

The Senate

Standing Committee on Economics

Australia's mandatory Last Resort
Home Warranty Insurance scheme

November 2008

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Senate Standing Committee on Economics

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Chapter 1

Introduction

Conduct of the inquiry

1.1 On 19 March 2008 the Senate referred to the Standing Committee on Economics for inquiry and report:

Australia's mandatory Last Resort Home Warranty Insurance scheme, including:

- (a) the appropriateness and effectiveness of the current mandatory privatised Last Resort Builders Warranty Insurance scheme in providing appropriate consumer protection and industry management;
- (b) the reasons for and consequences of the ministerial decisions relating to the removal of consumer protection provisions in respect of Corporations Regulation 7.1.12(2);
- (c) the ramifications for the future supply of this insurance product following the draft recommendations from the Productivity Commission report released in December 2007;
- (d) any potential reforms and their costs and benefits which may lead to appropriate consumer and builder protection and improved housing affordability; and
- (e) any related matters.

1.2 The committee advertised the inquiry on its website and in *The Australian* and wrote to many peak bodies inviting submissions. The committee received 125 submissions (see Appendix 1) and held seven hearings (see Appendix 2). The committee thanks submitters and witnesses for their contribution. At two of the hearings the witnesses asked, and the committee agreed, to take evidence confidentially on grounds of commercial confidentiality.¹ Where the report refers to evidence taken confidentially this is done with the witnesses' agreement. The Committee received a private briefing from the Productivity Commission on its recent review of Australia's consumer protection framework.²

1 Hearing of Vero Insurance Ltd on 20 June 2008 and of HIA Insurance Services Pty Ltd on 11 August 2008.

2 Productivity Commission, *Review of Australia's Consumer Protection Framework*, report 45, 30 April 2008

Background

1.3 The inquiry arose as a result of questions being raised about the adequacy of consumer protection in the current arrangements.

1.4 The insurance is taken by the builder, and covers the homeowner/consumer against loss from defects or non-completion of building work in certain conditions. In most states/territories the insurance is mandatory - the builder must take the insurance before either signing a contract or starting work. It is also 'last resort'- i.e. a claim can be made only if the builder is dead, disappeared or insolvent. Queensland has a 'first resort' scheme in which that limitation does not apply.³ Tasmania's mandatory last resort scheme was made voluntary from 1 July 2008.

1.5 The insurance is obtained from private insurers, except in Queensland where the scheme is a government monopoly. In theory nothing stops builders or consumer from buying extra cover, such as first resort cover, voluntarily, but in fact insurers do not offer it.

1.6 The current last resort arrangements in New South Wales and Victoria started on 1 July 2002, and there have been several inquiries and a number of complaints about the scheme, mostly from New South Wales and Victoria. Concerns about the insurance arrangements, compared to concerns about regulation of builders and dispute resolution in domestic building, should be distinguished conceptually but in practice they are closely related.

1.7 Most submissions were from either consumers or builders who are unhappy with the existing system. Almost all submissions were from New South Wales and Victoria. There were few submissions from South Australia or Western Australia, although these states' schemes have always been last resort schemes.⁴

Treatment of adverse reflections and submissions

1.8 The committee prefers to make submissions public as a resource for further public debate on the topic of inquiry. However the committee may keep a submission confidential at the submitter's request or by the committee's resolution.

3 The cover is also broader in Queensland: it includes no-fault subsidence (providing the builder has tested the ground according to the Australian Standard); cover for consumers who are not insured because of the builder's fraud; and no 20 per cent cap for non-completion. In the ACT the Master Builders Fidelity Fund may at its discretion, and sometimes has, paid claims where the builder was not dead, disappeared or insolvent. Queensland Building Services Authority, submission 8, attachment, p5. Mr J. Howard (Master Builders Fidelity Fund), *Committee Hansard* 13 June 2008, p.43

4 In South Australia the scheme under the *Building Work Contractors Act 1995* carries over that established by the *Builders Licensing Act 1986*. An industry-based voluntary scheme operated before then. In Western Australia the scheme was voluntary before 1997.

1.9 This inquiry received confidential submissions at the request of individual complainants; parties with reasonable requests for commercial confidentiality; and by committee resolution due to extensive adverse reflection.

1.10 The Senate's rules provide that if a submission makes relevant 'adverse reflections' on another party, the other party should be given reasonable opportunity to reply. Adverse reflections are generally regarded as comments which, if it were not for parliamentary privilege, might sustain a defamation action. Mere disagreement with another party's views is not an adverse reflection.

1.11 Many submissions to this inquiry contained adverse reflections. Mostly they were consumers naming individual builders or insurers, and builders complaining about insurers or the Housing Industry Association. The committee invited and received a number of replies.

1.12 Furthermore, the committee received some submissions regarding disputes that originated prior to the introduction of the change to 'last resort' in NSW and Victoria on 1 July 2002. The committee accepted these as public submissions, however must note that these cases fall outside the terms of reference of the inquiry, as they do not relate directly to the mandatory last resort home warranty insurance scheme and its mechanisms post 2002.

1.13 The Committee's focus was the policy aspects of home warranty insurance. The committee was not in a position take a view on individual disputes.

Summary of evidence received

Issues in submissions from consumers

1.14 The main issues or claims in submissions from consumers were:

- the lack of information and misunderstanding about the coverage of the insurance;
- that claimants may need to force a builder into insolvency, which is a slow and costly process (and legal costs are not recoverable in the insurance claim);
- alleged oppressive behaviour by insurers refusing claims or undervaluing the cost of claims;
- state licensing authorities not being diligent enough in vetting builders and getting rid of bad builders;
- resolving disputes in the various state consumer tribunals is slow and expensive; builders or insurers may prolong proceedings to wear the claimant down.

1.15 There was no suggestion that the insurance is a significant issue for the affordability of housing (for new house construction the insurance is usually under 1 per cent of the project value).

1.16 The stories of the individual complainants were often harrowing. However from a policy perspective the committee must consider whether they are representative of a wider problem, or whether they are unusual cases in a generally satisfactory system. The committee notes that many of the very complex and difficult cases presented as evidence originated prior to the introduction of the 'last resort' changes in NSW and Victoria on 1 July 2002, and therefore relate to a system that has already been superseded.

Issues in submissions from builders

1.17 The main issues or claims in submissions from builders were:

- difficulty getting insurance; with a general argument that it is not right that unaccountable private insurers effectively act as the financial assessors on behalf of state licensing authorities and may decide who is allowed to work as a builder;
- alleged oppressive behaviour by insurers such as unreasonable caps on turnover or unreasonable demands for security;
- difficulty getting insurance is encouraging builders to withdraw from the industry, or not enter it, adding to a skills shortage;
- the need for insurance encourages working outside compliance, such as with sham owner-builder arrangements.

1.18 Again, the committee must consider whether the submissions indicate a general problem, or whether the submitters' difficulties are unusual cases in a generally satisfactory system.

Response from insurers and regulators

1.19 The main supporters of last resort insurance in this inquiry were the Housing Industry Association, the Insurance Council of Australia, the NSW and Victorian governments, and Vero Insurance Ltd. Their main responses were:

- mandatory last resort insurance has delivered consumer protection at an economical, and still declining, cost;
- complaints that the market is not competitive, and insurance is too hard to get, may have had substance in 2001-2002, after the collapse of HIH, but this is no longer the case;
- financial assessment by insurers imposes a worthwhile discipline on builders and has improved builders' capital adequacy, to the benefit of consumers.

1.20 Both supporters and detractors of last resort schemes referred to the cost of insurance, in opposite senses. They compared premiums in NSW and Victoria with those in Queensland: supporters argued that competition has brought cheaper premiums in NSW and Victoria; detractors disputed this. This is considered further from paragraph 5.5. The primary concern of consumers was the quality of the consumer protection.

Structure of the report

- 1.21 Chapter 2 gives history and description of current arrangements.
- 1.22 Chapter 3 discusses the issues raised by builders.
- 1.23 Chapter 4 discusses the issues raised by consumers.
- 1.24 Chapter 5 discusses responses by insurers and regulators.
- 1.25 Chapter 6 discusses other consumer protection issues.
- 1.26 Chapter 7 discusses various other matters.
- 1.27 Chapter 8 makes recommendations.

Chapter 2

Description and history of home warranty insurance schemes

Description of home warranty insurance schemes

2.1 Home warranty insurance¹ covers the homeowner for non-completion and defects in building work.

2.2 Last resort insurance provides cover only if the builder is dead, disappeared or insolvent. These events act as a 'trigger' for a claim to be processed under the last resort system.

2.3 Last resort insurance, if triggered, provides for an insurer to cover the homeowner for loss arising from completing the house or remedying any defects in the previous building work. The value of insurance is capped at \$200,000 in Victoria and \$300,000 in NSW.²

2.4 Claims for non-completion are capped at 20 per cent of the contract value in NSW and Victoria. The cap for non-completion reflects the expectation that home owners will have made progress payments to the builder according to normal practice in the building industry. If the builder does not complete the work, it is assumed that the cost of completion will not be the full value of the house.

2.5 A 'first resort' scheme provides similar cover, but without the limitation that the builder must be dead, disappeared or insolvent.³ In this case, if a claim is proved the insurer arranges or pays for rectification then seeks recovery from the builder.

2.6 In either case the builder buys the insurance, with the homeowner named as beneficiary. This differentiates home warranty insurance from most insurance products wherein consumers take out a particular amount of insurance to protect their own assets. Home warranty insurance is a third party insurance, similar to compulsory wholesale insurance taken out by employers on behalf of employees for injury at work, or to compulsory insurance taken out by motorists on behalf of others who may

1 Often called builder's warranty insurance or home builders' warranty insurance; home indemnity insurance in Western Australia.

2 Other statutory limits are in Queensland \$400,000; SA \$80,000; WA \$100,000, Tas \$200,000; ACT \$85,000; NT \$80,000. Insurance Council of Australia, submission 44, attachment A.

3 The current government operated first resort scheme in Queensland provides more cover than the last resort schemes in other states, viz: no-fault subsidence (providing the builder has tested the ground according to the Australian Standard); cover for consumers who are not insured because of the builder's fraud; and no 20 per cent cap for non-completion claims.

be injured in an accident. Thus it is not typical of 'insurance' as understood by many consumers.

2.7 All states and territories have home warranty insurance. In all except Queensland it is last resort. In all except Tasmania it is mandatory (the insurance was made voluntary in Tasmania from 1 July 2008). In all except Queensland it is privately underwritten. The first resort scheme in Queensland is operated by a government monopoly, the Queensland Building Services Authority, which also carries out builders licensing and enforcement functions.

2.8 NSW and Victoria had first resort schemes similar to Queensland's. They switched to private insurance after abandoning their monopoly government models in 1996-97. They narrowed the coverage to last resort from 1 July 2002, as a response to the crisis in availability of insurance following the collapse of HIH in March 2001. In other states and territories the insurance has always been privately underwritten last resort. More details of the NSW, Victorian and Queensland schemes are at paragraph 2.19 and following.

2.9 Five general insurers offer home warranty insurance. All insurance is mediated by brokers. Further details of the states' schemes are in appendix 3. In the ACT insurance is also offered by the Master Builders Fidelity Fund. Being a discretionary mutual fund the MBFF is not prudentially regulated by APRA, but is regulated under the ACT *Building Act 2004*, which reflects APRA standards.⁴

Recent history⁵

2.10 The collapse of HIH Insurance in March 2001 created severe capacity constraint in the market as the company at the time had between 30% and 40% market share and in many cases offered the lowest premium. Immediately following the HIH collapse a number of other insurers pulled out of the market in part due to the withdrawal of reinsurance. As a result many (particularly small to medium) builders found it difficult to obtain HBWI, and were not able to retain their building licences.

2.11 On 13 March 2002, after consultation with the insurance industry, the New South Wales and Victorian Governments jointly announced a '10 point plan' intended to stabilise the market for home warranty insurance (comments in square brackets are from the 2002 Allen report mentioned further below):

New Model for Builders' Warranty insurance in NSW/Victoria

1. The threshold for compulsory home warranty insurance will be raised to \$12,000. [the same as for Western Australia and South Australia]

4 Mr J. Howard (Master Builders Fidelity Fund), *Committee Hansard* 13 June 2008, p.45

5 This section is based on Insurance Council of Australia, submission 44, and Productivity Commission, *Review of Australia's Consumer Policy Framework*, April 2008, p119

2. The minimum period of cover for structural defects will be 6 years. [from 7 years in NSW and 6½ years in Victoria previously]
3. The minimum period of cover for non-structural defects will be 2 years. [no distinction between structural and non-structural defects existed previously]
4. The mandatory requirement for builders of high-rise residential buildings to provide builders warranty insurance will be removed. Owners of high-rise dwellings will have access to a last resort catastrophe fund which is to be funded by builders and insurers. [2002 note: NSW did not proceed with this exemption, but instead agreed to underwrite private insurance for this purpose]
5. The maximum cover (i.e. excluding legal costs) for non-completion claims will be 20 per cent of the original building contract amount. [bringing NSW in line with Victoria]
- 6A. A homeowner will be able to claim under a home warranty insurance policy when their builder is dead, has disappeared, or is insolvent. [making insurance a 'last resort' as exists in WA, SA and the ACT]
- 6B. Insurers and NSW and Victorian agencies will agree procedures which will provide insurers with an opportunity to meet consumer needs for settlement of a claim prior to the 6A trigger point being reached.
7. The minimum amount of cover will be \$200,000 (inclusive of legal and other costs). [putting Victoria on a par with NSW]
8. New South Wales and Victoria will use their best endeavours to harmonise their builders' warranty insurance products and the specified processes to be followed by all parties (insurers, builders and homeowners). [2002 note: this resulted in both states adopting early intervention mechanisms along the line of Qld and WA, although NSW stopped short of giving builder licensing investigators powers to arbitrate disputes on site]
9. Insurers' liability in respect of claims above \$10 million arising from the death, disappearance or insolvency of any single builder will be capped. The catastrophe fund referred to at 4 above will also be available to meet claims liabilities in excess of \$10 million.
10. New South Wales and Victoria will use their best endeavours to harmonise the reporting requirements for insurers between the two states.⁶

2.12 NSW and Victoria changed their schemes accordingly from 1 July 2002.⁷

6 Apart from the points in square brackets, this is the complete text of a document provided by the Builders Collective of Australia, which appears to be contemporary but has no author or date. It is presumably the '10 point plan' referred to in the governments' announcement of 13 March 2002, however the Committee has not been able to find it in its original context to confirm this. Builders Collective of Australia, submission 20, p.14. P. Allen, *National Review of Home Builders Warranty Insurance and Consumer Protection*, report to Ministerial Council on Consumer Affairs, June 2002, p.20

2.13 The Ministerial Council on Consumer Affairs in 2002 commissioned a national review of home warranty insurance and consumer protection (the Allen Inquiry). The review considered insurance as well as licensing, contracts, dispute resolution and compliance. Its core recommendation was to 'put less emphasis on insurance and give more attention to strengthening the regulatory framework'.⁸

2.14 A 2005 inquiry into housing regulation in Victoria by the Victorian Competition and Efficiency Commission (VCEC) considered home warranty insurance among other things. Its main conclusions on HWI were:

- the crisis in availability of insurance which occurred in 2001-02 had ended;
- the market for insurance was competitive and there was no sign of insurers making excessive profits;
- insurers had responded to concerns that insurance eligibility demands were preventing discouraging people from entering the industry;
- the number of registered builders showed little change in the period 2000-2005;
- owner-builder trend data did not support claims of a major shift to unregistered builders to avoid the insurance;

2.15 VCEC supported continuing privatised last resort insurance, arguing that 'this [first resort/last resort] debate is almost academic, because private insurers are unwilling to offer such "first resort" cover'.⁹ It recommended some improvements: better information to consumers; a code of conduct for insurers; and better dispute resolution services.¹⁰

2.16 An inquiry by a NSW Legislative Council Committee in 2006-07 was concerned by evidence of poor consumer protection. It supported additional measures

7 To take the NSW scheme as an example: the regulation provides that the insurance *must* provide certain cover (eg 'loss or damage resulting from non-completion of the work because of the insolvency, death or disappearance of the contractor'), and *may* contain certain limitations on the cover (eg 'the contract may limit liability resulting from non-completion of the building work to an amount that is 20 per cent of the contract price....'). Nothing stops insurers from offering wider cover, but in practice this does not happen. The reference to 'maximum' cover in point 5 of the 10 point plan is misleading. Home Building Regulation 2004 [NSW], cl.56,58. Similarly Victorian Government Gazette 23 May 2002, *Domestic Building Insurance Ministerial Order*.

8 P. Allen, *National Review of Home Builders Warranty Insurance and Consumer Protection*, report to Ministerial Council on Consumer Affairs, June 2002, p.vii

9 VCEC, *Home Building Regulation in Victoria - Building Better Outcomes*, October 2005, p.218

10 VCEC, *Home Building Regulation in Victoria - Building Better Outcomes*, October 2005, p.225ff

to improve consumer information, promote early and fair dispute resolution, and promote the accountability and transparency of the scheme.¹¹

2.17 The Productivity Commission considered home warranty insurance in its 2008 report *Review of Australia's Consumer Policy Framework*. The Commission seemed to accept the argument of insurers that 'private capital would never be used to make a first resort HWI market'. However it noted the large number of complaints made to the inquiry, and agreed that consumer protection in home building could be better. It recommended enhancing the effectiveness of early stage consumer protection measures such as better linking of licensing to builder performance and better dispute resolution procedures. The Productivity Commission recommended:

In examining how to improve 'last resort' home builders' warranty insurance, the Senate Economics Committee should also consider how to enhance the effectiveness of earlier stage consumer protection measures in the home building sector, including through:

- providing for guaranteed access to effective alternative dispute resolution across Australia; and
- better linking licensing schemes to actual builder performance.¹²

2.18 In response to ongoing concerns Tasmania made its last resort scheme voluntary from 1 July 2008. This is intended as part of a suite of changes aimed at improving consumer protection in the home building sector. Other elements of the new policy package include:

- a mandatory dispute resolution process, administered by Consumer Affairs and Fair Trading (CAFT), open to both consumers and builders to initiate;
- some mandated standard contract terms, in order to reduce the likelihood of contractual disputes; and
- mandatory provision of information to consumers on the protections available to them.¹³

11 Legislative Council General Purpose Standing Committee No. 2, *Inquiry into the Operations of the Home Building Service*, December 2007, p.73ff

12 Productivity Commission, *Review of Australia's Consumer Policy Framework*, April 2008, p126-7

13 Department of Justice (Tasmania), *A New Consumer Building Framework - consultation paper*, February 2008. Productivity Commission, *Review of Australia's Consumer Policy Framework*, April 2008, p125

Home warranty insurance in New South Wales¹⁴

2.19 Before 1997 NSW operated a government-sponsored first resort scheme. The provision of insurance was privatised from 1 May 1997 following a recommendation of the 1993 Dodd inquiry into the then Building Services Corporation. The Dodd report found that 'there was no reason for the Government to continue in its monopoly of the insurance market and moreover its political ownership leaves it vulnerable to pressures not faced by private insurance.'

2.20 On 1 April 2002 the threshold for insurance was increased to \$12,000 (previously \$5,000). From 1 July 2002, in response to problems of availability of insurance following the collapse of HIH in March 2001, the scheme was changed to provide for claims to be made only where the builder has died, disappeared or become insolvent.

2.21 The 'Grellman' inquiry into the NSW scheme in 2003 did not recommend any fundamental change to the privatised last resort model, but made various suggestions for improvement.¹⁵ Some changes were made to the scheme from 1 September 2005 in response to Grellman's recommendations. For example the changes -

- established the home Warranty Insurance Scheme Board to monitor the scheme and advise the minister;
- recognising that a builder may seek insurance from more than one provider, authorised and required insurers to seek and provide relevant information among themselves regarding builders;
- authorised the Commissioner for Fair Trading to exchange information about builders with insurers;
- introduced claims handling guidelines which insurers must comply with;
- introduced a rule of 'deemed acceptance' of a claim after 90 days (previously the rule had been 'deemed refusal' after 45 days).¹⁶

2.22 On 30 December 2005 the Minister for Commerce signed an industry deed with insurers setting out the manner in which the government has agreed to exercise its powers under the *Home Building Act 1989*. The insurers agreed to provide certain information, which is the basis of the Office of Fair Trading's quarterly reports on the scheme since March 2007.

14 This section is sourced generally from NSW Legislative Council General Purpose Standing Committee No. 2, *Inquiry into the Operations of the Home Building Service*, December 2007, p.73ff; and from the NSW Office of Fair Trading's submission 16 to that inquiry

15 *NSW Home Warranty Insurance Inquiry - Final Report*, 30 September 2003 [Grellman inquiry]

16 Office of Fair Trading, submission 16 to NSW Legislative Council General Purpose Committee No. 2 Inquiry into the Operations of the Home Building Service, 2006, p.19

2.23 In a dispute situation where the builder is still in business complainants can use the dispute resolution service of the Office of Fair Trading, or take cases to the Consumer, Trader and Tenancy Tribunal (CTTT), which was established in 2002. A building inspector may issue a rectification order. Failure to comply with a rectification order is grounds for disciplinary action against the builder. The consumer is advised to take the matter to the CTTT using the rectification order as evidence. In 2005-06 the Home Building Division of the CTTT received 4,003 applications, of which 76 per cent were matters under \$25,000.¹⁷

Home warranty insurance in Victoria

2.24 The privately underwritten Domestic Building Insurance Scheme was introduced in May 1996, replacing the previous government scheme administered by the Housing Guarantee Fund. On 1 July 2002 it moved to being a last resort scheme, as agreed with NSW according to the 10 point plan (see paragraph 2.11).

2.25 Building Advice and Conciliation Victoria (BACV) was established by the Victorian Government in 2002 as a one-stop shop for building disputes. It provides free advice and conciliation services and is jointly delivered by Consumer Affairs Victoria and the Building Commission. Eighty per cent of disputes conciliated by BACV are successfully resolved. Disputes which cannot be resolved by BACV can be taken to the Victorian Civil and Administrative Tribunal (VCAT). The number of building matters initiated in VCAT has declined from over 1000 in 200-01 to 824 in 2006-7.¹⁸

2.26 The Building Practitioners Board, a statutory authority, is responsible for registering builders. It checks that applicants have the appropriate qualifications and insurance. As in NSW, financial assessment of builders is effectively delegated to insurers. The Board has disciplinary powers to suspend or cancel a licence or impose penalties.¹⁹

2.27 The Victorian Government advised that it is currently reviewing its builder registration and disciplinary framework with a view to better protecting consumers against problem builders.²⁰

17 Office of Fair Trading, submission 16 to NSW Legislative Council General Purpose Committee No. 2 Inquiry into the Operations of the Home Building Service, 2006, p.43,46

18 Victorian Building Commission annual report 2006-07, p.36. Victorian Government , submission 38, p.3-4

19 Consumer Affairs Victoria, submission 91 to VCEC Housing Regulation inquiry 2005, p.11. Department of Sustainability and Environment, submission 84, to VCEC Housing Regulation inquiry 2005, p22.

20 Victorian government, submission 38, p.4

2.28 Victoria has no reporting comparable to NSW's home warranty insurance reports, but advised that it is currently working with the insurance industry on ways to improve data collection about home warranty insurance.²¹

*Home warranty insurance in Queensland*²²

2.29 Queensland has mandatory 'first resort' home warranty insurance - a claim for non-completion or defects can be made even when the builder has not died, disappeared, or become insolvent. The scheme was introduced in 1977. It is administered by the Building Services Authority, which was established in 1991 to replace the Builders' Registration Board of Queensland, which dated from 1972.

2.30 The BSA is not regulated by APRA, but voluntarily follows the conditions APRA imposes on general insurers. Insurance cover (aside from the 'first resort' aspect) is similar to that in other states, but with some differences:

- cover of \$200,000 for non-completion, defects and subsidence that occur before practical completion;
- \$200,000 for defects and subsidence that occur after practical completion;
- the maximum total cover is \$400,000;
- these amounts include up to \$5,000 for alternative accommodation, removal and storage costs.

2.31 The cover against subsidence is 'no-fault' providing the builder has tested the ground according to the Australian Standard. As well, the scheme covers consumers who are uninsured because of the builder's fraud.

2.32 The BSA is also responsible for builders' licensing and disciplinary matters. Applicants must satisfy financial requirements, and are monitored more or less closely according to their turnover level to assure their financial stability. There is a system of demerits points leading to possible loss of licence for infringements.²³

2.33 The BSA has no specific legislative charter for dispute resolution, but it argues that its power to require rectification of defective work acts as an effective dispute resolution mechanism. Early intervention is designed to prevent disputes from escalating. Consumers and builders may appeal BSA decisions in the Commercial and Consumer Tribunal.²⁴

21 Victorian government, submission 38, p.5

22 This section relies generally on submission 8, Queensland Building Services Authority.

23 Mr I. Jennings (Queensland Building Services Authority), *Committee Hansard* 10 April 2008, p.19

24 Queensland Building Services Authority, submission 8, attachment, p.3

Suggested changes

2.34 Opponents of present last resort schemes mostly suggested either that the insurance should be made voluntary, or that the other states should adopt a government-operated first resort scheme, as exists in Queensland and used to exist in NSW and Victoria before the mid-1990s.

2.35 Insurers and regulators made various suggestions for improvement:

- better disclosure to the consumer about the nature of the product;
- an additional trigger to allow an insurance claim, viz cancellation of the builder's licence;
- a statutory contract condition that allows the consumer to terminate the contract in the event of the builder's insolvency (in this case the contract would not become an asset in the hands of the receiver);
- a 'guarantee of completion' - in a non-completion claim the insurer would be obliged to arrange completion of the house, not merely to pay out the beneficiary.

2.36 Other suggestions were made which relate more to minimising disputes or improving the dispute resolution arrangements which may precede an insurance claim or are the consumer's only recourse if the last resort conditions are not met. They included:

- more diligent vetting of builders by the licensing authorities, and more diligent action to de-license offending builders;
- better public information about builders' licensing record (record of infringements etc);
- better certification of building works;
- clearer, perhaps mandatory, standards and tolerances, so that there can be less dispute over whether work is a defect;
- cheaper and quicker dispute resolution in state fair trading departments and tribunals.

Chapter 3

Issues raised by builders

3.1 The main issues or claims in submissions from builders were:

- difficulty getting insurance; with a general argument that it is not right that unaccountable private insurers effectively act as gatekeepers on behalf of state licensing authorities;
- alleged oppressive behaviour by insurers such as unreasonable caps on turnover or unreasonable demands for security;
- difficulty getting insurance is encouraging builders to withdraw from the industry, or not enter it, adds to an existing skills shortage;
- the need for insurance encourages working outside compliance, such as with sham owner-builder arrangements.

Claimed difficulty getting insurance

3.2 Some submissions from builders complained about difficulty getting insurance. A closely related complaint is that turnover caps which insurers impose are too restrictive. For example:

The cost of obtaining such insurance for builders is often prohibitive in terms of bank guarantees or personal securities, with a business limited by the constraints imposed by the insurance company. Insurance companies can quite literally cripple a builder's ability to trade, and the constant implied (if not overt) threat of a decreased ceiling means it is extremely difficult to plan strategically.¹

3.3 Some submissions objected to the fact that, as they see it, insurers have become de facto regulators:

The rights of the small to medium builder were assigned to the insurance industry who is now the defacto regulator and decides who will build, when, and to what level.²

3.4 Availability of insurance was certainly a significant problem in the aftermath of the HIH collapse in 2001. However it appears that for most the problem has passed.³ Vero, the largest home warranty insurer, advised that in the years since 2002 it has refused 2-4 per cent of applications for eligibility, and the rate is now about 2

1 Submission 78, confidential.

2 Submission 114, Builders Collective of Australia, p.3

3 For example, see Victorian Competition and Efficiency Commission *Housing Regulation in Victoria - building better outcomes*, October 2005, p.212

per cent.⁴ On the matter of turnover caps, Vero advised that historically utilisation of turnover limits has not exceeded 40 per cent.⁵ Vero told an inquiry in 2005 that time to approve applications for insurance eligibility had reduced greatly, to 25 days, and more than 97 per cent of applicants are accepted for the turnover they request.⁶ Vero told this inquiry that the average time to approve applications for insurance eligibility is now around 1 day.⁷

Bank guarantees and deeds of indemnity

3.5 Submissions from builders complained about insurers' demands for bank guarantees or deeds of indemnity.⁸ The Builders Collective of Australia claimed that 'in all cases the builder must sign an open ended deed of indemnity to obtain insurance eligibility'...

Also in many cases securities must be provided such as open ended Bank guarantees and maintained on an annual basis at a cost of 2.5% of the face value of the guarantee.⁹

3.6 Some submissions complained that having deeds of indemnity still on foot during the statutory warranty period (typically six years) makes it difficult for the builder to shop around for another insurer (a second insurer would be reluctant to deal while the first insurer has a higher priority security). They also complained that insurers retain open-ended bank guarantees even after the statutory warranty period has ended (that is, after the possibility of incurring a claim cost has ended). For example the Master Builders Fidelity Fund (ACT) said:

We had lots of our builders through previous insurance schemes that still have bank guarantees that are not being paid back. This is despite the fact that the statutory warranty period is long past.¹⁰

3.7 The NSW Office of Fair Trading (OFT) advised in late 2006 that there were 640 bank guarantees or securities held by an insurer, which represents 5.2 per cent of NSW builders who have HWI eligibility. In the latest OFT home warranty insurance report, 11 per cent of builder eligibilities were secured, and 'since the June 2006

4 Vero Insurance Ltd, correspondence 13 October 2008.

5 Vero Insurance Ltd, confidential additional information 23 June 2008, p.3

6 Victorian Competition and Efficiency Commission, *Housing Regulation in Victoria - building better outcomes*, October 2005, p.225

7 Vero Insurance Ltd, correspondence 31 October 2008.

8 Deed of indemnity: the signatory indemnifies the insurer directly against costs arising from claims. Bank guarantee: the bank guarantees to pay the insurer up to a certain amount on demand. The bank then recovers from the signatory.

9 Builders Collective of Australia, submission 114, p.3

10 Mr J. Howard, Master Builder Fidelity Fund, *Committee Hansard* 13 June 2008, p.53. Similarly Builders Collective of Australia, submission 114, p.3.

quarter there has been a shift from bank guarantees to indemnities and multiple securities as preferred form of security.¹¹

3.8 The authorities and the industry groups seemed to concede that there may be problems where bank guarantees make it hard for builders to change insurers and/or are being held unreasonably long.¹² Mr McCarthy of the NSW Home Warranty Insurance Scheme Board:

I think there are still some concerns by builders around deeds of indemnity. We are investigating that aspect at the moment to find out where they apply.¹³

3.9 Dr Silberberg of the Housing Industry Association said:

We have, through our broker, made efforts to have guarantees extinguished. We do not condone the practice of holding guarantees after the liability has extinguished.¹⁴

3.10 HIA Insurance Services admitted that 'it is an issue in terms of changing insurance companies. If you have your security issued with one insurance company, that needs to be taken into account as part of your decision to change insurance companies'. And in relation to returning bank guarantees:

A lot of the securities were given post-HIH and so forth, so we really fight hard on behalf of our clients to get those securities back. We will put up our client's financial position to the insurer and say: 'There is no reason for you to keep this security. The builder has enough capital in his business and has a solid enough track record for that to represent reasonable security. Therefore, we don't believe that there's any need for you to continue to hold those securities.' We have been very successful at getting those back, particularly in the competitive environment that we are in, where there are a number of insurers fighting for the business of a builder.¹⁵

11 NSW Office of Fair Trading submission 16a to NSW Legislative Council General Purpose Standing Committee No. 2, inquiry into the operations of the Home Building Service, p.7. NSW Office of Fair Trading, *NSW Home Warranty Insurance Scheme - information on the scheme as at 31 March 2008*, p.5.

12 It appears there are complaints about guarantees being held unreasonably long, and about guarantees being held after the possibility of loss has ended. The second complaint appears to refer to open-ended bank guarantees in which the bank guarantees to pay the insurer unconditionally on demand, then recovers from the signatory. No issue arises with deeds of indemnity which refer specifically to reimbursing claims paid under policies, since the deed becomes irrelevant when the time limit for making claims expires.

13 Mr G. McCarthy (NSW Home Warranty Insurance Scheme Board), *Committee Hansard* 13 June 2008, p.79

14 Dr R. Silberberg (Housing Industry Association), *Committee Hansard* 17 September 2008, p.9.

15 Mr G. Donovan (HIA Insurance Services), *Committee Hansard* 11 August 2008 (in camera), p.17.

3.11 In Queensland the Building Services Authority carries out financial monitoring at licence application, at licence renewal and by audits. Licensees are given turnover limits, and they must meet set liquidity ratios at all times.¹⁶

3.12 Dr Silberberg of the HIA argued that in Queensland every builder has to provide a 'personal guarantee', implying that private insurers' requirements for security are not onerous by comparison. The Queensland Building Services Authority (BSA) replied that the BSA 'does not require personal guarantees'. The HIA clarified that this was a reference to the BSA's statutory power, in all cases, to recover claims payments from directors of a building company 'or any other person through whose fault the claim arose.'¹⁷

Arguments that HWI adds to existing skills shortages

3.13 Some submissions argued that the requirement of home warranty insurance is discouraging builders from entering or staying in the industry, adding to a skills shortage in the building industry.¹⁸

3.14 The Victorian Competition and Efficiency Commission considered the issue in 2005. It noted that the number of registered domestic builders in Victoria hardly changed between 2000 and 2005.¹⁹ At that time Vero said:

During the 2 years between 2001/02 and 2003/04, 'domestic builder unlimited' numbers in Victoria decreased by 5%. Some transferred into the 'domestic builder limited' category and the net reduction was therefore somewhere between 3% and 5%. During the same period, engineers decreased by 3%, commercial builders decreased by 3% and building inspectors decreased by 3%. In the 'domestic builders unlimited' category, it is difficult to detect any significant factors overlaying what appears to be normal industry consolidation of 3%.²⁰

3.15 More recent national statistics on apprenticeships and building employment show no noticeable effect. For example, over the last decade the average annual growth of apprenticeships in construction has been somewhat greater than in most other trade occupations. There was an unusual fall in 2001, presumably related to the HIH collapse and the GST related slump, but numbers have recovered strongly since then:.

16 Queensland Building Services Authority, submission 8, attachment p.2

17 Dr R. Silberberg (HIA), *Committee Hansard* 17 September 2008, p.2. Queensland Building Services Authority, additional information 1 October 2008, p.1. HIA, correspondence 17 October 2008. *Queensland Building Services Authority Act 1991*, s71,111C

18 For example, RDC Constructions, submission 23; Builders Collective of Australia, submission 67, p.3

19 Victorian Competition and Efficiency Commission *Housing Regulation in Victoria - building better outcomes*, October 2005, p.234

20 Vero Insurance Ltd, submission 171 to VCEC Housing Regulation inquiry 2005, p.21

Apprentice and trainee commencements in trade occupations, 1997-2007

ASCO group -	41	42	43	44	45	46	49	total
1997	6,300	7,600	4,900	8,100	6,300	1,400	6,900	41,800
1998	6,500	7,800	5,300	10,300	9,300	1,700	8,100	49,000
1999	6,100	8,800	6,300	12,500	9,800	2,500	9,500	55,700
2000	5,000	8,300	5,700	11,500	9,500	2,800	8,600	51,600
2001	5,300	7,800	5,500	9,600	9,700	3,200	8,200	49,500
2002	6,100	8,100	6,200	12,800	9,700	3,300	8,600	55,100
2003	6,900	10,000	7,400	15,100	10,000	3,000	9,300	61,900
2004	7,900	10,400	9,900	17,700	12,100	3,500	10,400	72,200
2005	9,500	10,400	11,000	17,900	11,600	3,800	10,600	75,000
2006	10,300	10,700	11,900	19,100	12,300	3,300	10,000	77,900
2007	10,600	11,300	12,000	22,100	12,100	3,200	11,300	82,900
annual average growth 1997-2007	5%	4%	9%	11%	7%	9%	5%	7%

ASCO groups:

41 mechanical and fabrication engineering tradespersons

42 automotive tradespersons

43 electrical and electronics tradespersons

44 construction tradespersons

45 food tradespersons

46 skilled agricultural and horticultural workers

49 other tradespersons and related workers

source: National Centre for Vocational Education Research, *Australian Vocational Education and Training Statistics, Apprentices and Trainees*, annual, 2007.

Trade occupations are defined as all tradespersons and related workers (ASCO 2nd edition)

3.16 Similarly, building trades employment showed a decline in 2001 but has recovered strongly since then:

Building and construction industry tradespersons Annual average employment year ending 30 December											
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Aust	295.0	318.4	329.5	341.4	336.3	353.5	380.9	396.6	421.6	448.8	453.9
% ¹		7.9	3.5	3.6	-1.5	5.1	7.7	4.1	6.3	6.4	1.1
NSW	95.8	106.5	113.2	117.7	107.5	117.9	133.8	131.5	128.6	137.7	136.7
% ¹		11.1	6.3	4.0	-8.7	9.7	13.4	-1.7	-2.2	7.1	-0.7
Vic	74.0	86.3	83.4	84.9	88.5	96.1	97.3	101.2	104.7	113.4	112.3
% ¹		16.7	-3.4	1.8	4.2	8.6	1.3	4.0	3.5	8.3	-1.0
Qld	55.3	59.3	64.5	62.3	65.1	66.1	71.7	80.6	98.4	99.8	102.3
% ¹		7.2	8.6	-3.4	4.5	1.5	8.6	12.4	22.1	1.4	2.5
SA	18.9	18.8	18.1	20.9	22.3	23.3	24.8	24.5	25.0	25.9	29.7
% ¹		-0.5	-3.9	15.6	6.6	4.4	6.5	-0.9	2.0	3.6	14.6
WA	36.0	32.8	37.1	39.9	38.5	36.8	37.6	41.8	47.1	53.3	53.0
% ¹		-8.8	13.0	7.6	-3.6	-4.3	2.2	11.1	12.7	13.1	-0.4
Tas	6.2	6.1	6.1	6.2	6.6	6.1	6.8	7.9	7.1	8.5	9.3
% ¹		-2.0	0.4	1.2	6.5	-6.9	10.7	16.3	-10.2	20.9	9.1
NT	3.1	4.3	3.4	3.4	3.1	2.6	3.6	3.5	4.3	4.1	3.7
% ¹		37.1	-19.4	-1.5	-8.9	-17.1	40.2	-3.5	23.9	-3.5	-11.5
ACT	5.7	4.4	3.8	6.1	4.9	4.8	5.5	5.8	6.5	6.0	6.9
% ¹		-23.7	-12.6	60.5	-20.1	-1.5	13.5	5.5	13.0	-7.3	14.9

1. year on year percentage change for the state in the row above.
source: ASB 6291.055.003, Labour Force, Australia, Detailed, Quarterly, Aug 2008

3.17 On the question of whether arrangements discourage new entrants, Vero said in 2005:

BWI does not prevent new suppliers entering the building profession. Since 2003 Vero have offered a product that is available to new builders entering the market... The annual turnover limit and the contract limit for single dwellings are more than sufficient for genuine new entrants. Effectively, new builders need just their vehicle and tools – then they can prove themselves with the first one or two homes they construct... insurers like Vero have recognised the problem and make every attempt to accommodate the genuine, committed builder, no matter their position on the ‘time in industry’ continuum.²¹

Arguments that HWI encourages working outside compliance

3.18 Some submissions argued that the requirement of home warranty insurance encourages builders to work outside compliance - for example, with sham owner-builder arrangements. According to the Builders Collective of Australia:

21 Vero Insurance Ltd, submission 171 to VCEC Housing Regulation inquiry 2005, p.17

All States except Qld are suffering from a non-compliant industry and an enormous increase in owner builder activity. (Qld owner builders under 5%) In Victoria owner builder permits are running at 42% down from 52%, after making it more difficult to obtain one of these permits. These figures are obtained from the Building Commission website, and CAV state more than half the building industry is non-compliant. These facts are repeated in all States and the official figure in NSW in December 2007 show of the 34,000 registered builders only 14,000 hold insurance eligibility.²²

3.19 In reply Vero said:

They [the Builders Collective] use a NSW example of 34,000 licensed builders' compared to 14,000 with HWI eligibility to state that there is systemic non-compliance affecting the competitiveness of compliant builders. They are not comparing 'apples with apples'. There are many licence categories that do not require HWI. NSW is by far the most compliant regime.²³

3.20 The Victorian Competition and Efficiency Commission in 2005 considered owner-builder trend data from 1998 and concluded that the statistics do not support claims that there has been a major shift to owner-builders (in particular, there was no significant change in the trend after the HIH collapse or the 1 July 2002 changes). This was consistent with the findings of the Grellman inquiry in NSW in 2003.²⁴

3.21 Since 2005 owner-builder permits in Victoria have declined greatly, presumably due to new regulations (since 14 June 2005) to limit owner-builder permits to genuine owner-builders (for example a rule that owner-builders are limited to only one home in any three year period).²⁵

3.22 On the other hand, Vero said in February 2008, 'Victoria's "leakage" (of licence fees and HWI premium) from "owner-builder" housing starts has been as high as 45% and, even after a tightening in 2006, remains unacceptably high at 35%'.²⁶ Vero had previously suggested that 'the only permanent solution to this seemingly intractable problem is that all owner-builders, in addition to being subject to the same fee structure as builders, take BWI at the commencement of building - not just if and when they sell the property within the warranty period.'²⁷

22 Builders Collective of Australia, submission 67, p.3

23 Vero Insurance Ltd, correspondence 24 July 2008, p.9

24 Victorian Competition and Efficiency Commission, *Housing Regulation in Victoria - building better outcomes*, October 2005, p.236-8.

25 Owner-builders permits in Victoria in 2004-05: 33,626; in 2006-07: 26,436. Building Commission, annual report 2006-07, p.35

26 Vero Insurance Ltd, confidential additional information 18 June 2008, p.27

27 Vero Insurance Ltd, submission 171 to VCEC Housing Regulation inquiry, 2005.

Chapter 4

Issues raised by consumers

4.1 The main issues or claims in submissions from consumers were:

- there is lack of information and misunderstanding about the coverage of the insurance;
- claimants may need to force a builder into insolvency, which is a slow and costly process (and legal costs are not recoverable in the insurance claim);
- alleged oppressive behaviour by insurers refusing claims or undervaluing the cost of claims;
- state licensing authorities are not diligent enough in vetting builders, and getting rid of bad builders;
- resolving disputes in the various state consumer tribunals is slow and expensive; builders or insurers may prolong proceedings to wear the claimant down;

4.2 Issues to do with dispute resolution may relate to last resort insurance (for example, a dispute with the insurer over quantum) or may relate to situations where the insurance is not at issue (disputes with builders still in operation).

4.3 Most submissions from consumers referred to their own building disputes. Some of these are extremely long-drawn-out disputes which date from before the present last resort arrangements started in NSW and Victoria on 1 July 2002. Strictly speaking these are complaints about the States' dispute resolution arrangements, not about last resort insurance. But the issues overlap, since the narrower the scope of the insurance, the more important it is that dispute resolution arrangements, which are the consumer's remedy when the insurance does not apply, are satisfactory.

4.4 Issues to do with the present last resort schemes are considered here. Other issues to do with consumer protection in home building are considered in chapter 6.

Concerns about the HWI insurance product

Inadequate understanding of the coverage

4.5 Many submissions argued that consumers have inadequate information and understanding of the last resort nature of the insurance. In NSW there is a legal obligation for the builder to give the homeowner a copy of the home warranty insurance certificate, and information about procedures for resolving contract and insurance disputes. It appears that this does not always happen. In any case,

consumers may be unaware of the true scope of the cover if they do not receive a copy of the full policy document.¹

4.6 It appears that some insurers, but not all, routinely give the policy information to the homeowner as well as the builder.² Vero agreed that there is a need for better information to consumers, but said 'our experience has been that very few homeowners really take the time to understand the product, irrespective of the amount of information that is out there.'³

4.7 Disclosure provisions under Chapter 7 of the *Corporations Act 2001* apply between the insurer and the builder purchasing the insurance. They do not apply to the homeowner.

4.8 Some submitters felt that the name itself is misleading, since 'warranty' encourages a misleading analogy with consumer good warranties that are not limited to cases where the seller is insolvent. CHOICE said:

With the labelling of it as a warranty, people think of a warranty as when they buy goods and they have a warranty that, if there is something wrong with the goods, the retailer or manufacturer will fix them up. Again, I think you are right in saying that the name of the product is part of the problem...⁴

4.9 Some terms used overseas are 'builder performance protection',⁵ 'building defects insurance' and 'completion insurance'. HIA Insurance Services suggested 'statutory default cover'.⁶

Possible difficulty forcing a builder into insolvency

4.10 Consumers complained that they may need to force a builder into insolvency, which is a slow and costly process (and legal costs are not recoverable in the insurance claim). For example:

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- 1 Mrs I. Onorati (Building Action Review Group), *Committee Hansard* 13 June 2008, p.5. Similar comments in NSW Legislative Council General Purpose Standing Committee No.2, *Inquiry into the Operations of the Home Building Service*, December 2007, p.86. NSW Office of Fair Trading, additional information 23 August 2008, p.5
 - 2 Mr D. Turner (HIA Insurance Services), *Committee Hansard* 11 August 2008 (in camera), p.22. Mr C. Lamont (Housing Industry Association), *Committee Hansard* 17 September 2008, p.12
 - 3 Mr P. Jameson (Vero Insurance Ltd), *Committee Hansard* 20 June 2008 (in camera), p.8
 - 4 Mr G. Renouf (CHOICE), *Committee Hansard* 13 June 2008, p.20. Similarly Mr P. Dwyer (Builders Collective of Australia), *Committee Hansard* 10 April 2008, p.6. Mr C. Lamont (Housing Industry Association), *Committee Hansard* 17 September 2008, p.12
 - 5 In the Alberta New Home Warranty Program
 - 6 Mr D. Farrell (HIA Insurance Services), *Committee Hansard* 11 August 2008 (in camera), p.21

I won the matter in the CTTT and was awarded costs. The builder did not pay so I had to liquidate the builder before I could submit a claim on home warranty insurance.⁷

4.11 Building Ethics Australia suggested that 'the trigger point for insolvency should be better defined to avoid the time and cost involved when a builder essentially stops trading but does not meet the insolvency criteria as per the Corporations Act.'⁸

4.12 Several submissions suggested that to avoid this difficulty the insurance should be triggered if the builder's licence is cancelled as a result of a disciplinary matter or because the builder has disobeyed a legal direction to rectify. The HIA said that 'a dispute resolution process could be expressly linked to trigger HWI if failure to comply with the process leads to licence cancellation':

We consider that State Governments could take a more pro-active position in regard to the introduction of a more robust and accessible dispute resolution process for home buyers and home builders. Such a dispute resolution process could be expressly linked to trigger HWI if failure to comply with the process leads to licence cancellation. This would have the effect of transferring the burden of pursuing a defaulting builder from consumers to the government licensing agency. In HIA's view this would address the main area of current consumer complaint about HWI without losing the advantages of the current system.⁹

4.13 Vero agreed:

The second area that we believe is worthy of consideration is an additional trigger, called termination. This is termination of the licence of a builder for noncompliance with a tribunal or court order, which, like death, insolvency or disappearance, is pretty final—that is, it cannot be rorted and, if they do not pay and lose their licence, they are probably insolvent anyhow. We believe this will further reduce the proportion of homeowners that have to pursue a builder to initiate a death, insolvency or disappearance trigger from around 10 per cent of all homeowners to single digits.¹⁰

4.14 Mr McCarthy of the NSW Home Warranty Insurance Scheme Board advised that the board agrees with these concerns and has proposed (and the NSW government has agreed) an additional trigger for an insurance claim which would be suspension of the license of a builder by the Office of Fair Trading for a builder's failure to comply with a money order of the CTTT or a court.¹¹

7 R. Siebert, submission 5, p.1. Similarly Consumer Action Law Centre, submission 32. p.4

8 Building Ethics Australia Pty Ltd, submission 113 p.3

9 Housing Industry Association, submission 60 p.13

10 Mr P. Jameson (Vero Insurance Ltd), *Committee Hansard* 20 June 2008 (in camera), p.6

11 Mr G McCarthy (NSW Home Warranty Insurance Scheme Board), *Committee Hansard* 13 June 2006 p.73

4.15 The Victorian government advised that it is 'working with the insurance industry ... to expand the grounds on which home builders warranty insurance claims can be made.'¹²

Other burdens on consumers in insolvency cases

4.16 The Housing Industry Association noted the burdens that may fall on consumers even when the builder's insolvency is clear:

Insolvency of a builder triggers liability. However a claim for 'compensation' is not payable until a loss is 'quantified'. The extent of loss is not known until the house is completed, likely to be much later... Unlike other forms of consumer insurance, with home warranty consumers are required to manage their own claims, which can be costly and time-consuming. The home owner is left to find another builder, determine to extend to work to be completed and negotiate a new contract.¹³

4.17 The HIA suggested that this situation could be improved if a successful claim triggered a 'guarantee of completion', not merely compensation:

Conceptually, that involves a change in approach. It would involve the insurer becoming responsible for managing the completion of the project rather than the consumer having to make a claim, organise builders and then recover compensation.... The obligation would be on the insurer to mobilise other builders and contractors to finish the house under the contract which had been on foot with the insolvent builder.¹⁴

4.18 It is inherent in this proposal that the concept of a cap on claims for non-completion would disappear.¹⁵

4.19 Further, in insolvency cases consumers may be left dangling by a receiver acting (as the receiver is bound to) on behalf of creditors. For example, in the recent insolvency of Beechwood Homes (NSW) in May 2008, delay was caused while the receiver tried to find a buyer for the company (which was eventually successful). The HIA commented:

Under contract law, the home owner with a partly built house cannot take steps to conclude the contract in the event of insolvency of the builder (unless the terms of the contract provide for this). It is the legal responsibility of the receiver to recover as much money as possible for

12 Victorian Government, submission 38, p.5

13 Housing Industry Association, additional information 17 September 2008, p.1

14 Mr S. Goodwin (HIA), *Committee Hansard* 17 September 2008, p.5

15 Mr S. Goodwin (HIA), *Committee Hansard* 17 September 2008, p.5. The rationale for the cap on claims for non-completion (now 20 per cent of the contract value) appears to be a view that this is a reasonable limit to the incidental costs of completing the house with another builder; given that the consumer has the value of work already done, and should not have paid for work not done.

creditors, including from contracts on foot. The outstanding contracts might be the only asset the receiver has available for sale... Home owners can be left dangling for an extended period of time while the receiver tries to sell the company as a going concern.¹⁶

4.20 The HIA suggested that this situation could be improved for consumers by legislating a standard contract condition allowing the homeowner to terminate the contract in the event of the builder's insolvency:

[This] would have the effect of causing insurers to act promptly to organise for other builder to complete contracts in an orderly way thereby removing the delays inherent in dealing with a Receiver, who must advance the interests of creditors.¹⁷

4.21 The HIA's related and consequential suggestions were:

- the consumer should have the right to use the approved plans and other intellectual property of the insolvent builder;
- increase the cap for non-completion claims to \$200,000;
- require builders to maintain an annual insurance policy for the purpose of covering 'mobilisation' moneys for plan preparations where a contract and home warranty insurance cover have not been executed (maximum payout of \$5,000 or 5 per cent of the contract price, whichever is the greater, is suggested).¹⁸

Difficulty in knowing what is defective work

4.22 The Housing Industry Association noted that home warranty insurance has potential for dispute, more than other sorts of insurance, because of the difficulty that may arise in judging what is a defect or what the value of the loss is:

It is not the same as motor vehicle insurance, where you either have an accident or you do not. It is not the same as home contents and fabric insurance where, if you have a fire, there is no doubt that the house has burnt down. The insurers come in in relation to loss adjusting. They decide how much you have lost. But in the home warranty insurance area, the issue is not how much it is going to cost to fix up that defect: the issue is, is it a defect?¹⁹

4.23 Statutory warranties in building regulations make reference to the Building Code of Australia, which sets legal minimum standards for building work. However the Building Code is cast in terms of performance measures, and does not go to the

16 Housing Industry Association, additional information 17 September 2008, p.1

17 Housing Industry Association, additional information 17 September 2008, p.2

18 Housing Industry Association, additional information 17 September 2008, p.2

19 Mr G. Simpson (Housing Industry Association), *Committee Hansard* 17 September 2008, p.19

level of detail that would help a homeowner to know whether the particular building work is defective in all cases. The HIA commented:

Where a consumer claims that building work complying with the BCA and complying with any contractual specifications is nevertheless in their opinion defective, this becomes a matter of evidence and subjective judgement.... This tends to be a grey area of opinion and doubt, in which uncertainty prevails.²⁰

4.24 A number of more detailed guidelines have been published. The Victorian Building Commission has a *Guide to Standards and Tolerances 2007* which 'aims to assist building practitioners to build quality homes and reduce or prevent disputes, since the majority of domestic building disputes arise from differing views on the quality of work and what is a reasonable standard of construction'.²¹ The Housing Industry Association has recently published a similar guide.²² However these guides are not legally binding. While they will hopefully reduce disputation, there is no guarantee that a tribunal considering a dispute will adopt the guide's standard.

4.25 Clearer standards of what is or is not defective work, preferably with legal force, would reduce the problem of disagreement over whether work is defective. The committee recommends in chapter 8 that a national 'best practice' system should include better definition of acceptable versus defective building work.

20 Housing Industry Association, correspondence 17 October 2008, p.5

21 [Victorian] Building Commission, Annual Report 2006-07, p.32

22 For example, Housing Industry Association, *Guide to Materials and Workmanship for Residential Building Work*, n.d. [2008]

Chapter 5

Responses from insurers and regulators

- 5.1 The main responses in submissions by insurers and regulators were:
- privatised last resort insurance has delivered consumer protection at an economical, and still declining cost;
 - complaints that the market is not competitive, and insurance is too hard to get, may have had substance in 2001-02, after the collapse of HIH, but this is no longer the case;
 - financial assessment by insurers imposes a worthwhile discipline on builders and has improved builders' capital adequacy, to the benefit of consumers.

The value of the insurance to consumers

5.2 A number of consumer submissions made complaints against insurers - mainly for denying claims, or (in the submitter's belief) offering insufficient payment or drawing out legal proceedings in a tactical way. Where these complaints named Vero, the committee invited Vero's reply and Vero responded in detail. For example, in one case, according to Vero:

Most of the delays were caused by the fact that Ms xxxxxxx's claim appeared to be substantially higher than could be justified by the facts of the case and her failure, despite being represented, to comply with orders and directions made by the CTTT.... Neither she nor the other homeowners would have been better off under an alternative scheme. In an optional scheme it is likely they would have recovered nothing. In the first resort scheme the same outcome would have occurred. There would still be the potential for disagreement and the need for resolution of issues of quantum.¹

5.3 On the claim, occasionally made, that insurers use court proceedings to wear applicants down, Vero commented:

Less than 10% of claims Vero handle involve a tribunal or court. Sometimes that is the only way to resolve the detailed technical issues that arise. But to suggest that Vero adopts this as a deliberate strategy to wear claimants down (irrespective of the merits or complexity of the claim) is preposterous and denies the indisputable fact that valid claims settled early and effectively always cost an insurer less than claims involving lawyers and courts.²

1 Vero Insurance Ltd, correspondence 24 July 2008, p.13

2 Vero Insurance Ltd, correspondence 16 August 2008

Committee comment

5.4 Some submissions seemed to imply that complaints of this sort arise from the toughness of the profit-motivated private insurer, and would not arise in a government scheme. This is not necessarily so. The possibility of disagreement about whether work is defective, or about the cost of rectification, exists in either case. A government insurer also has a duty not to pay more than is fair on claims.

The cost of home warranty insurance

5.5 The builder buys the insurance and passes on the cost to the consumer; so if price was a cause of complaint it would be for the consumer to complain. In fact the price of the insurance was not a significant issue in consumer complaints. Price comparisons between NSW/Victoria and Queensland were argued by those who support or oppose the two systems primarily for other reasons, each trying to use arguments about price as another string to their bow.

5.6 The Housing Industry Association provided this comparison of premiums, showing that for a median value new house in NSW and Victoria premiums are around \$3 per thousand dollars of project; in Queensland, \$7.57:

Home Owners Warranty Insurance as percentage of new home price							
		2002	2003	2004	2005	2006	2007
Sydney	median new house construction price ¹	\$179,067	\$192,167	\$240,423	\$240,125	\$246,041	\$265,433
	HOWI premium inc. govt charges ²	\$1,136	\$1,496	\$1,491	\$1,385	\$953	\$796
	HOWI % of new house price	0.634	0.778	0.620	0.577	0.387	0.3
	HOWI % increase over the period		24.06	-0.34	-7.65	-45.33	-19.72
Melbourne	median new house construction price ¹	\$165,969	\$184,070	\$200,987	\$203,431	\$219,671	\$232,649
	HOWI premium inc. govt charges ²	\$837	\$894	\$973	\$918	\$779	\$661
	HOWI % of new house price	0.504	0.486	0.484	0.451	0.355	0.284
	HOWI % increase over the period		6	8	-6	-18	-18
Brisbane	median new house construction price ¹	\$146,340	\$168,435	\$199,255	\$209,931	\$222,873	\$236,365
	HOWI premium BSA ³				\$1,240	\$1,692	\$1,789
	HOWI % of new house price				0.591	0.759	0.757
	HOWI % increase over the period					26.71	5.42
1. Based on unpublished ABS building approvals data							
2. Premiums taken from industry insurer							
3. Taken from warranty premiums charged by the QBSA							
source: Housing Industry Association, submission 60, p.5							

5.7 The NSW Office of Fair Trading (OFT) publishes reports on its HWI scheme including premium and claims information supplied by insurers. According to the latest report, in NSW in the March 2008 quarter average premium per project certificate including charges was \$723, and average premium per thousand dollars of project value was \$3.60 for new single dwellings and \$5.27 altogether. These figures have declined steadily since 2006.³

5.8 The Victorian government apparently does not know what premiums are in Victoria, which is regrettable. It said 'it is understood that Victorian premiums are on average less than those in Queensland.'⁴

5.9 Vero said that 'Queensland average premium financial year 2006/07 was \$688 (a 22 per cent increase on the previous year) and trending up; compare NSW calendar year 2007 of \$639 (premium including charges) and trending down'.⁵

5.10 Vero is the largest HWI insurer.⁶ Vero gave the committee confidential information about its own average premiums in recent years. Its figures are not the same as but are broadly consistent with the figures above.⁷

5.11 Against this, the Builders Collective of Australia provided Vero 2007 rate cards which appear to show much higher premiums: for example, a 'standard premium' of \$2,029 for contract value \$250-300,000 (single dwelling, category 1 (least risky) builder).⁸

5.12 These rate cards do demonstrate some inconsistency in the comparative cost of premiums by state as provided in evidence to the committee. It may be that the cards are intended as a guide rather than a firm quote, and are subject to negotiation in the individual case. These rate cards are contradicted by the weight of other evidence which the committee has no reason to doubt.

3 'Charges' includes all commissions, government and other charges reported by the insurer. It does not include charges by brokers to the customer. The 'including charges' premium is about 30% more than the 'excluding charges' premium: p.10. The higher figure for all projects, compared with single dwellings, arises because the rate per thousand dollars is higher for things like multi-unit buildings (\$5.52), additions (\$7.56) and renovations (\$8.51). NSW Office of Fair Trading, *NSW Home Warranty Insurance Scheme - information on the scheme as at 31 March 2008*, p.9-12.

4 Victorian Government, submission 38 p.3

5 Vero Insurance Ltd, correspondence 24 July 2008 p.8.

6 Although the home warranty portfolio is less than 1 per cent of Suncorp's commercial insurance business: *Committee Hansard* 20 June 2008 (in camera), p.1

7 Vero Insurance Ltd, confidential additional information 23 June 2008, p.7.

8 Builders Collective of Australia, additional information 8 September 2008, p.13

5.13 The Builders Collective also claimed that 97 per cent builders are in category 3 (more risky, higher premiums). Vero advised that about 30 per cent of its builders are in category 1 and 30 per cent in category 2.⁹

Availability of insurance

5.14 Five insurers now offer home warranty insurance, and all insurance is mediated by brokers. Those supporting the last resort system argue that falling prices demonstrate the increasing competitiveness of the market.

5.15 Dr Silberberg of the HIA said that home warranty insurance has 'fallen off the radar' as an issue for most builders:

We survey our members regularly and we have in excess of 40,000. We ask them what are the issues that occupy their minds, that keep them awake at night. Home warranty has dropped off the radar. For many builders it is a past issue....¹⁰

5.16 In response to criticisms that the demand for deeds of indemnity or bank guarantees prevents builders from entering the market, Vero advised that its use of formal security 'has never exceeded 10% of builders with HWI eligibility and the current proportion is closer to 5%':

The Builders Collective suggest that, after the collapse of HIH and withdrawal of Dexta, Vero "took advantage" of the situation by applying a general policy that all builders must provide guarantees. This is not true. Guarantees and securities have always been used as a selective tool to underpin the eligibility requirements of builders and are often required of builders who have chosen to hold assets outside of the building entity by using trusts. At no stage has Vero's use of formal security ever exceeded 10% of builders with HWI eligibility and the current proportion is closer to 5%....¹¹

5.17 Vero said in 2005 that 'security is only required if a builder does not meet the minimum financial tests of soundness such as holding net assets of 10 per cent of annual turnover.'¹² Vero told this committee it 'does not support the underwriting of trust structures without formal security from the beneficiaries as the structures are primarily designed to protect assets from attachment by creditors, including homeowners.'

Our ability to pursue the builder [personally] is a vital aspect of all HWI schemes, including first resort schemes. Without it, builders are more likely

9 Mr R. Joseph (Builders Collective of Australia), *Committee Hansard* 10 April 2008, p.11. Vero Insurance Ltd, correspondence 13 October 2008, p.2

10 Dr R. Silberberg (HIA), *Committee Hansard* 17 September 2008, p.7

11 Vero Insurance Ltd, correspondence 24 July p.10

12 Vero Insurance Ltd, submission 171 to VCEC Housing Regulation inquiry 2005, p.16

to hide behind “phoenix” companies or simply walk away from their contractual responsibilities.¹³

5.18 Vero advised that recoveries from builders have never exceeded 5-6 per cent of claims paid.¹⁴

5.19 On the cost of a bank guarantee to the builder, Vero said: 'Many builders prefer this option rather than face the tax/trust complications associated with boosting their balance sheets/ changing their business structure.'¹⁵

To use an example: If a builder's turnover is \$2million p.a., the bank guarantee is for 10% of turnover or \$200,000, and the fee is 2.0% of the security or \$4,000. At an average contract value of \$160,000, the number of contracts in a year would be approximately 12.5 and the cost of the bank facility, spread across these contracts, would be \$320 each. Set against the opportunity cost of tying up \$200,000 in net assets, the price is not onerous. It is often the reason why builders choose to use securities.¹⁶

Financial assessment by insurers is of benefit to consumers

5.20 The Insurance Council of Australia argued that the insurer's role in scrutinising builder applicants is beneficial for the consumer:

A key benefit for consumers of privatised home warranty schemes is that the initial eligibility assessment process aims to allow only technically competent and financially sound builders to operate.¹⁷

5.21 Vero argued that it is not unreasonable for insurers to have this role:

Licensing [by government] concentrates on technical ability, transferring the assessment of financial and business risk to those better placed, ie insurers.¹⁸

Claims that insurers are making excessive profits

5.22 It was sometimes suggested that insurers are making excessive profits from home warranty insurance.¹⁹ This would presumably be because of lack of competition. It was sometimes implied that this is enabled because (allegedly) home warranty

13 Vero Insurance Ltd, correspondence 24 July p.3,10

14 Vero Insurance Ltd, confidential additional information 23 June 2008, p.61

15 Vero Insurance Ltd, confidential additional information, 23 June 2008, p.13

16 Vero Insurance Ltd, submission 171 to VCEC Housing Regulation inquiry 2005, p.16

17 Insurance Council of Australia, submission 44, p.2

18 Vero Insurance Ltd, confidential additional information 23 June 2008, p.19

19 For example, Mr R. Joseph (Builders Collective of Australia), *Committee Hansard* 10 April 2008, p.2-3

insurance is exempt from some APRA oversight that applies to other insurances (in fact this is not true, as discussed in chapter 7).²⁰

5.23 In reply supporters of current last resort arrangements argued that with five insurers currently selling home warranty insurance the market is competitive, and this has led to declining prices and better value for homeowners.²¹

5.24 According to the reports of the NSW Office of Fair Trading (OFT), in recent years average premium including charges per thousand dollars of project value has been declining (for a new single dwelling, from \$4.97 in June 2006 to \$3.60 in March 2008).²² On the state of competition the latest OFT report says:

As at 31 March 2008 there were five groups of licensed insurers providing home warranty insurance in New South Wales. There appears to be competition among insurers with no one group having more than a 40% market share in providing cover for builders (in terms of reported total written premium including charges) and with each of the other groups holding between 10% and 20% of the market.²³

5.25 The OFT reports do not show the full history of premium revenue since the present scheme started on 1 July 2002. Since June 2006 the premium written per quarter has trended down from \$13.9 million to under \$9.7 million including charges; from \$11.1 million to \$7.3 million excluding charges (the latter figure is the amount retained by the insurer for claims, expenses and profit).²⁴

5.26 In relation to project certificates issued since 1 July 2002, the total claims payment to the end of 2007 has been \$16 million, and insurers estimate a further \$7 million payments in respect of claims already accepted.²⁵

5.27 These figures do not include claims yet to be made. The NSW OFT stressed that because of the long-tail nature of the insurance (cover lasts for six years after

20 For example, Mr G. Renouf (CHOICE), *Committee Hansard* 13 June 2008, p.22

21 For example, Insurance Council of Australia, submission 44, p.3. Housing Industry Association, submission 60, p.4,13.

22 NSW Office of Fair Trading, *NSW Home Warranty Insurance Scheme - Information on the Scheme as at 31 March 2008*, table D2.2

23 NSW Office of Fair Trading, *NSW Home Warranty Insurance Scheme - Information on the Scheme as at 31 March 2008*, p.9

24 NSW Office of Fair Trading, *NSW Home Warranty Insurance Scheme - Information on the Scheme as at 31 March 2008*, p.10. Premium including charges: \$13,899,000 in June 2006 quarter; \$9,767,000 in March 2008 quarter. Premium excluding charges: \$11,090,000 in June 2006 quarter; \$7,337,000 in March 2008 quarter. 'Including charges' includes all commissions, government and other charges reported by the insurer. It does not include charges by brokers to the customer: p.9. Does not include owner builders.

25 NSW Office of Fair Trading, *NSW Home Warranty Insurance Scheme - Information on the Scheme as at 31 December 2007*, p.15. Mr G. McCarthy (NSW Home Warranty Insurance Scheme Board), *Committee Hansard* 13 June 2008, p.74.

completion, and claims may be on foot for up to ten years) it is not possible to draw conclusions about profitability from the information to date:

Premium collected in 2002 could still be drawn down by claims made this year. As a result of this characteristic of the scheme, the fact is that we do not know the true profitability of the written premium in 2002 and will not until at least the end of 2009 or possibly 2010.²⁶

5.28 While the profile of claims development over time in the past may be a guide, it is not a reliable one, as claims vary with the business cycle: insolvencies will be more common when there is a slow down in the building industry. The long period of cover exacerbates the uncertainty:

One of the main consequences of long tail lines of business is that deteriorations in claims experience can take some years to materialise and, if they are not properly monitored, can have a sizeable impact on the feasibility of the scheme. For example, if reserves were built up at a 60% loss ratio for 4 years and it was then discovered that the underlying loss ratio was 85%, then the best part of a full year's premium would be required to be added to the reserves. This could have a devastating impact on the capital base supporting the business.²⁷

5.29 Vero gave the committee confidential information about its loss ratio on home warranty insurance business over the last ten years. The loss ratio is the ratio of claims expense to premium revenue, and is one of the key measures of the profitability of insurance. A lower figure is a better result for the insurer, with the proviso that in the case of long tail insurance the trend over a number of years must be considered. A better result in later years may be needed to pay for a worse result in earlier years.

5.30 Vero's pricing aims to achieve a predetermined loss ratio across the business cycle in order to derive the required return on capital. Vero commented that 'the 80 per cent figure that some have suggested is too high given the credit and surety nature of this product and the front-end load of resources needed to underwrite it.'²⁸

5.31 Vero's results show very high loss ratios for claims from the 1997 to 2001 underwriting years (the year the policy was issued) - that is, comparing premium revenue and claims expense within the year, the insurance was very unprofitable. Loss ratios for the underwriting years 2002 onwards have been lower. Vero commented

26 Mr G. McCarthy (NSW Home Warranty Insurance Scheme Board), *Committee Hansard* 13 June 2008, p.75

27 D. Smith, *Builders Warranty - first resort or last resort or does it really matter*, paper to Institute of Actuaries of Australia 15th general seminar, 16-19 October 2005, p.6

28 Mr P. Jameson (Vero Insurance Ltd), *Committee Hansard* 20 June 2008 (in camera), p.2. 'net loss ratio': ratio of claims to premium net of reinsurance expense and reinsurance recoveries. The different between net premiums and net claims is what the insurer retains to pay administrative expenses, commissions to brokers, and its own profit.

that a significant proportion of the premium collected during the underwriting years 2002 to 2006 was collected to pay for prior years' claims:

Collecting premiums in later years to pay for losses from earlier years is a typical action for long-tail classes when original underwriting-year pricing proves insufficient. This is why the New South Wales scheme data for the current version of that scheme shows a gap between premiums generated and claims paid.... we are not really comparing apples with apples.²⁹

5.32 Comparing with published APRA data on the public and product liability insurance classes as a whole, from 2005 to 2007 Vero's net loss ratio on home warranty insurance for those calendar (accident) years has been higher (worse for the insurer) than all insurers' results for public and product liability which, with HWI, forms part of the 'long tail' category of insurance.³⁰

Committee comment

5.33 The information above does not suggest that there is overcharging or lack of competition in the market for home warranty insurance.

Claims that commissions are excessive

5.34 It was sometimes claimed that excessive commissions are charged for insurance:³¹

There were incredible 60 or 70 per cent commissions on these policies which go back to various associations and agents.³²

5.35 An example was given of a policy in Tasmania from 2003 which showed agents' fees of \$918.80.³³

5.36 Home warranty insurance has always been sold through brokers since it is 'a specialised commercial insurance product, with a relatively low national premium pool, which lends itself to an intermediated distribution model', according to the National Insurance Brokers Association (NIBA). About 250 brokers have business in HWI, and according to NIBA 'insurance brokers compete aggressively in the market to obtain the business of builders'.³⁴

29 Mr P. Jameson (Vero Insurance Ltd), *Committee Hansard* 20 June 2008 (in camera), p.5.

30 Vero Insurance Ltd, confidential additional information, 23 June 2008, p.7-9. APRA, *Half Yearly General Insurance Bulletins*, various years, table 7.

31 For example, Mr R. Joseph, *Committee Hansard* 10 April 2008, p.3

32 Mr R. Joseph (Builders Collective of Australia), *Committee Hansard* 10 April 2008, p.3.

33 Builders Collective of Australia, submission 20 p.2

34 National Insurance Brokers Association, submission 127 p.4-5

5.37 Vero advised that it pays commissions to brokers of 7½ to 15 per cent depending on the circumstances. Brokers perform the sales and policy issuance function, and 'commission is a substitute in the large part for management expenses...with some of the smaller brokers, where we have to do more of the work, we pay less.'³⁵ Vero advised that its average commission payment in the period 2003-2007 has been about 10 per cent, and commissions are generally lower in HWI than in other general insurance classes.³⁶

5.38 HIA Insurance Services, the largest broker of home warranty insurance, said it receives 'an average of 15 per cent brokerage from insurance companies for this type of business.'³⁷

5.39 The NSW Office of Fair Trading does not report commissions separately, but lists total premium revenue with and without charges. 'Charges' includes not only the commissions discussed above but also charges such as GST, stamp duty, government levies and credit card surcharge reported by insurers. Total premium in the March 2008 quarter was \$7,337,000 excluding charges and \$9,767,000 - about one third more - including charges.³⁸

5.40 The figures above refer to commissions charged by brokers to insurers, which insurers pass on to the builders. Brokers may also charge a fee directly to the builder. In the case of the HIA Insurance Services:

The 15 per cent commission, frankly, is not sufficient to allow us to make any profit—it costs us more to run the business than we get from commissions—so we do charge fees to clients. So our remuneration comprises two components: a commission of up to 15 per cent paid by insurance companies and a broker service charge that we charge directly to the builder.³⁹

5.41 These fees are not included in the 'charges' reported by the NSW OFT, however 'based on information from insurers' the OFT believes that these fees 'are understood generally to be a flat dollar amount per certificate ranging from \$50 to \$400 depending on the volume of business of a particular broker with a particular builder.'⁴⁰

35 Vero Insurance Ltd, confidential additional information 23 June 2008, p.4. Mr P. Jameson (Vero Insurance Ltd), *Committee Hansard* 20 June 2008 (in camera), p.8

36 Vero Insurance Ltd, correspondence 13 October 2008

37 Mr D. Farrell (HIA Insurance Services Ltd), *Committee Hansard* 11 August 2008 (in camera), p.5

38 NSW Office of Fair Trading, *NSW Home Warranty Insurance Scheme - Information on the Scheme as at 31 March 2008*, p.10

39 Mr D. Farrell (HIA Insurance Services Ltd), *Committee Hansard* 11 August 2008 (in camera), p.5

40 NSW Office of Fair Trading, *NSW Home Warranty Insurance Scheme - Information on the Scheme as at 31 March 2008*, p.9

5.42 HIA Insurance Services' broker service charge to the builder varies depending on the costs associated with handling the business of the particular builder. HIAIS gave the committee confidentially figures on its highest, lowest and average charge. Both the highest and lowest figures are significantly lower than those suggested in the NSW Office of Fair Trading reports. The average figure does not support claims that commissions are excessive.⁴¹

5.43 On the case of the \$918 agent's fee, Vero commented:

Tasmania's owner-builder HWI regime is and always has been a first resort scheme. The nature of this insurance is retrospective in that the homes are already built and probably have been for some years. As a result, owner-builder HWI in Tasmania requires a pre-insurance inspection; which is a cost not normally needed for licensed builder HWI. The pre-insurance inspection is in all probability reflected in the \$900 fee that was characterised in the evidence to the Committee as a commission.⁴²

Committee comment

5.44 The committee accepts the evidence that commissions to brokers are generally within normal industry margins.

41 Mr D. Farrell (HIA Insurance Services Ltd), *Committee Hansard* 11 August 2008 (in camera), p.5. HIA Insurance Services, correspondence 27 October 2008.

42 Vero Insurance Ltd, correspondence 24 July 2008, p8

Chapter 6

Other consumer protection issues

6.1 In a scheme that limits insurance claims to the builder's death, disappearance or insolvency, it is all the more important to assure the quality of other aspects of building regulation and dispute resolution which are the consumer's defence if those conditions are not met. Many submissions related more to these other defences than to home warranty insurance as such. There is a need for:

- better regulation of builders at licence and licence renewal, with more expeditious procedures for disciplining or delicensing delinquent builders;
- better public information about builders' licensing and disciplinary record;
- quicker and cheaper dispute resolution.

6.2 The committee has not researched the position in each state, beyond noting the mostly qualitative comments in evidence, and makes only general comments.

Need for better regulation of builders

6.3 Assuring the technical competence of builders is the responsibility of state licensing authorities. Some submissions thought that the states are not rigorous enough about this. For example:

One of the problems that I have with the licensing arrangements in Victoria... is that it is basically like a golf club: you go through your initial assessment and you are accepted onto the book as a builder, and from then on in, provided you paid your annual fee to remain on the register, you could remain on the register.... It ought to be like a current licence, some sort of annual assessment, in my opinion.¹

6.4 All agreed on the need for better links between disciplinary decisions and licensing. Vero sees this as part of the 'defence in depth' against delinquent builders:

It is typical of the building industry (and other industries, too) that certain participants are inclined to ignore or work around whatever regime is in place. In this context it is absolutely essential that the consumer protection structure provides defence in depth - from up front education and clear enunciation of homeowner responsibilities, through to penalties for recalcitrant builders (that do directly influence the correct behaviour or permanently remove them from the industry) and backstop insurance protection.²

1 Mr M. Stokes, *Committee Hansard* 13 June 2008, p.32

2 Vero Insurance Ltd, confidential additional information 18 June 2008, p.21

6.5 The NSW Government said there is ample scope in NSW for deregistering builders who do not meet appropriate performance standards. It gave figures on disciplinary cases over the last few years: for example, in the three years to 2006/07, 814 licences were cancelled due to Licensing Branch compliance actions, such as licensees becoming insolvent, failing to comply with a Consumer, Trader and Tenancy Tribunal order, or lodging a fraudulent application.³

6.6 The Victorian government said it is currently reviewing its builder registration and disciplinary framework with a view to better protecting consumers against problem builders.⁴

6.7 There are different opinions on whether the licensing function should be in the same body as the insurance function (as in Queensland). The Queensland Building Services Authority thought that there were benefits in integration:

We are the only state that places financial requirements on our licensees—because they [the other states] leave it to the insurer to look at the financial requirements. That gives me compliance intelligence, because every time they are paying insurance I now know whether they are exceeding their annual allowable turnover. That then allows me to go in and have a look at that business.... It is integrated, because you are getting the intelligence, you are getting the data, and you know instantly when there is a problem... [In the other states] All they say is, 'We're not going to give you insurance,' so the regulators then do not move on the individuals that may have financial trouble in the industry.⁵

6.8 On the other hand the HIA thought that licensing and insurance should not be in the same body, because of the possible conflict of interest:

QBSA not only provides insurance and regulates licences it also represents consumers in disputes with builders. This is neither appropriate nor desirable because of the inherent conflicts of interest. State regulator/licensing bodies must be responsible for resolving disputes. When the role of regulator and insurer are fused there is moral hazard, since a finding in favour of one party or the other will have direct financial implications for the regulator/insurer. One of the major reasons for the decline and ultimate demise of the Housing Guarantee Fund in Victoria and the New South Wales Building Services Corporation was exactly this conflict of roles.⁶

6.9 VCEC in its 2005 inquiry noted that linking performance to registration does not depend on government ownership of the insurance:

3 NSW Government, submission 34, p.5

4 Victorian Government, submission 38, p.4

5 Mr C. Wright (Queensland Building Services Authority), *Committee Hansard* 10 April 2008, p.27

6 Housing Industry Association, submission 60, p.9

While integrating insurance and registration within a government agency offers this advantage, it is not essential. The key is the early identification of poor builder performance and linking this to registration.⁷

Committee comment

6.10 The committee agrees there is a need for better regulation of builders and better links between disciplinary decisions and licensing/delicensing. However the Committee notes that this does not depend on government ownership of the insurance scheme.

Better public information about builders' licensing record

6.11 Submissions argued that consumers should have full information about builders' licensing and disciplinary record. There is no disagreement about this. NSW has a public register with this information.⁸ In Queensland it is on the BSA website. It appears the same information is not easily available in Victoria.

Need for quicker and cheaper dispute resolution

6.12 Dispute resolution arrangements typically include mediation at an administrative level, followed by action in a consumer tribunal if mediation fails. Details vary between the states.

6.13 Many consumer submissions described extraordinarily long drawn out building disputes, including absurdly high legal costs in the tribunals in relation to the sum in dispute. For example, the Consumer Action Law Centre in Victoria described a case where - ·

- The dispute has lasted four years, without a satisfactory resolution;
- The builder rejected all attempts to conciliate the matter at Building and Conciliation Victoria;
- Proceedings in the Victorian Civil and Administrative Tribunal were drawn out and expensive, resulting in an order in favour of our client of over \$63,000;
- Independent costing of our legal services showed that over \$88,000 costs were incurred in relation to the matter;
- The order remains unsatisfied, requiring our clients to seek to wind up the builder's company in order to claim on Home Building Warranty Insurance (estimated to cost an additional \$4,000 - \$15,000)...⁹

7 Victorian Competition and Efficiency Commission *Housing Regulation in Victoria - building better outcomes*, October 2005, p.227

8 Mr S. Griffin, (NSW Office of Fair Trading), *Committee Hansard* 13 June 2008, p.78.

9 Consumer Action Law Centre, submission 32, p.9

6.14 There were similar stories about the Consumer, Trader and Tenancy Tribunal (CTTT) in NSW.

6.15 The Consumer Action Law Centre saw a problem that 'while the Consumer Affairs Ministries of the various States and Territories often provide mediation services, these are not typically reinforced with any determinative power on the part of the regulator...'

In Victoria, consumers with a complaint about a builder can complain to the Building Advice and Conciliation Service Victoria (BACV), which is managed jointly by Consumer Affairs Victoria (CAV) and the Building Commission. The problem with dispute resolution at BACV... is that builders do not have an incentive to resolve cases on a conciliated basis. ... Further, the BACV has no capacity to enforce an outcome.... The inability of conciliation to provide rectification orders leaves a very significant gap.¹⁰

6.16 In NSW building inspectors can issue rectification orders, but if the builder does not comply the consumer must still take the builder to the CTTT (the inspector's building report may be used as evidence of defects). Not complying with a rectification order is grounds for disciplinary action.¹¹

6.17 In response to the consumer complaint stories, the authorities gave statistics showing what they argue is a satisfactory overall achievement in early dispute resolution. In NSW:

The operation of the dispute resolution service initially involves an attempt to resolve the dispute by Fair Trading Centre staff. In 2006/07 of the 6,112 complaints received by Fair Trading around 2,251 or 36% of disputes were resolved at this stage. Of the 2,517 complaints referred to the Home Building Service, 1,784 were subject to site inspections, of which 1,533 or 86% were resolved.... The early intervention dispute resolution service has reduced the volume of building complaints going to the Consumer, Trader and Tenancy Tribunal by approximately 30%.¹²

6.18 In Victoria:

Around 80 per cent of disputes conciliated by Building Advice and Conciliation Victoria are successfully resolved.... The number of matters initiated [in the VCAT] has declined from over 1000 in 2000-01 to 825 in 2006-07.... The Victorian government is closely monitoring its domestic

10 Consumer Action Law Centre, submission 32, p.5

11 NSW Office of Fair Trading, submission 16 to Legislative Council General Purpose Standing Committee No.2, *Inquiry into the Operations of the Home Building Service*, November 2006, p.43

12 NSW Government, submission 34, p.4

building alternative dispute resolution services to identify opportunities for improvement.¹³

6.19 There are similar statistics for the tribunals. For example, in the NSW CTTT, 48 per cent of home building matters are listed for hearing within 28 days, 65 per cent are finalised before or at the first hearing, and 36 per cent are finalised within 35 days.¹⁴ In Victoria 72 per cent of domestic building cases are resolved by mediation, 62 per cent of cases are resolved within 20 weeks, and 78 per cent within 35 weeks.¹⁵

Discussion of consumer protection needs

6.20 As many submissions noted, home building or renovation is likely to be the most significant purchase most people make in their lives, and one that they have little experience of dealing with. In this situation it is particularly important that there is good consumer protection.

6.21 The consumer complaints - especially the stories of unbelievably long-drawn-out tribunal cases - show that there are still problems with dispute resolution in domestic building. However the committee does not think that the correct response is to return to a first resort government scheme.¹⁶ That would improve matters indirectly, by throwing more responsibility back on insurers, but it would risk other problems, which the industry groups suggested, arising from the fact that the insurance concerns events which are within the control of the insured builder (see paragraph 8.2).

6.22 In the committee's view the better response is to improve the builder licensing and dispute resolution arrangements directly. The committee agrees with VCEC's comment: 'The key is the early identification of poor builder performance and linking this to registration, rather than government ownership [of the insurance].'¹⁷

6.23 This includes the systems which go to minimising disputes - licensing & disciplining of builders - and those that go to resolving disputes expeditiously - a clear hierarchy of complaint/ mediation/ escalation/ judgement, with time limits. It should include protocols to ensure that, if licensing and complaint-handling are in different bodies, adverse decisions about builders in a consumer complaint flow through

13 Victorian government, submission 38, p.3

14 NSW Office of Fair Trading, submission 16 to Legislative Council General Purpose Standing Committee No.2, *Inquiry into the Operations of the Home Building Service*, November 2006, p.41

15 Victorian Civil and Administrative Tribunal, Annual Report 2006-07, p.23

16 In principle the issue here is first resort versus last resort, not government versus non-government; but '*...government scheme*' is used because of the strong evidence that private insurers would not participate in a first resort scheme.

17 Victorian Competition and Efficiency Commission *Housing Regulation in Victoria - building better outcomes*, October 2005, p.227

promptly to the licensing authority's disciplinary actions and public information about the builder's record.

Should the insurance be voluntary?

6.24 It has sometimes been suggested that home warranty insurance should be voluntary. In Tasmania it was made voluntary from 1 July 2008. The scheme in Western Australia used to be voluntary, but became compulsory in 1997.

6.25 In submissions opinions on this point were mixed. The Master Builders Association of WA argued for voluntary insurance, on the basis that 'typical savings of \$800 to \$1000 would be reaped for those homebuyers who choose to opt out'...

The highly concentrated structure of the WA housing industry means that a large percentage of project homes are built by a small number of extremely efficient builders. Consumers should be given the choice of whether to take out insurance under these circumstances.¹⁸

6.26 The more common view was that the insurance should remain mandatory, on the grounds that otherwise the risk to consumers is too high. For example, CHOICE said:

It seems there are three options. There is a system like Queensland's; there is a system like the one we have now but with improved transparency and improved coverage for home building warranty and last resort insurance; or there is voluntary insurance. I think the voluntary insurance would be the worst option.... because I just do not think that the consumers who need protection will, in sufficient numbers, choose to take out the insurance.¹⁹

6.27 The 2003 Grellman inquiry in NSW and the 2005 VCEC inquiry in Victoria made similar comments.²⁰

6.28 Insurance industry representatives argued that voluntary home warranty insurance is not practical because the market is too small and because of 'adverse selection' problems: the most likely takers would be builders who are at risk or consumers who think their builder is at risk. Vero advised that 'it would not be worth us writing voluntary insurance.'²¹

18 Master Builders Association of WA, submission 37, p.2

19 Mr G. Renouf (CHOICE), *Committee Hansard* 13 June 2008, p.28. Similarly Consumer Action Law Centre, submission 32, p.7. Dr R. Silberberg (Housing Industry Association), *Committee Hansard* 17 September 2008, p.13

20 NSW Government, submission 34 p.3. Victorian Competition and Efficiency Commission *Housing Regulation in Victoria - building better outcomes*, October 2005, p.197,213

21 Mr G. Donovan (HIA Insurance Services), *Committee Hansard* 11 August 2008 (in camera), p.10. Mr P. Jameson (Vero Insurance Ltd) *Committee Hansard* 20 June 2006 (in camera), p.16

Committee comment

6.29 The committee notes with interest the recent change to voluntary home warranty insurance in Tasmania and recommends that a review of the new system be undertaken after it has been fully implemented. Such a review would assess the success of a voluntary scheme combined with the stronger dispute resolution and reporting procedures that have been flagged by the Tasmanian government.

6.30 However the committee notes builder failure in the past, some on a large scale and, despite some problems with the scheme, believes that HWI has provided some redress. The Committee does not support a voluntary scheme at this time since a builder collapse would then leave consumers with no minimum level of protection.

6.31 The committee agrees with the predominant view that the insurance should remain mandatory.

Chapter 7

Other matters

National Claims and Policies Database

7.1 The National Claims and Policies Database (NCPD) was a response to the crisis in availability of liability insurance which occurred in 2001-03. It was prompted by a recommendation of this committee's 2002 report on public liability and professional indemnity insurance. The committee suggested that better industry-wide information on risks and claims would help insurers to set fairer, more stable premiums in these small (in the case of professional indemnity) and long-tail portfolios.¹

7.2 The database was created at the request of government and is administered by the Australian Prudential Regulation Authority (APRA), using powers under the *Financial Sector (Collection of Data) Act 2001*. It is intended to give insurers information to help them assess risks and determine appropriate premiums. It covers public liability, product liability and professional indemnity. The first data collection occurred in early 2005 and included claims and policies data from 1 January 2003. All APRA-regulated insurers must comply (unregulated foreign insurers and discretionary mutual funds do not have to comply).

7.3 Summary reports on policies and claim development are freely available, with protocols to ensure confidentiality of individual insurers.² For each class, reports show the number of risks written and the gross premium, and the development of claims.³ More detailed reports with breakdowns by occupation and industry classification (for example) are available by subscription.⁴

7.4 On some points (particularly the development of claims), the database has more detailed information than the NSW Office of Fair Trading HWI reports.

7.5 APRA also publishes information on general insurance as a whole in its *Quarterly General Insurance Performance* and *Half Yearly General Insurance*

1 Senate Economics References Committee, *A Review of Public Liability and Professional Indemnity Insurance*, October 2002, p.78ff

2 APRA, *National Claims and Policies Database - explanatory notes*, 5 September 2007, p.5

3 'Risks written' is different from policies written as a policy may have more than one associated risk. APRA, *National Claims and Policies Database - explanatory notes*, 5 September 2007, p.6

4 See www.ncpd.apra.gov.au APRA intends that some non-APRA-regulated insurance providers, including Lloyd's Australia Ltd and state and territory insurers, will be included in future reports. *National Claims and Policies Database - Overview of Professional Indemnity and Public and Product Liability Insurance*, 5 September 2007, p.4

Bulletin. These reports contain profit-related information such as loss ratios and underwriting results, some of which is broken down by the major general insurance classes. Information on home warranty insurance is gathered, but is not reported separately, as it is a small part (possibly about 5 per cent) of the public and product liability class.⁵

7.6 The NCPD database is limited to professional indemnity and public and product liability insurance. Treasury advised that APRA undertook public consultations on the specifications of the NCPD in July/August 2003 and October to December 2003. Information was disseminated by media release and on APRA's website and submissions were invited. A number of submissions were received however only a small number of respondents commented on home warranty insurance. Of those, some strongly opposed including home warranty insurance in the database, and others queried its inclusion. Reasons for this included that home warranty insurance would require different specifications and that given the small number of insurers (in 2003) it would not be possible to publish information due to the confidentiality requirements that would apply.⁶

7.7 It appears that the Builders Collective of Australia was not aware of the consultation in 2003.⁷ Representative of Vero, the major HWI insurer, advised that Vero did not have input at that time. Vero had no objection to including HWI in the database now. They also commented that 'this highly volatile class needs greater consistency in the actuarial approach to predicting future claims costs'.⁸ This implies that the purpose of the database - to provide better industry-wide information on small and volatile classes - would be valid for HWI.

Effect of Corporations Regulation 7.1.12(2): retail vs wholesale clients

7.8 Corporations Regulation 7.1.12(2) exempts mandatory home warranty insurance from certain consumer protections in the *Corporations Act 2001*. Some submitters thought that this in some way removes HWI from oversight by APRA, ASIC or the ACCC which would otherwise exist. Some submitters also thought that the regulation was necessary, and was made deliberately, to implement the last resort

5 The 14 classes of general insurance reported in APRA's half-yearly reports are further described in the general insurance reporting instructions. Home warranty insurance, with gross premiums estimated at about \$85 million by HIA Insurance Services, is about 5 per cent of public and product liability with gross premiums of about \$1.9 billion in 2007. APRA, *Half Yearly General Insurance Bulletin*, December 2007, p.19. Mr D. Farrell (HIA Insurance Services), *Committee Hansard* 11 August 2008 (in camera), p.1

6 Department of the Treasury, additional information 29 July 2008, p.10. See also Ms V. Wilkinson (Treasury), *Committee Hansard* 13 June 2008, p.59-60

7 Builders Collective of Australia, correspondence 25 August 2008, p.6

8 Mr P. Jameson & Mr J. Nagle (Vero Insurance Ltd), *Committee Hansard* 20 June 2008 (in camera), p.7,12. Vero Insurance Ltd, correspondence 13 October 2008

changes to HWI in NSW and Victoria from 1 July 2002.⁹ Some also seemed to think that the regulation was necessary to enable insurers to demand bank guarantees or deeds of indemnity from builders.¹⁰

7.9 These claims have no basis. They misunderstand the law. In some cases the concern seems to arise from confusing APRA's role as prudential regulator with APRA's role collecting information for the National Claims and Policies Database, discussed above.

7.10 In fact Corporations Regulation 7.1.12(2) has no connection with and no effect on APRA's prudential regulation of insurers. It has no connection with APRA's information-gathering or with the National Claims and Policies Database. It has no effect on the general consumer protection powers of ASIC and the ACCC, or the States' power to make laws about home warranty insurance. It was not a prerequisite to the scheme changes which took place in NSW and Victoria from 1 July 2002. Details follow.

Description and context of Corporations Regulation 7.1.12(2)

7.11 Chapter 7 of the *Corporations Act 2001*, enacted in 2002, imposes requirements for the sake of consumer protection on providers of financial services and financial products such as general insurance contracts.¹¹ A distinction is made between 'retail clients' and 'wholesale clients'. Retail clients, but not wholesale clients, enjoy -

- access to an external dispute resolution scheme approved by the Australian Securities and Investments Commission (ASIC);
- compensation arrangements providing cover in case of misconduct by the licensee;
- the provider's obligation to provide a range of disclosure documents (financial services guide, statement of advice and/or product disclosure statement as relevant).¹²

7.12 A retail client includes the purchaser of six listed classes of insurance, including 'a home building insurance product (as defined in the regulations)' (s761G(5)(b)).¹³

9 For example, Housing Industry Association, submission 60, p.8. Builders Collective of Australia, submission 20, p.8-9: 'This action removed the BWI product from any form of consumer protection scrutiny by any authority including ACCC, APRA and of course ASIC as last resort BWI was now deemed a wholesale product'. Mr P. Dwyer (Builders Collective of Australia), *Committee Hansard* 10 April 2008, p.3: 'The 10 point plan... put in motion a change to the corporations regulation to allow this to come into play.'

10 Builders Collective of Australia, correspondence 27 June 2008, p.1

11 A 'financial product' includes a contract of insurance (with exceptions not relevant here): s764A

12 Treasury, additional information 29 July 2008, p.13

7.13 These provisions were inserted into the Corporations Act by the *Financial Services Reform Act 2001*, which came into force on 11 March 2002. This was part of a wide-ranging reform of regulation of financial services, which responded to recommendations of the 1997 Financial System Inquiry (the Wallis Committee). The aim of s761G was to make clear that an individual or small business purchaser of one of the listed classes of insurance is a retail client (except where another provision shows otherwise), and a purchaser of insurance not on the list is not a retail client. The listed classes follow the classes subject to 'standard cover' consumer protection provisions in the *Insurance Contracts Act 1984*.¹⁴

7.14 The Corporations Amendment Regulations 2001 (No.4) supported the Financial Services Reform Act, and were similarly wide-ranging (the regulations have 491 pages). Draft regulations were put out for public consultation in August and September 2001.¹⁵ The regulations came into force with the main amendments in the Financial Services Reform Act, on 11 March 2002.

7.15 The regulations further define the classes of insurance mentioned in s761G(5) of the Corporations Act, which determine the scope of 'retail client'. They list inclusions and exclusions. The exclusions generally follow the exclusions from the 'standard' cover' protections in the *Insurance Contracts Act 1984*: they exclude marine insurance and insurance for the purposes of a law (including a law of a State or Territory) relating to workers compensation or compulsory third party compensation.¹⁶ The exclusions also include (with no direct correlate in the Insurance Contracts Act) home warranty insurance mandated under state law, as follows:

Corporations Regulation 7.1.12

For subparagraph 761G (5) (b) (ii) of the [Corporations] Act, a home building insurance product is a contract that provides insurance cover (whether or not the cover is limited or restricted in any way) in respect of destruction of or damage to a home building.

A home building insurance product does not include insurance entered into, or proposed to be entered into, for the purposes of a law (including a law of

13 Providing the purchaser is an individual or small business as defined.

14 Financial Services Reform Bill 2001, explanatory memorandum, p.1,29-30. The listed classes are motor vehicle, home building, home contents, sickness and accident, consumer credit, travel, and personal and domestic property insurance, as defined in the regulations. The list can be added to by regulation. All but the last copy the classes subject to 'standard cover' consumer protection provisions in the Insurance Contracts Act. The 'standard cover' provisions have the effect that an insurance contract is assumed to have certain conditions relating to the events covered and the minimum cover, unless the insurer has clearly advised to the contrary. *Insurance Contracts Act 1984*, s32-37. *Insurance Contracts Regulations 1985*, reg 5ff.

15 Corporations Amendment Regulations 2001 (No.4), explanatory statement, p.3-4

16 The *Insurance Contracts Act 1984* as a whole, thus including the standard cover provisions, does not apply to insurance for the purposes of a law relating to workers compensation, or insurance for the purposes of a law relating to compensation for death or injury resulting from the use of a motor vehicle: s9.

a State or Territory) that relates to building or construction work in relation to a home building.

7.16 The result is that the purchaser of mandatory home warranty insurance is not a 'retail client', so the product disclosure and related provisions of the Corporations Act do not apply.¹⁷

7.17 The explanatory statement of the Corporations Regulations gave no clear reason for this particular exclusion. It only said:

The exclusions (some of which were based on section 9 of the Insurance Contracts Act) have generally been limited to marine insurance, workers' compensation insurance, compulsory third party insurance and, in the case of home building insurance, cover required under statute in respect of residential building works.¹⁸

7.18 Treasury advised that the exclusion was based on the view that if a state or territory law mandates certain insurance, the state or territory law should also be responsible for outlining what disclosure or other consumer protections should apply:

This exclusion is consistent with the treatment of other state mandated insurance products such as workers compensation and compulsory third party motor vehicle insurance. The reason for these exclusions is that, if a state or territory law mandates a certain type of insurance, in the Commonwealth's view, the state or territory law should also be responsible for outlining what disclosure and/or other consumer protection measures need to accompany the insurance. If the Commonwealth also regulates in this space, there is a risk of duplication and/or inconsistency between Commonwealth and state/territory based regulation which may well increase the overall regulatory burden and result in increased insurance costs.¹⁹

17 If the insurance is not mandatory ('entered into for the purposes of a law') the exclusion does not apply, and the purchaser would be a retail client providing some other tests are satisfied (the purchaser should be an individual or small business as defined, and the insurance should satisfy the definition of 'home building insurance product' in the regulation). It should be remembered that in this case the purchaser is the builder, not the homeowner. Department of the Treasury, additional information 29 July 2008, p.13

18 Corporations Amendment Regulations 2001 (No.4), explanatory statement, p.6

19 Ms V. Wilkinson (Department of the Treasury), *Committee Hansard* 13 June 2008, p.57-58. It is not clear that this was the original motivation for excluding certain state-mandated insurance from the *Insurance Contracts Act 1984*, which was the precursor of the present provision. The exclusion of workers compensation and compulsory third party insurance came about because the Act responded to recommendations of the Australian Law Reform Commission's report 20, *Insurance Contracts* (1982), and these classes were excluded from the ALRC's terms of reference. The reason for excluding them from the ALRC's terms of reference is not discussed in the ALRC report, however the explanatory memorandum of the Insurance Contracts Bill 1984 commented: 'They are both forms of compulsory liability insurance and so subject to different considerations such as whether they should be replaced by a principle of general accident compensation': p18.

7.19 Vero Insurance Ltd said:

There is no connection between the HWI 10 point plan and the FRS amendments to the Corporations Act to introduce product disclosure (to purchasers of general insurance) other than they occurred at approximately the same time. HWI was not defined as a retail product because, like workers compensation and motor compulsory third party insurance, it was mandated insurance the structure for which was already in place under the relevant state legislation.²⁰

7.20 Further: although the exclusion of mandatory HWI has no direct correlate in the 'standard cover' provisions of the Insurance Contracts Act, it is noteworthy that the 'home buildings' section of the standard cover provisions is clearly directed at loss or damage to a complete, inhabited dwelling from the usual causes (fire, theft, burst pipes etc).²¹ The intention in the Corporations Regulation may have been to duplicate the standard cover provisions, but to clarify an exclusion that arguably was already implied, to avoid doubt.

7.21 Further: the exclusion of mandatory HWI is consistent with the definition of 'home building insurance product' elsewhere in the regulation. A 'home building' does not include a building that is under construction by the insured (in this case, the builder) in the course of a construction business (regulation 7.1.12(4)). It appears the intention was to exclude professional builders, consistent with the underlying concept of 'retail client'.

7.22 The National Insurance Brokers' Association thought there would be little benefit in making home warranty insurance a 'retail' product:

Builders, the policyholders, regularly take out Home Warranty Insurance and as a result they generally have a sound knowledge of the product. There would be little or no benefit in designating Home Warranty Insurance to be a "retail" product under the Corporations Act. Designating Home Warranty Insurance to be "retail" would simply mean that builders were required to receive additional disclosure documents that would be no benefit to the vast majority of them. The additional costs involved would far exceed any potential benefits.²²

7.23 Treasury agreed that there is merit in providing better information for consumers about the nature of the product, but thought that 'the Corporations Act may not be the appropriate vehicle for achieving this.'²³ In this regard it should be remembered that the 'client' in this case is the builder who purchases the insurance, not the homeowner who is the beneficiary. The Corporations Act does not regulate the relationship between the insurer and a third party beneficiary or between the purchaser

20 Vero Insurance Ltd, correspondence 24 July 2008, p.11

21 Insurance Contracts Regulations 1985, reg. 11.

22 National Insurance Brokers Association, submission 127 p.4

23 Ms V. Wilkinson (Department of the Treasury), *Committee Hansard* 13 June 2008, p.58

(builder) and the third party beneficiary. Corporations Regulation 7.1.12(2) did nothing to change regulation of those relationships, as they were not regulated under the Corporations Act in any case. If the regulation was changed to make the builder purchasing home warranty insurance a 'retail client', this would not address the demand for better information for homeowners.

Committee comment

7.24 Corporations Regulation 7.1.12(2) relates only to the product disclosure and related provisions in Chapter 7 of the Corporations Act. It did not remove any consumer protections which previously existed, as it was part of a new scheme created by the *Financial Services Reform Act 2001*.

7.25 The exclusion of mandatory home warranty insurance from the product disclosure regime for retail clients was consistent with the precedent of the 'standard cover' provisions in the *Insurance Contracts Act 1984*. The definition of 'home building insurance product' shows an intention that professional builders should not be regarded as retail clients. The exclusion is consistent with the exclusion of other state-mandated insurance, on the grounds that if the state chooses to make insurance mandatory, it should be responsible for the disclosure regime.

7.26 The Corporations Act does not regulate the relationship between the insurer and a third party beneficiary - in this case, the homeowner. If the regulation was changed so that a small builder was a retail client, this would have no bearing on concerns about the improving information to homeowners about the product.

7.27 If small builders purchasing home warranty insurance were defined as retail clients, the most significant effect would be that they would have access to an external dispute resolution scheme approved by ASIC.²⁴ This could include complaints about refusal to insure (which was the main complaint made by builders in this inquiry).²⁵ However it appears that the present dispute resolution scheme intends to exclude liability insurance generally.²⁶ The possibility of including home warranty insurance would have to be considered in context of the policy on liability insurance generally. It would not be sound to include home warranty insurance alone as an ad hoc measure.

24 They would have to satisfy the other tests of 'retail client': relevantly they must be either an individual or a small business employing less than 20 people: *Corporations Act 2001*, s761G(5) & (12). For dispute resolution schemes: *Corporations Act 2001*, s912A. Treasury, additional information 29 July 2008, p.4

25 The scheme allows for 'non-claim' disputes which may include 'the failure to offer insurance or to only offer insurance on non-standard terms'. Financial Ombudsman Service, *General Insurance Terms of Reference*, 1 July 2008, clause 4.3

26 For small business applicants as defined public and product liability insurance is excluded. Compulsory third party motor vehicle and workers compensation is generally excluded. Financial Ombudsman Service, *General Insurance Terms of Reference*, 1 July 2008, clauses 1.2, 2.1

7.28 The relevant dispute resolution scheme is administered by the Financial Ombudsman Service Ltd. The Financial Ombudsman Service was created on 10 July 2008 as a merger of three former schemes: the Banking and Financial Services Ombudsman, the Financial Industry Complaints Service, and the Insurance Ombudsman Service. It is now reviewing the terms of reference of the three former bodies with the aim of developing a new single terms of reference by 2009.²⁷

Role of the Australian Prudential Regulation Authority (APRA)

7.29 APRA is the prudential regulator of the financial services industry. APRA regulates private insurers under the *Insurance Act 1973*. This includes insurers who provide home warranty insurance contracts. APRA collects information from insurers using powers under the *Financial Sector (Collection of Data) Act 2001*, and uses it to publish quarterly and half yearly statistical bulletins.

7.30 It has been suggested that APRA does not collect data on home warranty insurance.²⁸ This is wrong. APRA's data collection includes data on home warranty insurance, though it is not visible separately, as it is gathered and reported as part of the much larger class 'public and product liability'.²⁹

7.31 APRA separately collects information on public liability, product liability and professional indemnity insurance for the National Claims and Policies Database, as discussed above.

7.32 It has been suggested that Corporations Regulation 7.1.12(2) removes home warranty insurance from some APRA oversight which would otherwise apply and does apply to other classes of insurance. This is wrong. The regulation has no connection with and no effect on APRA's activities. Home warranty insurance has no special status in APRA's prudential regulation or data collection.³⁰

Role of the Australian Securities and Investments Commission (ASIC)

7.33 ASIC has general consumer protection powers in relation to financial services as defined in the ASIC Act. These control behaviour such as unconscionable conduct, misleading or deceptive conduct, bait advertising, pyramid selling and so on. They

27 The FOS board has done an initial public consultation, and plans to put out draft Terms of Reference for further stakeholder comment early in 2009. Financial Ombudsman Service, *Developing New Terms of Reference for the Financial Ombudsman Service*, 14 August 2008, p.4

28 Builders Collective of Australia, submission 119, p.1

29 Home warranty insurance appears to be about 5 per cent of the liability class: see footnote to paragraph 7.5.

30 The comment assumes that 'State insurance' within the meaning of the *Insurance Contracts Act 1984* and s51(xiv) of the Constitution means insurance issued by the state as insurer. This appears to be the case: see the High Court case *Attorney-General (Vic) v Andrews*, (2007) 233 ALR 389, which assumes that 'state insurance' has a meaning analogous to 'state banking'.

mirror provisions in the Trade Practices Act which the Australian Competition and Consumer Commission (ACCC) administers except in relation to financial services.³¹

7.34 This general consumer protection law applies to all contracts of insurance,³² and this is not affected by Corporations Regulation 7.1.12(2). There was no suggestion in this inquiry that home warranty insurers have offended against the general consumer protection law.

Corporations Regulation 7.1.12(2) and state laws

7.35 The states have general legislative power.³³ The Commonwealth has legislative power on the subjects listed in section 51 of the Constitution. If a state law and a Commonwealth law conflict, the Commonwealth law prevails to the extent of any inconsistency.

7.36 Corporations Regulation 7.1.12(2) relates only to the product disclosure and related provisions of the Commonwealth *Corporations Act 2001*. It has no connection with and no effect on the state laws which mandate home warranty insurance. It was not a prerequisite to implementing the last resort changes to HWI which NSW and Victoria made from 1 July 2002. This was done under state law using the states' general legislative power. The fact that the regulation was made about the same time was a coincidence. As explained above, the regulation was a small part of a wide-ranging reform of financial services law which had been under development for four years. It reflects precedents that go back to the *Insurance Contracts Act 1984*.

Claims of conflict of interest within the HIA

7.37 The Housing Industry Association Ltd (HIA) is Australia's largest builder organisation. It has over 40,000 members and revenue of \$88.5 million in 2007. It is a non-profit public company limited by guarantee. It has no shareholders and does not pay dividends to members. Revenue is used to provide services for members.³⁴

7.38 The HIA supports privatised last resort home warranty insurance (though in this inquiry it made some suggestions for reform, as discussed previously) and opposes suggestions to return to a Queensland-style government scheme.

7.39 Some submitters of the opposite view claimed or implied that the HIA has a conflict of interest in this matter, since (they believe) the HIA is acting contrary to its

31 *Australian Securities and Investments Commission Act 2001*, part 2. *Trade Practices Act 1974*, parts 4A & 5.

32 With a few exceptions that are not relevant here. *Australian Securities and Investments Commission Act*, s12BAA(7) & (8)

33 With a few exceptions noted in the Constitution, which are not relevant here.

34 Dr R. Silberberg (HIA), *Committee Hansard* 17 September 2008, p.1. Builders Collective of Australia, additional information 25 July 2008, p.3

members' interests, and suppressing internal dissent, for the sake of the income it gets from the insurance.³⁵

7.40 The HIA advised that 'revenue from activities associated with HWI accounts for about 3 per cent of HIA's gross revenue from all sources.'³⁶

7.41 The HIA is half owner of HIA Insurances Services Pty Ltd (HIAIS), an insurance broking business.³⁷ HIAIS is one of about 250 brokers in Australia who do home warranty business. HIAIS is the biggest of these, with about 40 per cent market share of the home warranty business. HIAIS also brokers other insurances for builders.³⁸

7.42 Mr Donovan of HIA Insurance Services said 'there is no compulsion, there is no necessity, for a HIA member to use HIA Insurance Services. Likewise, many clients of ours are not HIA members.'³⁹

7.43 In 2007 the HIA received \$2.35 million as its share of HIAIS profits attributable to home warranty insurance. This was 2.6 per cent of HIA revenue of \$88.5 million.⁴⁰ That percentage has been declining in recent years and is expected to continue declining.⁴¹ HIAIS also pays the HIA for office accommodation and marketing services on a commercial basis. HIAIS gave the committee confidentially recent figures for these payments. They are small in proportion to the licence fee payments and do not change the general conclusions about the HIA's income from HIAIS.⁴²

35 For example, Mr R. Joseph, *Committee Hansard* 10 April 2008, p.12

36 Housing Industry Association, submission 75, p.3.

37 The other half owner is Aon Risk Services. Aon is Australia's and the world's largest insurance broker. HIAIS operates as an authorised representative under the licence of Aon Risk Services. Mr D. Farrell (HIA Insurance Services), *Committee Hansard* 11 August 2008 (in camera), p.2-3

38 Mr D. Farrell (HIA Insurance Services Pty Ltd), *Committee Hansard* 11 August 2008 (in camera), p.2,9

39 Mr G. Donovan (HIA Insurance Services), *Committee Hansard* 11 August 2008, p.6

40 Dr R. Silberberg (HIA), *Committee Hansard* 17 September 2008, p.1. The total 'licence fee' from HIAIS to HIA, which represents the profit share, was about \$6 million, but this includes profit attributable to other lines of business. HIA Insurance Services Annual Report 2006.

41 HWI-related HIAIS profit share/HIA revenue (\$ million): 2005: 2.7/69.3=3.9%. 2006: 2.5/74.2=3.4%. 2007: 2.35/84.8= 2.8%. Dr R. Silberberg (HIA), *Committee Hansard* 17 September 2008, p.1. HIA annual reports. HIA Insurance Services, correspondence 27 October 2008.

42 Mr G. Donovan (HIA Insurance Services), *Committee Hansard* 11 August 2008 (in camera), p.23. HIAIS, correspondence 27 October 2008

7.44 The HIA advised that no HIA member or staffer has shares in HIAIS (HIAIS has no individual shareholders). Two HIA staff are directors of HIAIS, but they receive no payment for that.⁴³ HIAIS makes no loans to HIA or anyone within HIA.⁴⁴

7.45 On the suggestion that the HIA is prejudiced by a vested interest in the status quo, the HIA manager director Dr Silberberg said:

I am bemused by the observation that HIA has some conflict of interest which prejudices its objectivity in looking at this or any other matter. Our National Policy Congress took a decision to support voluntary home warranty. If we were solely guided by some sort of financial motive, why would HIA support a policy of voluntary home warranty in the states outside of Queensland?⁴⁵

7.46 As to whether the HIA is suppressing internal dissent: the HIA does not have a structure in which ordinary members can requisition a general meeting of the whole association (which is the default rule under s249D of the *Corporations Act 2001*). The HIA has a structure in which only certain regional and national office-bearers (and a few others ex-officio) are entitled to attend and vote at general meetings of the whole association.⁴⁶ The regional and national office-bearers are elected by outgoing committees, not directly by the members. The Articles of Association appear to envisage that grass roots involvement takes place at the branch level (to the extent allowed by the relevant regional executive committee), and members' views are then passed up to regional executive committees and taken by the regional office bearers to the national policy congress and general meetings of the whole association.⁴⁷

7.47 In provisions similar to s249D of the *Corporations Act*, ten per cent of those entitled to vote at a general meeting of the whole association can requisition a general meeting, and ten per cent of the members in a region can requisition a general meeting of the region.⁴⁸

43 Dr R. Silberberg (HIA), *Committee Hansard* 17 September 2008, p.1

44 Mr G. Donovan (HIA Insurance Services), *Committee Hansard* 11 August 2008 (in camera), p.24

45 Dr R. Silberberg (HIA), *Committee Hansard* 17 September 2008, p.11

46 Under s249D of the *Corporations Act 2001* a general meeting of a company may be requisitioned by at least 100 members *who are entitled to vote at the meeting*. The *Corporations Act* also has provisions about who is entitled to vote at a general meeting (s250E), but this is a replaceable rule - the Act allows a company's constitution to change the rule. Under the HIA's constitution (the Articles of Association) those entitled to vote at a general meeting of the whole association are limited to those entitled to attend and vote at the National Policy Congress; and those entitled to attend and vote at the National Policy Congress are limited to certain regional and national office bearers. HIA Articles of Association 31, 55(b)

47 HIA Articles of Association 28: a Regional Executive Committee may establish branches and pass by-laws for the administration of branches including for the election of office bearers of branches. There are nine HIA regions, mostly following state boundaries.

48 HIA Articles of Association 54-55.

7.48 Dr Silberberg of the HIA commented on the suggestion that the HIA does not properly represent its members:

We survey our members regularly and we have in excess of 40,000. We ask them what are the issues that occupy their minds, that keep them awake at night. Home warranty has dropped off the radar. For many builders it is a past issue... today 70 per cent of residential builders in New South Wales and Victoria are in the top-rated categories, so they enjoy the lowest premiums. Go back to 2001 when HIH collapsed: less than 10 per cent of builders were in the top categories as rated by Royal and Sun Alliance at that time, so there has been a significant shift by the industry.⁴⁹

Committee comment

7.49 On the evidence the HIA receives about 2.6 per cent of its income from its connection with brokering home warranty insurance. In recent years that figure has been declining. The Committee does not see evidence that the HIA's views on home warranty insurance is improperly influenced by that income. The HIA supports its views with various arguments. Whether or not one agrees with them, there is no reason to think its views are not held *bona fide*.

7.50 The Committee received evidence which shows there are hostile relationships between the HIA and some members and former members who disagree with the HIA's policy on home warranty insurance. The committee does not know the full context and did not question the HIA in detail on these complaints (since they are marginal to the policy issues which were the focus of the inquiry). The committee takes no view on whether the HIA's approach to these debates is reasonable. The Committee takes no view on whether the HIA's representative structure described above is effective at acting on the views of the membership.

Allegations about Senator Helen Coonan

7.51 During the inquiry allegations were made about the Hon. Senator Helen Coonan, former Minister for Revenue and Assistant Treasurer in the Howard government. The allegations are discussed in Appendix 4. The committee concluded that there was no reason to investigate the allegations against Senator Coonan nor any reason to refer the allegations to any other body.

49 Dr R. Silberberg (HIA), *Committee Hansard* 17 September 2008, p.7

Chapter 8

Summary and recommendations

Issues raised by builders

8.1 It is important to assure the financial stability of builders. Industry groups argue that the discipline of the insurers in vetting builders, with the ability to demand security if necessary, has generally improved the financial strength of builders and led to a drop in the number of insolvencies.¹ It is also necessary for the insurers because the claims experience of this long-tail class of insurance may be volatile over time.²

8.2 The committee notes that insurers advise that they would not participate in a first resort scheme. This is because 'the risk of obtaining and enforcing a court order is not one the insurer can realistically insure.'³ As Vero put it:

One of the basic criteria required to create an insurable event is, such event is accidental and beyond the control of the insured or any other party with a financial interest...So-called "first resort" BWI does not and cannot work because it fails, on several counts, to meet two of the primary tests of insurance, i.e. those of Insurable/Financial Interest and Insurable Event. A builder may gain a potential financial advantage by triggering an event which is not accidental and over which he has control.⁴

8.3 It appears that the requirement for security affects approximately 10 per cent of builders if the NSW Office of Fair Trading reports are representative. The committee is concerned at the lack of accurate data that is available on the number of builders who have provided security as a condition of receiving HWI, and in what form that security takes; in particular, the use of unlimited bank guarantees. This data should be included in any national data collection model and monitored carefully with a view to decreasing the burden on builders over time.

8.4 However the committee agrees with the argument that inhibiting builders from placing assets beyond the reach of consumers and their insurers is a benefit to consumers overall.

8.5 The implication that builders who are affected by these requirements would be better off in a government operated system is unsound. A government operated system must also have its financial requirements. In the Queensland system a builder

1 NSW Legislative Council General Purpose Standing Committee No. 2, inquiry into the operations of the Home Building Service, December 2007, p.82.

2 Office of Fair Trading, submission 16a to Legislative Council General Purpose Committee No.2, Inquiry into the Operations of the Home Building Service, December 2006, p.7

3 Housing Industry Association, submission 60, p.10

4 Vero Insurance Ltd, submission 71 to VCEC inquiry into Housing Regulation, p.8,18

who cannot satisfy the requirements is not asked for other security - the builder is simply refused a licence.

8.6 The committee is sympathetic to builders' concerns that active bank guarantees and deeds of indemnity make it difficult to change insurers. It appears that the authorities and industry bodies share this concern, but have no solution apart from 'make efforts' to encourage insurers to return securities.

8.7 The committee has not received evidence that would suggest a different conclusion from that of VCEC in 2005: that while some individual builders may have genuine grievances, there is nothing to suggest a significant systemic problem. However the committee notes the continuing concerns of the major insurer about the high rate of owner-builder activity in Victoria.

Issues raised by consumers

8.8 The committee agrees that there is a need for better information to consumers about the product. The committee suggests that a copy of the insurance certificate, a summary of the insurance product and an explanation of the relevant dispute resolution procedure should be provided by the insurer to the builder. The builder should then be required to provide this information to the consumer to assist all parties understand the nature of the insurance. Where possible this information should be as standardised as possible. This disclosure process should be part of the national 'best practice' scheme.

8.9 Furthermore the committee notes that "Home Warranty Insurance" is not an effective title for the insurance and implies a misleading level of coverage for consumers. The committee recommends changing the name of the insurance.

Recommendation 1

8.10 The committee recommends that all parties receive a copy of the insurance certificate, summary of product and dispute resolution procedures. The committee recommends changing the name of the insurance.

8.11 The committee acknowledges consumer concerns regarding the requirement in some cases to force a builder into insolvency before being able to claim HWI insurance. The consumer concerns on this issue are reasonable and the suggested additional 'loss of licence' trigger of an insurance claim appears to provide a solution.

8.12 The recent collapse of Beechwood Homes demonstrated an example of delay for consumers even when the builder was clearly insolvent. The HIA's 'guarantee of completion' and related suggestions require further examination.

8.13 The committee accepts the predominant evidence that premiums are lower in NSW and Victoria than in Queensland.⁵ However there are some discrepancies, the cause of which is unclear in the absence of clear official information, similar to the NSW Office of Fair Trading reports, in other states.

8.14 The committee recommends that better information should be published on a nationally consistent basis to improve accountability about this product. Reporting of premiums should be part of this.

8.15 In comparing premiums it should also be remembered that the Queensland scheme provides better cover: apart from being first resort, it covers no-fault subsidence; cover for consumers who are not insured because of fraudulent misrepresentation by builders; and non-completion without the cap of 20 per cent of contract value.⁶

8.16 In any case, the insurance is a very small proportion of total project costs (less than 1 per cent), and the difference between Victorian/NSW premiums and Queensland premiums is even smaller. The alternative schemes should be judged mostly on their other merits.

8.17 The committee agrees that consumers should be able to access thorough information on a builder's licensing and disciplinary record (subject to possible exceptions for matters still in dispute, to ensure procedural fairness to builders).

8.18 The fact that most building disputes resolve quickly does not alleviate the stress and expense of the ones which do not. A key element of a dispute resolution system is the ability to deal with disputes expeditiously. It is not acceptable that some disputes drag on for years.

8.19 In any dispute resolution system there may be a tension between resolving disputes quickly and giving both sides reasonable opportunity to have their say. Where the right balance lies depends on the situation. On the evidence the committee suggests that in the few intractable building disputes the balance may be too far towards slow and expensive.⁷

8.20 For example, in the NSW case, a homeowner might reasonably think that once an inspector has made a rectification order, which the builder has disobeyed, the

5 VCEC reached similar conclusions in 2005: Victorian Competition and Efficiency Commission *Housing Regulation in Victoria - building better outcomes*, October 2005, p.225-6

6 Queensland Building Services Authority, submission 8, att. p.5. Mr I. Jennings (BSA), *Committee Hansard* 10 April 2008, p.20. No fault cover for subsidence applies providing the builder tested the ground according to the Australian Standard.

7 In the NSW CTTT 36 per cent of cases are finalised within 35 days of receipt, but the statistic does not show how long the other 64 per cent take. NSW Office of Fair Trading, submission 16 to Legislative Council General Purpose Standing Committee No.2, *Inquiry into the Operations of the Home Building Service*, November 2006, p.41

next step should be deregistration of the builder followed by insurance claim, rather than being forced to re-agitate the whole case before a tribunal which may have less building expertise than the original inspector.

8.21 There would probably be fewer disputes if there was clearer guidance to both builders and homeowners about what is or is not a defect. As noted at paragraph 4.24, a number of 'standards and tolerances' guides have been published as advice on this, but they do not have legal force. Clearer standards of what constitutes defective work, preferably with legal force, would help avoid and resolve disputes.⁸

Recommendation 2

8.22 The committee recommends that COAG and the Ministerial Council on Consumer Affairs (MCCA) should pursue a nationally harmonised 'best practice' scheme of consumer protection in domestic building.

The scheme should include but not be limited to:

- **disciplinary procedures and penalties;**
- **clearer definition of defective work;**
- **quicker and easier dispute resolution;**
- **the proposed 'loss of licence' insurance trigger;**
- **the HIA's 'guarantee of completion' and related proposals,**
- **and better information for consumers (including information on builders' licence record and average cost of premiums).**

8.23 The Committee does not suggest that this necessarily needs to be done by Commonwealth regulation, if consistency can be achieved by inter-state cooperation.

Need for more detailed information

8.24 A theme in submissions was the need for better information about this class of insurance for the sake of accountability and transparency, given that it is mandatory.

NSW Office of Fair Trading HWI reports

8.25 NSW since 2007 has published reports on its scheme, including information such as the number of builder eligibilities; the number of securities held by insurers;

8 Given the complexities, care would need to be taken not to prohibit sound but non-standard work methods. A standard could be incorporated into regulation to the effect that there is a rebuttable presumption that work of a listed type, not within the set tolerance, is defective.

number and value of project certificates; premiums including and excluding charges; and information about claims (though not a full break down of claims development).

8.26 The committee commends NSW for this. No other state publishes similar information. Victoria says that it 'is currently working with the insurance industry on way to improve data collection on the BWI product.'⁹ Vero noted that 'scheme transparency is up and running in NSW, work in progress in Victoria.'¹⁰

8.27 The committee agrees that better public information on this insurance is warranted for the sake of accountability and transparency, given that it is mandatory. This would hopefully allay some of the stakeholders' suspicions that insurers make unreasonable profits from it. It should include key contextual information (such as number of builders, number of owner-builders, building permits) to illuminate trends.

Recommendation 3

8.28 The committee recommends that COAG and the Ministerial Council on Consumer Affairs should pursue a nationally harmonised scheme of detailed reporting of home warranty insurance.

National Claims and Policies Database

8.29 It is not surprising that home warranty insurance was not included in the National Claims and Policies Database, since the creation of the database specifically responded to the crisis in public liability and professional indemnity insurance at that time. It appears there was no particular expectation that other sorts of insurance should be included.

8.30 In particular, the exclusion of HWI had nothing to do with the treatment of HWI in Corporations Regulation 7.1.12(2), as discussed in chapter 7.

8.31 The question arises whether it would be useful to include HWI in the database now. This would go some way to answer demands for better public reporting of this class.

9 Victorian Government, submission 38, p.5

10 Vero Insurance Ltd, confidential additional information 23 June 2008, p.23

8.32 In 2003 there were reportedly not enough insurers to assure confidentiality of information. This no longer applies: five insurers offer home warranty insurance. According to the database methodology this should dispel concern.¹¹

8.33 The Committee recommends that home warranty insurance should be included in the National Claims and Policies Database, both to promote actuarial consistency among the insurers, and to satisfy public demands for greater transparency about this class. Satisfying public demands for greater transparency is justified because the insurance is mandatory.

Recommendation 4

8.34 The committee recommends that home warranty insurance should be included in the National Claims and Policies Database.

Senator Annette Hurley

Chair

11 'Data items are not included in the NCPD reports at this aggregate level unless at least three insurers contribute to the aggregate total for that data item. For policy reports, a data item is not reported where a single insurer contributes more than 85 per cent of the aggregate total or two insurers contribute more than 90 per cent of the total. These rules may be relaxed for claim reports if there is sufficient participation in the particular market to prevent identification of individual insurer claim information.' APRA, *National Claims and Policies Database - explanatory notes*, 5 September 2007, p.5

Home Warranty Insurance Inquiry

Additional Comments by Senator Marshall

For most Australians, building a home is one of the biggest financial commitments they are likely to make. Moreover, it is likely to be the only substantial financial outlay that they are likely to make of this kind. It is therefore no wonder that many Australians do not understand the complex issues around building a home and what cover they are in fact receiving with Home Warranty Insurance.

As we have seen following the collapse of HIH, most states have moved to a last resort scheme of Home Warranty Insurance. This system does not provide the level of cover implied in the provision of insurance nor the level of cover home builders should expect. Last resort insurance has been described as “junk insurance” by many commentators. Whilst the insurance industry disputes this label, what they don’t dispute is that few would purchase this insurance if it were not mandatory to do so.

On the whole I agree with the direction of the report and its recommendations. However, of the four recommendations, I believe recommendation two does not go far enough. I have been convinced over the course of this inquiry that the committee should be recommending a nation-wide adoption of a form of Home Warranty Insurance that reflects the form currently in effect in Queensland.

It is my view that the Federal Government should take a leadership role on this issue and progress a Home Warranty Insurance model through COAG using the current Queensland model as a template.

It is proper that, though a comprehensive Home Warranty Insurance model, the Government facilitates the provision of appropriate protection and support for those Australians who make the commitment to build a home. It is also important to recognise that builders contribute to the residential infrastructure of our nation and that we have a responsibility to ensure that protection is provided to all parties involved in home building.

Senator Gavin Marshall

Labor Senator for Victoria

Dissenting Report

Australian Greens

The Australian Greens moved for a Senate Inquiry into Last Resort Home Warranty Insurance because it was clear to us that the privatised last resort home warranty scheme as it currently exists does not provide appropriate consumer protection or building industry management. It was clear to us that it is not working for consumers or the building industry and should be either abolished or reformed.

Even the Productivity Commission in its 2008 report, *Review of Australia's Consumer Policy Framework*, commented on the large number of complaints it received about this insurance product. Its report noted the need for better consumer protection in home building and the need for early stage consumer protection measures like improved dispute resolution and better linking of licensing with builder performance.

The decision of the Senate to inquire into mandatory last resort home warranty insurance was welcomed by consumer advocates and builders alike as a means of finally exposing and ending the mandatory and grossly flawed nature of what Choice magazine described as “junk” insurance. Criticism of the scheme is not new with the Tasmanian government being the most recent to dump the scheme following extensive evidence and supporting documentation from Kim Booth Tasmanian Greens MHA.

The overwhelming majority of submissions and evidence confirmed that the product is fundamentally flawed and provides little or no benefit to either consumers or builders. The limited support for the product came from the NSW and Victorian state governments, or those who have benefited from it financially including the Housing Industry Association, (HIA) and the insurance industry itself.

Throughout the hearings, no one said that they would purchase last resort home warranty insurance unless they were forced by law to do so. Even the Housing Industry Association admitted that it would support the product becoming voluntary.

Therefore the recommendation of the Committee to maintain the scheme (albeit with some improvements) and its mandatory nature is wrong and unfounded. It does not reflect the evidence.

The weak conclusion that the scheme should be mandatory because it might provide some redress is unsupported by any evidence. The insurance was not used in dealing with the Beechwood collapse in NSW and the Gumleaf Construction collapse in Victoria. If it is effective in providing redress, why was it by-passed? The second argument that if the scheme was voluntary it would not be worth the insurance industry providing the product because of the low demand, proves the point. It is a worthless product.

There was considerable evidence supporting the claims of builders that the current situation requiring unlimited bank guarantees has driven many into non compliance. It is unacceptable that active bank guarantees and deeds of indemnity lock builders in and preclude them from being able to change insurers. It is wrong that many builders are still trying to get their guarantees back long after the appropriate period has passed. Action must be taken by the relevant authorities to rectify this injustice.

Throughout the hearings many remarks were made about the role of the HIA and the power over its members that it has been able to leverage because of the mandatory nature of this insurance product and the lack of competition in the market for this insurance product particularly in the early years following privatisation. It is clear that builder registration and licensing should be better linked to skills and performance rather than be dependent on insurance industry requirements. The current arrangements have afforded undue power and influence to the insurance industry and its brokers.

Whilst HIA describes itself as an association, it is a company limited by guarantee. It has no shareholders and does not pay dividends to its members. It has over 40,000 members and as the report indicates, it received revenue of \$88.5 million in 2007. HIA owns 50% of HIA Insurance Services which in turn has a 40% market share of the home warranty insurance business.

The report refers to the issue of alleged suppression of internal dissent in the HIA and the questionable representative nature of its structures. Whilst the Committee report describes the issues, it chose to take no view on whether the HIA's structure is representative or effective in acting on the views of its membership. It is clear that HIA does not have an effective representative structure as many members seem to be disenfranchised in the organisation.

Whilst the HIA surveys its members, there seems to be no mechanism for the members to hold the organisation to account. Evidence was provided that in a specific instance in July 2004, a member was informed that "you are not among the class of persons who would be entitled to receive notice of, attend or vote at such a meeting" referring to the request to hold a general meeting under Section 249 D of the Corporations Act. The responses of HIA to the allegations were misleading and it would appear that the matter of whether or not the HIA breached Corporations Law is outstanding.

Many submissions to the inquiry highlighted the benefits of the Queensland model of home warranty insurance. This system is described in an Appendix to the Committee report. The Greens concur that this scheme represents best practice in Australia and has the support of consumer advocates and builders alike.

The Greens make the following recommendations:

Recommendation 1

Australia should adopt a national approach to this issue and rapidly move to a system based on the Queensland model of home warranty insurance. The Federal government should oversee the design of the scheme and seek to have it implemented through the COAG process. A timeframe should be adopted such that the new model comes into operation by January 2010.

Recommendation 2

Between November 13th 2008 and January 2010, Last Resort Home Warranty Insurance should not be mandatory. If an insurance product provides good cover it will be supported voluntarily.

Recommendation 3

The Greens agree that any form of Home Warranty Insurance should be included in the National Claims and Policies Database.

Recommendation 4

If any loopholes remain in Commonwealth regulation or legislation such that HWI is exempted in any way from oversight by APRA, ACCC and ASIC, then that legislation or regulation must be amended immediately to close the loophole.

Senator Christine Milne

Australian Greens Senator for Tasmania

Deputy Leader of the Australian Greens

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Mr Barry Armstrong
2	Glen Crest Homes
3	Mr Giles Harden Jones
4	Mr Ken Buckley
5	Mr Rob Siebert
6	Mr Peter Watts
7	Dwyer Builders
8	Queensland Building Services Authority
9	Port Phillip Construction P/L
10	CDM Enterprises
11	Mr Michael Stokes
12	Mr Scott Maxworthy
13	CONFIDENTIAL
14	Tyrrells Property Inspections
15	Craftsman Homes Dubbo
16	CONFIDENTIAL
17	Housing Industry Association
18	CONFIDENTIAL
19	CONFIDENTIAL
20	The Builders Collective of Australia Inc
21	Pluim Constructions Pty Ltd
22	Mr Clinton Buckwell
23	Regency Design Centre
24	Mr Craig Ingram MP
25	Mr Peter Kavanagh
26	Ms Sylvia Hale
27	Cliff and Donna Cunningham
28	CONFIDENTIAL
29	Riviera Properties Limited
30	RJ Dohmen Constructions
31	Ms Dawn Coombridge
32	Consumer Action Law Centre
33	CONFIDENTIAL
34	NSW Government
35	Mr Shaun Tomlinson
36	Gippsland Secured Investments Limited
37	Master Builders Association of WA
38	Dept of Treasury and Finance, Victoria
39	Keith Aitkens Bathrooms
40	Australian Hardwood Homes
41	Mr John Fulton
42	Mr Colin Grivelle

43 CONFIDENTIAL
44 Insurance Council of Australia
45 Mr Ian Muir
46 L&F Holdings Pty Ltd
47 Building Action Review Group
48 CHOICE
49 Master Builders Fidelity Fund
50 Robert Verdouw & Associates Pty Ltd
51 CONFIDENTIAL
52 Ms Lydia Chakouch
53 Mr Murray Thompson MP
54 Property Power
55 NAMES CONFIDENTIAL
56 Mr John Buckley
57 Mr Robert Siebert
58 CONFIDENTIAL
59 Mr Rob Siebert
60 Housing Industry Association
61 CONFIDENTIAL
62 CONFIDENTIAL
63 CONFIDENTIAL
64 CONFIDENTIAL
65 Mr Phil Dwyer and Mr Russell Joseph
66 NAME CONFIDENTIAL
67 Builders Collective of Australia Inc
68 CONFIDENTIAL
69 Master Builders Association of Victoria
70 Mr Kim Booth MP
71 CONFIDENTIAL
72 CONFIDENTIAL
73 Mr Barry Armstrong
74 Ms Janine Bransden & Mr Chris Carlson
75 Housing Industry Association Ltd
76 CONFIDENTIAL
77 CONFIDENTIAL
78 CONFIDENTIAL
79 Builders Collective of Australia Inc
80 Mr Andris Blums
81 CONFIDENTIAL
82 Mr Andris Blums
83 CONFIDENTIAL
84 CONFIDENTIAL
85 BrainLAB Australia and New Zealand
86 Mr Garry Wells
87 Mr Philip Connors
88 SA Office of Consumer and Business Affairs
89 Mr Graeme Hall & Mrs Antionette Hall
90 FORM LETTER
91 CONFIDENTIAL
92 CONFIDENTIAL
93 Mr Bill Caldwell

94 CONFIDENTIAL
95 Mr Keith Hughes
96 CONFIDENTIAL
97 Mr Andrew Vasiliou
98 Mr & Mrs Tauber
99 CONFIDENTIAL
100 CONFIDENTIAL
101 CONFIDENTIAL
102 CONFIDENTIAL
103 Ricky & Julie Lovett
104 CONFIDENTIAL
105 Ms Lia Onorati
106 CONFIDENTIAL
107 Mr Rob Siebert
108 CONFIDENTIAL
109 CONFIDENTIAL
110 CONFIDENTIAL
111 Master Builders Association of WA
112 Mr Rob Siebert
113 Building Ethics Australia Pty Ltd
114 Builders Collective of Australia Inc
115 Korfiatis Family
116 Masters Builders Australia Inc
117 JKE and HC Davies
118 Mr Anthony De Donato
119 Builders Collective of Australia Inc
120 Mrs Louisa Berg
121 Zebra
122 Ms Mary Ellen McCue
123 CONFIDENTIAL
124 Ms Anne Fitzgerald
125 National Insurance Brokers Association

Additional Information Received

- Received on 6 June 2008, from Senator the Hon. Helen Coonan. Corporation Regulation reply to adverse comment;
- Received on 10 June 2008, from Taylor Fry Consulting Actuaries. Comment on NSW Office of Fair Trading report on Home Warranty Insurance Scheme to 31 December 2007;
- Received on 17 June 2008, from Builders Collective of Australia. Response to letter read on 13 June 2008 by Senator the Hon. Helen Coonan;
- Received on 3 July 2008, from Housing Industry Australia. Response to adverse comment in submission numbers 63 & 71;
- Received on 8 July 2008, from Builders Collective Australia. Letter regarding Senator the Hon. Helen Coonan's role in Corporations Regulation;
- Received on 11 July 2008, from Builders Collective of Australia. NSW Office of Fair Trading evidence from 13 June 2008;
- Received on 25 July 2008, from Builders Collective of Australia. HIA structure and corporations regulation letter;
- Received on 25 July 2008, from R Siebert, various comments;
- Received on 29 July 2008, from the Treasury (Cth). Response to Questions taken on Notice on 13 June 2008 and response to correspondence from Mr Phil Dwyer;
- Received on 11 August 2008, from Builders Collective of Australia. Comments on Senator the Hon. Helen Coonan with 2 attachments;
- Received on 23 August 2008, from the NSW Office of Fair Trading. Answers to Questions taken on Notice on 13 June 2008;
- Received on 25 August 2008, from the NSW Office of Fair Trading. Home Warranty Insurance scheme report to 31 March 2008;
- Received on 8 September 2008, from Builders Collective of Australia. Premium rate cards;
- Received on 17 September 2008, Housing Industry Australia. NSW/QLD Comparison of Home Warranty Insurance Schemes;
- Received on 17 September 2008, Housing Industry Australia. NSW Home Warranty Insurance Scheme issues;
- Received on 24 September 2008, Housing Industry Australia. Submission to the Allen Inquiry 2002;
- Received on 24 September 2008, Housing Industry Australia. Standards and Tolerances guide 2008;
- Received on 1 October 2008, from Queensland Building Services Authority. HIA evidence 17 September 2008.

TABLED DOCUMENTS

- **10 APRIL 2008, CANBERRA**

- Queensland Building Services Authority, 'KPMG, *Review of the Queensland Building Services Authority*, February 2005';

- **13 JUNE 2008, SYDNEY**

- Building Action Review Group, '*12 Case Studies*', Correspondence 17 September 2008;
- Building Action Review Group, Correspondence 5 August 2006, 11 September 2006, 7 October 2006;
- Building Action Review Group, Correspondence 28 June 2005;
- NSW Office of Fair Trading, documents regarding NSW Home Warranty Scheme;
- NSW Office of Fair Trading, '*Consumer Building Guide*';

- **17 SEPTEMBER 2008, CANBERRA**

- Housing Industry Association, '*Proposals*'.

APPENDIX 2

Public Hearings and Witnesses

CANBERRA, 10 APRIL 2008

- BRODY, Mr Gerard, Director of Policy and Campaigns, Consumer Action Law Centre
- DWYER, Mr Phillip John, National President, Builders Collective of Australia Inc
- JENNINGS, Mr Ian, General Manager, Queensland Building Services Authority
- JOSEPH, Mr Russell, Member, Builders Collective of Australia Inc.
- McCOSKER, Mrs Mandy Fiona, Executive Manager Insurance, Queensland Building Services Authority
- WRIGHT, Mr Colin Charles, Deputy General Manager, Queensland Building Services Authority

SYDNEY, 13 JUNE 2008

- CHAKOUCH, Ms Lydia, Secretary, Building Action Review Group Inc.
- GRIFFIN, Mr Stephen, General Manager, Home Building Service, NSW Office of Fair Trading
- HOWARD, Mr Jerry Anthony, Deputy Executive Director, Master Builders Fidelity Fund
- LIM, Mr Michael, Manager, Investor Protection Unit, CFSD/Markets Group, Department of the Treasury
- McCARTHY, Mr Greg, Chair, NSW Home Warranty Insurance Scheme Board
- ONORATI, Mrs Irene, President, Building Action Review Group Inc.
- RENOUF, Mr Gordon, Director of Policy and Campaigns, CHOICE
- STOKES, Mr Michael
- WALKER, Ms Caroline Rosemary, Senior Adviser, Insurance Access and Pricing Unit, Department of the Treasury
- WILKINSON, Ms Vicki, Manager, Insurance Access and Pricing Unit, Department of the Treasury

CANBERRA, 17 SEPTEMBER 2008

- GOODWIN, Mr Shane, Deputy Managing Director, Housing Industry Association Ltd
- LAMONT, Mr Chris, Chief Executive, Policy, Housing Industry Association Ltd
- SILBERBERG, Dr Ronald, Managing Director, Housing Industry Association Ltd
- SIMPSON, Mr Glenn Ives, Senior Executive Director, Legal Affairs and Corporate Services, Housing Industry Association Ltd

CANBERRA, 23 SEPTEMBER 2008

- YEEND, Ms Julie, Assistant Secretary, Council of Australian Governments Skills Recognition Taskforce, Department of the Prime Minister and Cabinet

CANBERRA, 24 SEPTEMBER 2008

- CHISHOLM, Mr James, Manager, Consumer Policy Framework Unit, Department of the Treasury
- WRITER, Mr Simon, Policy Analyst, Consumer Policy Framework Unit, Department of the Treasury

APPENDIX 3

Summary of Australian building regulation and home warranty insurance schemes

From submission 44, Insurance Council of Australia, April 2008

Introduction

A form of home builders warranty insurance is compulsory in every State and Territory in Australia and, in general, provides for compensation for loss or damage arising from a contractor's failure to complete home building work or to meet certain standards of workmanship in performing such work.

Various Acts in the States and Territories govern the way in which this insurance is administered and underwritten. In most States, the insurance is a prerequisite for the commencement of work. With the exception of Queensland and the Northern Territory, home warranty insurance schemes are privately underwritten by insurers approved under the relevant legislation.

This paper gives a general outline of operation of the various schemes in relation to home building work done by a contractor on behalf of another person. It should be noted that the relevant legislation in the different jurisdictions may also set out particular provisions in relation to developers, owner-builders and kit home suppliers.

New South Wales

The home warranty insurance scheme in NSW is privately underwritten.

The Office of Fair Trading (OFT) Home Building Services division is the authority responsible for administering the scheme in accordance with the *Home Building Act 1989* (HBA).

The objectives of the HBA focus on the need to ensure that residential building work meets acceptable standards and that consumers are protected or have avenues of recourse when builders fail to meet or complete their obligations.

Essentially, the role of the OFT includes evaluation and approval of licences for builders and maintenance of a register of specified information; and approval of insurers and insurance conditions.

The majority of disputes between owners and builders or other contractors are dealt with initially by the OFT. Disputes unable to be resolved through the initial dispute resolution process, and appeals in relation to residential building insurance, are dealt

with by the Home Building Division of the Consumer Tenancy and Trader Tribunal (see Part 3A of HBA).

Residential building work is essentially considered to be the building or alteration of dwellings which, as defined in the HBA, include a detached or semi-detached house, transportable house, terrace or town house, duplex, villa-home, strata or company title home unit or residential flat, and extends to include swimming pools and other structures related to the dwelling. Highrise developments over 3 storeys are exempt (with effect from 31/12/2003).

To obtain a licence authorising the holder to contract to do residential building work, applicants need to show the OFT that they have the fitness, ability and capacity to carry out the contracts for which the licence is required. Applicants must also satisfy the OFT that they have complied or are able to comply with any insurance requirements of the HBA in relation to the work (section 20 of HBA). The OFT must cancel licences under certain circumstances (section 22 of HBA) and may suspend licences if the holder has not or cannot comply with the insurance requirements (section 22A of HBA).

Section 18B of the HBA provides that various warranties by the licence holder or person required to hold a licence before entering into a contract are implied in every contract to do residential building work. These warranties include:

- that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- that all materials supplied by the holder will be good and suitable for the purpose;
- that the work will be done with due diligence and within the time frame stipulated in the contract.

Proceedings for a breach of warranty must be commenced within seven years from completion of the work, or if the work is not completed, the due date for completion or the date of the contract (section 18E of HBA). The warranties extend to immediate successors in title (section 180 of HBA).

Insurance

Section 92 of the HBA provides that a person must not do residential building work under a contract where the contract price exceeds \$12,000 unless a contract of insurance is in force in relation to the work, and a certificate of insurance evidencing the contract of insurance has been provided to the other party to the contract.

If a contract of insurance is not in force, the contractor may not be entitled to damages in the event of breach by another party to the contract but remains liable for damages for any breach committed by the contractor (section 94 of HBA).

To protect home owners section 99 of the HBA requires that the contract of insurance taken out by the builder or tradesperson must insure the person on whose behalf the work is being done against the risk of loss:

- resulting from non-completion of the work due to insolvency, death or disappearance of the contractor; and
- arising from a breach of a statutory warranty in respect of the work (which extends to the person's successors in title).

The contract of insurance must be of a kind approved by the Minister and be provided by an insurer approved by the Minister. The contract must provide for cover of not less than \$300,000 in relation to each dwelling to which the insurance relates (section 102 of HBA).¹

A contract of insurance must provide cover for loss arising from non-completion of the work for a period of not less than 12 months after failure to commence, or cessation of the relevant work. In relation to other loss insured, cover must be provided for a period of not less than six years for structural defects from the earlier of completion or the termination of contract, or two years for non structural defects from the earlier of completion or termination of contracts.

Insurers

Section 103A of the HBA provides that the Minister may approve a kind of insurance, or an insurer for the purposes of the Act. An approval may be subject to conditions, and the Minister may, by written notice to an insurer, revoke or vary an approval.

Five insurers are currently approved -with one providing insurance for owner builders only.

If a liquidator or provisional liquidator has been appointed in respect of an insurer, or an insurer has been dissolved, the insurer may be declared insolvent by the Minister (section 103G of HBA). Subject to certain provisions, section 103I of the HBA provides that the State will indemnify any person who would have been covered by an insolvent insurer's policy.

Victoria

The builders warranty insurance scheme in Victoria is privately underwritten.

The operation of the scheme is governed by the *Domestic Building Contracts Act 1995* (DBC) and the *Building Act 1993* (BA). Overall supervision of the BA is

1 Increased from \$200,000 in March 2007 as per schedule 1 of the *Home Building Amendment (Minimum Insurance Cover) Regulation 2007* (NSW) which amended the *Home Building Regulation 2004* (NSW).

assigned to the Building Commission (BC). The Building Practitioners Board (BPB) is responsible for the administration of the registration system and oversight of the conduct of registered building practitioners.

The Victorian Civil and Administrative Tribunal resolves domestic building disputes and disputes relating to insurance claims concerning domestic building work.

The objects of the DBC under section 4 are:

- to provide for the maintenance of proper standards in the carrying out of domestic building work in a way that is fair to both builders and building owners;
- to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness; and
- to enable building owners to have access to insurance if domestic building work under a major domestic building contract is incomplete or defective.

The DBC applies to the erection or alteration of a home and any associated work such as driveways and swimming pools (section 5). Subject to qualifications, a home means any residential premises and includes any part of commercial or industrial premises that are used as residential premises (section 3(1)).

Section 29 of the DBC provides that a builder must not enter into a major domestic building contract unless registered under the BA (see section 169 of BA). Major domestic building contract means a contract for which the price for the work is more than \$12,000 or any higher amount fixed by regulation (clause 6, Domestic Building Insurance Ministerial Order (No. S 98 Friday 23 May 2003)).

If the applicant for registration is required under Part 9 of the BA to be covered by insurance, the applicant must include proof of such insurance with the application. The BPB must register an applicant if satisfied that, among other things, the applicant has satisfied the requirements of section 169 of the BA, and that he or she holds an appropriate qualification and is of good character (section 170 of BA).

A building contract must not be entered into unless it contains all relevant details, including details of registration, implied warranties and insurance required under the BA (section 31 of DBC).

Under section 8 of the DBC, the builder warrants that, in general, work and materials will meet certain standards of workmanship and fitness for purpose and other legislative requirements and that work will be carried out with reasonable care and skill and within certain timeframes. The warranties transfer to successors in title (section 9 of DBC) for a period of 10 years after completion of the home (section 134 BA).

Insurance

Section 135 of the BA provides that the Minister may by order published in the Gazette require building practitioners to be covered by insurance. It is an offence for a building practitioner to carry out work unless covered by the required insurance (section 136 of BA). Such required insurance may cover losses resulting from:

- breaches of warranties implied into the major domestic building contract for that work under the DBC;
- defective work; and
- non-completion of the domestic building work (section 137A).

Under clause 35 of the Domestic Building Insurance Ministerial Order, insurers' liability is a minimum of \$200,000 per dwelling.

Insurers

Five insurers are currently underwriting this class of insurance in Victoria.

South Australia

The building indemnity insurance scheme is privately underwritten.

The Commissioner for Consumer Affairs is responsible for administering the scheme, in accordance with the *Building Work Contractors Act 1995* (BWCA). The scheme is designed not only to give consumers protection but also to ensure high standards of accountability in the building industry.

All builders and tradespeople are required to be licensed by the Commissioner of Consumer Affairs (section 6 of BWCA) and must possess the standards of qualification and experience set out in the Regulations, including sufficient business knowledge and experience and financial resources for the purpose of properly carrying on their business.

Licensed builders are required (section 12 of BWCA) to ensure that their work is properly supervised by a Registered Building Supervisor (section 15 of BWCA).

For domestic building work, a "house" means a building intended for occupation as a place of residence but does not include such things as hotels, motels and the like. Domestic building work includes associated work such as swimming pools.

Under section 32 of the BWCA, certain warranties are implied on the part of the builder in every domestic building work contract. These warranties include that the work will be performed in a proper manner to accepted trade standards, that materials will be good and proper, and that the work will be performed with reasonable diligence. Proceedings for a breach of warranty must be commenced within five years after completion of the work.

Insurance

Section 34 of the BWCA requires that prior to commencing building work builders must take out insurance, and (in relation to domestic building work) provide the owner with evidence of Building Indemnity Insurance. A policy of building indemnity insurance is necessary where the building work costs over \$12,000 and requires council approval.

The policy of insurance complies with the Act:

- if it insures each person who may become entitled to the benefit of a statutory warranty against the risk of being unable to take the benefit of the warranty because of the insolvency, death or disappearance of the builder; and
- in the case of work being performed on behalf of someone, it insures that person against the risk of loss resulting from non-completion of the work because of the insolvency, death or disappearance of the builder (section 35 of BWCA).

The Regulations under the BWCA require a minimum cover of \$80,000.

Insurers

Four insurers are currently underwriting this class of insurance in South Australia.

Western Australia

The home indemnity insurance scheme (HII) is privately underwritten.

The Consumer Protection Division of the Department of Consumer and Employment Protection is responsible for administering the home indemnity insurance scheme in accordance with the *Home Building Contracts Act 1991* (HBCA).

The Builders Registration Board (BRB) is established under the *Builders' Registration Act 1939* (BRA) and is responsible for the administration of, and compliance with the BRA.

Home building work is defined in the HBCA to include the construction or alteration of a dwelling or multi-unit grouped homes or high-rise developments including associated work such as landscaping and swimming pools.

Under section 4 of the BRA, builders must be registered with the BRB, which compiles and keeps a register containing the names, addresses, qualifications, and other prescribed particulars of persons who are admitted to the register. It has the power to cancel or suspend registration or take proceedings for offences against the BRA (section 8). The BRB will need to be satisfied with the skill and experience of applicants and may require evidence of material and financial resources (section 10 of BRA).

Under section 12A of the BRA, the Disputes Tribunal (see section 26 of BRA) has the power to order a builder to remedy any faulty or unsatisfactory building work within specified time frames or order payment of suitable compensation to the owner. Complaints must be made within six years of completion of the dwelling.

Insurance

The HII provisions were incorporated into the HBCA in 1996 to protect home owners against financial loss.

Under the regulations, all residential building work exceeding a value of \$12,000 including new dwellings, extensions and alterations and associated work such as swimming pools must be covered.

The HBCA (section 25C) requires that builders must obtain a HII policy before performing residential building work.

Section 25D of the HBCA provides that a policy of insurance for residential building work performed on behalf of another person under a residential building work contract complies if it insures that person and the person's successors in title against:

- the risk of loss of deposit; and
- the risk of loss from non-completion by reason of insolvency, death or disappearance of the builder.

In the case of such work to be performed by a builder on behalf of another person, whether or not under a residential building work contract, a policy of insurance complies if it insures that person and the person's successors in title against the risk of being unable to take advantage of an entitlement to, or to enforce or recover under, a remedy under section 12A of the *Builders' Registration Act 1939* because of the insolvency, death or disappearance of the builder.

A policy of insurance must also provide that claims may be made under it at any time before the expiration of 6 years from the day of completion (section 25D of HBCA).

A minimum cover of \$100,000 applies or the cost of the building work if less than this amount (section 25D of HBCA).

Insurers

Five insurers are currently providing home indemnity insurance in Western Australia.

Tasmania

Housing Indemnity Insurance in Tasmania is privately underwritten.²

2 The following information reflect the law in Tasmania as at 18 April 2008.

The Department of Justice and Industrial Relations is responsible for administering the scheme in accordance with the *Housing Indemnity Act 1992* (HIA) and its Regulations.

Under section 3 of the HIA, a residential building means a building intended primarily for occupation as a place of residence but excludes buildings comprising three or more separate dwellings situated directly one above the other, or residential flats. Building work includes the erection or alteration of a residential building and additions thereto.

The HIA does not apply to building work that is valued at less than \$12,000 or such other amount as prescribed by the regulations (section 5).

For building work covered by the HIA, certain warranties are implied in a building work contract, namely:

- that the work will be carried out in a skilled and proper manner in accordance with the plans and specifications agreed to by the parties;
- all materials supplied by the builder will be good and suitable for the purpose and unless specified in the contract will be new;
- work will be performed in accordance with requirements of this or any other Act;
- where the contract does not stipulate a period for completion, that the work will be performed with reasonable diligence (section 7 of HIA); and
- building work will be reasonably fit for the purpose expressed by owner.

Proceedings for a breach of a statutory warranty must be commenced within 6 years after completion of the work (section 9 of HIA). The warranties also extend to successors in title (section 8 of HIA).

Insurance

A builder must not perform building work unless a complying insurance policy is in force in relation to the work, and in the case of work to be performed under a building work contract the owner has been furnished with a certificate as evidence of the insurance policy (section 11 of HIA).

Section 12 of the HIA provides that a policy in relation to building work complies with the Act if:

- the policy insures each person who is entitled to the benefit of a statutory warranty in respect of the building work against the risk of being unable to enforce or recover under the statutory warranty because of the insolvency, death or disappearance of the builder;
- where the work is performed on behalf of some other person, the policy insures that person against the risk of loss resulting from non-completion because of the insolvency, death or disappearance of the builder;

- the policy provides that it will remain in force for a period of six years after the date of completion of the relevant work;
- the policy provides for the prescribed insurance cover or the cost of the building work, whichever is the less;
- the policy is in a form that has been approved in writing by the Minister and is granted by an insurer so approved; and
- the policy complies with any other requirements prescribed by the regulations.

The prescribed insurance cover is defined to mean cover of at least \$200,000 or such other prescribed amount (section 3 of HIA).

Insurers

Insurers issuing policies must be approved by the Minister (section 20B of HIA).

Currently four insurers are issuing Housing Indemnity Insurance policies.

Queensland

Under the Queensland *Building Services Authority Act 1997* (QBSA), the Building Services Authority (BSA) is the provider of home warranty insurance under a statutory insurance scheme.

The objects of the Act are:

- to regulate the building industry to ensure the maintenance of proper standards in the industry and to achieve a reasonable balance between the interests of building contractors and consumers;
- to provide remedies for defective building work;
- to provide for the efficient resolution of building disputes; and
- to provide support, education and advice for those who undertake building work and consumers.

The QBSA requires building contractors to be registered in order to carry out professional building services. The QBSA (section 31) restricts registration to persons considered fit and proper for the purpose, having certain qualifications and or professional experience and a minimum financial standing as determined by the Board of the BSA. The BSA handles all licensing matters and is responsible for ensuring all licensees continue to meet the required standards.

The General Manager of the BSA is also responsible for assessing and approving the payment of insurance claims as well as advising consumers on insurance claims (section 18 of QBSA).

For domestic building work above \$3,300, the *Domestic Building Contracts Act 2000* stipulates that the builder warrants that: the work will be carried out diligently; in an

appropriate and skilful way; materials will be suitable for the purpose and work will be in accordance with the contract and any relevant laws. The warranties transfer to successive owners of the building (section 49). A proceeding for a breach of a warranty must be started within 6 years and 6 months after the work is finished, or if the work is not finished, the stated completion date or period (section 51).

Insurance

Under section 68 of the QBSA, a building contractor must, before commencing residential construction work pay to the QBSA the appropriate insurance premium for the work in accordance with the regulations.

The Insurance Scheme insures the construction of a House, Duplex, Townhouse, Villa unit, any residential unit (provided it is not a multiple dwelling of more than 3 storeys) and residential outbuildings.

Under the Queensland Services Board Policy (Edition 5 - parts 1-3), the BSA will pay for loss for:

- non-completion due to contract termination resulting from licence suspension or cancellation, death or legal incapacity of the contractor or insolvency;
- defective construction; and
- subsidence or settlement of the insured work.

Payment for loss arising from non-completion will only be made if the insured has properly terminated the contract with the contractor within two years from the date of payment of the insurance premium or the date of entering into the contract, whichever is the earlier.

Payment for loss arising from major defective work will be made if the defect first becomes evident within six years and six months after date of payment of premium, or the date of the contract, whichever is the earlier (see Parts 1 and 2 of the Queensland Services Board Policy).

The maximum liability for each residence is the replacement value of the insured work or \$400,000 whichever is the lesser. Cover also includes alternative accommodation, removal and storage costs up to \$5,000 (Part 4 of the Queensland Services Board Policy).

Insurance claims are made to the QBSA and any disputes over decisions can be referred to the Queensland Building Tribunal (section 86 of QBSA).

Northern Territory

A limited form building warranty insurance protection is mandatory in the Northern Territory. It is underwritten by the Northern Territory Insurance Office (a statutory authority).

The Government's role in building control is undertaken by the Building Advisory Services Branch of the Department of Lands, Planning and Environment. The general functions of the Branch are to:

- provide an advisory service to industry, government and the public;
- maintain a central Building Records System;
- develop and implement Regulations and policies;
- provide administrative and technical support to statutory bodies.; and
- monitor, audit and enforce the requirements of the *Building Act 1993* in the Northern Territory

The *Building Act 1993* (BA) and its Regulations provide the framework for the control and standards for building. The Act provides for the establishing of technical standards for buildings, the registration of building practitioners and certifiers, the regulation of building matters, the granting of building and occupancy permits and the establishing of a building appeals process, and for related purposes.

The Building Practitioners Board is established under the Act to maintain acceptable building standards and to ensure practitioners are suitably qualified. Building Practitioners are registered by the Board if they meet the qualification standards (section 24 of BA). Building and occupancy permits are issued by private sector Building Certifiers who are authorised by the Board.

Regulations establish standards and requirements for buildings and the carrying out of building work which include standards for performance and materials or methods of construction.

Insurance

An owner or his agent can apply to a building certifier for a building permit but, under section 61 of the BA, work cannot commence unless:

- the person holds a type or class of approved policy of insurance against failure to carry out the building work due to negligence or reasons beyond his or her reasonable control; and
- the building work, when complete, is covered by an approved policy of insurance against non-compliance with the Regulations.

Insurance is supported by the Home Building Certification Fund, which is managed by the Territory Insurance Office (TIO).

The TIO policy does not include cover, for example, for non-completion due to insolvency, poor workmanship or lack of due diligence, defects etc. unless there is a breach of the Regulations.

NB: The Building Act was amended late 2004 to provide for stricter licensing requirements (implementation 2005) and compulsory, privately underwritten home

warranty insurance. The provisions relating to private underwriting were originally intended to be implemented in 2006. To date these provisions have not been activated and the commencement of these provisions is now expected to be early-mid 2008, subject to competitive insurance products being available in the Territory.³ Insurance scope and limits will be similar to NSW.

Australian Capital Territory

The residential building insurance scheme in the ACT is privately underwritten.

The Department of Urban Services is the statutory authority responsible for regulating the home building industry and the scheme in accordance with the *Building Act 2004* (BA). The BA provides for the appointment of a Building Controller whose responsibilities include:

- supervision of the Act and its Regulations;
- registration and maintenance of builder licences;
- approval of building permits.

The objectives of the BA focus on the need to ensure that residential building work meets acceptable standards and that consumers are protected or have avenues of recourse when builders fail to meet or complete their obligations.

The BA (section 88(2)) incorporates statutory warranties on the builder of a residential building that, in general, require that the work will be carried out in a proper and workmanlike manner, in accordance with the plans and any requirements, that the materials will be good and proper and that the work will be completed with reasonable diligence.

The warranties expire at the end of five years from the date of the certificate of occupancy (section 88 of BA and refer Regulations).

Each of the owner's successors in title succeeds to the rights of the owner in respect of the statutory warranties (section 88(3) of BA).

Insurance

Approval for residential building work valued at more than \$12,000 will only be granted if the Building Controller (or an appointed Certifier) is satisfied that the required insurance, in approved format, is in place.

Section 90 of the BA provides that an insurance policy in respect of residential building work complies if, among other things:

- it is issued by an authorised insurer;

3 NT Government, *Residential Building Reform*, September 2007, p.9

- it provides for a total amount of insurance cover of the prescribed amount, or an amount equal to the cost of the work, whichever is less;
- it insures the owner and successors in title for a specific period;
- it insures the owner and successors in title against the risk of being unable to enforce or recover under the contract because of the insolvency, disappearance or death of the builder;
- it insures the owner and successors in title against the risk of loss resulting from a breach of a statutory warranty;
- it insures the owner and the successors in title against the risk of loss resulting from the builder's negligence or from subsidence of the land;
- it provides that a claim may only be made within the prescribed period after the claimant becomes aware of the existence of the grounds of the claim; and
- the form of the policy has been approved in writing by the building controller.

Under the regulations, the minimum cover per dwelling is \$85,000.

Insurers

An 'authorised insurer' is defined in the BA to mean a body corporate that has been granted authority to carry on insurance business under the *Insurance Act 1973* (Cth) (section 12).

If an insurer ceases to be in the business of issuing residential building insurance policies, or if the insurer's authority to carry on insurance business is cancelled under the *Insurance Act 1973* (Cth), the insurer must notify the building controller within 7 days of either event occurring (section 95 (1) of BA).

Insurers are required to provide annual claims statistics to the construction occupations registrar (section 95(4) of BA).

Currently five insurers are providing home building warranty insurance in the ACT.

APPENDIX 4

Allegations about Senator Helen Coonan

The Hon. Senator Helen Coonan, former Minister for Revenue and Assistant Treasurer in the Howard Government, was mentioned in this inquiry in two ways:

- There were allegations that Senator Coonan had received favourable treatment in her own building dispute in 2001-02. The implication was that this was done to induce her to form a good view of privatised home warranty insurance.¹
- There were allegations that Senator Coonan's position either as a minister or as Chair of the Senate Regulations and Ordinances Committee, around the time that Corporations Regulation 7.1.12(2) was made, has some suspicious significance.²

Senator Coonan's building dispute

Vero advised that Senator Coonan made a claim in relation to defective building works in March 2001 (when the NSW first resort scheme was still in force). Inspection reports noted significant defects. Vero accepted the claim. The quote for rectification exceeded \$340,000. Vero paid \$200,000 in June 2002 as that was the limit under the policy.

An internal review of the decision was undertaken in December 2002 following allegations in the media that Senator Coonan had received preferential treatment. The review concluded that there was no evidence to support the allegation.

Vero advised that, contrary to claims in evidence at this inquiry,³ paying the policy limit of \$200,000 was not particularly rare. In the period April 2001 to June 2002 Vero paid 18 claims on single dwellings at or near the \$200,000 policy limit.

Vero noted that suggestions that a \$200,000 payment was irregular, on the grounds that 'the insurance pays only 20 per cent of the contract value',⁴ are unsound because:

- Senator Coonan's policy was issued before the 20 per cent cap came into force;

1 Builders Collective of Australia, submission 20, p.7; additional information 17 June 2008. Mr P. Dwyer (BCA), *Committee Hansard* 10 April 2008, p.4-5

2 Builders Collective of Australia, correspondence 8 July 2008. Mr P. Dwyer (BCA), *Committee Hansard* 10 April 2008, p.4.

3 Mr P. Dwyer (Builders Collective of Australia), *Committee Hansard* 10 April 2008, p.4

4 Mr P. Dwyer (Builders Collective of Australia), *Committee Hansard* 10 April 2008, p.4

- in any case, the 20 per cent cap only applies to non-completion, not to rectifying defects.

Vero advised that the builder concerned has been the cause of about a dozen claims, including three claims for the maximum amount.⁵

Senator Coonan and Corporations Regulation 7.1.12

It was suggested that Senator Coonan was 'responsible for this area' around the time Corporations Regulation 7.1.12 was made, and that this has some suspicious significance.⁶

Corporations Regulation 7.1.12 was made on 8 October 2001, at which time Senator Coonan was not in the ministry. It came into force on 11 March 2002, at which time the responsible minister was the Parliamentary Secretary to the Treasurer, Senator Ian Campbell.⁷

It was further suggested or implied that there is some significance in the fact that Senator Coonan was Chair of the Senate Regulations and Ordinances Committee around the time the regulation was made.⁸

This misunderstands the role of the Regulations and Ordinances Committee. The committee scrutinises regulations against general criteria, such as whether the regulation is in accordance with the authorising act, or whether it trespasses unduly on personal rights and liberties. The Committee does not consider policy aspects.

In any case Senator Coonan was not on the committee at the time the committee considered these regulations (on 11 March 2002).⁹

Senator Coonan's comment on this matter is attached.

5 Vero Insurance Ltd, correspondence 25 July 2008. Mr P. Jameson (Vero Insurance Ltd), *Committee Hansard* 20 June 2008 (in camera), p.13-14

6 Builders Collective of Australia, submission 20, p.8. Mr P. Dwyer (Builders Collective of Australia), *Committee Hansard* 10 April 2008, p.4

7 The Hon. Senator H. Coonan, additional information 6 June 2008.

8 Builders Collective of Australia, correspondence 8 July 2008.

9 Senator Coonan was formally the chair when the committee secretariat received the Corporations Amendment Regulations 2001 (No.4) on 17 October 2001. However this was during the campaign period for the November 2001 election, and the committee conducted no more business until a new committee was formed under a different chair after the election. The new committee considered the regulations at a meeting on 11 March 2002, and sought advice from the minister on some matters, but not on regulation 7.1.12. J. Warmenhoven, Secretary, Senate Regulations and Ordinances Committee, correspondence 30 September 2008.



SENATOR THE HON HELEN COONAN

Shadow Minister for Foreign Affairs

Manager of Opposition Business in the Senate

17 October 2008

Mr Geoff Dawson
Secretary
Home Warranty Insurance Inquiry
Senate Standing Committee on Economics
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Mr Dawson

HOME WARRANTY INSURANCE INQUIRY

I refer to your letter dated 1 July 2008 inviting me to comment following the conclusion of the evidence of the Hearings of the Inquiry into the Home Warranty Insurance Scheme.

I request that this letter be published as part of the final report.

At the outset, I wish to make it perfectly clear that I support the Inquiry as raising matters of legitimate concern with the operation of home builder's warranty. I am sympathetic towards genuine home renovators and builders who have been exposed to the inadequacies of certain State schemes.

It is however regrettable that the Inquiry has to an extent been subverted and Committee time diverted by unrelated and entirely spurious claims surrounding the botched renovation of my home over eight years ago and the subsequent claim for rectification. These unhappy circumstances were and are clearly outside the Terms of Reference. Nevertheless unfounded allegations relating to my abovementioned personal circumstance were vigorously pursued by a witness, Mr. Dwyer, who appeared before the Committee at its Hearings on 10 April 2008.

Mr Dwyer also made startling and unfounded claims about the conduct of Ministers of the Crown, and by implication, a Senate Committee, a Government Agency and relating to advice provided by the Australian Treasury in connection with the making of Corporations Regulation 7.1.12 (the Regulation).

Mr. Dwyer and others, in the absence of a shred of evidence, made but could not substantiate the allegations. I emphatically deny the allegations and I am able to demonstrate conclusively below that they are completely false.

A handwritten signature in black ink, appearing to be 'Helen Coonan', located in the bottom left corner of the page.

That Mr Dwyer is unable to come to grips with or accept independent evidence that explains the making of the Regulation and who had Ministerial responsibility for it, and which comprehensively refutes his claims, is clear from correspondence he entered into with the Secretary of the Committee, Mr Geoff Dawson, dated 8 July 2008 and 11 August 2008 respectively (the correspondence). Copies were provided to me on 8 October 2008. This correspondence was in addition to the written submission of the Builders Collective of Australia of which Mr. Dwyer is the National President, dated 8 April 2008, and Mr. Dwyer's oral evidence that made the same or related claims at the Committee's hearings on 10 April 2008.

In order to set the record straight, I now refer to each of these allegations made by Mr. Dwyer, together with the facts which clearly refute them;

- a) That as Minister for Revenue and Assistant Treasurer, I was influenced to bring about a change in the Regulation.

The committee has received evidence from a Treasury Official, Mr Joe Picot, Analyst in the Financial System Division in the Australian Treasury, in an email dated 27 May 2008 that states:

"For your information, Corporations Regulation 7.1.12 was made on 8 October 2001, the responsible Minister being the Minister for Financial Services and Regulation, Mr. Joe Hockey. The Regulation came into effect on 11 March 2002, at which time the responsible Minister was the Parliamentary Secretary to the Treasurer, Senator Ian Campbell."

It is clear that I was not even in the Ministry when the Regulation was made, nor was I the responsible Minister at the time it took effect – a year later.

- b) Mr. Dwyer then raised a subsequent claim in the correspondence with Mr. Dawson that I had what he labelled a "secondary" role at the time the Regulation was drafted and gazetted because I was Chair of the Committee of Regulations and Ordinaries. (12/8/99 to 26/11/01).

Mr Dwyer is wrong on three fundamental points.

1. The Regulation and Ordinances Committee plays no role and has no authority whatsoever in the drafting and gazettal of any Regulation.
2. The drafting and gazettal of all Regulations is concluded before a Regulation is available for the Regulation and Ordinances Committee's consideration.

Further he is wrong again in his conclusions about my presumed role in the review of the Regulation.

In a letter to the Committee dated 30 September 2008, the Committee Secretary of the Senate Regulations and Ordinances Committee, Mr James Warmenhoven, relevantly advised:

"The Corporations Amendment Regulations 2001 (No 4) were made on 8 October 2001 by the then Minister of Financial Services and Regulation – the Hon Joe Hockey. As you are no doubt aware, the writs for the 2001 federal election were issued on the same date.

The regulations were received by the Committee secretariat on 17 October 2001. The Legal Adviser prepared a report for consideration by the Committee on 30 January 2002. The regulations were tabled in the Senate on 12 February 2002 and were considered by the Committee at its meeting on 11 March 2002.

Senator Coonan was Chair of the Committee on 8 October 2001, and nominally remained in that position throughout the caretaker period until 26 November 2001, when she was appointed to the Ministry. However, following the issue of the writs on 8 October 2001, the Committee held no meetings and made no decision until the reconstitution of the new Parliament, and the appointment of a new Committee, in 2002.

As noted above, the Committee eventually considered the Corporations Amendment Regulations 2001 (No 4) on 11 March 2002. The Committee sought advice from the Minister in relation to some matters contained in these regulations, but not in relation to regulation 7.1.12 which, on its face, seemed unexceptionable."

In short, I was not a member of the Committee when the Regulation was considered by it. The Regulation was considered by the Committee after I had ceased to be a member.

3. Further, the policy of the Regulations which is Mr. Dwyer's concern was never at any time considered by the Committee as it is specifically prohibited by its Terms of Reference from such consideration.

- c) Next at Mr. Dwyer's apparent behest, a journalist contacted me seeking an explanation as to why APRA had exempted home builders warranty providers from the National Claims and Policies Database.

On this point, the Committee had already heard evidence from a Treasury official, Ms Vicki Wilkinson, Manager with the Insurance Access and Pricing Unit of the Australian Treasury, on 13 June 2008, where the following explanation was provided (Hansard pages 58-59):

"Following a request from the Australian government in 2003, APRA established the National Claims and Policies Database in consultation with the insurance industry and other stakeholders. The objective of the NCPD is to provide insurers, the community and government with a better understanding of professional indemnity and public liability insurance.

However, following consultation with stakeholders, home builders warranty insurance was excluded from the National Claims and Policies Database as it has a different policy period, premium earning pattern and cause of loss to normal liability business, and therefore a separate data collection would be required.



Obviously, a separate data collection would potentially impose additional financial and reporting burdens on the insurance industry, and really the benefits of that need to be assessed against the costs."

- d) Finally, in the correspondence with Mr. Dawson, Mr Dwyer comments on a paragraph that apparently appears in a submission by a Colin Burchett which goes back to the house renovation.

As mentioned in the opening paragraphs of this letter, this matter has nothing to do with the Terms of Reference of the Committee and any attempts by an individual to enlarge the Committee's remit must be resisted.

Should the Committee wish to concern itself with this claim, my response is that I have no knowledge of the circumstances in which the builder who botched my renovation obtained an insurance certificate. He was required to have one as a condition of the contract. This was a matter for him.

Having now set out each of Mr Dwyer's false allegations and having clearly demonstrated that each of them has no basis in fact, I point out to the Committee that the consequence of not preventing irrelevant comments of such an adverse nature have a major personal impact on the person adversely mentioned. For example, I have had to endure false and malicious commentary from the press on the matter. I should add that I was contacted by the same journalist sequentially about each of Mr Dwyer's claims as they were raised in the course of the Inquiry.

On each occasion the journalist submitted storylines that contained factual errors and imputations that were proposed to be published in a mainstream newspaper and that obliged me to run around and collate information already in the public domain refuting and disproving Mr Dwyer's claims in order to meet the journalist's deadlines.

In respect of one such article it was necessary for me to publish a correction in a letter to the Editor of the Sydney Morning Herald, dated 11 June 2008, which I attach.

The pattern of conduct about which I complain, was that unfounded allegations were made under parliamentary privilege and the so called "story" was then taken up and the allegations repeated and published, or threatened to be published, in a mainstream newspaper.

From the above sequence of events, it would be open to a fair minded person to conclude that Mr Dwyer has sought, so it would seem, to cloak himself in parliamentary privilege in order to wage a bizarre campaign that rests on a non existent foundation.

That he has not had the good grace to admit that he is wrong and to take up the opportunity extended to him by the Committee to retract his claims in the face of incontrovertible, independent evidence, must in my view, reflect adversely on his credit and his motivation.

Whilst this may have consequences for how the Committee might regard his evidence, for me, as a serving Senator and as a former office holder under the Crown, I consider that this whole episode raises larger issues and that it is incumbent upon me in these capacities to make some additional comments in the broader public interest.

Mr Dwyer has quite clearly embarked on a campaign to rectify perceived deficiencies in the NSW scheme of Home Warranty Insurance. To that, no one can object and I certainly do not.

However, Mr Dwyer apparently believed that his campaign would be enhanced by making totally unfounded and outrageous allegations against me in my capacity as a Minister and as the Chair of a Senate Committee and to enlist the totally misguided efforts of a reporter who in turn sought to make a story by repeating the allegations made by Mr Dwyer under privilege and publishing them in a mainstream newspaper after they were shown quite clearly to be without any possible substance or foundation.

The practice of using parliamentary privilege in a legitimate inquiry about perceived injustices in the law, as a vehicle to make and maintain unfounded claims against public figures, apparently to obtain publicity and to then utilise media organisations to further that aim by repeating the allegations that have been shown to be unfounded, is a practice which Parliament must, in the interests of good government and for its own protection, take strong measures to condemn.

Whether Mr Dwyer's conduct in general and in particular his repetition of allegations shown to be unfounded, constitutes contempt of parliament is a matter for the Committee. Even if it is not contempt in itself, it is, most clearly, an abuse of the parliamentary process and of parliamentary privilege.

Parliamentary privilege is an essential and an important feature of our system of Government. Its abuse can seriously damage the parliamentary process and lead to criticism when it is otherwise necessary to invoke it as a legitimate protection.

Finally, for the record, although I am entitled to do so, I have deliberately not taken part in the hearings nor do I propose to participate in the confidential deliberations of the committee in its final report.

I thank the Committee for its consideration and forbearance.

Yours sincerely,



HELEN COONAN



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Suggested influence untrue

An article ("Questions over \$200,000 claim paid to Coonan", May 31) contains the suggestion that as the minister for revenue and assistant treasurer I was influenced to bring about a change in the Corporations Regulations by pressure from an insurance company. This is untrue. I was not even a minister at the time the regulation was made, nor was I the responsible minister at the time it took effect - a year later.

There are legitimate questions as to whether the home builders' warranty insurance scheme is working as intended for the parties to a home building contract. However, any inquiry must be informed by the facts, and not fuelled by speculation and innuendo.
Helen Coonan Senator for NSW

B