who have a record of performing sub-standard building work.

Where the registration and monitoring of builders is effective, some problems that may be experienced in the domestic building industry can be minimised as they are rectified at their source. That is, where high standards are placed on builders in order to obtain and retain approved builder status, fewer problems should occur as those builders who may cause problems as a result of their financial status or poor workmanship will not be on the register and therefore not be in the market place.

Finding 5.1

The Committee finds that a key element of a successful domestic building industry is the existence of an approved builder register which only includes those builders who are competent and reliable. Consumer reliance may then be placed on this register.

Recommendation 5.1

The Committee strongly recommends that the Office of Fair Trading and Business Affairs regularly review the procedures employed by the Housing Guarantee Fund in registering, monitoring and deregistering builders. The Office should ensure that such procedures are adequate and complied with in order to satisfy itself that the approved builder register contains only builders worthy of registration.
5.2 BUILDER REGISTRATION, ONGOING SCRUTINY AND DeregISTRATION

5.2.1 Introduction

Both the builder registration and deregistration procedures employed by the Fund have been criticised. The Fund itself called for a rewrite of the licensing requirements in its 1992-93 annual report.3

One common criticism made by consumers is the lack of information provided to owners about an individual builder's history. The Trade Practices Commission reported in relation to this that:

"Regulatory and industry bodies routinely advise consumers to check the accreditation of the builder they propose to engage. However, consumers frequently complain that they are able to obtain little or no useful information when they attempt such a check. While they may be able to ascertain that a particular tradesperson is licensed, it is far more difficult to obtain details of that person's record in the industry, for example details of any past disciplinary action."4

The release of a builder's claims history to potential clients may prejudice their business where they have improved their work practices. The former Ministry of Consumer Affairs supported this view. As part of a response to a request made by Victims of Builders Support Group Incorporated to produce a list of deregistered builders the Ministry reported:

"The danger is that individual builders could find themselves in the position of having demonstrated to HGF that their current capacities and standards were beyond reproach and been re-instated under new business

3 Ibid; Page 8
4 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 31
arrangements, only to be commercially disadvantaged due to past shortcomings or the shortcomings of past associates."

Whilst the Committee acknowledges the former Ministry's position, it believes that the potential risk of disadvantaging builders is outweighed when compared to the need to protect consumers. Accordingly, the Committee considers it appropriate for consumers to be provided with certain information, upon request, regarding the claims history of a builder they are contemplating engaging.

The Committee believes that only details of claims that are upheld against a builder by the Fund, the existing appeals committee or the proposed building disputes tribunal (refer Chapter 3) should be released to consumers. These details would be expected to include the dates and values of judgements and/or directions to rectify defects. This will assist consumers in making a decision as to whether they should engage a particular builder. In order to provide some protection to builders who have improved their practices and to avoid creating an administrative burden on the Fund, the Committee believes that claims history information, for a period of five years prior to the date of the enquiry, should be supplied to consumers.

Finding 5.2

The Committee finds that it is appropriate for the Housing Guarantee Fund to release certain information to consumers regarding a builder's claims history.

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Recommendation 5.2

The Committee recommends that upon request, the Housing Guarantee Fund provide certain information concerning claims upheld against builders by the Housing Guarantee Fund, the existing appeals committee or the proposed building disputes tribunal, for a period of five years prior to such enquiry. Information to be released should include the dates and values of judgements and/or directions to rectify defects.

5.2.2 Registration of Builders

The removal of the requirement for builders to be members of an industry association led consumers to question the standards that builders were required to comply with in order to obtain registration by the Fund.

At public hearing, the Fund advised that builder approval is based on a range of criteria including an assessment of technical, financial and management skills along with confirmation that finances are sound enough to enter into a range of contracts. Documentation that was subsequently provided to the Committee by the Fund sets out further detail on the criteria builders are required to comply with, including:

- successful completion of a 54 hour training course on business management, law and the building process;
- assessment of technical and character references supplied by the applicant;
- assessment of domestic building experience;
- assets and liabilities of applicant;
- at least three years work experience if the applicant has not completed an apprenticeship and does not hold a relevant academic qualification;
- completion of at least two years work experience where the applicant has completed an apprenticeship or holds a building degree or diploma; and

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6 Housing Guarantee Fund Limited; Minutes of Evidence; 8 June 1994; Page 11
• completion of at least ten years work experience, with five as a supervisor where applicants have been working in the industry at a senior level but do not have any trade or academic qualifications.7

The Committee believes that such criteria are appropriate to enable the Fund to evaluate the suitability of a builder for registration at the time of application.

Victims of Builders' Support Group Inc have stated that registration as a builder should be afforded only to persons and companies which demonstrate:

i ability to properly interpret architectural drawings and specifications;
ii have full knowledge of statutory requirements which relate to domestic building works;
iii are competent to cost building contracts;
iv have adequate capital resources; and
v have proper supervisory and management skills.8

The Committee has been advised that the skills listed in (i) to (iii) and (v) form part of the course which is required to be completed before a builder is approved. Accordingly, all of the requirements identified by Victims of Builders Support Group Inc are provided for, either by the course builders are required to undertake or the Fund’s assessment of the applicant’s financial position.

A further consumer based criticism was raised by the Trade Practices Commission which noted that "there is a concern among owners that an individual builder, who has previously been deregistered, could simply set up a company through which to operate and hence continue to carry on business."9 The Fund replied to this at public hearing:

"We now have some 23 years of records of every person who has been a director, a partner, a construction manager or

7 Housing Guarantee Fund Limited; How to Become Registered as an HGF-Approved Builder or Supervisor; July 1993; Pages 5-8
8 Victims of Builders Support Group Inc; Submission to the Premier of Victoria; 18 January 1993; Page 5
9 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 31
supervisor in any building application since 1972, and should a company fail and that person attempt to come back, he would need to be tested against that database, firstly; then if someone had failed to pay his dues, he would be assessed. If he were still an undischarged bankrupt he would not come back into the system."\textsuperscript{10}

The Committee considers it essential for every builder who is deregistered to be entered into this database and for all applications received by the Fund to be checked against it. Should any applicant appear on the database as having been formerly deregistered or as a partner/director of a deregistered organisation, the Committee believes that a thorough review must be undertaken to ensure that the builder is fit for registration. The Committee anticipates that such a review would include an interview with the builder, a review of other projects completed and an analysis of financial position.

Upon admitting an applicant for registration, the Fund imposes restrictions on the builder's activities to ensure that these are within the builder's ability and capacity.

Builders are registered as either restricted or general builders. Restricted builders are approved to carry out only certain areas of domestic building work, such as staircases, roofing or door/window replacement. This ensures that builders who are experienced only in specialised areas of building do not obtain approval to perform work outside their area or expertise.

As a further restriction, all builders are given a maximum number of jobs which may be undertaken at any point in time. For example, a newly approved builder may be restricted to one or two jobs at any one time. This provides the Fund with the opportunity to monitor a new builder's performance and ensure that they do not undertake more work than they are able to successfully complete. The Committee considers that the placing of job limits on builders is appropriate and that such limits should be regularly reviewed to ensure that they are commensurate with the

\textsuperscript{10} Housing Guarantee Fund Limited; Minutes of Evidence; 8 June 1994; Page 13
builders capabilities. The limits protect consumers and prevent builders from over-committing themselves.

Finding 5.3

The Committee finds that it is essential for the Housing Guarantee Fund to adequately scrutinise all builders applying for registration to ensure the protection of the consumer and builder.

Finding 5.4

The Committee finds that the builder registration procedures as set out in the Housing Guarantee Fund publications "How to become registered as an HGF-Approved builder or supervisor" and "Company Rules" are adequate, if properly implemented, to enable the Fund to evaluate a builder's suitability for registration.

Finding 5.5

The Committee finds that the restrictions that are imposed on builders' activities, such as type of work and job limits, are appropriate and should be maintained.

Finding 5.6

The Committee finds that any applicant for registration as a builder who has been formerly deregistered or was a partner/director of a deregistered organisation, should be subjected to a detailed examination to ensure past shortcomings have been resolved.
Recommendation 5.3

The Committee recommends that more stringent restrictions should apply to the amount and type of work to be undertaken by all builder registration applicants who have been previously deregistered or have been a partner/director of a previously deregistered organisation.

5.2.3 Ongoing Scrutiny and Deregistration of Builders

As part of its role in maintaining the approved builder register, the Fund must continually scrutinise the practices of builders. That ongoing scrutiny is relied upon by the consumers of the domestic building industry and protects builders from over-committing themselves.

The Fund advised the Committee at public hearing how it carries out such scrutiny and deregistration:

"During their (builders) working lives they undergo a regular monitoring process. Firstly, from our computer records we examine the normal time they take to build projects. If that time is extending, we want to know the reasons for it. We hear a lot from subcontractors in the industry. We also hear through complaints from consumers. We also subscribe to all the normal mercantile journals to discover problems. Through these mechanisms we assess builders on a regular basis, but only where there is a known problem.

... If a builder is in any way insolvent or not of good financial standing as assessed by the Housing Guarantee Fund he is automatically removed. If there is some doubt about the builder's finances - that is, his finances may be worsening - he would be given his natural justice opportunity to show cause why he should not be removed, and if could not comply he would be removed.

In the same way with defects: from our records we would continually log the number of claims received by a builder
and if claims were being made concerning items a builder would not fix, he would be reviewed. If we paid claims and he refused to reimburse us for those claims, as he is required to do under the rules, equally, we would review that builder with a view to removing him.\textsuperscript{11}

The evaluation procedures employed by the Fund form an essential part of builder scrutiny and should be undertaken on an ongoing basis. The Office of Fair Trading and Business Affairs should review the Fund’s employment of these tests to make certain that they are satisfactory.

Table 5.1 indicates the apparent small numbers, in percentage terms, of builders deregistered by the Fund in 1991-92 and 1992-93.

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Breach of Fund Rules</td>
<td>87</td>
<td>63</td>
</tr>
<tr>
<td>Non-payment of Annual Fee</td>
<td>623</td>
<td>599</td>
</tr>
<tr>
<td><strong>Total (a)</strong></td>
<td>710</td>
<td>662</td>
</tr>
</tbody>
</table>

Number of Registered Builders as at 30 June

| Percentage of Builders Deregistered | 5.16%   | 4.72%   |

(a) Note: In addition during 1992-93 253 (404 in 1991-92) were voluntarily removed from the register and 25 (8 in 1991-92) retired from the industry.


The Committee believes that the Fund must be pro-active in the scrutiny of builders, and not limit its investigations to where a problem becomes

\textsuperscript{11} Ibid; Pages 11 and 12
known. The Fund should analyse telephone inquiries received as well as the actual claims lodged to assist in determining those builders who may not be performing satisfactorily. The Committee notes that the Fund’s procedures for resolving complaints provide for every complaint received, whether in person, by telephone or mail, to be given a number and recorded. Such complaints should also be recorded on a builder’s file. When the Fund becomes aware of a potential problem, for example, financial difficulty, prompt action is required to ensure that further consumers do not become affected.

The Fund should also review computer generated 'exception reports' to highlight builders whose performance may be unsatisfactory. Further, on a regular basis the Fund should select and review a sample of builders to ensure that their competency and financial status is of the required standard.

When builders were required to be members of an industry association in order to obtain approved builder registration, the loss of such membership led to the builder’s deregistration. The Fund, however, has advised at public hearing that it currently does not deregister builders who are removed from membership of an industry association. The Housing Industry Association Ltd, at a public hearing conducted by the Economic Development Committee, advised that it always notifies the Fund upon the removal of a builder from their membership. The Committee believes that the Fund must review the registration of each builder who is removed as a member of an industry association and determine whether they remain fit to be an approved builder.

Victims of Builders Support Group Inc have criticised the Fund's deregistration of builders. They stated that the "policies and procedures adopted by HGFL ... negate the possibility of the deregistration of builders on grounds of incompetence."
The Fund's company rules detail the grounds upon which it will deregister a builder. These rules provide that a builder may be removed from the register when the builder is/has:

(a) been convicted of an offence under certain parts of the Local Government Act;
(b) committed an act of bankruptcy; been wound up or placed in the hands of an administrator;
(c) failed to pay the fee;
(d) failed to comply with the rules;
(e) been convicted an offence which the Fund considers renders them unsuitable to be approved;
(f) not of good financial standing;
(g) not of good repute and character;
(h) none of the partners/directors experienced in the class of work which the approval is held;
(i) failed to maintain reasonable standards of competence;
(j) failed to comply with an Arbitrator's award or Court order in connection with any contract to which they are a party in circumstances likely to cause the Fund loss;
(k) given the Fund false or misleading information; and/or
(l) failed to pay any sum due in relation to a cash redeemable bond or other indemnity, guarantee or bond.14

The Trade Practices Commission report recommended that builders be deregistered on evidence of dishonesty, insolvency or poor work performance.15 The Fund's rules provide for deregistration in all such cases. The Committee believes that the Fund's rules adequately provide for builder deregistration however they must be enforced to ensure that reliance can be placed on the approved builder register.

14 Housing Guarantee Fund Limited; Company Rules; 1 October 1993; Rule 10; Pages 9 and 10
15 Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 8
Finding 5.7

The Committee finds that the Fund should continue to monitor all builders on an ongoing basis and act on all indicators of problems. In particular the Fund should undertake extensive evaluation processes with a view to deregistering builders when:

- they are unable to provide satisfactory evidence that they are financially sound;
- they do not abide by contracts;
- their work is not of the required standard; or
- there are a number of valid complaints made against them.

Recommendation 5.4

The Committee recommends that upon the removal of a builder from membership of an industry association, the Housing Guarantee Fund review the registration of that builder to determine whether he/she remains fit to be an approved builder.

Recommendation 5.5

The Committee recommends that the Housing Guarantee Fund be pro-active in the scrutiny of builders. It is recommended that such scrutiny include the periodic and systematic review of a sample of builders to ensure their competency and financial status is of the required standard. These reviews would occur as a matter of procedure and not as a consequence of a potential or known problem coming to light.
5.3 OTHER PROPOSALS

5.3.1 Builders Registration Board

As stated, it is imperative that the builders register be effectively maintained in order to provide an adequate level of consumer protection. Criticisms regarding the Fund's maintenance of this register have been received and proposals for reform suggested to the Committee.

The Victims of Builders Support Group Incorporated recommended that a Builders and Allied Trades Registration Board be established to control all building registrations. They suggested that "any such Registration Board should be empowered inter alia to:

i Decide the qualifications required for registration of builders, subcontractors and building consultants.
ii Register all building contracts.
iii Hear claims brought by subcontractors against builders and vice versa
iv Register awards brought down by a Building Disputes Board
v Register and analyse the outcome of claims made against industry members
vi Regularly provide government with a statistical analysis of the performance of builders and sub-contractors and advise, of any need for legislative change."\(^{16}\)

Other parties in the domestic building industry do not appear to support such a Board. The Fund, at public hearing, expressed dissatisfaction about a registration board:

"We have a strong view that warranty is required for all domestic building work. We have a strong view that licensing - stand alone - is of no relevance. If you are to have a warranty, you register people who can undertake the work. But to license anyone who stands up and professes to be in the building industry and not to have a warranty attached to that licence has very little benefit."\(^{17}\)

\(^{16}\) Victims of Builders Support Group Inc; Submission to the Premier of Victoria; 18 January 1993; Pages 4 and 5

\(^{17}\) Housing Guarantee Fund Limited; Minutes of Evidence; 8 June 1994; Page 15
The Housing Industry Association expressed similar dissatisfaction at public hearing:

"I would be totally opposed to that. The experience of other states has been that simply putting people's name on computer lists does not create the environment you want - the disciplinary environment, the counselling of people all the way through."\(^{18}\)

In the majority of other states around Australia builder licensing is ultimately controlled by the Minister for Housing.\(^{19}\)

Arguments that the licensing of builders should be linked with the warranty system have been put forward. The purpose of such a link is to ensure that a warranty is provided only to registered builders and that the register is updated with a builder's claims history. The link also provides for a more efficient operation as the same technical knowledge is required for both the licensing and warranty functions.

In order to maintain the link between licensing and warranty provision, and prevent unnecessary duplication of tasks and inefficiency, the Committee believes that the registration function should remain with the Fund while it continues to be the sole provider of the guarantee. Should there become more than one approved guarantor then it may be more appropriate for the registration function to be carried out by another party.

Finding 5.8

The Committee finds that whilst the Housing Guarantee Fund is the sole provider of the guarantee, the builder registration function should be linked to the provision of the warranty on the grounds of efficiency, and should remain with the Fund.

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\(^{18}\) Housing Industry Association Limited; Minutes of Evidence; 8 June 1994; Page 7
\(^{19}\) Trade Practices Commission; Home building - consumer problems and solutions; November 1993; Page 45
5.3.2 Demerit Point System

As an incentive to builders to maintain high standards of workmanship the Committee believes that consideration should be given by the Office of Fair Trading to the establishment of a demerit point system similar in principle to that used for motor vehicle licensing.

Under such a system builders would be assigned a limit on the number of points that they could accrue over a set period. Points would then be allocated against a builder upon a range of criteria, including claim history and payment of fees. The points could be awarded on a sliding scale based upon the size of the "offence". Should the builder reach their point limit they would be removed from the register.

Extensive consideration would need to be given to this system should it be implemented. Determination of the initial number of points given to builders along with the number "fined" for each claim would be required. Analysis of these issues is outside the scope of this Inquiry and it is recommended that the Office of Fair Trading and Business Affairs consider such as part of its review (refer Chapter 1).

Recommendation 5.6

The Committee recommends that the Office of Fair Trading and Business Affairs consider as part of its review the introduction of a demerit point system for builders similar in principle to the motor vehicle drivers' demerit point system.
CHAPTER SIX: ROLE OF THE OFFICE OF FAIR TRADING AND BUSINESS AFFAIRS

6.1 POWERS UNDER THE HOUSE CONTRACTS GUARANTEE ACT 1987

The House Contracts Guarantee Act 1987 (the Act) prescribes a number of responsibilities for the Minister for Fair Trading and Business Affairs and the Chief Administrator (Secretary) of the Department of Justice. These duties and powers include:

- approval of the Housing Guarantee Fund's (the Fund) procedures for handling complaints and disputes (Section 13(1));

- appointment of the directors of the Fund (Section 22(1)(a));

- prescribing provisions to be contained in the Fund's articles of association (Section 22(1)(b));

- approval of the Fund's contract of insurance relating to its liabilities (Section 22(1)(c));

- appointment of the members of the appeals committee (Section 22(1)(g));

- approval of the rules under which the Fund approves or proposes to approve builders or supervisors and establishes the appeals committee (Section 22(2)(a));

- approval of any terms and conditions that the Fund requires or proposes builders or supervisors be required to comply with (Section 22(2)(b));

- prescribing the form in which a register of approved builders and supervisors and a register of work are to be kept (Section 25(1));
• laying the Fund's annual report before both the Legislative Council and the Legislative Assembly or reporting the cause of the Fund's failure to submit an annual report to each House of Parliament (Section 25A(2) and (3));

• granting an extension of time for the submission of an annual report (Section 25A(4));

• appointment of persons who are recognised to report on owner-built dwellings (Section 28); and

• making regulations in relation to aspects of the guarantee including terms and conditions with which the Fund must comply, determining domestic building work, prescribing fees and prescribing provisions to be included in domestic building work contracts (Section 33(1)).

6.2 ROLE OF THE OFFICE

To enable the Office of Fair Trading and Business Affairs (the Office) to adequately fulfil its role of administering the Act, the Committee believes that supervision of the Fund's operations is required. Further, the Office must satisfy itself on an ongoing basis that the guarantee system is operating effectively, efficiently and as intended by the legislation. Without some degree of monitoring, the Office is unable to obtain such satisfaction.

Close regulation by the Office is required in order to protect the interests of owners and builders, particularly as the Fund is a public company and not reviewed by the Auditor-General or the Ombudsman nor subject to the Freedom of Information Act 1982. Further, as the Fund is a legislative monopoly provider the onus on the Office to be satisfied with the Fund's operations is greater.

The Committee sought information from the Office regarding the level of
its involvement in the Fund's operations. The Office replied:

"The structure of HGF means that it has high levels of autonomy in its operations. The OFTBA has a role in monitoring and supervising the functioning of the guarantee system (both through complaints made to it and as the agency administratively responsible for the legislation).

While OFTBA has the general responsibility for monitoring and advising the Minister on the functioning of the guarantee system it has limited, if any, influence over the day to day operations of the Fund. Where owners or builders complain to OFTBA about the Fund's processes or decisions, OFTBA contacts the Fund to clarify the nature of the complaint and, if appropriate, may request HGF to review the case.

In cases where matters involving breach of the Act have been referred to OFTBA, the Investigations and Compliance Division investigates the case and, where appropriate, prosecutes the offender."¹

The Committee also enquired as to what approach the Office adopts on an ongoing basis to assure itself that the Fund's operations are satisfactory and in accordance with the Act, including its compliance with all approved rules and procedures. The Office replied:

"... this Office does not have the authority to intervene in HGF claims policies or decisions. OFTBA seeks information about HGF's operations as the need arises from either the Chief Executive or officers of the Fund, or through the Minister's and Secretary's nominees on the Board of Directors.

This Office does not and cannot constantly monitor HGF's compliance in its daily operations with the company rules or

¹ Office of Fair Trading and Business Affairs; Letter to the Public Accounts and Estimates Committee; 15 July 1994
claims handling procedures, nor would it be appropriate to do so. ...

The primary mechanism that OFTBA has to remedy any problems or anomalies that may arise in the functioning of the guarantee system is through review and amendment of the legislation."²

The Committee is concerned that the Office believes that it is inappropriate to monitor the Fund's compliance with the rules and procedures. As the former Ministry noted, it is the Minister who is accountable for the Fund's operations and who must ensure that they comply with the legislation (see below). In addition, the operation of the guarantee is a matter of significant public interest. The Committee believes that to fulfil this role the Office must regularly review the Fund's operations. Further, the Committee considers that the Office's power to approve the Fund's rules and procedures is weakened if it does not also regularly review the compliance and appropriateness of them.

The former Ministry of Consumer Affairs in its 1990 discussion paper noted concerns about the level of involvement in the Fund's operations, stating:

"How far matters of policy such as these may legitimately be probed while the guarantor remains an independent, private company is, in fact, a moot point. Without doubting HGF's bona fides, this is a serious concern for the Ministry.

While the guarantee scheme is intended to be "co-regulatory", it is the government of the day which is ultimately responsible to the public for its operation. Yet government influence on policy and access to the information used in its formulation is circumscribed.

The relationship between HGF and the Ministry has been generally a co-operative one, but the company clearly has a

² Office of Fair Trading and Business Affairs; Letter to the Public Accounts and Estimates Committee; 3 August 1994
private enterprise's sense of the limits to which it is accountable. ...

... as the Minister is accountable for the operation of the guarantee scheme, it is only reasonable that the Minister be fully capable of ensuring that the internal regulation of the guarantor is in accord with the objects of the legislation.\(^3\)

In its recent discussion paper the Office of Fair Trading and Business Affairs (the Office) commented on the Fund's attitude to its role, stating:

"HGF has indicated that it wishes to remain free from unnecessary Government control."\(^4\)

Given that the Fund is a public company the Committee understands that it would not wish there to be greater government intervention, however the Committee considers a greater level of monitoring to be necessary.

Throughout this report the Committee has recommended actions which it believes the Office must take to adequately fulfil its role in administering the Act. The Committee acknowledges that its recommendations extend the Office's existing powers under the Act and may therefore require legislative amendment. These recommendations, in summary, are:

- the Office must satisfy itself that the Fund is meeting its objectives and obligations under the Act and is doing so economically and efficiently; and report the results of such to the Parliament (Recommendation 2.2); and

- the Office should regularly review the procedures employed by the Fund in registering, monitoring and deregistering builders and ensure that such procedures are adequate and are being complied with (Recommendation 5.1).


The Committee believes that the Office should also review the claims handling procedures on a regular basis and determine their adequacy and the level of the Fund's compliance with them. The Committee notes that the former Ministry stated that the legislation should provide for the regular review of these procedures and of their application.5

The Committee's recommendations to increase the Office's supervision of the Fund are not intended, and should not be taken as questioning the integrity or otherwise of the Fund and its officers. The Committee's recommendations are solely a reflection of what it considers to comprise adequate and appropriate public accountability.

In addition to reviewing the Fund's operations the Office must also ensure that complaints against builders for breaches of the Act are avidly pursued whenever a matter is referred to them. The Committee considers it important for action to be taken against builders on a timely basis to ensure that other owners are not disadvantaged by builders continuing to trade.

The Committee notes that the Fund expressed dissatisfaction regarding the prosecutions by the Office in its annual report, stating:

"As in previous years, the Fund has significant concerns about the adequacy of the current prosecution system. Few matters proceed to prosecution and we believe this is a serious impediment to the legislation remaining effective."6

The Committee has been provided with information on one case which indicates that more timely and extensive action could have been taken by the Office. This information relates to Customtone Kitchens Australia Pty Ltd which did not register a large number of its contracts with the Fund and accordingly was in breach of the Act. When brought to light the Fund allowed Customtone Kitchens to back register in excess of 600 contracts

6 Housing Guarantee Fund Limited; Annual Report; 1992-93; Page 7
without payment of the registration fees. The Committee understands that the Office was made aware of this situation.

In November 1993 the Office stated that the allegations made regarding Customtone Kitchens had been substantially supported and that different options for action were being considered, one of which was prosecution. It was also aware at this time that further contracts remained unregistered.

It was not until several months later, in February 1994, that the Office determined not to initiate proceedings against Customtone Kitchens deciding that it was more appropriate "to warn the company of its statutory obligations and inform it that any repetition of an offence would result in prosecution."

An administrator was appointed to Customtone Kitchens in May 1994. The Committee notes that it has been alleged that a further 161 contracts remained unregistered.

The Committee believes that upon becoming aware of events of non-compliance with the Act, the Office must investigate the matter and take corrective action promptly. Further, the Office should assure itself that any efforts that are made to rectify a problem are adequate.

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7 Office of Fair Trading and Business Affairs; Letter to Ms A Scott: 30 March 1994 and Ms Ann Scott; Minutes of Evidence: 11 May 1994; Page 16
8 Office of Fair Trading and Business Affairs; Letter to Mr Ross Smith, MP: 22 November 1993
9 Ms Ann Scott; Letter to Mr Ross Smith, MP: 30 November 1993
10 Office of Fair Trading and Business Affairs; Letter to Mr Ross Smith, MP: 21 February 1994
11 Ms Ann Scott; Minutes of Evidence: 11 May 1994; Page 16
12 Ibid; Page 15
Finding 6.1

The Committee finds that the Office of Fair Trading and Business Affairs should take a significantly greater role in the regulation and supervision of the operations of the Housing Guarantee Fund. That role, for example, should extend to the regular review of the adequacy of the approved claims handling procedures employed by the Housing Guarantee Fund and ensure that they are complied with.

A strong regulative and supervisory function is necessary because the Housing Guarantee Fund, currently a legislative monopoly, is a public company and not subject to the Ombudsman, the Freedom of Information Act or audit by the Auditor-General. Further, responsibility for the operation of the guarantee rests with the Minister for Fair Trading and its operation is a matter of significant public interest.

Finding 6.2

The Committee finds that it is important for the Office of Fair Trading and Business Affairs to pursue matters that are referred to it for prosecution or investigation on a timely basis to ensure that owners are not disadvantaged by unsatisfactory builders continuing to trade.

Committee Room
6 September 1994
APPENDIX 1

DRAFT BUILDING DISPUTES TRIBUNAL BILL
Third Draft
10 August 1992

A BILL

to establish a Building Disputes Tribunal, to amend the House Contracts Guarantee Act 1987 and the Small Claims Tribunals Act 1973 and for other purposes.

BUILDING DISPUTES TRIBUNAL ACT 1992

The Parliament of Victoria enacts as follows:

PART 1 – PRELIMINARY

Purpose

1. The purpose of this Act is to establish a Building Disputes Tribunal with jurisdiction to hear and determine domestic building work contract disputes and certain appeals under the House Contracts Guarantee Act 1987.

Commencement

2. This Act comes into operation on a day or days to be proclaimed.

Definitions

3. In this Act –

"approved builder" has the same meaning as in the House Contracts Guarantee Act 1987;

"approved guarantor" has the same meaning as in the House Contracts Guarantee Act 1987;

"domestic building work contract" has the same meaning as in the House Contracts Guarantee Act 1987;

"Fund" means Building Disputes Tribunal Fund;

"jurisdictional limit" is $40,000 or any larger amount that is prescribed for the purposes of section 7(4) of the House Contracts Guarantee Act 1987;

"metropolitan area" means the same meaning as in Part VII of the Melbourne and Metropolitan Board of Works Act 1958;

"Tribunal" means Building Disputes Tribunal.
PART 2 - ESTABLISHMENT AND CONSTITUTION OF TRIBUNAL

Establishment of Tribunal

4. (1) There is established a Tribunal called the Building Disputes Tribunal.

(2) The Tribunal consists of -

(a) a Chairperson; and

(b) such number of legal referees, technical referees and conciliators as are appointed in accordance with this Act.

(3) Schedule 1 contains provisions about the membership of the Tribunal.

Tribunal staff

5. (1) Subject to the Public Service Act 1974 there shall be appointed a registrar and as many deputy registrars and other staff as are necessary for the proper functioning of the Tribunal.

(2) Schedule 2 contains provisions about the powers and functions of the registrar.

Jurisdiction of Tribunal

6. (1) The Tribunal has jurisdiction to hear and determine -

(a) any dispute between the parties to a domestic building work contract; or

(b) any appeal under section 16(1) of the House Contracts Guarantee Act 1987 -

that does not involve a monetary claim for an amount in excess of the jurisdictional limit.

(2) No issue in a dispute between the parties to a domestic building work contract that has been duly referred to the Tribunal is justiciable in any court or other tribunal unless -

(a) the other proceeding was commenced before the reference to the Tribunal; or
(b) the reference to the Tribunal has been withdrawn or struck out
for want of jurisdiction.

(3) A court or other tribunal in which a proceeding has been
commenced that relates wholly or partly to a dispute which the Tribunal
has jurisdiction to hear and determine may direct that the dispute be
referred to the Tribunal.

Constitution of Tribunal for exercise of powers

7. (1) The Tribunal shall, for the purpose of the exercise of its
powers in relation to a matter, be constituted -

(a) if the amount of monetary relief sought is $10,000 or less, by
a single member; or

(b) in any other case, by either the Chairperson or a legal
referee sitting with a technical referee or, if the applicant
so elects, by a single member.

(2) Subject to any directions of the Chairperson, it is the
responsibility of the registrar to select the person who is, or the
persons who are, to constitute the Tribunal for the purpose of a
particular proceeding and in so doing he or she must have regard to the
need for the Tribunal to have appropriate knowledge and experience.

(3) A party may specify at a preliminary conference or at any other
time before the commencement of the hearing the type of knowledge and
experience on the part of a Tribunal member that the party believes is
relevant to the particular proceeding.

Reference of question to non-sitting member

8. (1) The Tribunal if constituted by a single member may, subject
to and in accordance with the regulations, refer any question of fact or
law to another member of the Tribunal for him or her to -

(a) decide the question; or

(b) give his or her opinion with respect to it.
(2) The Tribunal may act under sub-section (1) on its own initiative or on the application of a party and may do so at any time whether before or after the commencement of the hearing, including any preliminary conference.

Provisions applying when Tribunal is constituted by more than one member.

7. The following provisions apply to a hearing at which the Tribunal is constituted by more than one member:

(a) The Chairperson or legal referee must preside;

(b) Questions of law must be determined only by the Chairperson or legal referee;

(c) Questions of fact of a technical nature must be determined only by the technical referee member;

(d) Other questions of fact must be determined by both members but if they are unable to agree on the determination they must be determined according to the opinion of the Chairperson or legal referee.

Function of conciliators

10. (1) The function of conciliator members of the Tribunal is to attempt to achieve a settlement of a dispute without proceeding to a formal hearing. If a settlement is achieved the Tribunal constituted by the conciliator may make a consent order. If no settlement is achieved, the conciliator must identify the issues in dispute and inform the Chairperson of them and the time likely to be required to hear them.

(2) If the amount of the monetary relief sought is more than $10,000, a conciliation process involving all the parties must take place before the commencement of the hearing of the proceeding. In any other case, the Chairperson may direct that it take place if all the parties agree to participate in it.
PART 3 - PROCEDURE AND POWERS OF TRIBUNAL

Applications

11. (1) An application to the Tribunal is made by writing filed with the registrar accompanied by the prescribed fee or, outside the metropolitan area, with a registrar of the Magistrates' Court.

(2) A registrar of the Magistrates' Court with whom an application is filed must send it, as soon as practicable, to the registrar of the Tribunal.

(3) An applicant may withdraw the application at any time before the Tribunal has determined it by giving written notice of withdrawal to the registrar and informing each other party. However, the applicant can then only make a subsequent application in respect of the same subject-matter with the leave of the Tribunal.

Directions

12. (1) The Chairperson may, at any stage of a proceeding, give any direction for the conduct of the proceeding which he or she thinks conducive to its effective, complete, prompt and economical determination.

(2) A direction may be given in writing (including writing transmitted by facsimile machine) or orally (including by telephone).

(3) The Chairperson may, by instrument, delegate to the registrar or a deputy registrar, any function or power of the Chairperson under this section, except this power of delegation.

Preliminary conferences

13. (1) The Chairperson may direct that the parties attend a preliminary conference to be presided over by the Chairperson or another member of the Tribunal selected by the Chairperson.

(2) The objects of a preliminary conference are——

(a) to identify the issues in dispute and attempt to achieve a settlement;
(b) to identify the most appropriate constitution of the Tribunal for a hearing of the dispute.

(3) A preliminary conference may, at the discretion of the Chairperson, be held by telephone or by means of closed-circuit television or other telecommunication facility.

Interlocutory proceedings

14. Subject to and in accordance with the regulations, a party to a proceeding in which the amount of monetary relief sought is more than S10,000 or to a proceeding that is an appeal under section 18(1) of the House Contracts Guarantee Act 1987 may —

(a) require any other party to make discovery of all documents which are or have been in that party’s possession relating to any issue in the proceeding;

(b) with leave of the Tribunal constituted by the Chairperson —

(i) serve interrogatories on any other party relating to any issue in the proceeding;

(ii) require any other party to give further or better particulars of any matter relating to any issue in the proceeding.

Third parties

15. (1) A party may join as a third party to the proceeding any person who appears to that party to have a sufficient interest in a resolution of the dispute to which the proceeding relates.

(2) The Tribunal may direct that there be joined as a party to a proceeding any person who appears to it to have a sufficient interest in a resolution of the dispute.

(3) The Tribunal may act under sub-section (2) on its own initiative or on the application of a party or of a person wishing to be joined as a party.
(4) The registrar must notify any party joined under this section of the day, time and place fixed for the hearing, or resumption of hearing, of the proceeding.

Registrar to fix hearing date

16. Subject to any directions of the Chairperson, the registrar must fix a day, time and place for the hearing of a proceeding and notify the parties of it.

Presentation of cases

17. (1) The following provisions apply if the amount of monetary relief sought is $10,000 or less:

(a) A party who is a natural person is not entitled to be represented by an agent unless:

(i) it appears to the Tribunal that he or she would be unfairly disadvantaged without that representation; or

(ii) all parties to the proceeding agree that the party should be represented by an agent and the Tribunal is satisfied that no other party would be unfairly disadvantaged by that representation;

(b) A party who is not a natural person is not entitled to be represented by an agent who is a lawyer, an architect or an engineer.

(2) Nothing in this section prevents a party from using the services of an interpreter for a fee that does not exceed that fixed by the Tribunal.

Tribunal may proceed in party’s absence

18. The Tribunal may proceed to hear and determine a proceeding in the absence of a party who does not attend despite having had reasonable notice of the hearing.
Power to require evidence

19. (1) The Tribunal may cause a summons to be served on a person requiring the person to appear before it to give evidence or produce any document or thing or do both as directed by the summons.

(2) The Tribunal may act under sub-section (1) on its own initiative or on the application of a party.

Expert reports

20. (1) A party must serve on each other party a copy of a report by an expert witness that the party intends to tender, or the substance of which the party intends to adduce, in evidence at the trial.

(2) The report must be served at least 1 week before the hearing (including any preliminary conference) commences or at such other time as the Tribunal may direct either generally or in relation to the particular proceeding.

(3) Without limiting section 32, the Tribunal may order a party to pay to another party within a specified time any costs properly incurred by the other party as a result of a failure by that party to comply with this section or a direction given under this section.

Tribunal may require statement of facts

21. The Tribunal may require a party to file with it and serve on the other parties within such period as it directs a statement setting out the facts on which the party intends to rely and, if claiming a sum of money, indicating how that sum is calculated.

Tribunal may require summary of arguments, etc.

22. The Tribunal may require a party to file with it within such period as it directs a statement summarising the arguments that the party intends to put and referring to any legislation or common law on which the party intends to rely.

Evidence

23. (1) Evidence before the Tribunal -
(a) may be given orally or in writing; and
(b) must, if the Tribunal so requires, be given on oath or affirmation or by affidavit.

(2) A member of the Tribunal may administer an oath or affirmation or take an affidavit for the purposes of a proceeding.

Rules of evidence do not apply

24. The Tribunal is not bound by rules of evidence but may inform itself on any matter in any manner that it thinks fit.

Natural justice applies

25. The Tribunal is bound by the rules of natural justice.

Tribunal hearings to be in public

26. The hearing of proceedings before the Tribunal must be held in public. However the Tribunal, if satisfied that it is desirable to do so, may direct that the hearing of a particular proceeding, or of part of a particular proceeding, take place in private and give directions as to who may be present.

Power to prohibit publication of identifying information

27. The Tribunal may make an order prohibiting the publication of the name of a party to, or witness in, a proceeding.

Reservation of questions of law

28. (1) If a question of law arises in a proceeding, the Tribunal may, on its own initiative or on the application of all the parties, reserve the question in the form of a special case for the opinion of the Supreme Court.

(2) On reserving a question of law, the Tribunal must not—

(a) make a decision to which the question is relevant until the Supreme Court has given its opinion; or

(b) proceed in a manner or make a decision that is inconsistent with the Supreme Court's opinion.
General power of Tribunal to make determinations

29. The Tribunal has power -

(a) within the jurisdictional limit, to make any determination that it considers appropriate to compensate a party for loss or damage or to remedy a breach of contract including -

(i) an order requiring the payment or re-payment of money at the one time or by instalments;

(ii) an order requiring the performance of work;

(iii) an order rectifying a contract;

(iv) an order restraining a party from committing a breach of contract, whether temporarily or permanently;

(v) an order that contains two or more types of order referred to in this paragraph;

(b) to make a consent order;

(c) to make an interim order;

(d) to dismiss any application or strike it out for want of jurisdiction;

(e) to make any determination ancillary or incidental to any other determination made by it.

Order and reasons for it

30. (1) An order made by the Tribunal must be made in writing and a copy of it given to each party.

(2) The Tribunal is not required to give written reasons for its decision unless -

(a) if the amount of monetary relief sought is $10,000 or less, they were requested by a party before the commencement of the hearing; or

(b) in any other case, they were requested by a party within 14 days after receiving notice of the order.
Tribunal may correct order

31. (1) The Tribunal may correct an order made by it which contains —

(a) a clerical mistake; or
(b) an error arising from an accidental slip or omission; or
(c) an evident material miscalculation of figures; or
(d) an evident material mistake in the description of any person or thing referred to in the order.

(2) The Tribunal may act under sub-section (1) on its own initiative or on the application of a party made within 14 days after receiving notice of the order.

Costs

32. The Tribunal may, in accordance with the prescribed scale, make any order as to costs that it thinks just.

Enforcement of orders to pay money

33. (1) A person to whom money is required to be paid under an order made by the Tribunal may enforce the order by filing, free of charge, in the Magistrates' Court —

(a) a copy of the order certified as a true copy by the registrar of the Tribunal; and
(b) an affidavit setting out the amount still owed under the order.

(2) On compliance with sub-section (1) the order must be taken to be an order made by the Magistrates' Court and may be enforced accordingly.

(3) Nothing in this section prevents a person from making a claim under a guarantee given under the House Contracts Guarantee Act 1987. The approved guarantor must make any payment under such a guarantee that it is necessary to make in order to give effect to an order made by the Tribunal against an approved builder or approved supervisor within the meaning of that Act.
Extension of time

34. (1) The Tribunal may extend the time for the doing of any act or thing fixed by the Tribunal or by this Act or the House of Representatives Guarantee Act 1987.

(2) The Tribunal may extend time under sub-section (1) before or after the time expires and whether or not an application for the extension is made before the time expires.

Dispensing with compliance

35. The Tribunal may dispense with compliance with any of the procedural requirements of this Act, either before or after the occasion for compliance arises.

Procedure of Tribunal

36. Subject to this Act and the regulations, the procedure of the Tribunal is in its discretion.

Contempt

37. A person must not –

(a) insult a member of the Tribunal while sitting as a member; or

(b) repeatedly interrupt a proceeding of the Tribunal; or

(c) create, or take part in creating or continuing, a disturbance in or near a place where the Tribunal is sitting; or

(d) assault or wilfully obstruct a person attending the Tribunal; or

(e) without lawful excuse, disobey a lawful direction given by the Tribunal or refuse or fail to appear or produce a document in response to a summons issued by the Tribunal.

Penalty: 10 penalty units or imprisonment for 3 months.
PART 4 - APPEALS AND RE-HEARINGS

Availability of appeals

38. (1) An order made by the Tribunal in a proceeding in which the amount of monetary relief sought is $10,000 or less is final and binding on the parties and can only be reviewed on the ground of lack of jurisdiction or denial of natural justice to a party.

(2) An order made by the Tribunal in a proceeding in which the amount of monetary relief sought is more than $10,000 may be appealed to the Full Court as if it were an order made by the County Court constituted by a Judge.

(3) Section 74 of the County Court Act 1974 and the rules of court made for the purposes of that section apply, with any necessary modifications, to an appeal under sub-section (2).

(4) An application may be made to the Administrative Appeals Tribunal for review of a decision of the Tribunal on an appeal under section 16(1) of the House Contracts Guarantee Act 1987.

(5) Despite anything to the contrary in the Administrative Appeals Tribunal Act 1984, the approved guarantor is entitled to apply to the Administrative Appeals Tribunal for review of a decision referred to in sub-section (4) and, if it does so, it must in any event pay its own costs in respect of the proceeding before that Tribunal and those of every other party to that proceeding.

Re-hearings

39. (1) A party who did not attend, and was not represented at, the hearing of a proceeding may, within 14 days after receiving notice of the final order made, apply to the Tribunal for an order that the order be set aside and that the proceeding be re-heard.

(2) The Tribunal may, if satisfied that the applicant had a reasonable excuse for not having attended the hearing, set aside the order on any terms and conditions that it thinks just and re-hear the proceeding.
(3) Subject to sub-section (4), an application under this section does not operate as a stay of the order unless the Tribunal so orders.

(4) An application under this section with respect to an order for the payment or re-payment of money operates as a stay of so much of the order as relates to the payment or re-payment of money.
PART 5 - MISCELLANEOUS

Levy payable by approved builders

40. (1) An approved builder must pay to the approved guarantor in respect of each domestic building work contract entered into by the builder a levy at the rate of $10 or any larger amount that is prescribed.

Penalty: 10 penalty units.

(2) Payment of a levy under sub-section (1) must be made at the prescribed time and in the prescribed manner.

(3) The approved guarantor receives the levies on behalf of the Tribunal and must, in accordance with the regulations, pay them into the Building Disputes Tribunal Fund.

(4) A contract is not illegal, void or unenforceable only because of a failure to comply with this section with respect to the contract.

Building Disputes Tribunal Fund

41. (1) The registrar must establish and maintain a Fund to be called the Building Disputes Tribunal Fund.

(2) There must be paid into the Fund -

(a) any fee payable under this Act;

(b) any amount payable to the Fund or the Tribunal by the approved guarantor under section 40(3) of this Act or in accordance with the rules referred to in section 22(1)(f) of the House Contracts Guarantee Act 1987;

(c) any income from the investment of money credited to the Fund and the proceeds of the sale of any investment;

(d) any other money required or permitted to be paid into the Fund by or under any other Act.

(3) There may be paid out of the Fund -

(a) the costs and expenses of, or incidental to, the functioning of the Tribunal;
(b) any costs and expenses incurred by the Tribunal in informing
the public about its functions;

(c) any payment required to be made under sub-section (4).

(4) The registrar may invest any money in the Fund in any manner
which is approved by the Treasurer.

Service of documents

42. (1) A document that is required or permitted by or under this Act
to be served on a person may be served on that person in or out of
Victoria —

(a) in the case of a natural person, by delivering it personally to
him or her or by sending it by post addressed to him or her at
his or her usual or last known place of residence or business;

(b) in the case of a body corporate, by sending it by post
addressed to the body at its registered or principal office or
by leaving it at that office with a person apparently over 16
and apparently employed there;

(c) in the case of an unincorporated body, by sending it by post
addressed to the body at its principal or last known place of
business or by leaving it at that place with a person
apparently over 16 and apparently employed there;

(d) in any other manner directed by the Tribunal or permitted in
relation to that person by or under any other Act.

(2) Without limiting sub-section (1), a document may be served on a
company or a registered body within the meaning of section 363 of the
Corporations Law in accordance with section 220 or 363 of the
Corporations Law, as the case requires.

(3) Service must be taken to have been effective even though the
rights and obligations of the person served have been assigned, or have
passed by operation of law, to another person so long as the server was
unaware of that fact and the service was not personal service.
Secrecy

43. (1) A person who is or has been a member of the Tribunal, the registrar, a deputy registrar or a person engaged as a member of the staff of the Tribunal must not, either directly or indirectly, make a record of, or divulge or communicate to any person, any information concerning the affairs of any person acquired by him or her in the course of his or her office or employment under this Act.

Penalty: 5 penalty units.

(2) This section does not apply to any thing done -

(a) in the course of performing a function or exercising a power under this Act; or

(b) for the purposes of any legal proceeding as defined in the Evidence Act 1958.

Immunity provision

44. (1) A member of the Tribunal or the registrar or a deputy registrar or a person engaged as a member of the staff of the Tribunal is not personally liable for anything necessarily or reasonably done or omitted to be done by him or her in good faith -

(a) in the exercise of a power or the performance of a function under this Act or the regulations; or

(b) in the reasonable belief that the Act or omission was in the exercise of a power or the performance of a function under this Act or the regulations.

(2) Any liability that would, but for sub-section (1), attach to a person because of an act or omission of that person attaches instead to the Crown.

Supreme Court - Limitation of jurisdiction

45. It is the intention of this section to alter or vary section 85 of the Constitution Act 1975 to the extent necessary to prevent the bringing before the Supreme Court of a dispute which section 6(2) makes justiciable only in the Tribunal.
Regulations

46. (1) The Governor in Council may make regulations for or with respect to—

(a) the practice and procedure of the Tribunal;

(b) the reference by the Tribunal, if constituted by a single member, of any question arising in a proceeding to another member of the Tribunal for decision or opinion;

(c) prescribing fees to be payable in respect of applications to the Tribunal or the happening of any other event in or in relation to a proceeding;

(d) the forms to be used under this Act;

(e) generally prescribing any other matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.

(2) The power to make regulations prescribing fees may be exercised by providing for—

(a) specific fees;

(b) maximum fees;

(c) minimum fees;

(d) fees that vary according to value or time;

(e) the manner of payment of fees;

(f) the time or times at which fees are to be paid;

(g) the exemption of persons or proceedings or a class of person or proceeding from fees.

(3) Regulations may impose a penalty not exceeding 10 penalty units for a contravention of them.

Transitional provision

47. (1) The appeals committee established by the approved guarantor must hear and determine any appeal made before the commencement of this section under section 16(1) of the House Contracts Guarantee Act 1987 as in force immediately before that commencement.
(2) Any appeal made after the commencement of this section under section 16(1) of the House Contracts Guarantee Act 1987 as amended by section 48(1) of this Act shall be heard and determined by the Tribunal, irrespective of whether the relevant decision was made before or after that commencement.

(3) On the final determination of all appeals referred to in subsection (1), the appeals committee shall be abolished and its members shall go out of office.
PART 6 – AMENDMENTS OF OTHER ACTS

Amendment of House Contracts Guarantee Act

48. (1) In the House Contracts Guarantee Act 1987 –

(a) in section 16(1) –

(i) paragraphs (d), (e), (g) and (h) are repealed;

(ii) for the expression commencing "and on payment" and ending at the end of the sub-section substitute "and on payment of the fee prescribed under the Building Disputes Tribunal Act 1992, appeal to the Building Disputes Tribunal established under that Act";

(b) in section 16, for sub-sections (4) to (8) substitute –

"(4) An application may be made to the Administrative Appeals Tribunal for review of a decision of the approved guarantor –

(a) not to approve a builder in relation to a class of domestic building work; or

(b) to revoke the approval of a builder in relation to a class of domestic building work; or

(c) not to approve a supervisor in relation to a class of domestic building work; or

(d) to revoke the approval of a supervisor in relation to a class of domestic building work."

(c) in section 17(2)(a), for "appeals committee established by the approved guarantor under its rules" substitute "Building Disputes Tribunal";

(d) in section 22(1), for paragraphs (f) and (g) substitute –

"(f) it has in force rules requiring it –

(i) to pay into the Building Disputes Tribunal Fund established under the Building Disputes Tribunal Act 1992 –"
(A) any levies received under section 40 of that Act;

(B) the cost incurred by the Building Disputes Tribunal in hearing and determining appeals under section 16(1) as specified in a notice served on it by the registrar of that Tribunal;

(ii) to assist in the development and maintenance of building dispute resolution procedures whether by the provision of funding, staffing or expert advice to the Building Disputes Tribunal or otherwise."

(2) After section 26 of the House Contracts Guarantee Act 1987 insert -

"26A. Arbitration clauses

(1) Subject to sub-section (2), a provision of a domestic building work contract of a kind referred to in section 55(1) of the Commercial Arbitration Act 1984 is void despite anything to the contrary in that Act.

(2) Sub-section (1) does not apply if -

(a) the amount payable under the contract or the amount set out in the contract as a fair and reasonable estimate of the amount payable under the contract in respect of the work to be performed is $300,000 or more; or

(b) the Director of Housing incorporated under the Housing Act 1983 is a party to the contract.

Amendment of Small Claims Tribunals Act

49. In section 2(1), in the definition of "small claim", after "insurance" (where first occurring) insert "(but does not arise out of a domestic building work contract as defined in the House Contracts
Guarantee Act 1987 or out of a contract which would be a domestic building work contract but for paragraph (b) of the definition of that term in that Act).
SCHEDULE 1

MEMBERSHIP OF TRIBUNAL

Section 4(3)

Appointments

1. (1) The members of the Tribunal shall be appointed by the Governor in Council.

(2) A member shall be appointed either as a full-time member or as a part-time member.

Qualifications for appointment

2. (1) Only a barrister and solicitor of not less than 7 years' standing may be appointed as the Chairperson.

(2) Only a barrister and solicitor of not less than 3 years' standing may be appointed as a legal referee.

(3) Only a person who -

(a) has been registered as an architect under the Architects Act 1991 for not less than 3 years; or

(b) has been a Graduate Member of the Institution of Engineers, Australia for not less than 3 years - may be appointed as a technical referee member.

(4) Only a person who has, in the opinion of the Governor in Council, special knowledge of building practices or of any class of building practices relevant to the work of the Tribunal may be appointed as a conciliator member.

Terms and conditions of appointment

3. (1) Subject to clause 4, the Chairperson holds office for 5 years but is eligible for re-appointment.

(2) Subject to clause 4, any member other than the Chairperson holds office for the period, not exceeding 5 years, specified in the instrument of appointment but is eligible for re-appointment.

(3) A member is entitled to be paid any remuneration or travelling or other allowances fixed from time to time for the member by the Governor in Council.
(4) The instrument of appointment of a member may specify terms and conditions of appointment that are not inconsistent with this Act.

(5) A member is not subject to the Public Service Act 1974 in respect of the office of member.

Vacation of office

4. (1) A member may resign from office by writing signed by the member and delivered to the Governor in Council.

(2) The office of a member becomes vacant on the member turning 72.

(3) The Governor in Council may remove a member from office if—

(a) the member is mentally or physically incapable of carrying out satisfactorily the duties of his or her office; or

(b) the member is incompetent or guilty of neglect of duty; or

(c) the member is guilty of unlawful or improper conduct in the performance of the duties of his or her office; or

(d) the member is found guilty of an offence punishable on conviction by imprisonment for a term of 12 months or more; or

(e) the member becomes bankrupt.

Acting appointments

5. (1) The Governor in Council may appoint a legal referee or a person who is not a member of the Tribunal but who is qualified to be appointed as Chairperson to act as Chairperson—

(a) during a vacancy in the office of Chairperson; or

(b) during any period when the Chairperson is absent from duty or is unable, whether on account of illness or otherwise, to perform the duties of the office.

(2) The Governor in Council may appoint a person to act as a member (other than the Chairperson) during any period when the member is absent from duty or is unable, whether on account of illness or otherwise, to perform the duties of the office.
APPENDIX 2

CHECKLIST EXTRACTED FROM 'THE PLAIN ENGLISH HOME BUILDING CONTRACT' - NEW SOUTH WALES
**CHECKLIST**

**BEFORE SIGNING THE OWNER AND CONTRACTOR SHOULD CHECK THIS LIST**

**NOTE:** This checklist does not form part of the contract documents.

This contract should have been available to both parties in sufficient time to allow for reading and for advice to be obtained if necessary, prior to signature.

**WARNING: CONTRACT PRICE & COMPLETION TIME - POSSIBLE CHANGES**

The owner should be aware that the contract price may change in accordance with the contract. The reasons include:
- Provisional Sums (Clause 8)
- Prime Cost Items (Clause 9)
- Variations, including those required by council (Clause 11)
- Interest on overdue payments (Clause 12)

Ensure that you fully understand how these clauses may affect the contract price. The completion time may in some instances need to be adjusted. See Clause 6.

Note, in the event of a dispute the amount payable by the owner may be subject to an order of the Building Disputes Tribunal or a Court made in accordance with this contract and the law.

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<table>
<thead>
<tr>
<th>Take time to read and understand all the contract documents. If you answer NO to any of the questions below you are not ready to sign the contract -</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Does the contractor hold a current BSC contractor licence?</td>
<td></td>
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<tr>
<td>• Does the licence cover the type of work included in the contract?</td>
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<tr>
<td>• Is the name and number on the contractor's licence the same as on the contract?</td>
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<tr>
<td>• Is the contract price clearly stated? (see Clause 1)</td>
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<tr>
<td>• Is the deposit within the legal limit? (see Clause 2)</td>
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<tr>
<td>• Is the work to be undertaken covered in the contract, drawings or specification? (see Clause 3)</td>
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<tr>
<td>• Are the owner's special requirements or finishes included in the drawings or specifications? (see Clause 3)</td>
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<tr>
<td>• Are the commencement date and completion period clearly stated? (see Clauses 4 &amp; 5)</td>
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<tr>
<td>• Is the procedure for extensions of time understood? (see Clause 6)</td>
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<tr>
<td>• Are the provisional sums or prime cost items clearly stated, and understood? (see Clauses 8 &amp; 9)</td>
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<tr>
<td>• Are the stages for progress payment acceptable and based on value for work done? (see Clause 10)</td>
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<tr>
<td>• Is the owner aware of the obligations in relation to payment (Clauses 10,12,13), proof of ownership of land and capacity to pay (Clause 4), selection of prime cost items (Clause 9) and work and materials by owner? (Clause 14)</td>
<td></td>
<td></td>
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<tr>
<td>• Is the procedure for variations understood? (see Clause 11)</td>
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<tr>
<td>• Is the procedure understood if defects need to be rectified after completion of the work? (see Clause 21)</td>
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<tr>
<td>• Is the procedure to resolve disputes understood? (see Clause 25)</td>
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<tr>
<td>• Has the owner checked with the lending authority concerning the rights of the contractor to place a caveat on the title to the land? (see Clause 26)</td>
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</tbody>
</table>
BIBLIOGRAPHY
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Building Act 1993; No 126/1993; Melbourne; 1993

Building Disputes Tribunal Bill; Third draft; 10 August 1992

Building Services Corporation; The Plain English Home Building Contract; 1993

Building Services Corporation Act 1989; No 147; New South Wales; 25 March 1992

Consumer Claims Tribunals Act 1987; No 206; New South Wales; 14 September 1992

Consumer Claims Tribunals; Information about consumer claims tribunals and building disputes tribunals; Leaflet

Department of Justice; Annual Report 1993

Government Officer; May 1994

House Contracts Guarantee Act 1987; No 44/1987; Melbourne; 18 December 1991

House Contracts Guarantee (Miscellaneous Amendment) Bill and Explanatory Memorandum; Melbourne; 1991

House Contracts Guarantee Regulations 1988; Statutory Rule No 117/1988; Melbourne; 5 May 1994

Housing; April 1994

Housing Guarantee Fund Limited; Annual Report; 1991-92

Housing Guarantee Fund Limited; Annual Report; 1992-93
Housing Guarantee Fund Limited; Procedures for Resolving Complaints and Claims; 12 December 1991

Housing Guarantee Fund Limited; Company Rules; 1 October 1993

Housing Guarantee Fund Limited; How to Become Registered as an HGF-Approved Builder or Supervisor; July 1993

Housing Industry Association Limited; Annual Report; 1992-93

Housing Industry Association Limited; Housing in Victoria; Issue Number 49; March 1994

Housing Industry Association Limited; HIA Plain English Building Contract; April 1994

Ministry of Consumer Affairs; Annual Report; 1990-91 and 1991-92


Minutes of Evidence in relation to public hearings conducted by Economic Development Committee during their inquiry into the Victorian Building and Construction Industry


Parliament of New South Wales; Public Accounts Committee; Report on the New South Wales Builders Licensing Board; D. West. Government Printer NSW; Report Number 29; December 1986

Queensland Building Services Authority Act 1991; Queensland; Reprint No. 2; 10 January 1994

Queensland Building Tribunal; Guidelines for the Conduct of a Hearing of a Domestic Building Dispute under the Queensland Building Services Authority Act 1991; Procedural Guidelines; Information for Applicants and Respondents; Leaflets; 15 October 1992
Trade Practices Commission; *Home building - consumer problems and solutions*; November 1993

Victims of Builders Support Group Incorporated; *Submission Concerning Reform of the Home Building Industry*; Submission to the Premier of Victoria; 18 January 1993

Victorian Consumer Affairs Committee; *Consumer Rights in the Domestic Building Industry - Report on Seminar Held 24 June 1993*
LIST OF WITNESSES
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11 May, 1994

Victims of Builders Support Group Incorporated

Mr B. Shand, President
Mr R. Delahunty, Secretary

Individual

Mrs A. Scott

8 June, 1994

Housing Guarantee Fund Limited

Mr M. Nugent, Chief Executive Officer

8 June, 1994

Office of Fair Trading and Business Affairs

Ms A. Hammann, Senior Policy Officer
Ms V. Bates, Assistant Director

8 June, 1994

Housing Industry Association Limited

Mr L. Groves, Chief Executive Officer
LIST OF ORGANISATIONS AND INDIVIDUALS PROVIDING SUBMISSIONS TO THE PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE
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Appeals Committee

Mr Ken Coghili, MP

Hon. Phillip Gude, MP

Hassall, Rowland

Housing Guarantee Fund Limited

Housing Industry Association Limited

Ms Elsie Johnson

Master Builders Association of Victoria

Ms Ann Scott

Victims of Builders Support Group Incorporated
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**OTHER**

Thrift and the Noiseless Step; 100 Years of Public Accounts Committees of the Parliament of Victoria  

**July 1994**