

Committee Secretary  
Senate Economics Committee  
Department of the Senate  
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Australia

### **Submission to Inquiry into Australia's Mandatory Last Resort Home Warranty Insurance Scheme**

I was a member of the Inquiry into the operations of the state's Home Building Service conducted by General Purpose Standing Committee No.2 of the Legislative Council of the NSW Parliament. Submissions, transcripts of evidence, the Inquiry's Report, recommendations, and my dissenting statement can be found at:

<http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/D9F780D9C38E3EFACA257325001AAA11>

The inquiry heard evidence from many consumers about the inadequacy and unfairness of the State's last resort home warranty insurance scheme, which came into effect in July 2001. In particular, many complained of the difficulty of obtaining compensation from insurance companies, of the need to exhaust all other avenues before being even able to lodge a claim, and of the devastating burdens – both financial and emotional – that litigation imposed. Yet litigation was often the only avenue of redress that ultimately was open to many complainants.

The committee also heard evidence that many builders were unhappy with the operations of the home warranty insurance scheme, and believed that it contributed to an escalation rather than resolution of disputes, to the disadvantage of both consumer and builder.

The NSW Office of Fair Trading indicated in November 2007 that the State government was considering additional 'triggers' that would enable a consumer to lodge a claim regardless of whether the builder were insolvent or had been bankrupted. Those recommendations have yet to be made public.

On 1 March 2007, the Government increased the maximum compensation payable under the existing scheme from \$200,000 to \$300,000, but this is of cold comfort to people whose ability to even lodge a claim has effectively been denied.

I am strongly of the view that only a non-profit first-resort scheme along the lines of that operating in Queensland is capable of delivering justice to consumers and builders alike. As its report notes at para 6.49 (p.86), the GPSC2 Committee was "concerned by the evidence about the perceived vested interests of insurers and industry bodies".

My dissenting Statement (Appendix 5 of the Report) sets out the reasons for my extreme disquiet with NSW's current scheme and highlights issues that I am sure are common to all Australian jurisdictions where privatised, last resort schemes prevail.

# Appendix 5 Dissenting statement

**Ms Sylvia Hale MLC, The Greens**

Privatised home warranty insurance is a failure, as is clear from the numerous inquiries into its operation in this and other States and from the disturbing evidence provided to this Inquiry. It not only fails to offer timely, appropriate or adequate protection to consumers, it is also a source of profound dissatisfaction within the building industry itself. As the Master Builders Association commented:

The privatisation of consumer protection insurance in NSW has had a devastating impact on the NSW residential building industry.

... Other than for insurers, it is difficult to identify who has benefited from the introduction of a privatised insurance scheme in NSW. 295

It is a scheme that is fundamentally flawed because its design ensures that few claims can be made against it. A consumer seeking rectification or compensation for unsatisfactory work cannot claim against an insurer unless the builder is dead, has disappeared or is insolvent (and even bankruptcy does not always meet the last criterion). 296

The scheme is one of 'last resort' and the onus falls on the consumer, who may already have suffered ruinous financial losses, to exhaust all other avenues of redress including expensive and time-consuming litigation (which few are able to afford) before lodging a claim. Even then, as evidence to the Inquiry indicated, there is a marked resistance on the part of insurers to settle.

A stark illustration of this was provided by a witness who has been 'left with a house I cannot live in, cannot have fixed or get fixed through Home Owners Warranty Insurance nor can I sell it because it does not comply with the conditions of development consent'. 297 His legal, rental and rectification costs are \$290,000, yet Vero, his insurer, has said it will pay only \$50,000. 298

In contrast to NSW's privatised, profit-driven scheme of last resort is Queensland's scheme, which the Builders' Collective of Australia commended:

There are no profit driven brokers, Trade Associations or insurers that can exploit any systemic weakness in the Queensland system whatsoever. It is fully transparent, accountable and audited by the Auditor General on an annual basis.

... it is the only system in Australia that delivers genuine first resort protection ... a consumer can make a claim against the warranty policy without the last resort triggers of death, disappearance and insolvency. ...

Fundamentally, if the builder will not fix the adjudicated defect then the accreditation arm of the QBSA can and does take action against that builder and will inevitably lead to suspension and/or deregistration. All this occurs while the defect or incomplete work is fixed and the home owner gets on with their life. 299

Some contend that insurance premiums in Queensland are higher than in NSW, 300 although others dispute this claim. 301 The critical issue, however, is not so much the size of the premium as the protection it offers. Any premium, however cheap, that does not provide adequate protection is too expensive.

Consumer satisfaction with the public Queensland scheme appears to be high: 'The consumer rate of approval for the Queensland BSA as measured by a McNair Anderson survey done for the Government rated the scheme at 96 per cent approval two years ago [2004]'.<sup>302</sup> In contrast, the view of the Australian Consumers' Association about schemes such as NSW's is scathing:

Basically our view is that home warranty insurance makes a mockery of consumer protection. It's not worth the paper that it's written on. It's completely useless and particularly the last resort clause makes it a junk insurance. <sup>303</sup>

Professional builders have additional concerns. The Master Builders Association doubted whether the entry of more insurers into the home warranty market had increased competition or reduced premiums:

... the question remains whether in reality there is true competition. Builders being blocked from registering with all insurers in the market is not consistent with 'free movement' in this specific market. This barrier prevents builders from capitalising on any competition in premiums offered by the seven insurers, effectively denying the client or consumer the benefits of competitive premiums.

Indeed, a builder is required to cancel their eligibility with the current insurer, should they wish to gain eligibility with a new insurer. Not only does this cause difficulties and increase administration for the builder, it also denies the builder a contingency should an insurer choose to withdraw from the scheme.<sup>304</sup>

Mr Russell Joseph of the BCA commented that insurance cover 'is sold by the private insurance company but claims may be recovered from the builder under the deeds of indemnity and/or bank guarantees held by the insurer'. <sup>305</sup> In effect, the burden of underwriting insurance is transferred from the insurer to the builder. Mr Joseph also noted that, unlike Queensland where they are not required, indemnities and bank guarantees are 'a huge problem' for builders in NSW. <sup>306</sup>

Mr Ray Brown, Past President of the Building Designer Association, spoke of the difficulties some of his members experienced 'because of caps and the inability of those builders to attain warranty insurance. ... Many such as myself and others still have indemnities in place and are unable to have them released'. <sup>307</sup>

The power to refuse insurance, which a builders must obtain, affords the insurer an opportunity to exert significant influence over the builder's business.

Because of its profit-driven, last-resort nature, no amount of tinkering will result in any fundamental improvement to the NSW scheme. It should be abandoned and a scheme modelled on the first-resort, not-for-profit, publicly administered Queensland scheme adopted. As Mr William Meredith of the MBA commented, 'when you look at the Queensland scheme, which is a scheme of first resort, I guess a scheme of first resort can work and, indeed, it is working up there'.<sup>308</sup>

295 Submission 14, p 12

296 Mr Phil Dwyer, Evidence, 20 November 2006, p 39

297 Submission 1c, p 7

298 See para 6.13 above

299 Submission 13, p 2

300 Submission 16a, p 6

301 Mr Russell Joseph, Evidence, 20 November 2006, p 40

302 Mr Phil Dwyer, Evidence, 20 November 2006, p 41

303 ABC TV 7.30 Report, 8 January 2007. The interview is referred to in submission 32a, p 2

304 Submission 14, p 15

305 Evidence, 20 November 2006, p 38

306 Evidence, 20 November 2006, p 38

insurance. ... Many such as myself and others still have indemnities in place and are unable to have them released' .307  
307 Evidence, 20 November 2006, p 36  
308 Evidence, 20 November 2006, p 25

Yours sincerely

Sylvia Hale, MLC

16 April 2008