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Ombudperson's Message



Ian Darling - Ombudperson

The Tarion Ombudsperson Office (the Office) promotes and protects fairness for homeowners at Tarion. We do this by receiving, investigating and seeking to resolve homeowner complaints regarding their interactions with Tarion. The Office is an impartial, independent and confidential resource. We do not take sides in a complaint, but work to secure fair outcomes. The Office reports directly to the Tarion Board of Directors, and its independence is protected by the Terms of Reference for the Ombudsperson. This report provides an update on the activities of the Office in 2016 as well as a summary of cases and recommendations.

In a recent tweet, the Property Ombudsman in the United Kingdom described the role of Ombudsperson as

**“getting it right;
putting it right;
and setting it right.”**

1 <https://twitter.com/TPOmb>, 12 October, 2016.

This refers to the role the Ombudsperson plays with early resolution, investigations and recommendations. We help Tarion to “get it right” by intervening to correct obvious errors, reducing delays and resolving complaints. Our investigations and recommendations are geared toward “putting it right” by finding appropriate remedies and mechanisms of redress. We also look to “setting it right”

by making systemic recommendations and supporting culture change by making fairness a priority in our work with Tarion.

In 2016 we received 372 contacts. The office provided information or advice in 105 cases, made 124 referrals, resolved 93 cases through early resolution, and made 17 recommendations. We continue to focus on complaint mitigation through early resolution, complaint tracking, identification of root causes of problems and advice to complainants regarding how to resolve their concerns. We also use complaint prevention strategies, by providing advice and feedback to Tarion about complaint trends and emerging issues. This approach allows the Office to resolve issues at an early stage, while using investigations to address more complex cases and systemic issues.

I would like to use this year's annual report message to provide observations about 5 areas including how our office works, an evaluation project, and trends identified in our case-work in 2016.

Previous Annual Report Recommendations

In preparing for this Annual Report, I reviewed the recommendations from previous years in order to evaluate the impact of our recommendations. In the 2010 annual report (released early 2011), we identified gaps in the Special Seasonal coverage. In response to our recommendation Tarion agreed that the issue was valid - however the change would require changes to the Customer Service Standard (Builder Bulletin 42). Tarion acknowledged that BB42 was under review, and created a temporary work-around while the bulletin was being revised. Over six years later, Tarion is still relying on this workaround, which requires individuals to identify specific cases, and is therefore subject to human error. I am disappointed that there is still not a permanent resolution to this problem.

Reasons for decisions

After reviewing recommendations and interventions made by our office in 2016 we have concluded that in the majority of complaints, Tarion's decisions are correct. We consider that they are correct when the decision is consistent with the evidence available, and within the rules of the warranty program.

We are concerned that in many of these cases Tarion has not fairly communicated its decisions - making the decisions correct, but not fair. When reviewing if Tarion has acted fairly, we apply a three-part test - we review procedural, substantive and relational fairness. We look at whether the correct process was used, if the decision is correct and fairly communicated, and how people were treated during the process. If any of these aspects are neglected, then the situation may be unfair. When we find a situation is unfair, our recommendations are directed toward rectifying the wrong. In cases where Tarion has made a correct decision, but had not communicated the decision appropriately we recommend that Tarion clarify the reasons for the decisions. Tarion decisions are now communicated more effectively, when compared to when the office was established, but this remains an area for improvement. I encourage Tarion to continue to review how it communicates with homeowners, so that stakeholders receive reasoned decisions with sufficient information and are able to understand the rationale behind the decision.

Stakeholder Perspective

In addition to reviewing individual decisions, the office also reviews the overall fairness of Tarion processes. As well as the three-part fairness test, we apply some relatively simple questions to the situations we review: “Does the stakeholder know why a decision was made? and, “Did they know what would happen next?” Unfortunately, there were too many times where we were unable to answer “yes” to these questions. Information provided by Tarion may have been correct, but it lacked context for consumers to understand the rules, or what would happen next. I encourage Tarion to view communication from the perspective of stakeholders. Tarion often uses brief and direct messaging, which can come across as terse and insensitive to stakeholders. This remains a challenge for Tarion, and an opportunity for improvement.

When the Ombudsperson reviews a complaint, and develops recommendations, we attempt to review the Tarion process from the perspective of the users. It is important that reforms and revisions to Tarion’s process are consistent with Tarion’s consumer protection mandate. While any changes must work for Tarion, it is equally important that they meet the needs of the stakeholders. We anticipate that, 2017 will be a year of further change within Tarion. Considering the impact of process changes from the perspective of the users should be a guiding principle.

Impact of the Ombudsperson Survey

In 2016, the Ombudsperson Office conducted a survey of Tarion employees to assess the impact of the Ombudsperson Office. It was focused assessing employee understanding of the office and the impact of Ombudsperson interventions and recommendations. The survey was modeled on ‘The Impact of Ombudsman Investigations on Public Administration: A Case Study and an Evaluation Guide’ developed by the Toronto Ombudsman.

Following a review of the survey results, our office concluded that there was high recognition of the role of the Ombudsperson – respondents were able to identify the role of the Ombudsperson in promoting and protecting fairness and recognize the independent role of the Ombudsperson.

The survey also provided an opportunity to critique the office. A sample of responses include:

- Feeling that the Ombudsperson advocates too strongly for homeowner’s perspective
- Concerns that Tarion acts to appease Ombudsperson
- Concern about a lack of voice of Tarion staff in Ombudsperson process (consultation during investigation)
- Employees not informed of outcomes of cases.

The survey results provided a perspective to review our practice. We were pleased to see the impact of the office in terms of general knowledge of the office and generally positive feedback. We noted that some of the critiques of the office involved misperceptions of the role and mandate for the office. This speaks to the need for ongoing communication and education within Tarion. We have a plan in 2017 to improve communication within Tarion about the role and function of the office. We have reviewed the criticism of the office and identified the following focus areas:

- Improved communication with Tarion when the Ombudsperson concludes that there is no outstanding fairness issue to be addressed.
- Reasserting that it is part of the Ombudsperson role to identify fairness issues, even if they are not identified by complainants.
- Ensuring that Ombudsperson process is perceived to be fair by Tarion
- Improving how the office speaks about its accomplishments and recommendations.



Independence

The subject of Ombudsperson independence is frequently discussed within the Ombudsman community. It is also a topic that we spend time considering, and we work to assert our independence by ensuring that the office is structured appropriately, and by how we conduct our case work. The ethical principals established by the Forum of Canadian Ombudsman hold that in order to be independent the Ombudsman office should be independent in intent, administration and decision-making. Nora Farrell, an Ombuds researcher and practitioner notes that:

The use of “internal Ombudsman” may incorrectly convey the notion that this type of Ombuds is less independent than it actually is. For example, due to the culture of the organization and the organization’s respect for the independence of the role, it is not unusual for the standard criteria for the establishment of the Ombuds role ... to be found within the terms of reference ... which founds the Ombuds role. As a result of a strong foundation of this nature coupled with the Ombuds’ personal credibility, while the role may not be configured so as to be as structurally independent as a legislated Ombuds, the incumbent may be perceived as operating at the same level, by virtue of her demonstrated capacity to “speak truth to power.”²

The Tarion Ombudsperson office was established in 2009. It was established with the intent to be an independent office. The terms of reference for the office establish the administrative structure for the office to be independent (along with reporting to the board of directors, and authority to develop and manage the budget for the office). Our interventions and recommendations demonstrate that the office operates independently while completing its casework. Most important is that Tarion respects the independence

of the office. Furthermore, the results of the survey demonstrate that Tarion understands and accepts the independent role of the office.

I encourage you to read the remainder of the report. It provides an outline of how the office works, statistics, case studies and recommendations. The role of the Ombudsperson extends beyond resolving individual complaints, and toward promoting fair practices across Tarion. The Ombudsperson Office achieved success in 2016 by working with employees from every department within Tarion. I am proud of the role the Ombudsperson Office has played in affecting positive change within Tarion, and appreciate that both Tarion Management and the Board of Directors support this important role. I would like to extend my gratitude to all the employees with whom the Office interacted this year. Fair solutions have been found as a result of their professionalism, collaboration and commitment to service. I look forward to continuing to work collaboratively to resolve complaints, and promote fair practices in the future.

Ian Darling

Ombudsperson
January 2017.

2 Farrell, Nora J., “The Evolution of the Idiosyncrasy of the Role of the Ombudsman/person in Canada” in *The Nature of Inquisitorial Processes in Administrative Regimes – Global Perspectives*, Laverne Jacobs & Sasha Baglay (eds.) (Surrey, England: Ashgate Publishing Company) 2013



When the Ombudsperson Office receives a complaint, we seek to understand the concerns and obtain permission to look into the complaint. We then assess the complaint to see what efforts have been made to resolve the problem, and we provide advice and guidance to assist homeowners in resolving their concerns. If the homeowner has not spoken to Tarion about their complaint, we will discuss

The Office strives to be responsive and timely in its work, establishing service benchmarks to help achieve this goal. We aim to respond to initial homeowner inquiries within 1 business day. We strive to complete case reviews within five working days of when we receive the homeowner's permission to access the case file. Early resolution and investigation can take longer to complete, depending on the circumstances. We strive to

When the Ombudsperson finds that a complaint has been substantiated, the Office works with Tarion to determine a fair solution. In some cases, we make a recommendation about the dispute. We then monitor the response and implementation of any changes from the recommendation.

Our Process



2016 Year In Review

In reviewing complaint trends in 2016 we identified the following five complaint trends.

1. There was an increase in total contacts to the office.
As part of this increase in total contacts was an increase in general inquiries and requests for information. These cases were generally closed during the intake phase of our process. We attribute the increase in inquiries and requests for information to the contact information for the Ombudsperson Office being more prominently displayed on the website.
2. We also received a greater number of complaints about Tarion service, rather than about more general policy-related complaints when comparing 2016 to 2015.
3. The office received a number of complaints from homeowners regarding delays by Tarion during the warranty process. Some of these delays were attributed to the time required to hire third parties to review complex defects, other delays appear to be related to workload. We identified these concerns to the Warranty Services department, and will continue to monitor the situation.
4. We received an increased number of complaints related to Builder service. In 2016 we received 118 complaints, compared to 38 in 2015. These complaints relate to how individual builders provide warranty service to homeowners. While they are not directly related to Tarion, they are significant because they point to industry-wide trends, and may be relevant to Tarion's regulatory role. The complaints were about poor after sales service provided by Builders, and the condition of homes upon closing. We also saw an increase in inquiries related to Tarion's deposit and delay coverage. This suggests that builders had more difficulty providing service to consumers in 2016. These trends may be side-effects of the trades strike in the spring of 2016 - however, from a Tarion-perspective it may point to need for more effective ways to monitor builder service, and improved outreach or education programs directed to marginal builders.

5. In 2016 we also noted an increase in complaints from builders. The mandate of the Ombudsperson office is to receive complaints from homeowners. The 22 contacts from builders suggests that builders may also have concerns about Tarion fairness, but no method of complaint. Since the office was established in 2009 we have received 76 complaints from builders. In these cases, we are limited to providing a referral to an appropriate Tarion department. The complaints come from small builders, or those who are unfamiliar with Tarion.



The most common complaints were:

- Slow/No response from Tarion
- Concerns with invoices or collections actions
- Incorrect contact information
- Questions about renewal process
- Builder security and release - particularly concerns about delays.
- Perceived unfair treatment during the warranty process
- Complaints about enforcement activities.

We will continue to monitor these complaints.

Statistics

Jurisdiction

The Ombudsperson Office received 372 complaints and inquiries in 2016. This is an increase from 2015. Of the 372 contacts, 338 fell within the jurisdiction of the Office (as outlined in the Terms of Reference which can be found on ombudsperson.tarion.com). The majority of the non-mandate complaints were related to Tarion, but were excluded from our mandate. Complaints from builders are an example of a non-mandate complaint.

Table 1 - Jurisdiction

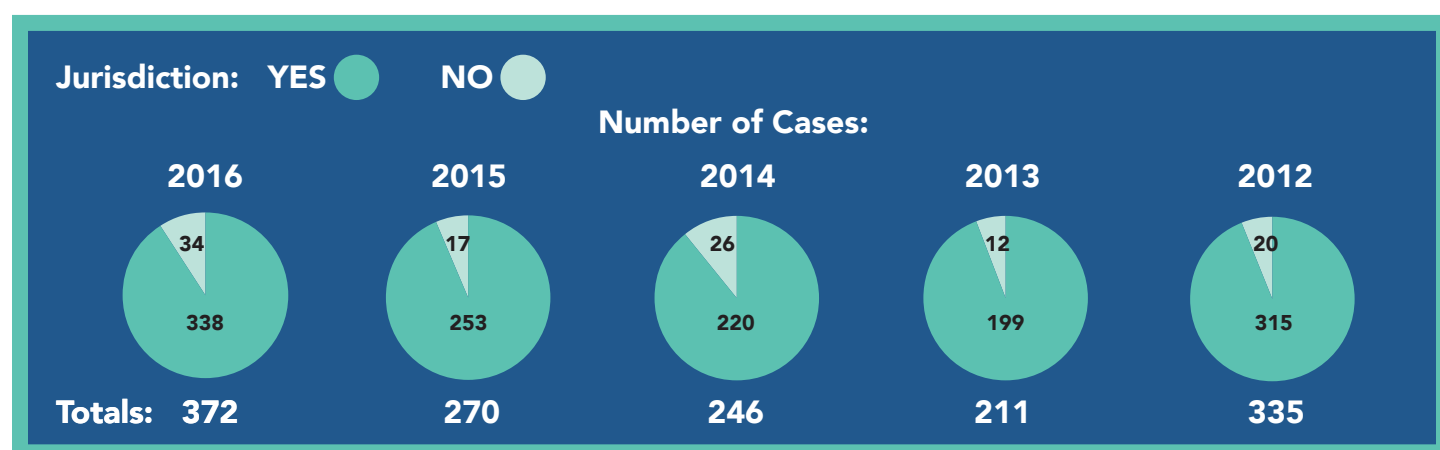
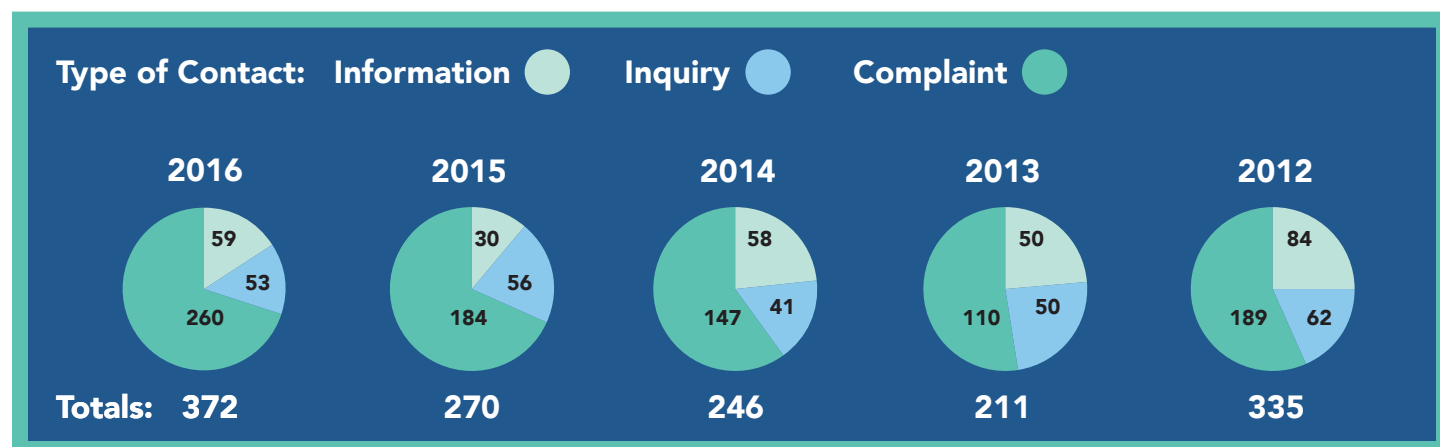


Table 2 - Type of Contact



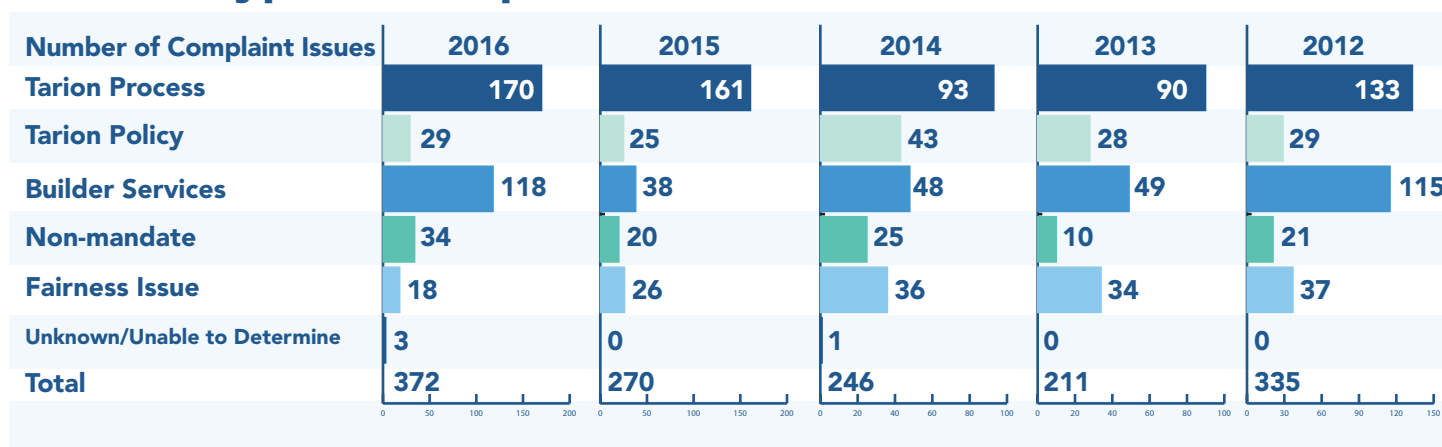
When the Ombudsperson Office receives a request for information, inquiry or complaint, we assess the concern and track the issue(s) presented. Information and inquiries tend to be resolved through the Ombudsperson intake process. These cases are resolved quickly by providing advice, information and referral.

Complaints about Tarion processes and builder services continue to be the most common types of complaints. “Builder services” refers to complaints about the service provided by builders to homeowners. These complaints are not directly related to Tarion but are important to track because part of Tarion’s role is ensuring builders meet their obligations under the warranty, and educating them regarding effective service.

These complaints tend to be resolved in the intake phase of the Ombudsperson process. In many cases, the Office helps complainants to understand the warranty process, explains how to manage their warranty complaints, and makes referrals to appropriate Tarion staff. These cases tend to have fewer interactions and are closed with one or two contacts. This demonstrates the importance of the informal role the Office plays in preventing problems from escalating.

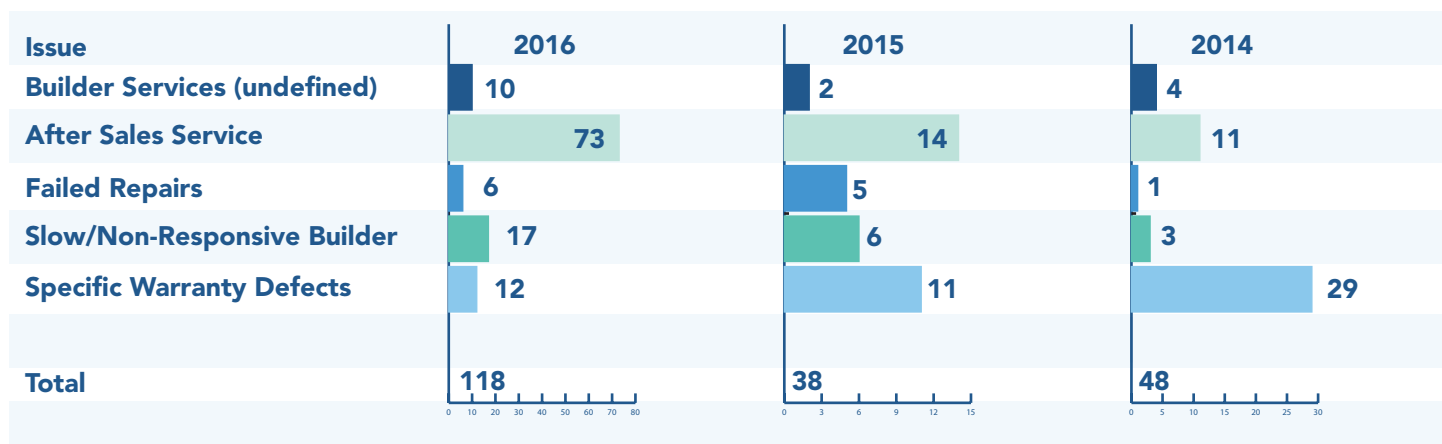
Complaints related to fairness issues remain the most complex, and take the longest to resolve. Fairness complaints frequently stem from how Tarion conducts the warranty process. We consider the basis of a complaint to be a fairness issue in cases where it includes (but is not limited to) aspects of procedural fairness, the substance of decision-making, or where interpersonal issues undermine fairness.

Table 3 - Type of Complaint



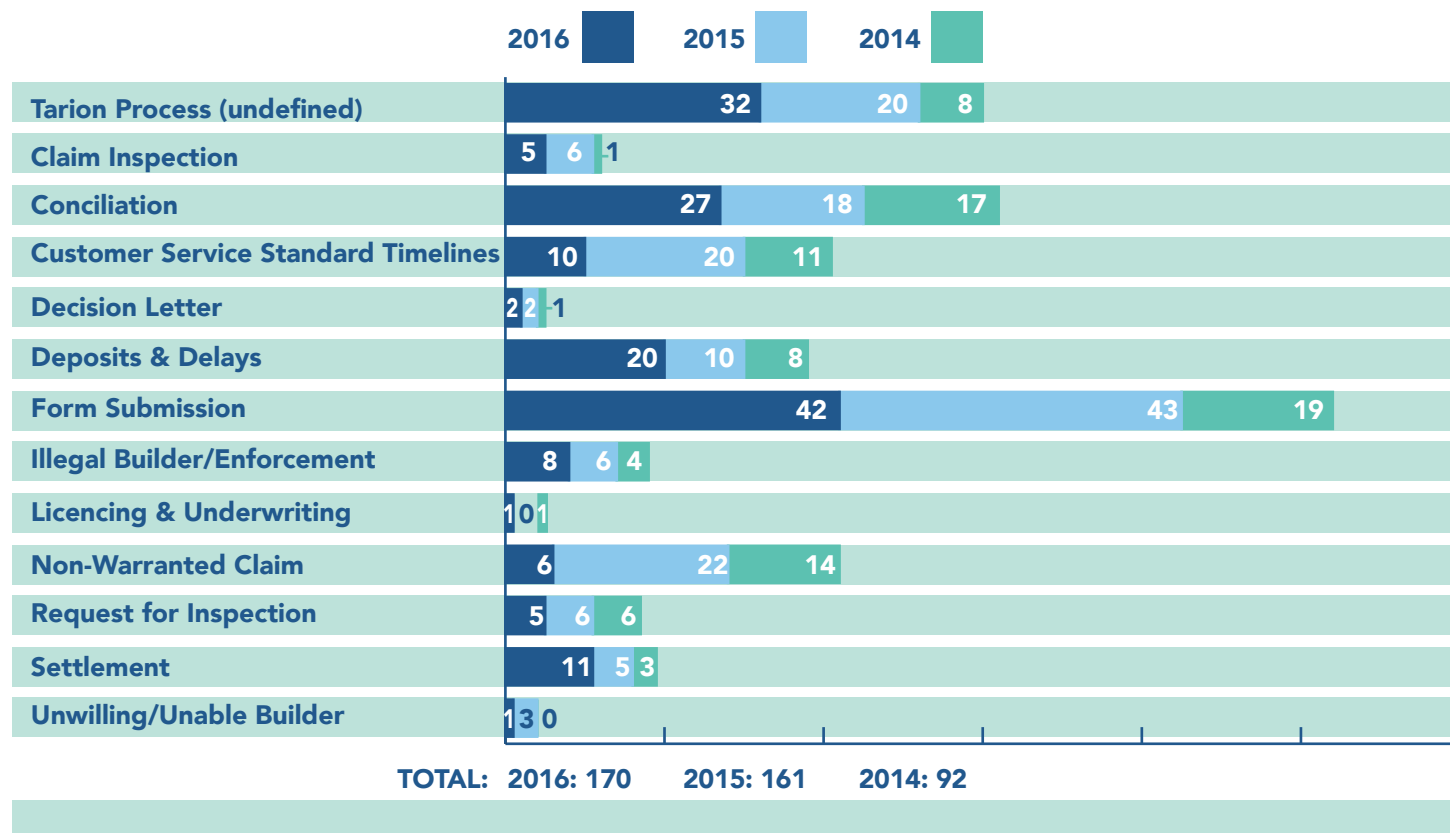
The following two tables provide some context about the specific issues raised by homeowners about “Builder Services” and “Tarion Process” complaints over the past three years. Table 4 shows that the increase in complaints about builder services were caused by growth in complaints about After Sales Service and Slow/Non-Responsive Builder. Builder services complaints are generally closed during our intake phase – by providing information, advice and referral to help homeowners address their concerns. We believe that this may be a temporary increase in concerns related to the trades strike in 2016. We will continue to monitor these contacts to determine if this is a temporary increase, or part of a larger trend.

Table 4 - Builder Services Complaints 2014 - 2016



A review of “Tarion Process” complaints shows an overall increase in these complaints since 2014. This corresponds to an increase in inspection related activity by Tarion. When comparing our complaints, the issues mirror Tarion’s warranty process - with the largest single category related to form submission, and decreasing as homeowners move through the warranty process. In 2015 and 2016 there was an increase in concerns about conciliation inspections and non-warranted claim decisions. We have not identified a single cause of this increase, but have directed our interventions, feedback to management and recommendations toward addressing any fairness issues identified through individual case work.

Table 5 - Tarion Process Complaints 2014 - 2016



Action and Resolution

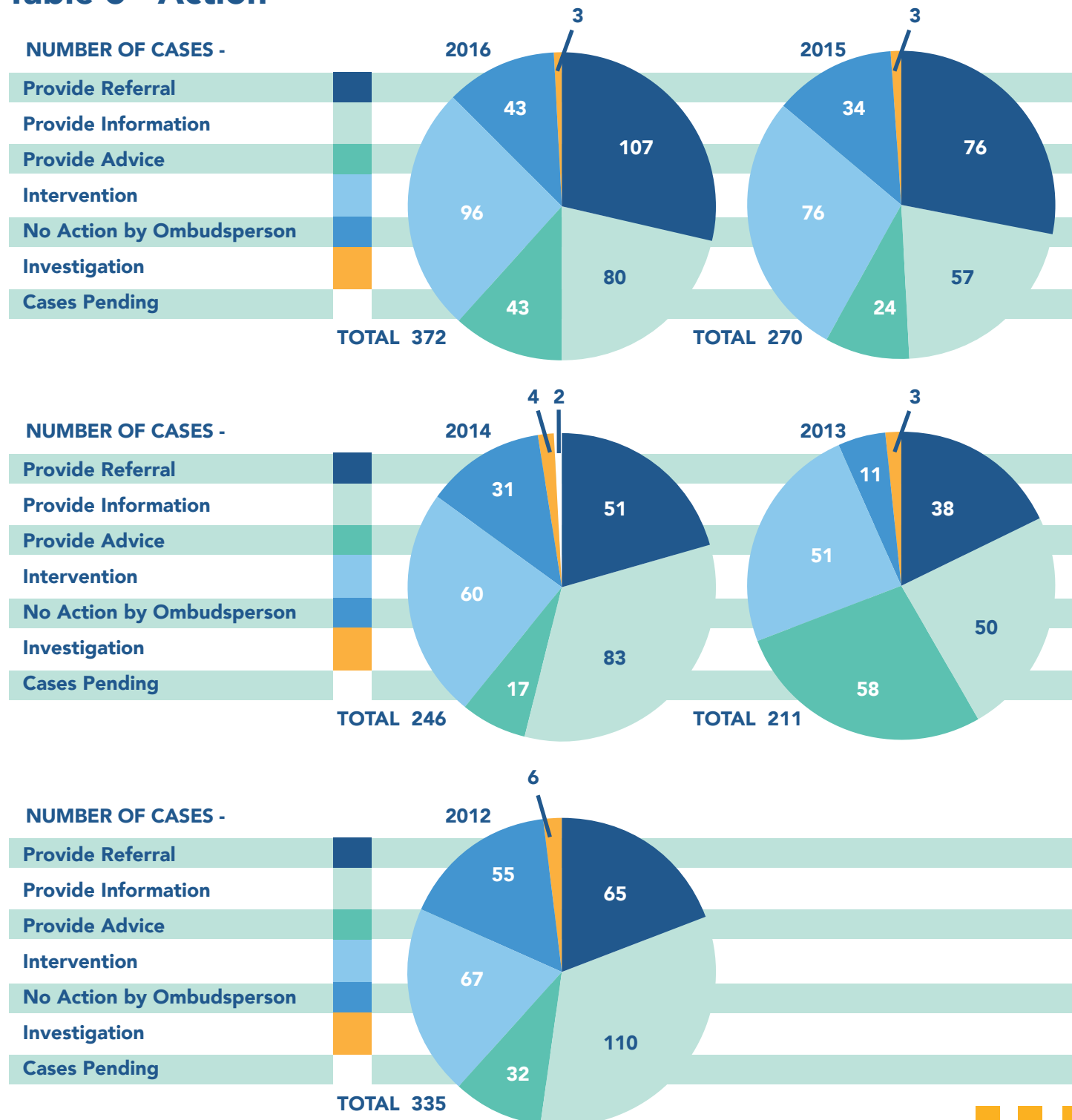
Action refers to how the Ombudsperson dealt with the complaint. Table 6 shows the important role the Ombudsperson Office plays in informally resolving complaints. It demonstrates how the Ombudsperson works to resolve concerns informally by providing information, referral and advice. The Ombudsperson is designed to be an office of last resort. This means that complainants need to address their concerns to the relevant Tarion department before we will investigate a complaint. Most cases where we provide advice and referral are premature, because the complainant has not addressed their concerns to the appropriate Tarion department. In these cases, we provide information about the complaint process and advice to complainants about how to effectively complain to Tarion. It is our experience that in most of these cases, homeowners are able to resolve their complaints and inquiries with only one contact with the Ombudsperson Office.

Intervention refers to cases where the Office attempts to resolve complaints using a variety of conflict resolution techniques and strategies. Investigation refers to formal investigations which result in findings and recommendations. We continue to focus our interventions toward early resolution. We have found it more effective to focus on conflict mitigation through early resolution than investigating what went wrong after the fact.

Investigation remains an important function of the Ombudsperson Office and is used when problems cannot be resolved informally, where there are disputes over the facts of the case or where the problem may have systemic implications. The number of cases where a formal investigation is required remain low because we are able to resolve complaints informally, and are able to make case-specific recommendations following informal interventions.

The impact of the caseload in 2016 can be seen in an increase in our intake case-work (where cases are closed after the office provides information, advice and referral). We intervened in a higher number of cases in 2016, but the rate of interventions remained relatively stable.

Table 6 - Action



Resolution

Table 7 shows how the complaints and inquiries were resolved, and how this corresponds to the phases of the Ombudsperson complaint process: intake, early resolution and investigation. Cases that were closed during the intake phase were inquiries and requests for information where the issue was premature or fell outside the mandate of the Office. Issues are determined to be premature when complainants have not yet attempted to resolve their complaints with the relevant Taron department. In these cases, we provide information and referral to appropriate resources.

Early resolution involves advice and intervention by the Ombudsperson Office. Early resolution can take one of several forms: we can provide advice to complainants about how to resolve their concerns; we also attempt to resolve complaints through conflict resolution and negotiation; in some cases, we conduct reviews to establish if a complaint is founded and may make recommendations. Investigation refers to a full and formal review of the file, interviews with relevant parties and conclusions based on the available evidence. Investigations may result in formal recommendations. The Ombudsperson Office also has the authority to start “own motion investigations.” In these cases, the Ombudsperson can choose to investigate an issue without an individual complainant. In 2016 we initiated three own motion investigations. Two of the investigations were still under way as this report was being written.

Table 7 - Resolution

Phase of Ombudsperson Process	Action: Number of Cases:	2016	2015	2014	2013	2012
Intake	Referral - Premature	88	62	41	35	56
	Abandoned by Complainant	35	13	20	10	55
	Referral/Information - Complaint out of Jurisdiction	28	17	18	6	17
	Information - Premature	63	44	52	38	86
	Referral/Information Complaint Unfounded	8	10	23	6	16
	Ombudsperson Office Withdrew	7	21	11	1	0
	Under Appeal	0	0	0	2	1
	In Litigation	1	0	0	0	2
Early Resolution	Advice to Complainant	43	24	11	55	28
	Review – Unfounded	14	15	23	12	21
	Facilitated Solution	35	21	11	8	17
	Review and Recommendation	3	8	12	7	13
	Early Resolution	41	32	19	27	17
	Compromised Solution	2	0	2	1	0
Investigation	Investigation – Unfounded	0	0	1	0	2
	Investigation and Recommendation	1	3	3	3	4
Pending	Cases with Outcome Pending	3	0	0	0	0
TOTAL		372	270	246	211	335

Case Studies

The following section includes case studies, which demonstrate how the Ombudsperson works, and provides an opportunity to learn from complaints. These examples are based on actual case files from the Ombudsperson Office. Some of the details have been changed to protect the confidentiality of the people involved.

Finding Fairness After Tarion Error

Mr. C requested a claim inspection for items that had been warranted in his Year End conciliation inspection and had not been resolved during the builder repair period. He was assigned an inspection date. One week later he was informed by Tarion that his inspection was rescheduled for a month later than the original date. He contacted Tarion and was told that, due to an error on the part of Tarion's computer system, the Warranty Assessment Report from the Year End conciliation inspection had not been sent to his builder and that the builder had been unaware that items had been warranted. Tarion stated that they had since sent the builder the report, but that they now had to provide him with time to resolve the issues. Mr. C. felt that this was unfair because he had followed the Tarion process correctly but was now being made to wait an additional 30 days due to Tarion's mistake. He was also upset that the inspection had been rescheduled without consulting him about alternate dates.



The office of the Ombudsperson reviewed Mr. C's file and determined that there had been a brief period of time where Tarion did not automatically send out both copies of the Warranty Assessment Report. The error had been caught and rectified and Tarion traced the reports that should have been sent, making sure that builders received them. Tarion is obliged by the New Home Warranty Plan Act to provide the builders with a 30-day repair period following receipt of the Warranty Assessment Report, which is why the inspection was rescheduled.

The Ombudsperson office found that Tarion behaved appropriately in rescheduling the inspection, however we determined that Tarion erred in not taking into account the inconvenience this caused Mr. C. Tarion should have proactively provided Mr. C with the reason for rescheduling and should have consulted with him on the new date. As a result of the Ombudsperson office intervention, Tarion provided a written apology to Mr. C.

Tarion accepted our recommendation that in any other cases where computer malfunction required rescheduling inspections, an explanation of the need for rescheduling would be provided along with a consultation on new dates would be provided to the homeowners.

Resolving Loss of Heat

Ms. X contacted the Ombudsperson Office mid-November desperately trying to resolve an on-going issue with the heating delivery and distribution system in her condo unit. She had been in the unit for approximately 3 months. The issue was noted as a defect at the Pre-Delivery Inspection (PDI) and 30-day form. She had experienced issues with the AC during the warmer months and now was experiencing a total loss of heat. Not only was the heating system not functional, it was blowing air conditioned air rendering the temperature in the unit 14 degrees Celsius.

Conversations with her builder and property manager had resulted in several visits to the unit to make small repairs, but none were successful. The builder was now insisting that the defect was fixed and that the homeowner was simply not using the system correctly. The builder stated that any future visits to address this issue would be charged to the homeowner out of pocket.

Ms. X had spoken to Tarion on two occasions prior to speaking with the Ombudsperson Office. She was told that the defect was not deemed an emergency and she was encouraged to continue working with the builder through the regular timelines for the Builder Repair Period which expired in mid-January. After this time, she could request an inspection and Tarion would visit the home to make a warranty assessment. She was also advised that the builder would not be required to provide portable space heaters until the temperature reached zero.

The Ombudsperson Office reviewed the Construction Performance Guidelines which says that heating systems should be capable of maintaining an indoor air temperature of 22 degrees Celsius in living spaces. Also, on further review of the Homeowner Information package, we noted that total loss of heat between September 15 and May 15 constituted an exception to the statutory warranty process and was considered an emergency. Procedure for

emergencies state that if the builder does not assess and correct the situation within 24 hours, that the homeowner should contact Tarion for further assistance.

After the office raised these findings with the Customer Service Department, Tarion scheduled an investigative inspection immediately to attend Ms. X's home. Tarion confirmed that there was no heat. The builder completed additional repairs to the heat pump and thermostat in the unit. Our Office followed up with the homeowner and she



indicated that following Tarion's intervention and the builder's latest repairs, heat was restored to the unit. Following resolution of the case, the office of the Ombudsperson spoke with the Customer Service team to ensure that new employees understand what constitutes an emergency and the requirements for heat during the winter months.

Unexplained Delays

Ms. Z contacted the Ombudsperson to complain about Tarion's slow response time to problems with her roof. She explained that the roof was defective, including missing shingles, and areas where water was penetrating into the attic and seeping into the living spaces, causing damage to the interior of the home. These items were listed on the first-year form and an inspection had been completed. Following the inspection, the roof was one of several items that were left as "not assessed" because they required Tarion to consult with an engineer before making a warranty determination.

Tarion scheduled a reinspection with an engineer. Subsequently, the homeowner did not hear from Tarion for several months despite several attempts at contacting the Warranty Services Representative. Furthermore, the report completed by Tarion's expert had not been forwarded to the homeowner for review. While Ms. Z was waiting to hear back from Tarion, the conditions of her roof continued to worsen. She was forced to perform emergency repairs to prevent further water damage. She contacted her own third parties to assess the conditions of the roof.

After speaking with our Office, we requested that Ms. Z forward us all reports from roofers and other experts that she

had independently contracted to assess her roof. We also requested that she provide invoices for emergency work completed and a timeline of failed repairs that had been completed over the course of the first year of occupancy. Our Office then presented Tarion with the information. We identified that there had been an inordinate delay in making a decision regarding the "not assessed" items. We spoke to Tarion about the lack of communication between Warranty Services and the homeowner to date. We also indicated that Tarion's expert report had not yet been provided to the homeowner and asked that Tarion make this available as soon as possible.

Following our intervention, Tarion scheduled a re-inspection with senior Warranty Services staff. Tarion hired a second engineer, roofer, and contractor to visit the home again and identify the issues in order to prepare a scope of work. Structural issues were identified and the defect was warranted. Tarion provided a cash settlement to complete the necessary repairs. The homeowner was also reimbursed for repairs that were completed to mitigate damages during the delay



Chargeable, Non-chargeable

In April 2016, Mr. N contacted the office of the Ombudsperson to complain that his Year End conciliation inspection had been made non-chargeable to his builder, despite unresolved items on his Year End list being assessed as warranted. Mr. N was also concerned that there had been an extended delay in Tarion responding to a request for more information about the Warranty Assessment Report.

The Ombudsperson office file review determined that the conciliation was made non-chargeable because the

lack of access would not affect Mr. N's warranty, it would result in a non-chargeable conciliation for the builder. We concluded that the decision to make the conciliation non-chargeable was based on standard Tarion process, and communicated to the homeowner that the decision was fair.

During the file review, the Ombudsperson office determined that there had been a delay in Tarion's response to Mr. N. Following his conciliation inspection, Mr. N had questioned his Warranty Service Representative about the assessment. Unsatisfied with the responses, Mr. N asked for, and



homeowner had not provided access to his home for the builder during the repair period. This is an exception to chargeability as outlined in the Builder Bulletin which established rules for Chargeable Conciliations (Builder Bulletin 20 Chargeable Conciliations). Although both Mr. and Mrs. N had both taken time off from work to provide access to the builder prior to submitting the Year End Form, once the form was submitted they felt they couldn't take any further time off and were unable to provide access as a result. The lack of access was well documented and Tarion had informed Mr. N prior to the inspection that although the

was provided with, the Warranty Service Manager's contact information. Mr. N sent the Manager an email asking to speak with them about the assessment. He received no response and after a two-week period, sent a follow up email. This time, he received a response and had a discussion with the Manager. When the Ombudsperson office brought the delay to the Manager's attention, they were unaware that the original email had been received. They outlined for our office the expected customer response time and provided Mr. N with a written apology for not meeting this expectation.

Major Structural Defects

This year the Ombudsperson office has noted an increase in cases involving Major Structural Defects (MSDs). Below are three examples.

MSD CASE #1:

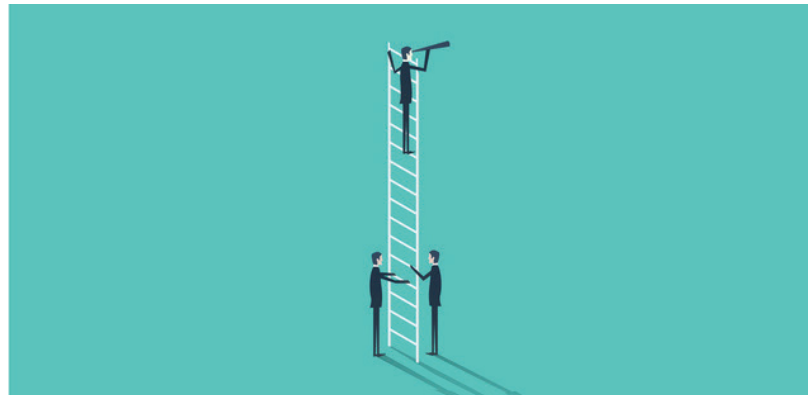
Mr. F experienced some cracks in the walls and floor of his basement and submitted a Major Structural Defect (MSD) form to Tarion in February 2016. Shortly after, he was contacted by his builder and once the weather became favourable, repairs were performed. However, within weeks of the repairs being completed, the cracking reappeared. Mr. F contacted the builder, who performed a site inspection and declined to do any further repairs. Mr. F contacted Tarion only to find out that his deadline for requesting a conciliation inspection had passed months previously. Mr. F turned to the Ombudsperson office for help. We reviewed his file and determined that Mr. F's home had been built in 2009, therefore his warranty was subject to the old process for MSD claims, which did not require the homeowner to request a conciliation within a particular time frame. This meant Mr. F was able to request the inspection and Tarion was able to assist him in having his MSD resolved.

MSD CASE #2:

Ms. A purchased a new home with the intention of putting an in-law suite in the basement. However, water penetration issues prevented her from doing so. She worked with the builder over the next 5 - 6 years, attempting to have the problems resolved. When she neared the expiry of the 7 Year warranty and the water penetration was still present she submitted a MSD Form. Ms. A believed that her issue met the criteria for a MSD and requested a conciliation inspection. The inspection determined that there was water penetration, but the item was not warranted because Tarion assessed the water penetration to be covered only under the 2nd Year Warranty, which had expired, and not under the 7 Year MSD warranty.

Ms. A believed that her issue should have been assessed against the criteria for an MSD, not dismissed as a 2nd Year issue and she contacted the Ombudsperson office. We reviewed the file and discovered that Tarion's Major Structural Defect Warranty Interpretation Guideline states that there are circumstances in which water penetration could be considered a MSD, if the water penetration is such that it "materially and adversely affects the use of a significant portion of the building for usual and ordinary purposes". Based on this information, we recommended

that the case be reviewed with this Guideline in mind. As a result, Ms. A's water penetration issue was reopened and re-assessed based on the MSD criteria.



MSD CASE #3:

Mr. P was in his 5th year of his warranty when he discovered mould in his attic, caused by ice damming and subsequent water penetration. When he called Tarion to inquire about what could be done, he was advised to submit an MSD form so that the issue could be investigated to determine whether it fit the criteria for an MSD. He did so, and an inspection was scheduled. The inspection took place and it was determined mould was present in the attic, but did not fit the definition of an MSD, because it was small isolated patches that could easily be cleaned. The defect was not warranted.

Mr. P. approached the office of the Ombudsperson asking why Tarion had recommended that he submit an MSD form when there was no MSD. The office performed a file review and determined that the Work the File process was not properly followed and that no one had spoken to the homeowner to determine whether or not the item he listed on his form would fit the criteria of an MSD. Had questions been asked, it would have been easy to discover that the mould present affected neither the function of load bearing elements or use of a significant portion of the living space. In fact, the inspection was not needed to make this assessment and, due to the file review by the office of the Ombudsperson, Mr. P was refunded the cost of the inspection. In addition, a Warranty Services Manager contacted Mr. P to apologize and to provide a detailed explanation of why the item was not warranted.

Recommendations

The mandate for the Ombudsperson Office includes resolving individual complaints and addressing systemic issues. An issue is considered systemic when a number of homeowners are affected by a Tarion process, and the concerns do not relate only to an individual decision or action.

The Ombudsperson Office can make recommendations related to individual cases. These include suspending or postponing an action; reconsidering or changing a decision; and reducing delays. We can recommend that Tarion provide an apology or financial restitution. We make recommendations to improve communication, make changes to

services or provide reasons for decisions in individual cases. Our systemic recommendations are to make changes to policies or general practice.

When we make recommendations, we work with Tarion to ensure there is understanding of the recommendation and specific agreement in implementing the recommendations. Following acceptance of the recommendation, the Office is in regular communication with Tarion regarding the implementation of recommendations. The Consumer Committee of the Board of Directors then monitors Management's response to the recommendations.

Table 7 - Status of 2016 Recommendations

	TOTAL	Implemented	Not Implemented	Partially Implemented	To Be Implemented
Actions & Decisions	1	0	0	0	1
Apology	4	3	1	0	0
Recommend to improve communication (Individual Case)	1	1	0	0	0
Recommend to provide reasons for decision	1	1	0	0	0
Recommendation to change policy	3	0	0	0	3
Recommend change to practice	7	1	0	0	6
TOTAL	17	6	1	0	10

In 2016, The Ombudsperson office issued 17 recommendations. These recommendations were directed toward case specific remedies, as well as recommendations to change policy or practice. Changes to policy and practice take longer to be implemented because the work required to satisfy the recommendation is more complex.

During 2016 Tarion chose not to accept one recommendation. This was the first time since the office was established

that this has happened. In the case in question, following an in depth investigation the Ombudsperson office recommended that Tarion acknowledge an error, and apologize to the homeowner for the situation. Tarion refused to accept the recommendation because they did not believe that an error occurred. We made a further 10 recommendations to improve Tarion's process as a result of this investigation. Tarion accepted these recommendations, and is in the process of implementing changes.

Systemic Recommendations

Update on Recommendations in the 2015 Annual Report

The 2015 Annual Report contained three systemic recommendations. They were directed toward improving practices, and enacting changes geared to conflict prevention. The recommendations considered: Delayed Closing, Financial Loss and Deposit Claims Process; Policy and Process Development; New Builders Outreach; and Contract Homes. Tarion accepted the recommendations and developed an implementation plan. These commitments were outlined in the Management Response section of the 2015 annual report. Management are responsible for reporting on progress toward implementing the recommendations to the Consumer Committee of the Board of Directors. I can report that Tarion is on time with respect to the commitments to implement the recommendations.

2016 Systemic Recommendations

Fair Cash Settlements

The Ontario New Home Warranties Plan Act establishes that if a builder does not complete repairs that Tarion can pay compensation, perform repairs, or arrange for repairs to be completed. Tarion has internal guidelines that establish criteria for when it is appropriate to resolve a claim by cash settlement. These include assessing health and safety concerns, the complexity of the defect, or if the homeowner is in a vulnerable position. We accept that cash settlements can be appropriate, however we are concerned that the process used when dealing with cash settlements is not always fair. We have reviewed complaints received by the Ombudsperson about cash settlements and have identified the following concerns about the cash settlement process. Homeowners have told us that they:

1. Feel abandoned by Tarion and surprised that Tarion is not completing the repair;
2. Do not understand how the cash settlement process works;
3. Do not understand how Tarion develops the scope of work for the repair;
4. Feel overwhelmed by the process of repairing their home. Frequently homeowners state that they purchased new homes in order to avoid having to oversee repair work;
5. Do not understand how Tarion establishes the value of repairs, and the process to secure independent quotes to establish the cost of the repair;
6. Do not understand how the HST is paid by Tarion;
7. Do not understand the wording of the standard settlement and release documents. They indicate that they feel that they are releasing Tarion from all further warranty obligations, whereas Tarion sees the release relating only to the scope of work for the repair.

We have determined that the following elements of a fair

process relate to cash settlements. Tarion should ensure that there is:

1. A clear assessment of the capacity of homeowners to manage the repair process;
2. Where appropriate (complexity of issues, ability of homeowner to manage the process), the cash settlement should include the costs associated with expert oversight - for instance project managers or engineers;
3. Fair notice that cash settlement is being considered. Fair notice includes notice to homeowners as soon as Tarion is considering providing a cash settlement, and an opportunity for homeowners to provide comment regarding the proposed settlement;
4. Clear communication about the cash settlement process. Including:
 - a. The scope of work, including: information about how Tarion establishes the scope of work, and value of the repair
 - b. information about how to select a contractor;
 - c. how Tarion completes HST rebates
 - d. what happens if new warranty issues are identified
 - e. how to communicate with trades about warranties to repair work;
5. Clear and plain language settlement and release documents such it is clear that the settlement and release documents only relate to specific items, not global release of their warranty concerns;
6. Cash settlements must be offered in a manner that gives homeowners genuine choice over which trades conduct the work.

Major Structural Defect Assessments

In July 2010 the Major Structural Defect (MSD) coverage was changed to clarify the definition of a MSD. The changes were recorded as part of Builder Bulletin 24R - SEVEN YEAR WARRANTY FRAMEWORK – MAJOR STRUCTURAL DEFECTS (BB24R). The change came into effect for new homes where the agreement of purchase and sale was completed after July 1, 2012. In July 2014 Tarion published a guide to assist in its interpretation entitled “MAJOR STRUCTURAL DEFECT WARRANTY INTERPRETATION GUIDELINE.” The guideline was released in June of 2014, as homes under the revised MSD definition entered their third year of warrant coverage. The guideline was geared toward providing an understanding of how Tarion would implement the new MSD definition.

The guideline provides information about how Tarion would apply the new three part MSD definition. In describing the three-part test, BB24R states that:

“An MSD is, generally speaking, a defect in work or materials that meets one or more of three tests: failure, function or use.

- 1. FAILURE TEST** A defect in work or materials will be considered an MSD if the defect has resulted in the failure of a structural load-bearing element of a building.
- 2. FUNCTION TEST** A defect in work or materials will be considered an MSD if the defect materially and adversely affects the load-bearing function of a structural load-bearing element.
- 3. USE TEST** A defect in work or materials will be considered an MSD if it materially and adversely affects the use of a significant portion of the building for usual and ordinary purposes of a residential dwelling (subject to any specific use provisions set out in the purchase agreement for the home). The use test has two elements: (i) a material and adverse effect on use as a residential dwelling; and (ii) that affects a significant portion of the home.”

During 2016 we received a number of complaints about non-warranted MSDs. When we reviewed the complaints, we generally found that the warranty decision was correct - however we were concerned that Tarion’s decisions did not apply the tests outlined in the interpretive guideline. For example, in one case the warranty assessment indicated that water penetration was observed, but was not considered a defect because water penetration is only covered in the two-year warranty. The assessment did not make any reference to failure, function or use and did not take into account that water penetration can, according to the guideline constitute a MSD. The result is that the homeowner did not understand the decision. We considered the decision unfair because Tarion had failed to provide adequate reasons for the assessment. The case was resolved when

Tarion issued a revised warranty assessment, however we were concerned about the systemic issues identified during this process. When we spoke with Warranty Services staff about the interpretive guidelines, they were unaware of the document. Tarion did not conduct any additional training for staff regarding the content of the bulletin when it was published in June of 2014.

In reviewing the guideline, we also note that it is not consistent with current Tarion practice with respect to hiring independent experts to assess the defect. The bulletin suggests that the onus is on homeowners to produce expert reports to demonstrate that the defect is an MSD. The current practice is if a structural item is identified during the work the file process, Tarion will bring an expert to the inspection. The interpretative guideline appears to suggest that the homeowner is responsible to hire an expert, and Tarion only contracts with an expert when the builder and homeowner have provided conflicting reports.

Therefore, we recommend that:

1. Tarion train staff to ensure that the three-part test is used as part of the assessment
2. Tarion ensure that the three-part test is referred to when Tarion provides reasons for the warranty assessment
3. Tarion establish a quality assurance process to monitor implementation
4. That the appropriate section of interpretive guideline, and internal operational policies be revised to reflect current practice with respect to Tarion hiring experts for MSD investigations.
5. That Tarion examine its process for developing and promulgating interpretive guidelines to ensure that staff are following the process as described.
6. Tarion ensures that the MSD interpretative guideline is posted in a prominent manner so that it can easily be found by builders and homeowners.

Effective Committee Operation

Tarion frequently is required to make complex decisions that require input from different departments. In order to monitor these issues, and make decisions, Tarion has a variety of standing and ad hoc committees. Some are directed toward achieving a particular task or project, whereas others meet on a regular basis to fulfill a monitoring, or decision-making function. Use of committees can be beneficial because it ensures that multiple voices are represented, but it can lead to concerns about lack of accountability and poor decision-making.

Actions of committees can have a fairness impact for individual or many homeowners, depending on the nature of the decisions and committee authority. The Ombud-

sperson office has identified a concern that several Tarion committees are operating without clear terms of reference, or with terms of reference that are not consistent with how the committees actually function. We have also identified a concern with the process for establishing committees. There is no clear and consistent process to establish if a committee is necessary, or to establish the committee goals, objectives and membership to ensure Tarion staff are informed about the process and avoid duplication. In 2016 Tarion established a Builder Conduct Committee - the terms of reference for this committee provide a good model for other committees. The following graphic outlines what the Ombudsperson office considers as essential components, and their function, in a robust terms of reference.



The Ombudsperson recommends that Tarion review the structure, and function of operational committees to ensure that:

1. There is a clear and consistent process for the establishment of committees.
2. The role and function of the committee is clear
3. Committees have clear terms of reference, incorporating the essential elements of a terms of reference.

Conclusion

In closing, I would like to provide some advice to consumers. This report identifies instances where Tarion could operate more fairly, however, Tarion is governed by the limits of The Ontario New Home Warranties Plan Act (the Act). Under the Act homeowners have responsibilities as well as rights and they must ensure that they both understand and act on them. We regularly receive complaints from consumers who have not done so. For example, a complainant did not submit any warranty forms because they did not think that Tarion would help. Another homeowner cancelled a scheduled conciliation inspection even though repairs had not yet been completed. In both situations, by the time they contacted the Office the warranty for the home had already expired. In cases like this, we are severely limited in what we can do to affect a positive outcome. Consumers must protect their rights by becoming familiar with the warranty program, knowing the relevant dates, reporting warranty concerns and requesting conciliations. Knowledgeable, active and engaged self-advocacy is the most effective way consumers can protect their warranty rights, and use the warranty program to provide fair and effective resolution of warranty complaints.

Since its creation in 2009, the Office has worked to establish operating procedures that reinforce the principles of independence, impartiality, confidentiality, accessibility and fairness. We continue to benchmark our practices against other Ombudsman offices in the public and private sectors. I am proud of the work we have done to promote and protect fairness for home buyers.

Ian Darling,
January, 2017.



Management Response

Part of the mandate of the Ombudsperson's Office is to identify complaint trends and systemic issues, and to recommend improvements. On behalf of the Board of Directors, Tarion's management team is pleased to respond to the 2016 Ombudsperson's Annual Report.

Management is committed to continuous improvement and understands that the recommendations of the Ombudsperson contribute to our continuous improvement. Accordingly, we will strive to ensure that the manner in which we respond to both (a) the Ombudsperson recommendations in the report (and going forward); and (b) the Ombudsperson's day-to-day recommendations, will create effective, reliable and replicable fixes. It is our undertaking to "test" any proposed solution to an Ombudsperson recommendation for effectiveness, reliability and replicability in addition to responsiveness to the Ombudsperson's observations.

Recommendation 1:

Management will conduct an internal review of the cash settlement process and module, taking into consideration the elements of a fair process in cash settlements.

The timing for the completion of the review: March 31, 2017.

Following the review, management will work towards developing and implementing a revised cash settlement process that will take into consideration the six elements of fairness. This will include clear language explaining the specific issues that are subject to the settlement and how to address related issues that may become apparent following the execution of the settlement. Recommendations for the revised process will be reviewed with the Ombudsperson prior to implementation.

Timing for recommendations to be reviewed with the Ombudsperson: June 30, 2017.

Timing for implementation of recommendations and module update: September 30, 2017.

Recommendation 2:

Management will review the current MSD process, module and BB24R interpretive guidelines and develop recommendations for the improvement of the current process. Any recommendations will be reviewed with the Ombudsperson prior to implementation.

Timing for the completion of the review: June 30, 2017.

Management will develop a training program for all Warranty Services staff to ensure that the three-part test is used as part of the assessment and that the Warranty Assessment Report reflects the reasons for the assessment. This program will

begin in January 2017 in discussion format and will take place during manager and field unit meetings for soft implementation. The recommended process will be drafted for review prior to a hard implementation.

Timing for the recommendations to be developed and reviewed with the Ombudsperson: June 30, 2017.

File reviews for all Major Structural Defect claims will be mandatory to ensure the process is followed and the results will be discussed during field unit meetings.

Timing for the development and implementation of a quality assurance process: September 30, 2017.

Timing for the development and implementation of the training program: December 31, 2017.

Management will also review the interpretive guidelines and consider the practicality of making revisions in order to reflect current practice related to Tarion hiring experts. The module will also be updated to reflect the current practice. In addition, a review of the process for developing and promulgating interpretive guidelines will be reviewed to ensure they follow processes currently developed for other corporate publications.

Full review and implementation of changes: December 31, 2017.

Recommendation 3:

Management will review the current operational committees with the Ombudsperson to confirm which committees fall within this recommendation.

Timing for Management to review all committees with the Ombudsperson to confirm which fall within this recommendation: March 31, 2017.

Any committees that do not have these points in place will be identified and further reviewed to determine whether those committees will continue into 2017. Committees that are identified to continue into 2017 will be required to meet the points referenced in the recommendation.

Management will develop a framework for all affected committees to follow: September 30, 2017.

All affected committees will be subject to this framework which will include goals, objectives, and terms of reference: December 31, 2017.

Management will conduct ongoing monitoring of the committees for effectiveness, relevance and functionality:
Ongoing.