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## Legal maze can cost all

*Mediation*

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ROB RIDDELL, a construction law expert, has locked horns with home-building warranty insurance providers in more than a dozen cases over the past six years.

Most have taken between three and four years to settle, he says, and invariably the consumer comes off second best. "The insurance is not serving consumer protection imperatives at all, but consumers have no choice but to buy it because it's mandatory," says Mr Riddell, a partner at Gadens Lawyers. "If it wasn't compulsory, nobody would buy it - it's that bad."

Because of the scheme's "last resort" nature, substandard or incomplete work by a living, solvent and contactable builder is not covered by the insurance. Many consumers are ignorant of this, inquiries into the scheme have found.

If the builder refuses to rectify, an Office of Home Building inspector makes an assessment, and mediation begins. Failing agreement, either home owner or builder may take their claim and/or counter-claim to the Consumer Trader and Tenancy Tribunal. A tribunal order for a builder to rectify or compensate a consumer can be appealed in the Supreme Court (last month the NSW Government transferred responsibility to the District Court), and if losing there, can go to the Court of Appeal.

Even at the end of this drawn-out process, which can take two to four years, many home owners who have won in court can be back at square one, because if the builder remains recalcitrant, the insurer will pay out a claim only if the builder has died, absconded or become insolvent. The home owner is forced back into the court - the Federal Court this time - to make a bankruptcy claim against the builder. If that is achieved, only then it is time to begin battle with the insurer.

Because of the wholesale nature of the insurance, consumers have no recourse to the independent insurance ombudsman if they disagree with the insurer's assessment of their claim.

A 2007 NSW parliamentary inquiry into home-building expressed concern over the insurance's last-resort system and its tendency to worsen disputes. Payouts were seen to be inadequate, while the costs associated with exhausting legal avenues before claiming could

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be "exorbitant".

The need to reform the Consumer Trader and Tenancy Tribunal was so strong, the inquiry said, that the committee needed to consider an inquiry into the tribunal itself.

At a June hearing of a Senate inquiry, a committee member, Senator Christine Milne, observed the system appeared to rely on "litigation for harassment", whereby insurers wildly under-assessed claims to goad consumers into going back to the courts. When the insurer was confident the claimant was facing bankruptcy through legal costs, a minimum payout would then be offered.

Mr Riddell said it was not unusual for insurers to proclaim a policy inapplicable, due to a new builder being appointed mid-construction without the home owner's knowledge.

Scant data on the scheme has been collected by the NSW Government. However, a one-off government report giving rough figures on claims between June 2006 and December 2007 shows more than one out of every three claims finalised over that time had been rejected. Of the 2244 accepted, there was no way of knowing how many had been paid in full, because the figure included "liability fully, partially or deemed accepted".

The most recent figures from the Queensland Government show its state-run system is paying out 98 per cent of claims.

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