REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE No. 4

INQUIRY INTO HOME BUILDING SERVICE

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At Sydney on Monday 20 November 2006

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The Committee met at 9.30 a.m.

Uncorrected proof

PRESENT

The Hon. J. A. Gardiner (Chair)

The Hon. J. C. Burnswoods
The Hon. Dr A. Chesterfield-Evans
The Hon. G. J. Donnelly
The Hon. K. F. Griffin
Ms S. P. Hale
The Hon. G. S. Pearce

CHAIR: I welcome everyone to the second public hearing of General Purpose Standing Committee No. 4 inquiry into the operations of the Home Building Service of the Office of Fair Trading. On Friday we heard from a number of witnesses, including members of the Building Action Review Group, who informed the Committee of their personal experiences with the home building industry. Before we commence I shall make some comments about aspects of the Committee's inquiry.

The inquiry terms of reference require the Committee to examine the Home Building Service of the Office of Fair Trading with particular reference to the builder licensing system, the home warranty insurance scheme, the resolution of complaints and the enforcement of relevant regulatory provisions.

While the privilege that applies to parliamentary proceedings, including Committee hearings, is absolute, it is not intended to provide a forum for people to make adverse reflections about others. The terms of reference refer to the system as a whole and not individuals. While individual experiences relating to these issues will help the Committee to understand how the system works or does not work, the Committee is not in a position, nor does it intend, to investigate or conciliate individual complaints. Individuals who are subject to adverse comments in this forum may be invited to respond to the criticisms raised during the hearings, and these responses may subsequently be published by the Committee. It is important to remember that parliamentary privilege does not apply to what witnesses may say outside the Committee hearing. Therefore, I urge witnesses to be cautious about their comments to the media and others after they complete their evidence, even if it is said within the confines of this building. Such comments would not be protected if, for example, another person decided to take an action for defamation.

As with other inquiries, the Committee will consider any request by witnesses or Committee members that evidence be heard in camera. If a witness gives evidence in camera following the resolution of the Committee, however, they need to be aware that following the giving of evidence the Committee may decide to publish some or all of the in-camera evidence. Likewise, the House may at a future date decide to publish part or all of the evidence even if the Committee has not done so.

It is possible that some of the matters raised during the hearings may be the subject of legal proceedings elsewhere, such as the Consumer, Trader and Tenancy Tribunal. The sub judice convention requires the Committed to consider the impact of discussing a matter that is being considered by a court of law. The weight of opinion supports the view that a parliamentary committee may discuss or hear evidence on a matter that is being considered by another inquiry, tribunal or court, but that such committee should act responsibly in any use of this power. I remind people today that this inquiry is about the systemic issues and not the culpability or otherwise of particular individuals.

The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing the broadcast of proceedings are available from the table by the door. In accordance with the Legislative Council guidelines for the broadcast of proceedings, a member of the Committee or witnesses may be filmed or recorded but people in the public gallery should not be the primary focus of any filming or photographs. In reporting the proceedings of the Committee, the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee. Witnesses, members and their staff are advised that any messages should be delivered through the attendant on duty or through the Committee clerks. I ask everyone to turn off their mobile phones during the proceedings.

RODNEY KELVIN STOWE, Deputy Commissioner, Policy and Strategy, Office of Fair Trading, PO Box 962, Parramatta,

MICHAEL PAUL COUTTS-TROTTER, Director General, Department of Commerce, McKell Building, 2-24 Rawson Place, Sydney,

LYN BAKER, Commissioner, Office of Fair Trading, PO Box 972, Parramatta, and

STEPHEN PAUL GRIFFIN, Acting General Manager, Home Building Service, Office of Fair Trading, PO Box 972, Parramatta, sworn and examined:

CHAIR: Is that the capacity in which you are appearing before the Committee today?

Mr GRIFFIN: It is.

Ms BAKER: Yes, it is.

Mr COUTTS-TROTTER: Yes, it is.

Mr STOWE: Yes.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mr GRIFFIN: I am.

Ms BAKER: I am.

Mr COUTTS-TROTTER: I am.

Mr STOWE: I am.

CHAIR: If you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Do any of you have an opening statement?

Mr COUTTS-TROTTER: I do. Home building in New South Wales is a $19 billion a year industry that employs nearly 250,000 people. Last financial year the New South Wales industry provided 32,000 new homes, 21,500 major renovations and 1.66 million minor building works. The home building industry is more heavily regulated than many other industries, and for good reason. The stakes for home buyers and builders are very high when things go wrong. People can lose their life savings or their business and their livelihoods. No system to regulate human behaviour is perfect and no such system can be. The regulatory system in New South Wales is anchored on the Home Building Act and supported by licensing, compliance, dispute resolution and mandatory insurance.

On the available evidence, the New South Wales system of regulation works as well as, and in some cases better than, alternative systems around the country. There were about 5,900 home building complaints last year, representing one-third of 1 per cent of all home building work in that period. About 60 per cent of these complaints were resolved by mediation, delivered at no cost to the consumer or the builder. The system does work well for the vast majority of people it serves but not all, as was made plain to the Committee by the distressing stories presented in evidence on Friday.

This is much-examined area. There have been eight major reviews of aspects of the home building industry, beginning with the Dodd inquiry for the Greiner Government in 1993. Each has, or will, lead to changes, many of them major. The sweeping changes recommended by the Campbell report of 2002 still being bedded down. The major initiative to come from that report was the creation in 2003 of the Home Building Service within the Office of Fair Trading. The Home Building Service brings together all the building-related functions of the Office of Fair Trading in the one spot—licensing, compliance, insurance and the oversight of the private home warranty insurance scheme. The Home Building Service has implemented 26 of the 30 recommendations from the Campbell

report that relate to home building, and is either reviewing or finalising the implementation of the final four.

Since establishment of the Home Building Service, it has successfully mediated 5,000 disputes on site, issued 827 rectification orders, visited 3,700 building sites unannounced during 10 major compliance operations, undertaken in 1,600 other investigations, issued 1,300 penalty notices with fines totalling nearly a quarter of a million dollars, and prosecuted 88 people for 289 offences, leading to a further $50,000 in fines. New South Wales has the toughest on-the-spot fines in the nation. We are the only State or Territory in which people in the building industry have been investigated and gaoled. New South Wales is the only Australian jurisdiction to undertake random background checks on applicants for building licences. Every licence application is checked to ensure it meets licensing requirements, but in New South Wales, and only in New South Wales, 10 per cent of applicants are also reviewed to see if they have an undisclosed criminal history, or have been bankrupt.

New South Wales has the cheapest building licences in Australia. Other recent improvements to licensing that are worth bringing to the attention of the Committee stem from the recommendation of the Independent Commission Against Corruption's Operation Ambrosia inquiry, which itself was triggered by the findings of investigation within the Office of Fair Trading. New applicants for licences now have to present in person and prove their identity. Applicants can no longer obtain a licence by demonstrating they have worked in the industry for 20 years or more. Every applicant has to hold an approved qualification or equivalent related-prior learning that has been independently assessed by a registered training organisation in order to be considered for a builder's licence. New South Wales leads Australia in implementing Commonwealth-approved categories of licences in the home building, making it easier for skilled workers from New South Wales to trade elsewhere and for interstate trades to work in New South Wales.

Home warranty insurance is settling down following the establishment of the Home Warranty Scheme Board and the implementation of the recommendations of the home warranty insurance inquiry. Builders now find it much easier to get insurance. There are six insurers providing home warranty cover and another firm offers specialist cover for owner-builder work. Premiums have fallen and now, on average, cost less than half of 1 per cent of the value of the building contract. New South Wales premiums are considerably lower than those in Queensland. There are now very few cases of the insurers seeking indemnities and bank guarantees. I understand that only three per cent of builders carried bank guarantees. It is an evolving scheme and no doubt will change over time. Last week the Government announced an increase to the minimum value of insurance cover from $200,000 to $300,000 affected by March next year and the scrapping of a $500 excess.

In closing I would like to make three points in response to some issues raised before the Committee last Friday. It was stated that a building firm, Provincial Homes, was building without home warranty cover. This is not the case. The public register automatically posts notations indicating a builder does not have home warranty insurance if that builder has failed to provide a certificate of eligibility at the time it renews its licence. This is what happened with Provincial. Shortly after renewing its licence, Provincial provided the certificate showing that it had, and had had, eligibility and the notation was removed from the register. On Friday, evidence given to the Committee alluded to criticism of the licensing regime in connection with a case mentioned in the ombudsman's annual report. The case study used by the Ombudsman was not, in our view, a correct reflection of the findings of the investigation.

The Office of Fair Trading never agreed with all of the findings and recommendations made by the Ombudsman following his investigation. To say that Fair Trading had no criteria for assessing an applicant's overall fitness to hold a licence is, we submit, totally incorrect. The Commissioner for Fair Trading has written to the Ombudsman expressing her concern over the inaccuracy of the details contained in the case study. Finally, there have been suggestions during this inquiry that the Home Building Service needs to be independent. I guess I ask the question: Independent of whom, or what? The Home Building Service is not funded by or aligned with industry, insurance or consumer groups. It has a job to perform that is defined by the Home Building Act and it does so without fear or favour.

Home building is regulated in a way that is very similar to the motor vehicle repair industry which was presented to the Committee as an example of effective regulation. The systems of

regulation between home building and motor vehicle repair are almost identical. Both are overseen by Fair Training, both have licensing regimes, and the complaint handling and disciplinary processes are extremely similar. The regulation of home building generally works well, and compares well to alternatives. It can always be refined and improved—that is obvious. We hope that this inquiry will help in achieving that objective.

CHAIR: Are you able to table that opening submission?

Mr COUTTS-TROTTER: Yes, of course.

Document tabled.

Ms SYLVIA HALE: I am not sure whether I should address this question to Ms Baker or Mr Coutts-Trotter, but I notice on page five of your submission to the inquiry you stated that the Home Building Service has also been successful in achieving significant prosecution outcomes.

Mr COUTTS-TROTTER: Yes.

Ms SYLVIA HALE: Indeed, you referred to that when you referred to the investigation and gaoling of offenders. How many people have actually been gaoled?

Mr COUTTS-TROTTER: I will leave that to Mr Griffin to give me exact details. Some have been gaoled and some are on community service orders.

Mr GRIFFIN: That is right. There have been two so far. One is doing weekend detention—Peter Garay, who was operating unlicensed in the Hunter area. He is currently serving a sentence of 12 months weekend detention. Mr Michael Partridge was an unlicensed pre-purchase consultant and was also convicted and he is serving a sentence that was commuted to 150 hours of community service. Mr Ahmed Diab was operating in the south-western suburbs of Sydney and obtaining deposits from consumers but not returning to do their painting work. He is currently serving nine months imprisonment.

Ms SYLVIA HALE: It is not a great many people in the context, presumably, of the number of complaints you have received or the extent of building work that occurs in the State?

Mr COUTTS-TROTTER: I would not accept that. As I say, this is the only State in the nation that has gaoled people following these investigations. I think it is a pretty significant response.

Ms SYLVIA HALE: Also in your submission you state:

> In terms of reactive compliance strategies the Home Building Service has achieved excellent results over the past three years. It has conducted more than 1600 investigations; successfully prosecuted 289 offences resulting in fines and penalties of $500,000 …

I presume that is the cumulative sum of all the fines and penalties, so you could say when looking at those figures that, on average, the fines and penalties have been approximately $2,000, which is not a lot of money when you think of the losses that many people incur as a result of defective building.

Mr COUTTS-TROTTER: I think it has a pretty significant influence on the behaviour of builders, though. I would argue that a $2,000 fine, on average, is a pretty significant amount.

Ms SYLVIA HALE: You state that you have issued penalty notices to more than 1,300 individuals for more than 1,700 offences, resulting in fines of more than $720,000. My maths make that an average of approximately $40 per penalty notice. Is that correct, or is it a far larger amount than that?

Mr COUTTS-TROTTER: I do not know.

Mr GRIFFIN: It is far larger than that, of course. A lot of these penalty notices may go to the offender. An offending trader may have been issued with several penalty notices for one breach.

Ms SYLVIA HALE: It possibly would be more useful to the Committee if you gave a breakdown of the number of people getting quite heavy penalties because if you have a few getting very heavy penalties but the vast majority are getting very light penalties, as the average of approximately $40 suggests is the case, to suggest that this is achieving excellent results is presumably in the eye of the beholder.

Mr GRIFFIN: The lowest penalty notice is $250 and the highest is $3,000, so that would be the range of the penalty notices that have been issued. To suggest $40 would be incorrect.

Mr COUTTS-TROTTER: But I do not know whether the levying of fines is necessarily a measure of good performance. I think over time the measure of good performance would be a fall in the number of fines being issued because the quality of the industry continues to rise.

Ms SYLVIA HALE: You said on page 6 of your report:

> Whilst it is acknowledged that a small number of consumers may have had difficulty resolving their building issues, for the vast majority the systems, processes and services introduced via the establishment of the Home Building Service have benefited thousands of consumers …

Why do you think, even if they are a small number, they have found it so difficult to get resolution of their complaints?

Mr COUTTS-TROTTER: That is a difficult question to answer but one observation I would make is that significant home building problems are by their very nature complex. They take quite some time to get to the bottom of. They involve expert opinion and they may have built up over a long period of time. So, they are just inherently complex matters to deal with and any system, an informal system through the tribunal or a more formal system through the courts, is going to have trouble getting to grips with some of that.

Ms SYLVIA HALE: The Committee has received submissions and heard evidence that we have members of the public who are left with houses—and I cannot remember the council now—where there have been orders for demolition and where the house is totally unliveable. I think on Friday we were given two or three instances of such cases. Most people would seem to have legitimate grounds for concern but seem to be unable to get appropriate remedies from any part of the system?

Mr COUTTS-TROTTER: That is a difficult thing to respond to. As I say, any system is going to take some time to produce a remedy or response to something as inherently complex as a serious home building problem. In some cases the response is provided by the three options in the system, as in any other, which are the applicant wins or loses or reaches a compromise. Given that, there are occasions when either a builder or a consumer is not happy with the result.

Ms SYLVIA HALE: I know of one instance where an employee of the Department of Commerce is facing a situation where his home is being demolished. In another instance I can think of a woman who was formerly an officer of the CTTT has encountered enormous problems in getting rectification of work. If people who are so experienced are finding difficulty, does that not suggest to you there is something inherently wrong with the system as it stands?

Mr COUTTS-TROTTER: No, I am cautious about generalising. Obviously any system of administration needs to be viewed through the eyes of the people who have to work with it or deal with the result of it. It is important to keep those case studies in mind but you have to be cautious as well about generalising from individual cases. I am familiar with one of the matters you referred to. An officer of the Department of Commerce wrote to me. I passed that material on—as I should because I have no jurisdiction over it—to the chairperson of the tribunal to look at. In that case, without commenting on the substance of that, I make the point of there is a further avenue. He can proceed with that, albeit through the court system. Obviously we try as best we can to run a system in that most people do not have to go to the difficulty and expense of complex court matters, but the system does offer the prospect of a remedy to him albeit in the court system.

Ms SYLVIA HALE: But surely you would be aware that reliance upon the court system means it is prohibitively expensive for many people?

Mr COUTTS-TROTTER: Yes.

Ms SYLVIA HALE: And they are obliged, and we had evidence to this effect on Friday, to settle on what they consider to be totally unsatisfactory terms because they have run out of money. Why do you suggest reliance upon the court system?

Mr COUTTS-TROTTER: I am simply saying that at the end of the process, decisions of the tribunal in certain circumstances can be reviewed by the courts. But I cannot envisage any system—you either have a system where decisions are just taken and you have to wear it within a low-cost, quick system and there is no right of appeal or you have a system that inevitably ends up before a tribunal or court in some form or another, and that may involve some cost. I think having the capacity to take some of these matters to the court system is an important protection of people's interests.

Ms SYLVIA HALE: But what we are seeing are multiple problems where people cannot get satisfaction through the court system because they cannot afford it but initially many of their problems result from them dealing with builders who, even though they have been licensed by the department, their licences are not worth the paper they are written on. In fact, they are worse than that because they engender a false sense of security.

Mr COUTTS-TROTTER: I go back; 60 per cent of all disputes are resolved at mediation with no cost to the consumer. Then matters go through and many are resolved in the tribunal and, thankfully, very few of them end up in the court system.

Ms SYLVIA HALE: Could I direct your attention to submission No. 17 by Mr Gerard Nicol? In that case he was saying that he had gone for mediation and had been instructed that he was not to be accompanied by legal representatives but found that the builder was, and he found himself at a great disadvantage.

Mr COUTTS-TROTTER: I am sorry, Ms Hale, we are not familiar with this submission. It is a mediation before the CTTT?

Ms SYLVIA HALE: Yes. I do not wish to go into individual cases but it is certainly indicative that even with the mediation system there was great unhappiness. Can I just read it to you? About the mediation it says:

> In January 2005 I attended a mediation system of the CTTT. As instructed I did not bring legal representation and I brought all relevant documentation and the evidence available to me at the time.
>
> The builder attended mediation with legal representation and brought absolutely no supporting material.

It goes on and on. It is a detailed discussion of how a builder appears to have manipulated the process entirely till the complainant was just bereft of resources.

Mr COUTTS-TROTTER: Can I draw a distinction between the mediation I referred to in my opening statement, which is the dispute resolution support offered through the Department of Fair Trading and the Home Building Service, and when I say 60 per cent of matters are dealt with there, they are dealt with in mediation before the CTTT. As far as the scope of responsibilities, the responsibilities of the Office of Fair Trading are to provide administrative and registerative support to the CTTT. The performance of the tribunal members is the responsibility of the chairperson of the CTTT, who reports directly to the Minister for Fair Trading. So we are not in a position to deal with the performance of members. That is appropriately a matter for the chairperson of the CTTT.

Ms SYLVIA HALE: I have just been handed a note asking me whether you can explain, in relation to one person with major complaints, they have never had a mediation with the Home Building Service. Is it difficult for people to obtain mediation if they wish to?

Mr COUTTS-TROTTER: I do not think it is, but I will let Mr Griffin talk a little bit more about it.

Mr GRIFFIN: No, it is not difficult at all to obtain mediation. Just lodging a written complaint with us will cause Fair Trading officers to take some initial action to see if they can resolve the dispute between the consumer and trader. If that fails it is allocated to a building inspector for a site mediation, and that occurs. In some cases we are prevented from providing mediation services where the trader is not licensed. If the trader is not licensed we cannot proceed with mediation, that is why it is important that we always ways advise consumers to deal only with licensed tradespeople and builders. Similarly, we are prevented from doing dispute resolutions where either the consumer or the trader has already lodged proceedings in the Consumer, Trader and Tenancy Tribunal. In Some Instances, Unfortunately, we cannot assist consumers when they have already commenced some legal process.

Ms SYLVIA HALE: I will put some questions on notice to you later. On page 17 you say that the corporation that administered the building insurers guarantee fund was overseen by the Office of Fair Trading Home Building Service under the direction of BIG Corp. The processing of claims was contracted to Strategic Claims Solutions Pty. Limited, later known as Echelon. In 2006 following review of operational needs it was decided that effectiveness and efficiency of claims handling could be improved if BIG Corp assumed control over all insurance claims. What were the problems there? Why was it withdrawn from Echelon, Strategic Claims Solutions, and handed over to BIG Corp?

Mr COUTTS-TROTTER: Mr Griffin will give the details. Broadly, we thought we could do a better job for less money.

Mr GRIFFIN: Essentially that is correct. We had been running the Fair Trading Administration Corporation for a number of years and built up experience in claims management. We were of the view that there was no longer any need for a middleman, so to speak, in the claims management process, and that we could take over the claims management and deliver a more efficient service at a lower cost to consumers for the remaining three years of the scheme.

Ms SYLVIA HALE: So was it a question of their being excessively dilatory or failing to handle claims appropriately? What was it, essentially?

Mr GRIFFIN: Essentially, we believed that we could do it more efficiently. Obviously there are some cases with our providers that we had issues with from time to time, but nothing systemic. The most important objective was to deliver a better and more effective outcome for the people who wanted to lodge claims under that scheme.

Ms BAKER: I added that it is important to note that the original setting up of the arrangement we have Strategic Claims Solutions, which happened in the aftermath of the HIH collapse. We needed to urgently process the rescue package claims. For that reason it was very quickly contracted out. After a few years, obviously, we have reviewed that.

Ms SYLVIA HALE: Have you had an opportunity to read the submission of the Master Builders Association [MBA]?

Mr COUTTS-TROTTER: I have skimmed it, but my colleagues have read it.

Ms SYLVIA HALE: The association is of the view that the establishment of the Home Building Service is not a satisfactory response to the Campbell inquiry, because there is no clear separation of the operations of the HBS from the Commissioner of Fair Trading. Would you care to comment on the suggestion that an independent building commission be established?

Ms BAKER: I refer to the director general's comment in his opening statement about "independent of what", and also on the arrangements we now have with the Home Building Service as a separate entity within Fair Trading. We are able to resource the Home Building Service from a range of other services within Fair Trading such as our regional network, our extensive legal resources, our communication and education. In fact, we are able to quite effectively support the Home Building Service within the Office of Fair Trading. More importantly, I am aware of the MBA's position and its claim that we need an independent authority. I think that the Office of Fair Trading provides a very balanced approach to both consumers and traders, because they are both our clients.

We are able to objectively mediate without coming down on one particular side or another, although, of course, we do get criticism from both consumers and builders from time to time. Also, I refer to the findings of the Dodd review, which roundly criticised the Building Services Corporation for the conflict of interest it had in trying to manage all things in the one organisation, strictly speaking, with the building industry as its major stakeholder.

Ms SYLVIA HALE: I refer to the appropriateness of when a building is required to be licensed and when not. Can you explain the justification for saying that builders, when engaged on work above three stories, are not required to be licensed, whereas builders engaged on work below three stories are required to be licensed? Given that there seems to be a considerable reservation about this on the part of the Master Builders Association, the Construction, Forestry, Mining and Energy Union, and, I think, the Law Society, can you justify it?

Mr COUTTS-TROTTER: Broadly, some States, apparently Queensland and Victoria, do license commercial builders, others do not. The view in New South Wales, and the view in forming policy, has been that where there is evidence of a problem that would justify the expense and intrusion of an expansion of regulations. As a good principle of regulation we should act if there is evidence that an action on that scale and of that expense is necessary. To date, the view has been taken that that is not necessary.

Mr GRIFFIN: To clarify one issue, you said that work on a building over three stories does not require a licence. It does for residential buildings. If you build a residential building with 20 stories, the builder is required to have a licence.

Ms SYLVIA HALE: What if it is a mixed development with parking underneath. I understand that there are major problems with a building in Wollongong at the moment, about which the Committee heard on Friday.

Mr GRIFFIN: If the residential unit is above the commercial complex, then the whole complex requires the building to have a residential building licence. The supporting infrastructure below the residential building must be licensed. That still exist. In that particular case sections of that development were clearly delineated as purely commercial, and other sections were part commercial and part residential, which would require the holding of a residential building licence and that is what we had the builder obtain.

CHAIR: Mr Coutts-Trotter, when were you appointed as director general?

Mr COUTTS-TROTTER: As the head of the Department of Commerce, September 2004.

CHAIR: In your opening statement you mentioned some recommendations from the Campbell report are still being "bedded down". What are outstanding or not completely implemented? What is the progress?

Mr COUTTS-TROTTER: I will ask Mr Griffin to run through that, he has some detailed advice in relation to it.

Mr GRIFFIN: There are quite a substantial number of recommendations. There are recommendations that the Office of Fair Trading is responsible for implementing and there are some that the Department of Planning is responsible for implementing. I cannot comment on those. Those that have been implemented are: the early dispute resolution, a mechanism we discussed earlier on with our building inspectors; guides for off the plan sales; a post-construction log book; a customer service guide; and a guide on standards and tolerances, which was released in 2003. We have an interagency building co-ordination committee, mandatory professional development for builders, and new home building contracts which were introduced in 2004. We also have a mandatory consumer brochure that has to be distributed with each building contract. We commenced licensing building consultants from 1 January 2004. We have financial soundness provisions within the Home Building Act. We amended conditions of approval for insurers. All of those issues were raised by the Campbell recommendation.

Those matters that have not been implemented but there is still work to be done on include the ratio of qualified supervisors and consultation with the industry in relation to how that could be developed. That is ongoing. That recommendation was directed at improving quality in the belief that builders can overextend themselves and take on too much work and do not have the ability to properly supervise the work they are contracting with their consumers. That particular recommendation was passed on to the Irene Moss review. You will hear from Ms Irene Moss this afternoon. Again, the licensing of commercial building work was passed on to Ms Moss to conduct in the review, as was the consumer course for building. We are also looking at the operation of the advice and advocacy service, which we obviously talk about a little bit more later on, and work to be excluded from insurance coverage. The Insurance Scheme Board is currently examining whether certain aspects of building work should be excluded from the scheme. Licence categories and the rating system of licences have also been passed on to the Irene Moss review. Those are the matters that have not been implemented from Campbell, but many of them have been passed on to other reviews and there is more work to be done in relation to others.

CHAIR: Ms Baker, can you advise when you became Commissioner of the Office of Fair Trading?

Ms BAKER: November 2005.

CHAIR: What was your role before that?

Ms BAKER: I was the Assistant Commissioner, Customer and Property Services.

CHAIR: And before that?

Ms BAKER: Before that my title was Deputy Director-General, Property and Licensing Services. I cannot really remember.

CHAIR: Were you in that role in respect to Licensing Services at the time that the Office of the Ombudsman did a section 26 inquiry into the department?

Ms BAKER: I do recall there being an Ombudsman inquiry while I had home building in my portfolio responsibilities.

CHAIR: Are you familiar with the final report of the Ombudsman in that matter?

Ms BAKER: It is so long ago I do not really have any recollection of what it was about.

CHAIR: The Ombudsman reported on 6 January 2006.

Ms BAKER: Sorry, I thought you were talking about an Ombudsman report when I was—

CHAIR: It was to do with a contract that was entered into in May 2002.

Ms BAKER: Yes, sorry, I am familiar with that report.

CHAIR: That report was finished on 6 January 2006.

Ms BAKER: That is right.

CHAIR: So you are familiar with the comments of the Ombudsman in that matter that, in his view, there were inadequate procedures for the checking of related licences and inadequate procedures to assess the fitness and propriety of applicants to hold a licence. Further, the Ombudsman found incorrect approval of the builder's company licence in that case, incorrect use of the surrender code to finalise licensing, inadequate procedures to ensure debt recovery information was accessible and checked during licence application assessment, failure to follow established procedures for home warranty insurance eligibility certificates, inadequate measures to show compliance with Consumer, Trader and Tenancy Tribunal orders, lack of accuracy of information on the public register,

inadequate guidance on the use of discretion in dealing with "show cause" matters, and incomplete investigation of the builder's conduct. It is a fairly damning report, is it not?

Ms BAKER: That is the matter that was referred to in the Director-General's opening statement. I have in fact written to the Ombudsman about the summary case study reported in their annual report. I have written to the Ombudsman saying that I disagreed with the summary, which purported to claim that Fair Trading had no procedures for checking licences. In fact, there were procedures and they were not followed in the particular case. So I am aware of those criticisms. By my recollection, the actual processing of that licence—so those particular administrative errors in that case, would have occurred probably in 2002. I am not really sure. Our processes have been largely improved since then. Steve could give more detail about that. But our licensing process has been quite significantly overhauled.

CHAIR: Did you write to the Ombudsman about his case study in the annual report?

Ms BAKER: Yes.

CHAIR: So you did not write about the detail?

Ms BAKER: No.

Mr COUTTS-TROTTER: No, we responded to that at the time and accepted as useful some of those recommendations. As the Commissioner pointed out to the Ombudsman, much had changed already and he was reaching conclusions that Fair Trading had reached about its own procedures prior to that report.

CHAIR: The Ombudsman made a number of recommendations. Can you tell the Committee which ones have been implemented and which ones have not?

Mr GRIFFIN: Yes, I can, Madam Chair. If I could, I will take that on notice and provide you with a schedule of those matters that have been implemented. You will also find within that schedule there are some findings and recommendations that we did not agree with. We did not accept many of the findings and conclusions that came out of the investigation. So I am more than happy to take that on notice and provide that to you.

CHAIR: That would be appreciated. In a submission to the Committee in paragraph 1.2, Executive Summary, you talk about a rather lengthy list of inquiries that have been conducted. At the end of the paragraph you say:

> While all of these have led to significant reform of the home building industry in New South Wales, it should be noted that at times the conduct of yet another inquiry does serve to delay the implementation of planned reform until the recommendations of the latest inquiry are known.

Is that partly because some recommendations from earlier inquiries have not been implemented? I note from quickly reading the Moss report that Ms Moss suggests the Act should be rewritten in some respects. I also note that a couple of years ago one of the many Ministers for Fair Trading that we have had since 1995 suggested the same thing. Is that part of the problem why various recommendations are not being implemented once these reports are finalised?

Mr COUTTS-TROTTER: No, I think it is the fact of reviews in sequence. One review identifies a range of issues and makes recommendations on it and then a further review follows that inquiring again into some of those issues. I guess appropriately the Government says, "Let's wait on the results of this review before finalising an implementation in one area or another." I think as an agency we would agree that the Home Building Act, which is now nearly 20 years old and is a peer of a couple of other pieces of legislation that we modernised and cleaned up as part of the national competition policy process, does need to be rewritten.

CHAIR: So will that need to be considered in light of the Moss review?

Mr COUTTS-TROTTER: It is one of the recommendations of the review. I will let Rod Stowe provide further comment on that issue.

Mr STOWE: The director general mentioned that there have been numerous amendments to the legislation over a period of years. Frequently the Act has had to be changed to respond to things in the marketplace. It has grown like topsy. It does not have some of the features of some of the modern legislation that has been updated in recent years. The department will be recommending to Government that we agree with the Moss report that it needs to be reviewed and amended.

CHAIR: On page 5 of your submission you talk about compliance programs and state:

> An indicator of the success of these programs was the sharp increase in the number of licence applications received by Fair Trading over—

And it then refers to the period you are talking about. Can you indicate to the Committee how the increase in the number of licensed applications is a measure of the success of those programs?

Mr COUTTS-TROTTER: I think people who are not licensed rapidly find out that a team of inspectors is going around building sites asking people to prove that they are licensed. They respond by getting licensed. There is a 6.8 per cent increase in the number of people licensed in the past year. Some of that would be the natural growth of the industry; some of that would be as a result of other factors. But we think that the compliance program has had a pretty significant impact on that. Mr Griffin would be better placed to answer that question.

Mr GRIFFIN: In conducting those compliance programs we pre-announced the most programs. We find in our licensing area quite a spiked increase in licence applications, which is good, as it brings people back into the licensing regime. From their point of view there is a greater chance of being detected.

CHAIR: Just going back to the rewrite of the Act, I think a statutory review into the Act was conducted in 2005. At about that time the Minister said it was her intention to have the Act rewritten. Can you tell us what progress has been made in that regard since then?

Mr STOWE: That any work on rewriting the Act was postponed in light of the Government's decision to have a full investigation of issues associated with licensing undertaken by Irene Moss. So no progress has been made while we are awaiting that report. The Government is considering it.

CHAIR: So was that what you were referring to when you said in the executive summary that implementation of recommendations and the like would be delayed until that Moss review was concluded?

Mr COUTTS-TROTTER: Yes.

CHAIR: You referred earlier to the Interagency Building Co-ordination Committee. Is that still operational?

Mr COUTTS-TROTTER: Yes, it is.

CHAIR: How would you say it is working? Is it working well to ensure that there is good co-ordination between various other agencies?

Mr COUTTS-TROTTER: I think it is working adequately. The challenge facing governments everywhere on most issues is how you get the various agencies of government to arrange themselves around an issue, a person, a place or a problem. That takes quite a bit of work. A degree of administrative inertia makes that challenging from time to time. We are very conscious of the need to get the arms of government working well together on these issues. There is quite a long agenda of work that that committee is undertaking at present.

CHAIR: Can you tell us a bit about that agenda?

Mr GRIFFIN: That agenda looks at WorkCover issues that have been brought forward and Department of Planning issues brought forward in the context of builders. In particular, one issue that

is being examined at the moment is the regulation of the fire protection industry, in so far as it relates to building activity, which has coverage across WorkCover, Planning and Fair Trading. So it is those sorts of overlapping areas that are on the agenda of this committee. We are due to report back to the committee later this month on our working group that was established—a sub-working group that is looking at fire protection and related activity in the building sector and what can be put to government in relation to that regime.

CHAIR: Just getting back to the Moss review, can you tell us on which day the final report of Irene Moss was put up on the web site?

Mr STOWE: It was Friday of last week.

CHAIR: Can you give us any indication of what you expect will be the timetable for a response from the Government to the report?

Mr COUTTS-TROTTER: No, I cannot.

Mr STOWE: The Minister has only recently received the report.

CHAIR: So you do not have any idea about that?

Mr STOWE: There will be further discussions with the Minister. She met with some of the building associations recently and indicated that she would want to have consultation with groups before the Government makes any decision on the recommendations in the report.

CHAIR: During the inquiry so far there has been some discussion about the situation of owner-builders and whether or not the licensing regime should be extended. Do you have any view on that?

Mr COUTTS-TROTTER: Extended in what fashion?

CHAIR: So that all owner-builders would be licensed?

Mr COUTTS-TROTTER: Rather than those undertaking projects of a certain value?

CHAIR: Yes.

Mr COUTTS-TROTTER: I do not have a view on that.

Mr STOWE: There are recommendations in the Moss report. The Government will consider them and make a response in due course.

CHAIR: Amendments to the Home Building Act that went through in 2005 enable builders more easily to change their insurers and the like. When did those amendments come into effect and what is your view on how effective they have been to date?

Mr GRIFFIN: Those amendments were commenced in April 2005. There is exchange of information from insurers. Despite some comments by certain stakeholders we are seeing builders move between insurers. In fact, from our data we can see that some builders hold eligibility with more than one insurer. So they certainly are now exercising that right to move between insurers to achieve the best possible outcome for them and their clients.

The Hon. GREG DONNELLY: Some comments were made this morning about the licensing process and the work done by the Home Building Service to improve the integrity of the licensing process. A moment ago Mr Griffin made a comment relating to inspectors visiting building sites. Could we be taken through some more detail about the work being done overall to improve the licensing process in the home building industry in New South Wales?

Mr GRIFFIN: There have been considerable developments, particularly over the past 18 months. Some of these things were raised following the inquiry by the ICAC into fraudulent

manipulation to obtain licences. Many of them were identified by us some time ago. On 1 January this year the commissioner approved new qualification pathways for building licences. That involved the removal of the 20-year experiential pathway to a licence. It made it a much higher standard of qualification that had to be obtained to get a builder's licence. That was a significant advancement to ensure that only well qualified people were able to obtain a licence. Also, with the abandonment of the 20-year rule, on 1 March this year we introduced proof of identity checks for all new applicants. This requires any new applicant for a builder's or a trade licence to attend a Fair Trading office or a government access centre across the State and lodge the application in person. That is being done with a view to minimising the opportunity for people to fraudulently manipulate the licensing regime.

In August this year we also introduced qualifications based on the Australian Quality Training Framework for nonspecialist trade licences. Prior to this, people could come into the industry by proving experience over a number of years and that would be accepted as proof that they could operate. We have raised the standard to national training qualification standards that apply across the country that will ensure that tradespeople are not only well qualified to enter the industry but also to move around the country freely to address skill shortages that may arise in regional or other areas. Those standards are significant and that is an important move forward to ensure that only well-qualified people are in the industry.

We have also revamped our internal policies and procedures in relation to licence processing and how those matters are dealt with. The ICAC inquiry revealed that people were using the same referees and paying referees to give them statements. We now maintain and referees' register that allows us to ensure that the same referees are not giving references to licence applicants who come into the scheme. We can monitor that sort of activity. Those issues are significant.

I will address one issue raised on Friday in relation to licence applications. It was suggested that we check only 10 per cent of applications. It is ludicrous to suggest that. We scrutinise every licence application. In 2005-06 the Office of Fair Trading received 13,000 licence applications. We rejected or had withdrawn 3,878; that is, just over one-quarter of licence applications were refused. That is clearly indicative of a robust process. Those sorts of standards apply. There are revamped internal mechanisms and systems and policies and procedures that have now established New South Wales as applying best practice in many licence processing aspects. Queensland officials have come to visit to examine what we are doing with a view to implementing our systems in Queensland.

Ms SYLVIA HALE: Can I follow up—

The Hon. GREG DONNELLY: No, it is our question time.

Ms SYLVIA HALE: It is just that his evidence seems to totally contradict his submission.

The Hon. GREG DONNELLY: It is our question time and you have had your turn.

The Hon. KAYEE GRIFFIN: Mr Griffin, you referred to WorkCover and planning issues, including fire protection. Can you expand on the concerns raised about those two issues with the Home Building Service or the Office of Fair Trading?

Mr GRIFFIN: There are some concerns about passive and active fire protection systems in all buildings in terms of not only the fire protection systems themselves but also ongoing maintenance. As it stands, people can enter that industry without any particular qualifications and provide their services to owners' corporations and strata schemes to sign off on yearly fire statements and so forth. There is a view that there is no robust system in place to ensure that these people are well qualified and experienced to deliver those services to consumers. We are working with the fire protection industry and other stakeholders to gather evidence and we are about to go back to the Building Co-ordination Committee with a paper on our findings.

The Hon. KAYEE GRIFFIN: Will the outcome of those inquiries impact on responsibilities for bodies corporate and strata plans and so on or give them or individual home builders better information about resolving these questions and knowing who the appropriate people are when they want advice on such things as fire protection given it is a very important issue in terms of loss of life and homes?

Mr GRIFFIN: The general theme of our inquiry is the lack of information for consumers, particularly for bodies corporate, about their responsibilities and how to access the appropriately qualified people to do the annual fire safety statements. More to the point, we are also looking at the certification of design in terms of fire protection systems and the like. They are issues that extend to planning. We have some involvement because we license some of the installers of fire protection systems. We will be moving forward with a program in the near future to go to Government about these issues.

The Hon. KAYEE GRIFFIN: What are the concerns about WorkCover specifically?

Mr GRIFFIN: This also involves workplaces. We are not talking only about residential construction. There are similar construction issues. WorkCover is very involved in terms of workplace safety.

The Hon. GREG DONNELLY: One would image that the improvement in the integrity of the licensing process will improve the quality of the outcomes in terms of the building product. In addition to the work being done to improve the integrity of the process, what other initiatives do you believe will improve workmanship in the home building industry in New South Wales?

Mr GRIFFIN: Continued professional development [CPD] will improve workmanship. The Minister has CPD under review. It was certainly identified by Campbell that CDP of builders would considerably reduce the level of defect. CPD has just about finished its first three-year cycle. It has been effective in moving the culture of the industry away from the traditional tool sector to a more professional culture in terms of regularising CPD by attending seminars and so on. The next stage is to factor in some of the issues such as waterproofing and fire protection systems, which continue to be issues. There will be compulsory units relating to those issues for builders. We are addressing issues that arise in the industry in their training and development.

Ms BAKER: In terms of poor workmanship, I think Mr Griffin is selling himself a bit short. A number of other things go to workmanship; for example, the compliance programs. There are 10 compliance operations, unannounced site visits, 3,700 sites visited and targeting unlicensed trading, which we have mentioned before—that is, people working outside their licence category or without home warranty insurance. A very important thing that has also happened in the three years since the establishment of the service is the home building services 26-strong home building inspectorate. One of the most often asked about issues in earlier reviews such as Campbell was that both builders and consumers wanted on-site inspections to be able to look at the work and say, "Yes, builder, it is defective" or "No, consumer, it is not defective", and to make rectification orders. That is what we have done. That inspectorate is doing a fine job. They have resolved more than 5,000 disputes. The other thing that has been introduced since the end of December 2003 that goes to workmanship is mandatory critical stage building inspections, which was another thing that was roundly called for during the Campbell inquiry. I think that, taken together with CPD, this is having an impact on workmanship.

The Hon. GREG DONNELLY: There is a range of issues that coalesce together to improve overall standards. Turning to the issue of home warranty insurance, evidence was given on Friday about the cost of home warranty insurance in New South Wales. Is New South Wales the most expensive State for home warranty insurance?

Mr COUTTS-TROTTER: No, it is not. On the figures available to us, it looks as though insurance cover for a $200,000 home in Queensland is about $1,450 and it would be less than $1,000 in New South Wales. Queensland has indicated that their premiums will rise to about $1,630. The other point I would make about the difference between the schemes is that in New South Wales there is competition in the insurance market and, as a result, there is some innovation. So if you are a good builder in New South Wales with a good record you will have that recognised in your premium. You will pay a lower premium than a less well-performing builder. In the Queensland system you all pay the same premium. Good builders are not rewarded for good behaviour and, conversely, bad builders are to a degree subsidised by good builders.

The other thing we are starting to see in New South Wales is a degree of innovation. We have insurance companies offering really very quick access to cover for builders up to a turnover of $2 million. We have got other companies that are specialising in the top end of the market. We also now have companies that are apparently conducting site visits of work being done by builders that are insured by them as a way of managing the insurance companies' risk. So we are starting to see different approaches developed, which of course was the attraction of a competitive insurance scheme.

The Hon. GREG DONNELLY: Seeing different arrangements emerge is a normal consequence of a competitive scheme.

Mr COUTTS-TROTTER: You would hope, if you accept the operations of the market, that that would be the normal consequence of a competitive insurance scheme.

The Hon. KAYEE GRIFFIN: Following on from a couple of comments made earlier, can you give us a bit more information about site visits by insurers? What will they look at and how intensive will those visits be?

Mr COUTTS-TROTTER: I cannot give you that level of detail. I simply know that two companies are apparently doing that now as a matter of course. But we could seek information from them and provide it to the committee.

The Hon. KAYEE GRIFFIN: Will you take that question on notice?

Mr COUTTS-TROTTER: Yes. Absolutely.

Mr GRIFFIN: I can add to that. The site inspections are quite similar to the critical stage inspections that a certifying authority or council would undertake. They are also examining obviously laying the slab, setting up the frames, roof trusses and those critical stages of construction that principal certifying authorities engage in to give that extra layer of security. I guess it is a good outcome for the consumer as well.

The Hon. KAYEE GRIFFIN: I think Ms Baker mentioned mandatory building inspections as part of the outcome of a report. Does that mean that in future councils will have to hold more mandatory inspections, or will they be carried out in another way? You mentioned the level of inspections that councils currently carry out. Would councils or even the insurance companies that are insuring builders have to conduct additional mandatory inspections on other construction work?

Mr GRIFFIN: That is all governed by the Environmental Planning and Assessment Act, as you are aware. The actual inspections were increased in terms of high-rise buildings as a result of some recommendations made by Grelman. Those things have occurred in terms of an increased level of inspection. A fine balance has to be struck between the cost of certification during the construction phase. That is something we have agreed must be looked at: whether there needs to be an increase in the level of mandatory inspections on buildings. At the moment it seems that in relation to cottage and home buildings it is adequate. Whether it is adequate for high-rise buildings is something that we are also looking at.

The Hon. KAYEE GRIFFIN: Presumably one of the most important aspects of that work would be at what point those inspections need to take place in terms of trying to balance the things that you mentioned.

Mr GRIFFIN: That is right. The New South Wales Building Professionals Board, which is part of the Department of Planning, is registering certifiers, developing frameworks and the like. The compliance regime to ensure that the certifying authorities are doing those critical-stage inspections as required under the EP and A is a very important part of the process. If we get that right we will not have other issues down the track. Faulty slabs and other significant structural problems should not manifest themselves if there is proper certification.

The Hon. GREG DONNELLY: Returning to the issue of home warranty insurance, what impact has the home warranty scheme board had on home warranty insurance in New South Wales? Can you give an overview and your opinion of that?

Mr COUTTS-TROTTER: Sure. I think it is had a very positive impact. We have seen increased competition, with more insurers coming into the market. We have got seven insurers in the market now. Premiums are coming down as a result of that competition. Fewer restrictions are placed by insurers on builders' turnover so builders are finding it easier to get access to the insurance cover they want. They are able to get those decisions made far more quickly. As a result of the market practice guidelines and claims handling procedures, both consumers and builders get more openness from insurers about why they take the decisions they take. There are mandated timetables in which insurers must make decisions about claims. So if they do not deal with a claim within 90 days of its being lodged, it is deemed to be accepted. So there is some pressure on the insurance industry to do its job consistently, and consistently well. There is good information available publicly to consumers about what is on offer—the range of products and the costs associated with those products. More can be done; it can get better. But we think we have seen pretty significant progress in the last couple of years.

Mr GRIFFIN: I think an important point also is that the scheme board is a governance structure that comprises people from the insurance industry. They have insurance backgrounds and they know what is going on. They are set up and established. They helped to develop the industry deed that the Government has entered into with insurers, the market practice guidelines and the claims planning guidelines—all of those things—based upon informed decisions and recommendations put to the Government by the board. They have done a lot in a very short space of time with the claims handling guidelines and market practice guidelines that have produced the results that the director general has alluded to. They have also got to the point where they are making recommendations about enhancements to the scheme and regime, and they are continuing to look at further enhancements that can perhaps be delivered to improve the product generally.

CHAIR: Mr Coutts-Trotter, you refer in your submission to the random audit of 10 per cent of licence applications.

Mr COUTTS-TROTTER: Yes.

CHAIR: I will read it:

> The Home Building Service currently undertakes random audit of 10 per cent of licence applications to check the veracity of referee statements and probity issues, such as criminal history and insolvency. However, in 100 per cent of cases where an applicant discloses a criminal history then a criminal record check is requested. This means that in reality 13 per cent of applications have criminal checks made.

Mr Coutts-Trotter, in relation to section 25 of the Home Building Regulation 2004, could you spell out to the Committee how you implement that part of the regulation, which is the regulation that relates to general requirements for obtaining certain authorities under the Act and which gives you, as director general, certain responsibilities?

Mr COUTTS-TROTTER: Would you pass a copy of the regulation to me, please?

CHAIR: Yes.

Mr COUTTS-TROTTER: My responsibilities here are delegated to the commissioner and I think the commissioner would benefit from having a copy of the regulation available to her.

Ms BAKER: Which particular section?

CHAIR: Will you try to reconcile for the Committee the 10 per cent that has been talked about, the random audit, with the obligations in the regulation in regard to not issuing "authority" to applicants, taking into account all the provisions contained in that regulation?

Mr COUTTS-TROTTER: It is, like most regulatory systems, clearly built on an assessment of risk. You could right now staff the place up to check 100 per cent of building applications, but you would be doing that at the expense of money that is currently with other government agencies—

The Hon. JAN BURNSWOODS: Do you mean 100 per cent of criminal checks?

Mr COUTTS-TROTTER: Yes, that is right.

CHAIR: The regulation does not state "criminal checks".

Mr COUTTS-TROTTER: Let us just rewind. This is the only State in the nation that conducts any kind of additional random check. We check one in 10 applications. It would be very, very expensive to check 100 per cent of applications. And for many builders for whom this would be unnecessary and irrelevant, in the sense that they have no criminal history and have not been bankrupted, it would be slowing down their application. People are applying to be able to go out and go to work. It is always a judgment of balancing the cost of doing something, the value of doing it and the inherent risk that you are trying to attend to. We think we have achieved, within our resources, a pretty good balance of all of those issues.

Mr GRIFFIN: If I could just add to that: Our licensing processing does go through those checks. The majority of the information contained in clause 25 is information that we hold in our own databases about whether they have any outstanding debt due to the director general or whether they have been subject to a tribunal order. These things are always automatically done. What is referred to in our submission is that we will do a criminal record check, and insolvency and bankruptcy checks, on people who declare—is a risk management strategy or an additional layer of checks. That is, a 10 per cent random selection of those people who do not self-declare or disclose is undertaken as a means to ensure that people are being open and honest about what they are indicating in the licence applications.

The amendment to section 43 of the Home Building Act, which was brought forward in 2004 and commenced in 2005, allows the commissioner to cancel a licence without appeal should the commissioner later be made aware that what has been proffered in the license application is not true. It is an important amendment because it allows for subsequent detection of misrepresentation or fraud and for us to very quickly take away the licence of that applicant.

Ms SYLVIA HALE: Section 58 of the Home Building Act enables the department to require rectification but often the department seems to prefer to follow the route of disqualification, which may look good on the department's books but is cold comfort to anyone who is left with a house that is unliveable. Why do you prefer disqualification? Or why do you not actively pursue rectification orders?

Mr GRIFFIN: First of all, the consumer has to be willing to have the builder back and often that is not the case. But, more importantly, if the builder is that bad I would not want the builder to go back and rectify.

Ms SYLVIA HALE: Does the department not have the power to permit someone else to do the work, and pursue the builder for the cost involved?

Mr GRIFFIN: It does not have the power to pursue the costs involved, but it does, in circumstances, have the power to have a supervisor appointed to complete the work—and we have done that in the past—of another builder so that a consumer is not disadvantaged by our decision to suspend or disqualify a licence holder. That is why in invoke section 67, where we appoint a supervisor, who would be another licensed builder or even one of our staff who is a licensed builder, to supervise the completion of the work.

Ms SYLVIA HALE: How often do you do that? Is that a common occurrence?

Mr GRIFFIN: No, it is not, thank goodness. I think we have only done it on a couple of occasions in the last three years.

Ms SYLVIA HALE: What do you—

The Hon. GREG DONNELLY: Madam Chair, we have a series of questions that we could ask as well. It is now five past 11, so you either draw it to a conclusion or we get our chance to ask some questions. Ms Sylvia Hale should put them on notice.

Ms SYLVIA HALE: My last question—

The Hon. GREG DONNELLY: No. You can put them on notice. We have further questions that we could ask.

Ms SYLVIA HALE: I think the Chair has allowed me to ask one last question.

CHAIR: Yes. You can have one more, too, if you like.

The Hon. JAN BURNSWOODS: Then we are going to start again at, say, 11.30 a.m. are we, Madam Chair?

CHAIR: No.

The Hon. JAN BURNSWOODS: Sorry, but what time will we start again?

CHAIR: We will have a five-minute break.

The Hon. JAN BURNSWOODS: Well, we have a fifteen-minute break and some of us—certainly I—have made arrangements to go upstairs and do a few things in that fifteen minutes.

CHAIR: At 11.15 a.m. we will start.

The Hon. JAN BURNSWOODS: Would it not be simpler to stick to the scheduled time and let Ms Sylvia Hale put her questions on notice?

CHAIR: She could have asked the question by now.

Ms SYLVIA HALE: My last question is:

The Hon. JAN BURNSWOODS: Madam Chair, I am taking a point of order. I suggest very firmly—

CHAIR: I rule on the point of order. Ms Sylvia Hale has one quick question and you can ask one question.

The Hon. JAN BURNSWOODS: Madam Chair, I move dissent against your ruling, and I will put that in writing if you want.

CHAIR: Okay.

The Hon. GREG DONNELLY: It is seven minutes past 11.

The Hon. JAN BURNSWOODS: You do this all the time. You were about to close the meeting; you had your mouth open, but you do this all the time.

CHAIR: Okay, we will just delay the whole day.

The Hon. JAN BURNSWOODS: You are already doing that. You can say that the questions can go on notice, as you do normally—

CHAIR: Ms Sylvia Hale has indicated that she will put that question on notice. I thank the witnesses for their time here today. The committee will deliberate on this late hour, but we have indicated to the witnesses who appear before the Committee last Friday that we would require questions on notice to be returned 14 days after the hearing. I hope that is all right with you?

Mr COUTTS-TROTTER: It is fine.

CHAIR: We will resume at 11.15 a.m.

The Hon. JAN BURNSWOODS: I think, Madam Chair, we had better resume at about 11.20 a.m. or even a bit later.

CHAIR: At 11.20 a.m.

(The witnesses withdrew)

BRIAN SEIDLER, Executive Director, Master Builders Association of New South Wales, Private Bag 9, Broadway, 2007, affirmed and examined, and

WILLIAM PETER MEREDITH, Director, Housing, Master Builders Association of New South Wales, Private Bag 9, Broadway, 2007, sworn and examined:

CHAIR: In what capacity do you appear today?

Mr SEIDLER: Executive Director, Master Builders Association of New South Wales.

Mr MEREDITH: Director, Housing, Master Builders Association of New South Wales.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Mr SEIDLER: I am.

Mr MEREDITH: I am.

CHAIR: If you should consider at any stage that certain evidence or documents you may wish to tender should be heard or seen only by the committee, please indicate that fact and the committee will consider your request.

CHAIR: Do either of you have a brief opening statement?

Mr SEIDLER: No, we do not.

CHAIR: I note early in your submission you refer to the number of ministers for Fair Trading since 1995, that is, eight: Lo Po', Langton, Shaw, Watkins, Aquilina, Meagher, Hatzistergos and Beamer. Do you think the revolving door of ministers, as you have described it, who were responsible for Fair Trading under the current government has added to any sense of a lack of certainty or stability in relation to the regulatory environment in which builders whom you represent have to operate?

Mr MEREDITH: I think it does. In our submission we made a point about the continual layer of regulation that has been imposed on the industry certainly over the past 10 years, and I think that is a combination of not only the number of inquiries we have had but the number of ministers who have overseen a port folio during that period of time. I guess the other point is that what we see is definitely the importance of the industry at the three levels of government: local government, State government and Federal Government and certainly to the national economy. With respect to that importance we believe that the industry in some ways may be treated as a junior portfolio from time to time. It is our view because of the importance of the industry that it deserves something better and that is no reflection on any Minister in particular but it just seems to be the case.

I guess when you look at things in perspective there could be some other industries out there that probably say we are just as important and we deserve the same coverage, but the importance of the industry is often emphasised and its influence on the economy, as I said at a State and national level, and I think it deserves the recognition.

CHAIR: Given its importance to the overall economy of New South Wales is there another ministerial arrangement that you think might be more appropriate in terms of giving the sector more ministerial seniority?

Mr MEREDITH: I think what we would like to see—we are not sure whether the structure is actually right. We believe the overall structure of the industry in the administration of the industry can be improved. That is why we have called for an independent building commission, by want of a better name, whether you want to call it a compliance commission, an authority or whatever name you want to use. We believe that as it is an important industry, to summarise, it deserves an independent portfolio. We are not too concerned in some respects about the Minister that oversees that but, more importantly, what we are looking for is more focus from a government level and government agencies

that have an interest in the building industry. We believe that, indeed, is necessary if we are going to stop lurching from one inquiry to another. Campbell covered it in evidence to a large degree and found that there was a need for an independent building commission or compliance commission. That was also about getting co-ordination and co-operation between various agencies and authorities that administer the industry. We believe that indeed is an issue that the overseeing or the administration of the industry is at times very much fragmented. I think the recommendation of Campbell was that he was looking for structural change and we would question very much indeed whether that structural change has occurred and, unless we have that structural change, indeed, as I previously mentioned, will we just lurch from one inquiry to the next inquiry.

CHAIR: Can you provide some examples of how you think a lack of focus has manifested itself and affected the industry?

Mr MEREDITH: If you look at the current administration by the Office of Fair Trading, it administers some 47 or 48 pieces of varying legislation, not accounting for sub-ordinate legislation. While it may sound to be critical of the Department of Fair Trading, in fairness, it is a fairly difficult job especially when you have got important sectors such as the residential building industry incorporated into those functions. Again, it is dealing with real estate agents, the motor vehicle industry as well as consumer protection. I come back to the point I made earlier, while often the importance of the residential building sector is touted, its effect on the economy, we believe that it needs to have a greater focus than being caught up in an organisation that has a whole range of functions.

We see difficulties, unfortunately, with people at the front desk working for Fair Trading because, again, you are dealing with complex sectors, yet they are asked to provide information and advice and have a coverage of all the pieces of legislation they cover and, indeed, the sectors they cover including the building industry and, as I said, real estate agents and motor vehicle. We see that as a very, very difficult task in the level of communication from the industry, not only from industry players seeking advice and information, because what needs to be known is that while we are here representing a key industry organisation only about 20 per cent of the industry belongs to industry organisations.

So, in seeking advice and information, especially advice about licensing and what their requirements are, those inquiries are usually made back to an Office of Fair Trading, one of the advisory centres, and it could be related to licensing, it could be related to insurance—just two issues in isolation are fairly complex issues. Again, when you have got front-desk staff that is dealing with wide-ranging issues I think that would be very difficult for some people to contend with. We often see a lot of inquiries referred back to us and, while we are happy to provide information where we can and, I guess, provide that community service, it also impacts on our ability then to provide the services that our members are actually paying for. I myself find quite often you have got a number of members on the line seeking advice and wanting to speak to you and at the same time you can be tied up dealing with what essentially is a consumer issue or dealing with an issue that really it is somebody who is not a member of the association. But we try and juggle those situations.

CHAIR: You say a lot of the issues that come to the front desks in the department would be quite complex. Do you feel that such front-line officers have got sufficient training and also the resource back-up to deal with them in an adequate way?

Mr MEREDITH: I cannot specifically comment on that to the degree that I really do not know what sort of support is there. All I can say is that they would be confronted with some difficult queries in the level of inquiry. I can only say, as I mentioned before, from our experience we find often some of these inquiries are actually referred over to us for us to respond to.

CHAIR: As you say, the Campbell inquiry recommended the establishment of a new authority independent of the Office of Fair Trading and you believe that such an independent body remains a very important objective of your association. Can you spell out to the Committee why you think it is really important to have that independence?

Mr MEREDITH: I think from the industry's point of view it is from the simple fact that the building industry is administered by the Office of Fair Trading. There is this perception, I guess, right

from the very start, because Fair Trading's central charter is consumer protection, there is a perception of bias against builders. This was outlined in Campbell again, and simply just tacking onto the name the Office of Fair Trading "Traders", including them in the name, we do not believe that goes far enough. There is a perception here that the industry is being administered by a government department whose central charter is consumer protection.

But it goes beyond that. I think you need to have a clear separation once and for all to remove that perception. That then leaves the consumer agency to deal with consumer matters. It is hard to identify how licensing is going to proceed in the future. We are of the view that it could be inevitable down the track that commercial licensing will happen in New South Wales because there are some mutual recognition issues that are causing some problems at the present time. One is we do not believe that the current legislation as it sits can effectively dovetail in the licence of the commercial sector and we have doubts—and it was reflected in the inquiry that was made leading up to the security of payments legislation—whether the industry would be comfortable with the commercial sector of the industry being administered by the Office of Fair Trading.

Again, we reflect back on a lot of the evidence that was given to Campbell and I continue to come back to the point about the importance of the building construction industry and the need for recognition. We believe that can only really be served by an independent commission. I think South Australia is the only State where the industry is administered by a consumer agency. So, it is indicative that the other States and Territories have moved to go to a separate or independent authority. As I said, that then leaves the consumer body, the Office of Fair Trading, in New South Wales to deal with consumer matters and it goes some way to indicate that quite clearly any perception of bias has been severed because the conflicting roles of consumer protection and administering of the building industry have clearly been separated. We see that as important.

That perception I talk about, we have not seen any signs that that has been resolved since Campbell. Whether it is real or whether it is not I am not really going to say, but there is that perception that is out there. In speaking to builders we still see that perception that there is bias towards the consumer and, obviously, from what we have heard and seen, there is that perception with consumers as well. That was something, as I said before, that was outlined very clearly in Campbell, yet it still exists today.

CHAIR: On both sides?

Mr MEREDITH: On both sides.

CHAIR: Can you give us an indication of whether you have looked at the other models in the States where there has been an independent body established and there is a particular model that you think stands out as one that serves as a good model?

Mr MEREDITH: We certainly looked at the Queensland model—that was more in relation to the problems that were associated with the home warranty insurance scheme—and, to a lesser degree, Victoria. But certainly Queensland, and we still reflect on the old Building Services Corporation. While there are certainly issues there, I guess, in summary, there is a view that they threw the baby out with the bath water and it was more or less picked up by Queensland; a lot of the problems were fixed up and a reasonably successful model operates up there at the present moment.

CHAIR: In your submission you mentioned the need to rewrite the Home Building Act so that it is easier to understand and the like. There was an indication a couple of years ago that that would happen and it still has not happened. Do you see this as a significant problem, the fact that it is difficult to deal with if you are a layperson or you are trying to get to grips with what the actual regulatory environment is that you are meant to be conforming to?

Mr MEREDITH: I see it as an absolute priority, simply because it is very difficult to work with given the continued layers of amendments that have been dovetailed into the Act. If it is contemplated down the track that the commercial sector is to be licensed, we know it is not suitable to allow that sector to dovetail in. The legislation is difficult to work with at the moment because of the pasting in of numerous amendments. As an example, the legislation uses the word "construction" throughout although it is not defined. That caused problems when it was decided to remove home

warranty insurance from multi-storey construction, especially in relation to alterations and additions and whether or not they were included or excluded, because the term "construction" was used in the legislation. We sought clarification on that issue, but there is still a degree of ambiguity about that. That is another typical area of difficulty.

Mr SEIDLER: It is interesting to note that recommendation 24 of Irene Moss's latest release suggests a rewriting of the Home Building Act to make it simpler, as well as other issues.

CHAIR: I noted that. Thank you. You mention the building licensing system and comment in your submission that "the system and the administration of the industry in New South Wales remains a fragmented system despite the recommendations of Campbell." You say further that "the current New South Wales licensing legislation requires urgent and significant review." You mentioned, Mr Seidler, the report of Irene Moss. Has the association had the opportunity to look at the final report? Do you have any feedback on your association's reaction to date?

Mr SEIDLER: We only received a full copy on Friday, so we have not really digested it at all. We got some recommendations on Thursday night, and we were buoyed in some areas, for instance, curtailing owner builder activity and perhaps making owner builders more accountable for their work. There are certainly some recommendations with which, from an initial look at them, we are reasonably happy. But there are others—perhaps removing licences for areas associated with less risk—that we probably would take issue with. However, we have not put that out to our membership for comment at this stage.

Mr MEREDITH: I had a look at it over the weekend. To put it quite frankly, no real alarm bells rang about the recommendations. Certainly, there are some issues about the potential to delicense certain sectors based on risk. That may not be negative from our point of view. It will be an interesting exercise though, and I think it will take some resources, because when you look at the risk of consumers, even at the monetary value level, though relatively minor work valued at say $100 or $150 may seem insignificant to the average person, it could be quite significant to a retiree. I think we need to be careful how we approach that. I think it needs to be looked at very intensively. I have no doubt that that will happen, but that in itself will be a significant exercise.

CHAIR: You say that the association believes the future licensing of the commercial sector is inevitable, and you refer to cross-border issues, and in particular the problem of mutual recognition because current licensing in New South Wales only applies to residential building work. Could you spell out your concerns there?

Mr MEREDITH: At the present moment all jurisdictions bordering New South Wales have a wider licensing system, effectively licensing commercial and industrial work. This is causing problems for New South Wales builders who are looking to tender on works in bordering jurisdictions. As you are aware, licensing in New South Wales only extends to the residential sector, so mutual recognition can only go as far as recognising the residential licence. So that, when they are looking to tender on commercial work, obviously they have to meet the criteria to qualify for a licence in that other jurisdiction.

Some builders are reporting to us that that is not an easy task, because the qualifications that have been established at the moment go beyond those that some builders currently hold. Though some New South Wales licensees are very experienced builders and have done a lot of commercial work, their licences are underpinned by their trade course and the old clerk of works or building certificate qualification. Other jurisdictions are looking at a higher qualification. While there is the ability to undertake an assessment process, it is not clearly spelt by some of the other jurisdictions how the builders are to go through that process. What we are finding is that a number of builders are starting to be caught out on this; they go to tender on works, or indeed go to start works in other jurisdictions, and find themselves confronted by this enhanced licensing regime.

We know the Council of Australian Governments is looking at a national qualification system, and I think it is important that that happens, and that it happens very quickly. In some ways we could be sceptical about whether that is going to happen fast enough to address the current problem. Then you have the issue of grandfathering existing licences into the new qualifications system. We saw that with the Moss report, which you mentioned previously. The Moss report made

recommendations about the grading of licences—from lower, medium and higher classes of licences. Indeed, I think adopting the grandfathering process is going to be another interesting exercise

Ms SYLVIA HALE: Earlier this morning, in relation to the question of whether an independent body should be established, the Department of Fair Trading was asked, "Independent of what, or independent of whom?" Would you like to clarify from whom the new body would be independent?

Mr MEREDITH: As I have previously mentioned, we would certainly see the nexus severed with the Office of Fair Trading, the only reasons being that we really need to have a clear separation of responsibilities of the agency for consumer protection, or what its central charter is at the present moment on consumer protection, and its responsibilities for the administration of the industry. That is the first point. The second point about having an independent building commission, as I have mentioned previously, is the need for proper focus, through a government department and agency, on the administration of a very important industry, especially if that administration is also going to accommodate commercial and industrial work as well. What we are looking for in an independent authority is not simply a new authority administering the residential sector, but an authority that administers other sectors as well. In a lot of cases builders in country regions take whatever work comes before them, whether it is residential work or whether it is commercial work. You also find that a lot of the builders operating in the commercial sector are already licensed; they hold residential licences. So there is some crossover there.

The most important thing, and, again, it was raised in Campbell, is that the administration of the industry is very fragmented. We have the Planning Department, the new Building Professionals Board, the Rural Fire Service and WorkCover. All these authorities have an impact on the building industry and we see that as part of the problem. There seems to be pretty poor communication between one department and another department to the extent that one department will beaver away on a particular issue, and I guess BASIX is a clear example of that, yet construction issues can come from the work that, say, Planning and the BASIX unit is doing, but there seems to be poor communication back to the effect that that will have on the licensee and all the construction process, and related to other departments. We have the Building Code of Australia and the reference standards that sit there as a national building code, but in New South Wales we find that, in effect, the Rural Fire Service becomes a de facto planning authority. It is the sort of fragmentation that we see that does not help the industry, and is actually with part of the problem.

We believe that needs to be brought together, and, again, it was examined by Campbell; it was part of the Campbell recommendations. Indeed, the current Minister for Planning gave evidence in his former role as Mayor of Sydney City saying that is what needs to happen: We need to draw these processes together into one authority. But as a result we saw an agency established in the Office of Fair Trading. By the way, the industry paid a 21.5 per cent levy on licensing fees to establish that. We then saw the establishment of the Building Professionals Board. The Office of Fair Trading and Home Building Services administers some 170,000 licensees. I am not sure exactly the number certifiers the Building Professionals Board administers, but certainly a less insignificant amount than the number of licensed operators out there. Yet we have seen the establishment of his other independent body set up to administer this handful of accredited certifiers, yet the administration of licensed builders is being undertaken by an agency within the Office of Fair Trading. It does not make sense because to us it seems to be further fragmentation because the Building Professionals Board still comes under the Department of Planning so there is further fragmentation of the industry as a result of Campbell not going the other way.

Ms SYLVIA HALE: Page 12 of your submission says that the consumer has lost considerable ground with the introduction of the privatised Home Warranty Insurance Scheme. Other than for insurers it is difficult to identify who has benefited from the introduction of the private insurance scheme. On the same page you then talk about a substantially reduced level of protection for consumers. Would you expand upon why you make those comments?

Mr MEREDITH: Because the scheme moved from a scheme of first resort to a scheme of last resort, and effectively what we have now is that a claim can be made on insurance only in respect of insolvency, death or disappearance of the builder. That is a certain reduction in what was previously a level of consumer protection under a scheme of first resort. Under the previous scheme

effectively a consumer could determine the contract and put a claim straight onto the insurance scheme. Effectively under the current scheme you have now that cannot happen. While the builder is effectively still around, so to speak, the concerns had to be resolved between the builder and the consumer going through the CTTT, the court process or some other mediation process. You simply cannot make a claim on the insurance scheme. I guess that is what we are referring to when we say that the consumer has lost ground. But in saying that, our members tell us that they would not like to return to a scheme of first resort where, in effect, some of our builders have the contract terminated simply because there has been a disagreement between a client and a builder. The client did not want to deal with the builder any more and the client made a claim on insurance. That is not an ideal situation to return to.

But 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. It depends on how that is structured and administered, and how it operates. It is not an easy task to say, "Let's pick up the Queensland model and put it into New South Wales" because it operates a lot differently. You cannot look at the insurance scheme in isolation. A number of factors apply in Queensland that do not apply in New South Wales. Dispute resolution is one of them. The dispute resolution process in Queensland really underpins the insurance scheme up there. They try to deal with disputes up front before they move to making an insurance claim. In Queensland, under the dispute resolution process up there, they make orders against builders, but they will also make orders against the consumer. In New South Wales we do not have that process in the early dispute resolution process.

Under the early dispute resolution process the builder cannot trigger the process. If a builder wants to initiate the process, the matter ends up in the tribunal. The consumer can trigger the process. But when an inspector comes out and looks at both sides of the story and tries to reach an agreement, maybe work is included and maybe work needs to be fixed up, but on a lot of occasions money could be outstanding. Inspectors can make recommendations or directions to rectify the work, but they cannot make orders against the consumer to pay the money. Again, when that situation prevails it is not a good indication that it is a balanced system. Again, that is where the perception of bias comes into play. You might say, "I agree to fix these things, but what about the payment of these outstanding funds." But they cannot make orders against that. We have tried to seek having it changed so that the process can be initiated by the builder so that orders can be made. Yet we have not achieved that process.

Ms SYLVIA HALE: Page 14 of your submission expresses doubt as to whether there is, in reality, true competition in the provision of insurance. We heard evidence this morning that the existence of six or seven insurers in the field and a lowering of premiums is evidence that the system is working. Would you care to comment further on your submission?

Mr MEREDITH: Certainly there is no doubt that there is competition in the insurance market to the degree that it has certainly had an effect on premiums and a lowering of premiums. The point we are making about true competition is that when you have true competition, if you have six or seven insurers in the market it is our view that the builder should be able to move amongst those six insurers to seek the best value on behalf of the consumer in the cost of the premium. Currently they cannot do that. There is a great reluctance on insurers to have a builder or a client approved by more than one insurer. They come from a position that it is all about builders taking on too much work. They then get themselves into problems and that leads to claims. I suggest that in the current environment it is not likely that builders are going to take on too much work.

That is fine, but unless you have that ability to move amongst all the insurance providers and really tap into the competitive nature of the premiums you do not have true competition. It is all right on the one hand. But it is not much good for builders who happen to be with an insurer who sits at the top of the tree of having the highest premiums, if his is competitor sits down the list and is benefiting from $500, $600 or $1,000 variation in premium price. Certainly there is then competition between the two, but you do not have the capacity that if this person wants to change he has to give up his registration with that particular insurer and then try to seek registration with the other insurer that offers a better premium.

The reality is that that is not going to happen. First, there is an administrative process and builders hate administration, and they are not going to go out every second day and try to seek to be

registered with another insurer. The other thing is that we have seen no other issue like this insurance issue that effectively—and I will be quite frank about this—ripped the guts out of the residential building industry. That has left a bad taste in the mouth of a lot of builders. Those who now have registration with a particular insurer are very reluctant to go and look elsewhere because this legacy still exists and they are frightened that if they give up their current insurer, they may not get insured elsewhere, because they have struggled so hard and in a lot of cases they have had to beg to get insurance.

Putting that aside, the circumstances today are quite different and the issue of accessibility is not like it was previously. Certainly there are still builders out there who are struggling but we are finding that because of the problems that existed previously a lot of builders are not necessarily going back and having another try to get insurance. They realise the difficulties that they had been through before and they are probably not receptive to the fact that there have been changes and the accessibility issue has certainly improved considerably.

The Hon. JAN BURNSWOODS: Madam Chair, it would now be our time for questions. That is right, is it not? Sorry, Sylvia, your time has expired?

Ms SYLVIA HALE: No, it has not expired. The bell has not rung, has it?

The Hon. JAN BURNSWOODS: Yes, it has.

Ms SYLVIA HALE: It has not. I turn now to the Building Code of Australia.

The Hon. JAN BURNSWOODS: Point of order: Madam Chair, I seek a ruling from you in relation to the decisions this Committee made last week, that where only one member of the crossbench bothers to turn up, that Sylvia, for instance in this case, would be entitled not to 20 minutes but to 10 minutes.

Ms SYLVIA HALE: That is outrageous.

The Hon. JAN BURNSWOODS: It is something that you would remember we abided by in on four different estimates committees last week. Government members have a lot of questions; there are three of us here and at this stage there is less than 15 minutes to go for these witnesses. I would suggest that this stage we get on to our questions.

CHAIR: We might have to run over time. Gentlemen, are you able to stay for a few more minutes?

The Hon. JAN BURNSWOODS: But we have other witnesses at 12.15 p.m. I have taken a point of order in relation to the rulings and decisions that this Committee made last week and abided by at four different times.

CHAIR: There is no reference to that in the minutes and you know that the Committee has a fundamental resolution that I will allocate—

The Hon. JAN BURNSWOODS: I move dissent from your ruling, Madam Chair.

CHAIR: I have not finished speaking.

The Hon. JAN BURNSWOODS: I still move dissent from your ruling.

CHAIR: The Committee has resolved that I have the discretion to allocate the time and you know that I do that fairly.

The Hon. JAN BURNSWOODS: What absolute rubbish!

CHAIR: One-third between the Opposition, one-third between the Government and one-third between the crossbenches and that is what I have been doing.

The Hon. JAN BURNSWOODS: Madam Chair, I move dissent from your ruling.

Ms SYLVIA HALE: Madam Chair, I am prepared to put the rest of my questions on notice so that we do not—

The Hon. JAN BURNSWOODS: I have move dissent from the Chair's ruling.

Ms SYLVIA HALE: —spend all our time in ridiculous disputation.

The Hon. JAN BURNSWOODS: What you mean is that we do not spend all our time deliberately flouting the rulings of committees. So it is the Government's question time now, is it?

CHAIR: Do Government members have any questions?

The Hon. JAN BURNSWOODS: Yes, we have. I am trying to tease out what exactly you are getting at. Earlier you talked about an independent building commission and you have talked about, as you see it, the need for a body that could advance the cause of builders. You referred to some of the bureaucratic issues. If that sort of path is adopted, who do you suggest is going to look after consumers?

Mr MEREDITH: That, indeed, leaves the Office of Fair Trading as the principal consumer body. After all, the central charter is consumer protection.

The Hon. JAN BURNSWOODS: You would see this new body as doing the licensing of builders?

Mr MEREDITH: Certainly.

The Hon. JAN BURNSWOODS: If there were a complaint, challenge or discovery, for instance, of a criminal record, what would the process then be?

Mr MEREDITH: We would still see that the new body could deal with that and a lot of the processes that are currently undertaken could remain but the situation, we would see from the consumers' point of view, is that they would have the added advantage that they would still have a consumer protection agency sitting there whose focus is on consumer protection to take matters to if they do not believe that the new building body is addressing the issue.

It is no different to what happens in Queensland to a large degree. The Building Services Authority up there still deals with consumer complaints and consumer grievances. We have had eight inquiries in the last 10 years and we have had a number of legislative changes and packages of legislative reforms come through. I guess the reason why we have this inquiry is that there are still issues or there have been suggestions that we have issues. As to the issue of making structural change, it is not just about the independence from Fair Trading, it is about having this focus at a government level and government administration—a single focus on the industry where there are not added distractions, so that the industry can move forward in a proper way. The end result will be a better industry that will result in a better outcome for consumers.

The Hon. JAN BURNSWOODS: I put it to you that you have said quite a bit today about a built-in bias against builders in the way that the Office of Fair Trading operates. On Friday we heard a number of consumer advocates, and indeed consumers themselves, saying that the Office of Fair Trading is not doing enough to take builders to task. We might think, given two such opposing sets of evidence, that maybe the Office of Fair Trading is getting the balance about right.

Mr MEREDITH: At the present moment in the operations of the Office of Fair Trading and the Home Building Service, in our view, they have certainly been active. After all, non-licensed contractors have received custodial sentences. In our view, that is quite extraordinary, the level of penalty that is prepared to be handed out.

The Hon. JAN BURNSWOODS: Why do you say it is extraordinary?

Mr SEIDLER: If I may, I do not think he means extraordinary as something out of the ordinary. I think it is something that he is saying is very good.

Mr MEREDITH: Yes, I am not saying in the negative. I am saying in the positive. We can see that simple criminal activities have been undertaken and people go through the process and receive less significant penalties, and we promote that. Indeed, we have put the media releases of those persons who have received custodial sentences, together with substantial fines, on our web site and we promote it out there to the industry to try to give an indication that things have changed, especially those unlicensed contractors, "That if you want to continue down that road, this is what you can expect".

Because, at the end of the day, our members are telling us this is the issue that they want to address, and they have been saying this for quite some time. We are now seeing some action that that is taking place. Not only are we seeing the strategic campaigns that have operated, such as Operation Hammer, et cetera, that is being conducted, but we also get reports of sporadic activity being undertaken by inspectors to the extent that some of our members have been complaining or have raised queries that inspectors have walked onto commercial sites and asked certain people for their licences and they say they do not have any jurisdiction. We say, "Well, you are specialist trades. Yes, they do." That is the extent we are seeing it, which is certainly a lot more activity than we had seen previously.

The Hon. JAN BURNSWOODS: I was just going to ask you about that because we have had a number of views expressed about licence applications and the checking of those that are undertaken before consideration is given to granting a licence. Do you think that the checks at the moment are adequate?

Mr MEREDITH: Certainly the system changed at the beginning of the year, but there were certainly issues that were found by ICAC, but the circumstances in that inquiry were referred on by the Home Building Service, so it was initiated by them. What we are finding is that we deal with complaints from people, who are trying to seek licences. They are saying, "We should have received a licence" and they have not received a licence. We see it from the other end where people say, "We have all this experience in the industry. We believe we are within our rights to receive a licence but the system has worked against us."

The Hon. JAN BURNSWOODS: Can you give some examples of the sorts of reasons that those people have been knocked back?

Mr MEREDITH: It is either because there has been a question over whether they were suitably qualified or because there has been a question that they have not been able to adequately substantiate, under the previous 20-year rule, the experience that they have accrued in the industry. Those are typical scenarios.

The Hon. JAN BURNSWOODS: Is there a workable appeal mechanism for them to state their case? Do they go through you and have you state their case to the OFT?

Mr MEREDITH: Certainly. From time to time we have made representations but usually it is the Administrative Decisions Tribunal. Indeed, through our legal services we have provided assistance to some of the applications within that process. Some have managed to get their licence; others have been knocked back and are going through the process of being assessed at the moment under the new changes that were introduced earlier this year.

The Hon. JAN BURNSWOODS: Again I guess the issue from where we sit is that while you say that consumers and their advocates are saying sometimes the opposite, that it is too easy to get a licence or the checks are not sufficient, is it a matter where you will never please both sides so maybe if you are making both sides unhappy you are getting the balance just about right?

Mr MEREDITH: There will be times when you cannot please both sides. Even the best builder out there can potentially run into problems, especially in the situation we are heading into at the moment where there are skills issues. The residential sector is very much reliant on other players in the industry. You have your trade contractors and subcontractors. You have other key players such

as engineers and architects who do not actually fit in with the licensing scheme but are fundamental to the construction process. The builder heavily relies on these particular people. If you are in a situation where there is very high activity you have a shortage of skills. Builders generally like to build together a team of contractors who they know are reliable. They are aware of the work they can deliver. It is a satisfactory relationship. But if those people are also in demand by other contractors in levels of high activity you can find that, for instance, it may be difficult for a particular builder to get those key trades that they continually use back on their sites.

They immediately come under pressure from the Act that says that you will build within a reasonable time. They come under pressure from the client because the client sees no activity on the project and they say, "What's happening. My project has come to an end. I am carrying all these costs and charges. It is costing me money." The builder throws up his arms and says, "What do you want me to do?" In some cases the client might recommend their own bricklayer or tradesperson they know, or you will try and simply take some person whom he is not fully aware of. That is simply how problems can commence. It is not necessarily that the builder set out to do anything particularly wrong. They are just simply a victim of circumstances. As I said, that person has a licence. They could have had a very good history, but from a set of circumstances that is how the situation can effectively run off the rails.

The important thing for licensing is that we see that there is a mechanism to have some controls and jurisdiction over builders. We notice in the Moss report that they had commissioned some interviews with consumers. According to the Moss report, they found that consumers were generally pretty happy that there is a licensing system in place.

The Hon. JAN BURNSWOODS: I suppose that would relate to the statistics that the Director General gave this morning in terms of the number of complaints, the number that are mediated and so on.

Mr SEIDLER: If I could just make a general comment about the skills issue, we have to go to the Federal jurisdiction to look at the type of people who are coming in to work on homes in Australia, and that goes to assessment cells which are now being set up in countries around the world. So if they fail and let people with inadequate skills come in—

The Hon. JAN BURNSWOODS: Is this for a 457 visa?

Mr SEIDLER: Indeed. If they fail, then obviously the Office of Fair Trading or the Home Building Service will have problems at a New South Wales level that we have to address. It is not always that easy that there is a complaint about a skill or about a service. You need to now look at where those skills and services emanate from.

The Hon. JAN BURNSWOODS: There have been some quite highly publicised cases lately of what sounds like very poor skills and practice on the part of people coming in under those visas. I would have thought though that they might be mostly in the commercial area rather than the home building area.

Mr SEIDLER: Interestingly, I think they are in the commercial sector predominantly. However, when the commercial sector slows down they have a tendency to gravitate towards the residential sector, which then obviously affects the results in our sector.

The Hon. JAN BURNSWOODS: So in relation to those imported workers, how does the OFT go about assessing their suitability for a licence, or is it something that we have yet to grapple with because it is quite recent?

Mr MEREDITH: My understanding is that they would go through the same process as any other applicant and would have to satisfy—

The Hon. JAN BURNSWOODS: It would be much harder to get background and so on.

Mr MEREDITH: It would be. I think it would also be difficult for those particular applicants to satisfy some of the requirements.

Mr SEIDLER: For the residential sector.

The Hon. JAN BURNSWOODS: You have already talked about it a bit but I just wanted to get your overall view of the compliance activity carried out by the Home Building Service. Do you think on balance that it is strict enough, that the system of random checks, inspections and so on works? How would you sum it up?

Mr MEREDITH: At present we really do not have an issue. As I said, we have in the past, and certainly our members are crying out that they were just sick of competing against unlicensed contractors but we have seen, certainly over the past 18 months, a substantial increase in compliance activity. Whether it is enough, I guess, when is enough is enough? There is certainly a higher level of activity. We know that there were some comments made to the Moss inquiry that some of these campaigns are questionable. They go in and do a campaign for a couple of days and then go away, and then the unlicensed contractors move back into town. At present we believe that the intelligence that is going back to the Home Building Service can take care of that. We certainly provide intelligence to the Home Building Service.

We want to get rid of these people, to the degree that we are getting pretty frustrated that you are having articles appear in the paper — I think there was one on the weekend, something like a thousand builders find. Then you read the article and find that amongst these people were unlicensed persons. We do not look at them as builders at all. In fact, we are concerned that the term "builder" is being used so loosely. Indeed, we would like to see the use of the term "builder" restrained through similar legislation as the use of the term "architect". Frankly, we are seeing a lot of people caught out, and the ICAC Operation Ambrosia was a clear case: 100 shoddy builders have been outed. They were never builders in the first place. They were scammers; they were fraudsters. They simply brought a blight on to the whole of the industry.

The article in the weekend's paper, again, the big headline "1,000 builders fined " and you go through it and there were unlicensed contractors. We do not want those people basically related back to the professionals in the industry, because they are simply scammers. If you could legislate the use of the term "builder" that in itself I think would be a good thing.

The Hon. JAN BURNSWOODS: That brings us back to the issue of skills and qualifications. Going back for centuries, I suppose, the term "master builder" in itself was understood to mean a long apprenticeship and a kind of guild system so that in fact the whole community knew that someone using that term had been through a certain level of training and qualification and so on. If what you are suggesting were to be adopted you would need legislation or whatever to set out a whole series of mandatory training and qualifications for people to call themselves builders. Would you support something like that?

Mr MEREDITH: The licensing process, probably more so now than ever, recognises that persons applying for a licence need certain qualifications and we are seeing the development or adoption of a package of national qualifications. But there also needs to be recognition that from the old master builder system in Australia, the residential sector and the operation of the residential sector has changed quite substantially. There is heavy reliance on the subcontractor sector to the extent that they are actually the ones doing the work. That in itself is an important issue because the way the current system operates is that often the builder will have a co-ordination and overseeing or facilitation type of role with the people who are actually doing the hands-on work, yet when something goes wrong it all falls back onto the shoulders of the principal builder.

There may be arguments to say that that is what should happen, and that could be correct, but what we are actually concerned about is that for the people who are performing the work there is a big question as to whether in fact they are being held accountable for the work they are undertaking. I will give you an example. We have seen some very good builders brought down by the work of architects and engineers. These so-called professional people sit outside the licensing system. They are not required to be licensed in New South Wales, yet they are fundamental to the construction process. It starts with engineering design. It starts with architectural design. If there are anomalies in the work that they do, we often find that builders become de facto engineers and architects. We try to advocate

to our members, "Just don't fulfil that role." This is often where problems start. In the licensing system we have, you have key players in that licensing system who actually sit outside the game.

What happens is that for particular builders, those who I gave as an example previously, it is all right to say, "Well, you can go and take them on under their professional indemnity insurance", or whatever, but the reality is that it just does not happen because usually by the time the system is finished with the builders, they have got nothing left to go and pursue the architect or the engineer or whoever caused the problem. They are the trade contractor. Yet these people continue to move through the system. I just ask you to address that particular issue. You just cannot keep on focusing on the builder, the builder, the builder. You have to bring all these other key players to account and you have to have a fair and balanced system. But it is easy just to simply target the builder. For the system and the administration, it is easy just to point to one person rather than to say, "Well, we have these other key players in the system."

The Hon. JAN BURNSWOODS: But are not architects and engineers subject to registration and membership of professional associations? Finally, does not their local government certification system pick up some of the problems, if there are any, in BASIX plans, for instance, and whether or not they are workable and whether they are being built according to plan?

Mr MEREDITH: Madam Chair, we know from local government that the quality of plans indeed is an issue for councils. Indeed, one of the benefits of BASIX is that BASIX now requires more detail on plans as far as the BASIX commitment is concerned, so we are seeing a greater requirement on those designs. But when you look at critical inspections, we now have mandatory critical stage inspections in New South Wales but they are not necessarily looking at the quality of the work. They are just simply inspecting that basically it meets a building approval. What we are seeing every day are matters that come before the Consumer, Trade and Tenancy Tribunal [CTTT], yet those properties have been inspected and have been under mandatory inspections.

It needs to be asked: what is being inspected? The reality is that they are not inspecting for the quality of the work. If they are inspecting waterproofing, for instance, they are basically inspecting that the waterproofing has been carried out and in their view it has been carried out satisfactorily. They do not even have to form that view because of a lot of occasions what they will do is ask for third party certification from the installer or the person who undertook the waterproofing and basically they will accept that on its face value.

Mr SEIDLER: I will say just in summary of this point that if a builder has a contract with a client or consumer and the design, having been undertaken by an architect or engineer, resides with the consumer, when the builder builds it to the designer specification and it is wrong—if the design is incorrect or it is just not build-able—the builder will be held responsible for the total package. That is what Peter is trying to say. They reside outside the confines of the Home Building Act, and what we want to see is that they are made accountable of the process as well.

CHAIR: That brings us to the conclusion of this part of the hearing. I would like to thank both Mr Seidler and Mr Meredith for their time here today and for their submission. We really appreciate both.

Mr SEIDLER: I will make just one very quick point. Over the past eight months the Master Builders Association [MBA] surveyed the industry extensively. As all of the issues that the Committee is looking at have come up as very big issues for builders, we have put together a priorities paper that we have now sent to all politicians, both Opposition and incumbents. It deals with a lot of the issues here. The MBA is one of two organisations whose home warranty insurance has remained unchanged for nearly six and a half or seven years. We want to see a return to a public scheme, unlike other industry organisations.

That is not their view and that is probably why we have such, I guess, a debacle in this area. While we recognise that access to the product now is much better because there is competition, still our fundamental premise is that we go back to an industry-based scheme. All of these points, if I may be so bold, are contained in our priorities paper. I have brought some copies along for those who may be interested. Perhaps I will leave it at that.

CHAIR: How about I just say that we are all interested. If you could table that, that would be great.

Mr SEIDLER: Many thanks.

Documents tabled.

(The witnesses withdrew)

RAYMOND ROBERT STANTON BROWN, National President, Building Designers Association of Australia, P.O. Box 7400 Business Centre, Baulkham Hills, sworn and examined:

JAMES PATRICK WILLIS, New South Wales Manager, Builders Collective of Australia, P.O. Box 218, Terrey Hills,

PHILLIP JOHN DWYER, National President, Builders Collective of Australia, 27 Advantage Road, Highett, Victoria, and

RUSSELL GRAHAM JOSEPH, Member, Builders Collective of Australia, affirmed and examined:

CHAIR: Are you conversant with the terms of reference of this inquiry?

ALL WITNESSES: Yes.

CHAIR: If you should at any stage consider that certain evidence that you wish to give or documents that you wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Do any of you have a brief opening statement you wish to make?

Mr JOSEPH: Yes. I will start, if that is okay. I want to start by reaffirming that the Home Building Service is fundamentally all about consumer protection. That is, consumer protection in a financial manner, most primarily, and also providing health and safety and other issues. We want to address the key points in relation to that today, as involving consumer protection from both the builder and the consumer point of view. The builder licensing system, just going through the terms of reference—not wanting to go over the recent review; we received the report on that last week—is a consumer protection device, licensing, that is what it is all about. We support it in principle uncategorically. The licence review findings note on page 97, that there is no information on how the home building service assists consumers and industry. I find that an extraordinary statement. Obviously there is information but there is no information available on how it assists. I believe this is an issue and one that must be resolved.

The Builders Collective of Australia is the only industry group which also represents consumers. We have represented quite a few, particularly in Victoria and Tasmania. Our philosophy is that our building contracts are of paramount importance. The income derived from those contracts provides the income for the industry. It pays everyone—architects, engineers, suppliers, you name it. So we believe our contracts are extremely important and should be respected and their integrity should be increased.

We will speak to the home warranty insurance, particularly, if you like, the philosophical paradox where the way it works now in a privatised scheme is that the more profit that is made it is indicative of less consumer protection. That is a real problem. We believe this is not sustainable in the long term. That profit motive of more profit, less consumer protection is exactly what consumers need to be protected from and it is not what we are providing in any State in Australia other than Queensland. Big insurers, HIH and Aeon Insurance Brokers in particular, are the main cheerleaders and the main supporters of the current privatised scheme. As we heard from the Master Builders Association [MBA] it would like to see it return to a more public arrangement, as we would. We believe it is what drives many compliant builders to work for owner builders, and this was addressed adequately in the recent review and we will not go over that ground again. This will also be looked at by Mr Brown from the Building Designers Association point of view as well.

We will also look at the resolution of complaints as we go. In particular, the MBA was talking a short time ago about the issues and we heard that half the time the consumers are happy and half the time the builders are happy and maybe that means that everything is working. I suggest that perhaps that is not the case. What ends up happening is that the Office of Fair Trading cannot resolve a building dispute. It cannot resolve it. It can direct, suggest, encourage, push, cajole but cannot have a binding resolution. This is a huge problem. The only State in Australia that has binding determinations on building disputes is Queensland, and we will speak again on that.

The recent review of builder licensing also provides that if the rectification order is not complied with or a homeowner is not satisfied with the outcome they can lodge a building claim with the Consumer, Trader and Tenancy Tribunal, ostensibly to keep people out of the courts but, effectively, that is a court for the consumer and for the builder and it ends up as an enormous problem. We have the same issue in Victoria with VCAT, and again it is the same in every other State. So, dispute resolution is paramount in all of this, if we are looking at consumer protection, and we are.

We will also look at personal experience with James and Ray in the general areas of the exercise of judiciary powers enforcement, the relative legislative and regulatory provisions and perhaps the establishment of the Home Building Advice and Advocacy Centre. I think we will probably cover that when we discuss what we believe is a resolution to the whole picture. We will also talk in a bit more detail later about the Queensland system, as I have alluded to. That is, what is it and why should New South Wales adopt it? I will also give some examples from interstate. They are the opening remarks. I will pass over to Phil, who will give a brief history of the Builders Collective.

Mr DWYER: Since privatisation some 10 years ago we have seen more than 30 reviews and inquiries nationally into consumer protection in the building industry. It is not only an issue in New South Wales, it is also in all other States. Many of these have specifically excluded warranty insurance such as the current review of licensing in New South Wales completed only last week, yet to be able to build in New South Wales, the very first criterion is that a builder must have warranty insurance eligibility, a factor that cannot be excluded. The most significant inquiry was back in 2002, the Percy Allen inquiry, which stated that the building industry and consumer protection were in crisis. However, its recommendations were not heeded.

The industry head managers and regulators of the nation have continued to bandaid the problems and have ignored the fundamental fact that the current regime of consumer protection is flawed. The Australian Consumers Association summed up the situation accurately in *Choice* magazine back in August 2004, and I will provide an electronic copy of that to the inquiry. They said that this current regime on consumer protection for the building in Australia, or New South Wales, makes a mockery of consumer protection—and that is where we sit today.

Mr WILLIS: In regards to home owners warranty we perceive there being a conflict of interest of various parties in promoting it. We have found that the HIA and the MBA reluctantly provide those policies to their members, for which they obtain commissions. Those commissions have now become quite significant and we feel it is inappropriate for an industry organisation to have such a level of involvement in the provision of consumer protection. Over the past couple of months certain matters have come to light in other States in regard to conflicts of interest, namely in Tasmania, where there are corruption charges between the former Deputy Premier, Mr Green, who was found to have issued a virtual monopoly status to two former Labor Ministers.

The Hon. JAN BURNSWOODS: Point of order: The witness should stick to matters in New South Wales and certainly to matters within the terms of reference of this Committee rather than an excursion into Tasmania or any other State that is outside the terms of reference.

Ms SYLVIA HALE: To the point of order: If they experience a similar scheme in another State, it is relevant. I believe it is perfectly appropriate for a witness to this inquiry to provide that evidence and to relate it to the experience in this State.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: To the point of order: I endorse that. It seems we are looking at comparative schemes across the country and Mr Willis is talking about perverse incentives, if you like. His comments are entirely in order.

The Hon. JAN BURNSWOODS: Further to the point of order: There are issues when witnesses to an inquiry with very specific terms of reference in this State start going beyond those, and in particular start mentioning names in relation to events in another State. I am not sure whether the Clerks have advice on this matter, but this is not an appropriate path for the Committee to go down.

Ms SYLVIA HALE: He is the Deputy Premier, after all.

Mr WILLIS: May I make a comment?

The Hon. JAN BURNSWOODS: Not to the point of order, no. We are waiting for the Chair to rule on the point of order.

CHAIR: The Builders' Collective of Australia, in its submission, has referred to matters that it has put before the Tasmanian Legislative Council. So Mr Willis is speaking to his submission, as I interpret what he said. Apart from that, obviously the Committee has had quite a bit of discussion from a number of witnesses who have referred, as these witnesses do, to the Queensland regime in relation to builders licensing and so on. Therefore, it would be interesting to hear of the Tasmanian example. Mr Willis may proceed.

The Hon. JAN BURNSWOODS: Madam Chair, I have looked at the submission fairly carefully. The point I make is not that witnesses may not refer to their own interests in Tasmania. As you say, we have heard a great deal of evidence in relation to Queensland. My point of order related to the mentioning of names and cases that have no relevance to our terms of reference, but which may indeed stray into areas that this Committee has no authority or mandate to go into.

[*Interruption from public gallery.*]

CHAIR: Order! I suggest that the witnesses bear in mind that this Committee is interested in any input in relation to the terms of reference that can draw upon interstate experience and from which the Committee might benefit in making its recommendations to the New South Wales Parliament on these matters.

Mr WILLIS: My point is in regard to the system set up in Tasmania. It is exactly the same as the system in Victoria, and the same system we are suffering under in New South Wales. The way in which it has been set up and what we now find is that not only in Tasmania, where problems have arisen, but also in Victoria, where dealings between the insurer and their body, the Building Commission, has had matters referred. A gentleman has received whistleblower status in Victoria in regard to his dealings, and these relate to my own personal experiences in New South Wales. It was almost a carbon copy of the modus operandi of insurers and some dealings we had with the Office of Fair Trading, and subsequent meetings with the insurers. That is the main thing I highlight. The system is unaccountable. When a builder has a problem with not being provided with cover, who does he see?

Basically, everything has been vested into the powers of the insurers as a private entity. They can set the margins as to what value a job can be. They can set the annual turnover for the year, yet there is no accountability from the Government. No independent umpire, if you like, for them to go to and say that they feel they have been treated unfairly. We find that the people who are promoting this private system are the very people who are making the most profit from it, whether the HIA, which I said has conflicts of interest with four directors of the HIA executive who now sit on the board of AON. We find that quite disturbing.

This is another matter. It is all about consumer protection. At the moment the level of consumer protection that we have in New South Wales is simply that if you have a dispute, if you cannot resolve it, it goes to the CTTT. Again, there are issues as to whether the members are suitably qualified to judge these matters, not being building professionals. Then, if the outcome is not suitable, we offer them the chance to go to court and basically litigate each other out of existence. A lot of people with homeowner's warranty believe that they are covered and protected against faulty workmanship—and that could not be further from the truth. Home warranty covers builders' insolvency insurance only. The only time someone can make a claim is if the builder dies, becomes insolvent or disappears. Information that we have tried to garner in regards to how the premium are calculated, how many claims have been made in relation to those last-resort schemes, have been deemed commercial in confidence and unavailable. The industry then loses out by not having that data available to say whether the system is working or basically crumbling, as we feel from our experience that it is.

The people who we have been in discussions with feel it is a serious problem. This is not a small matter. While these matters are being fought out in the courts, a lot of the time the people cannot live in their house, because the house does not comply with the laws. There is no resolution or a way

in which those problems can be addressed at the ground level before they blow out into full litigation where it is basically a lose-lose situation. The other thing to remember is that the home owners warranty is capped at $200,000. If there are serious structural problems the chances are that amount will not be enough to cover the cost of repairing the defects.

Mr BROWN: Before I make my presentation, I would like to give a brief overview of my professional history, so it can be seen that my opinions are not from a narrow base. I am a Justice of the Peace, an accredited building designer and fellow member of the Building Designers Association of New South Wales, a past and immediate President of the BDA New South Wales, past Divisional President of the Master Builders Association of New South Wales, a trustee and executive member of the Parramatta Cumberland Master Builders Association, a 25-year member of the Master Builders Association, an 18-year gold member of the Housing Industry Association, a member of the Australian Architecture Association, a former Councillor and Deputy Mayor of Baulkham Hills Shire Council, have had 34-years in a building-design practice, am a multi-design award winner with MBA, HIA and councils, recently I was appointed the National President of the Building Designers Association and am a 30-year licensed practising builder.

I appear before this General Purpose Standing Committee specifically addressing one part of the terms of reference of this inquiry into the operation of the Home Building Service, that being 1 (b), the Home Warranty Insurance Scheme. I understand a more holistic view would be more appropriate to encapsulate all the subclause items in the terms of reference, but it is the home warranty issue that affects me mostly as a builder and these effects have been well detailed and articulated by my well-informed colleagues. It is with my more recent past position as President of the Building Designer Association of New South Wales that my concerns on the home warranty issue as an individual are further confirmed. I am not able to speak for other States of Australia but New South Wales Building Designer Association members, in pockets, have experienced difficulty attaining builders to execute varied price building projects because of caps and the inability of those builders to attain warranty insurance. Pity help a new young builder coming into the industry who has no assets!

Because, in my opinion, the structure of the home owners warranty insurance was not established correctly in the first place, many such as myself and others still have indemnities in place and are unable to have them released. It appears to me that vested interest groups and others have had the ear of governments and bureaucrats and, conversely with the absence of full industry consultation, we have a system that fails to effect true consumer protection and fair play for builders. In my conversation with many builders there is a resignation amongst them that the current situation is not going to change. Therefore, challenging the status quo is of no use and some are even concerned that any agitation may further affect their ability to attain home warranty insurance. Therefore, without all of those challenges and agitations, there is an incorrect perception that all is well in the paddock.

This inquiry is welcomed. We look forward to a balanced outcome for all: consumers and builders. My view and that of others is that a system similar to the Queensland government one is infinitely better than the current New South Wales system, which only suits insurance companies and some others. I respectfully request that as part of this inquiry an investigation into the Queensland model will make that part of the Home Building Service, that is, the Home Warranty Insurance Scheme in New South Wales, be viewed as a questionable system. Madam Chair, thank you for the opportunity to make representations to the Committee today.

Mr JOSEPH: Madam Chair, may I be able to speak further and make a couple more presentations before questions?

CHAIR: Yes.

Mr JOSEPH: I would like to take up on where Ray finished and give more specific detail on how the Queensland system works. It is not widely known and it is not widely advertised generally in the industry. However, I have brought along today an example of the Queensland Building Services Authority [QBSA] annual report for the 2005 year, a very detailed document, which I will refer to in a few minutes.

CHAIR: Would you table that document?

Mr JOSEPH: I can table that document, yes. First of all, I will look at the philosophy of the Queensland system, the advantages of it and the duties of the QBSA and how it operates. The philosophy of the QBSA primarily is to provide high-quality industry management that encompasses builder issues and consumer protection. They have achieved this very well over the last 10 years, particularly because of their policy and philosophy of staffing. That is, they have recruited throughout Australia, if you like, the best and the brightest throughout the private insurance industry and others who can manage their various departments within the QBSA very well. So they are not relying on people within the public service already who may not have those specific industry skills. They have gone outside and recruited and brought these people in.

The QBSA is a semiautonomous government-run organisation. Also in their philosophy they have realised that the issues of licensing, warranty and, most of all, dispute resolution are all interdependent. You cannot isolate one from the other; they are all connected and very much interdependent. The detractors of the Queensland system, most notably the insurers and, as I have said before, the Housing Industry Association [HIA] in particular in Queensland, have been shouting from the rooftops that this is some sort of conflict of interest that one group has got the ability to direct licensing, warranty and resolution. However, I would not describe it as a conflict but rather a convergence of interests because these three issues, as we have heard today from the Master Builders Association [MBA], are inter-related. You cannot separate them. Not only that, the philosophical underpinning of the QBSA means that by converging these interests together they are achieving the desired consumer protection outcome. I think that is important to note. We started today by saying it is all about consumer protection and it needs to finish with consumer protection. From where we sit the QBSA is the only model that works to achieve that beginning and end.

The advantage of the QBSA is it is self-funding: the licensing and warranty are independently funded by their own fees. The furphy that is often thrown up—and I mention this to the Committee because this is information that you often get—is that the Queensland Government throws millions of dollars into the QBSA every year just to keep it afloat. That is not true. I defy anybody to show me in that annual report where the Government has tipped in millions of dollars to prop up the QBSA. It is not there. That annual report is audited by the Auditor-General and any suggestion that there is impropriety is quite laughable. It is transparent, as you can see. All the cards are laid on the table. It tells you in there how many claims there were, what they were, some years who the builders were, who went under, how much they went under for, what the payouts were, what the problems were. They are interested in looking at this in an holistic manner from the ground up: who is causing the problems and why. Because they control the licensing they are able to weed out, if you like, these people from the start or monitor suspect ones as they work through. It works very well.

It is also accountable. It is accountable to taxpayers, to voters, to consumers. It is fully accountable. Unlike the current privatised system that we know quite well, unfortunately, it is not beholden to shareholders. The current system is beholden to shareholders and the other shareholders of the financial vested interests that profit from the system that we have. Because there are no financial vested interests, it means other advantages, such as, there is no ability to have the QBSA captured by private vested interest. The bureaucracy or the politicians, if you like, cannot be philosophically captured by an outside private interest in managing the QBSA because nobody has any money to make out of it, none whatsoever. As I said, it is fully audited and works with consumers and builders. I will also table another report from our colleagues who spoke earlier from the Master Builders Association. This is a submission they put in a few years ago which is still quite relevant because nothing has particularly changed up there where they wholeheartedly endorse the Queensland system and they give the reasons why. Is it possible to table this document?

CHAIR: I am not sure you can table a document from another organisation.

Mr JOSEPH: I will refer to it. They are not here. The MBA Queensland is separate to MBA New South Wales.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Point of order: If it is a public document, can he not draw attention to it?

CHAIR: Is it a public document?

Mr JOSEPH: Yes.

CHAIR: In that case go ahead.

Mr JOSEPH: The only reason I table it is to make the point that the Queensland system does have broad industry support. The MBA supports it and has done for a long time. As I said before, the only people who do not support it are those who are not able to make any money out of it, unlike the system we have here where there is a lot of money to be made. That is the main reason why I table it and I put the report forward for that reason. As to the duties of the QBSA, they financially assess all licensees. The 60,000-plus licensees in Queensland involve subcontractors and builders. They are all financially assessed. They are not financially assessed as we are in New South Wales and Victoria for warranty insurance purposes. They are financially assessed for security of payment. The QBSA wants to ensure that everybody working in the industry in Queensland is financially viable for each other—not so much for the consumers because the QBSA will meet that need. In relation to dispute resolution, QBSA mediation is binding. Disputes can be and are resolved in Queensland. There are obviously a few mechanisms to go to a court, if you like. However, the process is quite rigorous and it does settle these issues early. Builders or consumers can approach it at any stage.

I mention another issue that affects builders—bank guarantees and deeds of indemnity, which Ray mentioned. It is a huge problem for builders to have to put these up. In Queensland they have deed of covenant and assurance; it is not a bank guarantee. It is a promise by a builder that if he goes insolvent he will pay his debts. That debt is not paid to the QBSA, as in here our deed is paid to the insurer. If that money is ever forthcoming it is paid to creditors. So they are managing the industry to ensure that if we go under the creditors are met. The QBSA warranty is self-funding. Most importantly, it is first resort, that is, it covers defects. Builders do not have to be dead, disappeared or insolvent to make a claim; it is first resort.

It is half the price of what you pay here in New South Wales for warranty cover. It covers subsidence. Over here the maximum claim is $200,000; in Queensland it is $400,000. So you have half the price and probably 10 times the cover. On the surface, the licensing appears simpler, I would say, with 60,000 plus licensees in an industry of a similar size to that of Victoria, which is not far behind that of New South Wales. To conclude on the Queensland system—I will let Phil round off some comments in a second—it is a proven, working model. Most important, it has been working for 10 years and it is a proven system. The implementation of it provides no experiment on behalf of government.

We are not taking a leap in faith somewhere. We know how it works; we have the evidence in the annual report. It is not a band-aid to a system that is already perhaps floundering in some way. If I can refer again to Tasmania, a speech given by the Attorney General in Tasmania recently to the HIA was that they are seriously looking at implementing a Queensland system in Tasmania. He has specifically asked the HIA that when that review is complete we are expecting in a couple of weeks to work with him to ensure that they can help him move forward with that. He has assessed it and he has flown people down from Queensland. They have flown to Queensland, they have looked at it seriously and they can see no reason at this stage why they cannot implement it in Tasmania. I will let Phil round off.

Mr DWYER: Warranty insurance and how it does not work nationally. When we talk of New South Wales—and I am not referring to other States—I feel we must, we need to and we have to. I refer to warranty insurance since the collapse of HIH and September 11 events and the 10-point plan that was put together during 2002. Victoria and New South Wales together in harmony developed that 10-point plan and implemented it. After the implementation of the 10-point plan in the two States it then went to Tasmania in November 2003 and it also went to Western Australia and South Australia. So it is very important because it originated here in New South Wales.

The current regime that we have is what is operating nationally. We would like to see the Queensland model dropped right down the east coast and right round Australia, and have a uniform consumer protection regime and building industry management. We believe that the Queensland model works very well; it has for a long time. No-one has to prove anything. It sits there and it can be utilised in other States. We believe that what is good for consumers is also good for builders, and vice versa. I think that is very important because it will lead to an alliance of that contract between the

consumer and the builder that derives every cent of income to this industry. It is very important and it must be treated with a great degree of respect.

The current arrangements do not deliver that. When a consumer is faced with a building dispute, he is faced with costly civil action. He finds out that his warranty insurance does not cover him, except for death, insolvency and disappearance. Even insolvency comes with qualifications. If a builder declares himself bankrupt he is not insolvent, so therefore no claim. We do not know where the value is in the current arrangements. The builder suffers the same fate; he cannot achieve resolution to a dispute. What might start as a small problem escalates to a very significant problem with the involvement of many and all endeavouring to avoid responsibility.

The insurers sit on the sidelines, claim commercial in confidence, and collect an estimated national premium of $350 million annually. Despite the best efforts of the New South Wales Government, there are still no meaningful or verifiable claims and premium data on the public record. When it comes to claims facts, the insurance industry again hides behind a veil of commercial in confidence. However, last week, an Australian Securities and Investments Commission press release detailing the charges and announcing the sentencing of one of the directors related to the failed Homesafe Equities Pty Ltd in Victoria shows that they demonstrated a 2 per cent claims ratio.

As these claims have been managed by the State Government's Victorian Managed Insurance Authority, it is a given that this appalling claims ratio would be standard across the industry. In the United States of America, for example, an insurer would have been forced by government either to reduce premiums or to increase claims if this ratio dipped below 80 per cent, whereas the Government in New South Wales does not even blink at a 2 per cent claims ratio. The insurance premium take is significantly large and the building industry and its consumers are receiving little or no benefit from it. In fact, a recent submission by Consumers Affairs Victoria suggested that consumer protection would be enhanced by the removal of the requirement of the warranty insurance, as it would remove the barrier for entry into a compliant industry.

All States, except Queensland, are suffering from a non-compliant industry and an enormous increase in owner-builder activity. In Victoria, owner-builder permits are running at 42 per cent of all permits issued. This figure is obtained from the Building Commission web site and Consumer Affairs Victoria states that more than half the building industry is non-compliant. Tasmania's upheaval in the building industry with recent criminal charges being laid in relation to three people in Tasmania and their failed licensing system further highlights the failure of the current regime. However, the new Attorney General, Minister Kons, appears to be addressing the issues in a professional and forthright manner and is on the record as a clear supporter of the Queensland model. The supporters of the current regime are those that simply benefit financially from it.

CHAIR: Mr Dwyer, I just point to the time.

Mr DWYER: Thank you; I have almost finished. The building industry is the key economy driver. Its consumers and builders derive every cent of income for the industry. This inquiry has a terms of reference that allows a holistic approach to the matter of consumer protection, which is exactly what it requires, as looking at segments in isolation would never achieve realistic outcomes. I urge this inquiry to research the Queensland BSA regime of industry management and consumer protection as its industry is of similar size to that in New South Wales. It is transparent, accountable and cost-effective. It adjudicates for and is fair to both parties and it delivers genuine and timely first resort protection to consumers. Its benefits will satisfy all criteria of consumer protection within the New South Wales building industry. Someone somewhere needs to stand up for New South Wales consumers and builders. I hope that this inquiry can achieve a very good outcome for our building industry.

CHAIR: Thank you for that series of comprehensive inputs to the Committee; I appreciate them. In the interests of time, I will put my questions on notice. To keep us reasonably on schedule I suggest that we have a question from the Hon. Dr Arthur Chesterfield-Evans, Ms Sylvia Hale and two from the Government.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: What is your attitude to a separate regulatory scheme such as the one that, say, doctors or lawyers have? I think the MBA wanted a

separate scheme. That is a separate idea from the Queensland scheme, is it not? What is your attitude to that idea?

Mr DWYER: Yes, it is. It is like the travel agents fund and that type of thing. However, we believe that building is intricate. We must have a holistic look at building. We must bring everything under the one umbrella and not have segments so that if a builder fails and so on, he can be dealt with accordingly. Like the MBA pointed out earlier, many builders have just recently been fined in the weekend paper. They are not builders. We need a situation that determines where everyone sits in the equation. The contracts between the builder and consumer are very important. They must be dealt with differently. For years this matter has been going on without resolution. We need an adjudication system that will deal with disputes quickly. We could have a separate industry fund. Yes, that could easily happen. We refer to the Queensland model as the principle of what we are looking for, but it does not have to be that model.

I believe we can learn from the principles of the Queensland model. There is no other scheme that we can point to and say that we can learn from. The Queensland model is successful. We can learn from it and we should. We should not learn from our mistakes and use bandaids we have applied in the past. It has not worked. There have been more than 30 inquiries and reviews nationally. That speaks for itself in the short 10 years since privatisation. While privatisation might be good in some areas, it is not good for the building industry. It is too personal. I invade your home as a builder. If things go off the rails, they escalate very quickly. We need to have more respect for the people we are dealing with. We need an adjudication system. If something goes off the rails, instead of escalating and putting people in courts for four or five years and losing everything, we need an adjudication system where someone says, "You are wrong, fix it!"

Mr JOSEPH: With respect to the scheme, again we have a private interest in making money. We would like to see that removed so that the MBA, the HIA, the Builders' Collective or anyone else cannot profit from supplying ostensibly less consumer protection.

Ms SYLVIA HALE: Evidence from the Housing Industry Association on Friday and from the Office of Fair Trading today suggested that the virtues of the New South Wales system were obvious because premiums in New South Wales were less than they were in Queensland. The suggestion was that they are about $1,400 in Queensland and about $1,000 or $1,100 in New South Wales. The further suggestion was made that the Queensland system is a problem because it adopts a one-size-fits-all approach where everyone pays the same premium regardless of whether they are good or bad builders. Would you care to comment on that?

Mr JOSEPH: I have had that discussion with the HIA. I point out that one of my other roles is as an officeholder with the HIA in Victoria. I have had detailed discussions about this with Graham Wolfe, who was here on Friday. I have also had meetings with the insurance brokers and Graham Wolfe about the extent of the premiums. It is obvious that premiums are higher in Victoria and New South Wales. There is no question about it. The insurers point to issues known as average premiums. Those averages include houses, renovations, kitchens and bathrooms. They are minor renovations. That drags the average premium down to about the Queensland premium of $1,400. That is correct. However, that is not realistic. If we are talking about building projects, the Queensland premiums are half the price of premiums in New South Wales and Victoria. That is a given. Not for love nor money can we get out of the insurance industry, insurance brokers, the HIA or the Government what is the premium take for home building and renovations. We do not know it. I am sorry to say that I believe this average premium is a furphy. I have had detailed meetings with Graham Wolfe about this and no clear information has been provided.

Mr DWYER: Whether we pay $1 or $1,410 as in Queensland, if we are not getting a benefit from the money we are paying, what is the purpose of it? We must have a benefit for it, and that is what we are not achieving.

The Hon. JAN BURNSWOODS: What you just said is closely related to my question. As Ms Hale said, we had evidence on Friday and we have had submissions that in Queensland there are fewer successful onsite mediations, fewer disqualifications of builders, fewer penalty notices and fewer compliance investigations when compared with New South Wales. In terms of what you said about the benefit of the scheme being important, would you not consider that those activities are

important for faster resolution of consumer disputes, and how do you reconcile that with your assertion that the Queensland system is better?

Mr JOSEPH: First, we would reconcile that fairly quickly by saying that if there are fewer problems in Queensland they are obviously dealing with them more quickly. They may not get to the level they are here, and that is a good thing. We all know that disputes escalate very quickly in the building industry. Consumers in the gallery are nodding furiously. They know how quickly these things escalate and how much money it costs them. In Queensland they do not get to the escalation point that they do here.

The Hon. JAN BURNSWOODS: The first of the four points I made was about less successful onsite mediation in Queensland. That is the opposite of escalating disputes.

Mr JOSEPH: I am not sure that is correct. If you were to look at the annual report you would see in detail the number of disputes, how they monitor them and how they work around identifying the causes. It is clear, transparent and open. With all due respect, I am not entirely sure whether what you have said is correct. I have had detailed debate within the HIA on these issues. I am more than happy to forward in writing questions and responses about many of these issues. That may clarify some of these points. To be perfectly honest, I would dispute some of those assertions without further investigation.

The Hon. JAN BURNSWOODS: But you would agree it is important to achieve quick resolution?

Mr JOSEPH: Absolutely.

Mr DWYER: I spent four days in Queensland and thoroughly researched the BSA scheme with the assistance of the scheme managers, and I also surveyed consumers and builders. The consumer rate of approval for the Queensland BAS as measured by a McNair Anderson survey done for the Government rated the scheme at 96 per cent approval two years ago. It is a good working scheme and I believe that the principles can be applied in any State. It can be very good. While those four issues you have raised are all important, I believe the Queensland scheme caters for them. I believe the facts are there rather than suggestions. I prefer to deal with the facts.

Mr JOSEPH: That is correct. We say that because we have heard these assertions before on every aspect of the QBSA. When we expose them to the light of factual evidence and refer back to the QBSA about the actual figures, we find that they are fairly spurious. The detractors of the Queensland scheme are the people who benefit from the scheme we have now, which is predominantly the HIA and the insurers. MBA is three times the size of the HIA in Queensland. So any criticism of the QBSA must be taken with that financial vested interest in mind.

The Hon. JAN BURNSWOODS: Getting back to the issue of premiums, the average premium per contract is cheaper in New South Wales than in Queensland.

Mr JOSEPH: I am not sure, but I would doubt it. Again, we have been through this exercise in detail in Victoria. The average premium takes into account all premiums.

The Hon. JAN BURNSWOODS: I heard the answer before about different work.

Mr JOSEPH: But the average premium is not particularly relevant to doing the major building works, which are the subject of the majority of disputes.

The Hon. JAN BURNSWOODS: What about the point in relation to the setting of the premiums that good builders in New South Wales are rewarded with lower premiums?

Mr JOSEPH: The consumers may take issue with that. That is a fairly subjective perception of what is a good builder. The insurers will consider a good builder is somebody who either has lots of money or who is prepared to put up large bank guarantees. That has nothing to do—

The Hon. JAN BURNSWOODS: Or has fewer claims against them.

Mr JOSEPH: No. It has nothing to do with claims. It is about money—whether you have got money in the bank, assets in your business or can put up a bank guarantee. The consumers whom we have represented and spoken to at length will concur.

The Hon. JAN BURNSWOODS: How can you represent consumers?

CHAIR: That was your last question.

The Hon. JAN BURNSWOODS: Okay. I will put the others on notice.

Mr JOSEPH: You can put that question on notice if you like.

CHAIR: Thank you, gentlemen, for your attendance today. Owing to time constraints we cannot ask more questions now but members might put some on notice. Similarly, if you have particular information that you think we would benefit from but that you have not been able to provide today, if you could supply it in writing as soon as possible that would be good. Thank you for appearing before the Committee today and for your submissions.

Mr JOSEPH: We are more than happy to answer any detailed questions. We will research the issues and provide answers as soon as possible.

CHAIR: Thank you very much.

(The witnesses withdrew.)

(Luncheon adjournment)

IRENE MOSS, Chair, Review into Licensing of the Home Building Industry in New South Wales, PO Box R1476, Royal Exchange, and

KEVIN JAMES RICE, Assistant to Ms Moss, Review into Licensing of the Home Building Industry in New South Wales, 1/31 Manning Road, Double Bay, affirmed and examined:

LIAM KAM YOUNG, Senior Policy Officer, Department of Commerce, Level 22, McKell Building, 2-24 Rawson Place, sworn and examined:

CHAIR: I thank the witnesses for appearing before the Committee. Are you each conversant with the terms of reference of the Committee?

Ms MOSS: Yes, I am.

Mr RICE: Yes. They have been provided.

Mr YOUNG: Yes, I am.

CHAIR: If you should consider at any stage that certain evidence you may wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Ms Moss, do you wish to make an opening statement?

Ms MOSS: Yes. With the permission of the Chair I would like to go through the process of how we handled the inquiry and how we came to the conclusions.

CHAIR: That would be fine.

Ms MOSS: The terms of reference you all have in front of you with respect to our review, those terms were fairly comprehensive. They required us to take into account the housing and construction industry going through major changes at the moment and the licensing regime therein, and our need to have regard to the change and modern licensing practice within that industry. Modern licensing practice was not defined and the review is not aware of any theory or principles of modern licensing practice. In conducting this review according to the terms set by the Government, the review took "modern licensing practice" to mean the principles of best practice regulation.

The New South Wales Independent Pricing and Regulatory Tribunal [IPART] recently conducted a review of the burden of existing regulation in New South Wales. The IPART issues paper, "Investigation into the burden of regulation in New South Wales and improving regulatory efficiency", has set down general principles for best practice. In the interests of consistency, the review took the general principles of best practice regulation as outlined in it as being the basis for modern licensing practice. Those principles included: Regulation being fully justified and effective; providing the greatest net benefit or lowest net cost; regulation should be clear and concise; consistent with other laws and regulations; enforceable; administered in a fair and consistent manner; and not unduly prescriptive. In formulating its conclusions and recommendations, the review has at all times tried to analyse issues in relation to these principles.

I might also add that the Federal Regulation Task Force report, "Rethinking Regulation: Report of the Task Force on Reducing Regulatory Burdens on Business", especially the comments by the Productivity Commission and the Australian Chamber of Commerce and Industry regarding the cost to industry of regulation, was also quite useful to our review. What was our approach? We consulted broadly with targeted industry stakeholders, interest groups and government departments to get a sense of what was affecting the building industry. We had a very informative meeting with the Building Action Reform Group [BARG] during this stage, and conveyed to BARG the review's interest in receiving a written submission from the group. We also consulted with other Australian jurisdictions, such as the Director of Policy Services for the Victorian Building Commission, and we travelled to Queensland for a meeting with the Queensland Building Services Authority.

The review also conducted extensive research on licensing, especially in relation to licensing reviews previously conducted in New South Wales and other Australian jurisdictions. Of particular interest was the Cole Royal Commission into the Building and Construction Industry and the report upon the quality of buildings, handed down by the Joint Select Committee on the Quality of Buildings. We held public meetings in Penrith, Wagga Wagga, Dubbo and Tweed Heads in order to get the view of a wide cross-section of industry practitioners, especially those operating in regional areas. In order to gather information on consumer needs and expectations, an independent agency conducted focus groups with consumers who had been through or going through residential building work, or who were considering engaging or about to engage a contractor to perform building work.

The key findings of this qualitative research were that consumers are strongly wedded to the value of licensing systems; that licensing gives consumers an assurance that there are standards of good minimum quality in the industry overall; and that licensing signifies a level of protection to the consumer. Participants in the groups suggested that consumers are reassured by the presence of licences and would not like to see them removed. Widespread abolition of licences, considered for discussion purposes, or an increased stringency in the provision of licences were seen to be unfavourable to the industry and for consumers at large. In their view they would either lose their level of protection or their ability to a forward contracted services. The review called for initial submissions from stakeholders and other interested parties on the terms.

Advertisements calling for submissions were placed in major newspapers in New South Wales, as well as regional New South Wales and the ethnic press; 66 submissions were received by the review, and the submissions were used then in the preparation of an issues paper. An issues paper prepared by the review was released in early March 2006. The paper outlined the key issues raised with the review during the consultation phase, and canvassed a number of options in relation to each issue, in order to assist stakeholders in formulating their views. A total of 50 submissions were received by the review. Papers from individuals, major industry groups, builders and training organisations were submitted. They included people such as the National Electrical and Communications Association, the Electrical Trades Union of Australia, the Property Council of Australia, the Master Builders Association of New South Wales, the Department of Energy, Utilities and Sustainability, the Master Plumbers Association, the Housing Industry Authority; and major building companies, such as Leighton Contractors and the John Holland Group.

The review was not able to identify any consumer groups active in the area, apart from BARG, and so we commissioned the above consumer focus groups in order to identify consumer concerns. I am advised that the project manager, Mr Liam Young, personally invited BARG to send in a submission. They did not do so, but we did actually consult with that them and their views were considered in the preparation of the final report. In addition to the submissions, the review took into account very much the Council of Australian Governments [COAG] process, which is happening as we speak; the IPART review into the burden of existing regulation in New South Wales; the Federal Regulation Task Force, especially views expressed by the Productivity Commission and the Australian Chamber of Commerce and Industry; the Independent Commission against Corruption report on the investigation into schemes to fraudulently obtain building licences; and the New South Wales Ombudsman's report into a complaint that former Department of Fair Trading wrongly issued a contractor licence to a company in 2001.

Just looking at the submissions totally, it was interesting that there were some recurring criticisms raised with the review by the stakeholders, and those criticisms we can summarise in the following way: There were recurring criticisms about continuing professional development [CPD], particularly as it concerned relevance and access—access to courses et cetera was a real problem in rural areas; and the intent of continuing professional development. There were criticisms that the purpose of CPD had not been communicated clearly to licensees. A second recurring criticism was the ability of the licensing authority to detect unlicensed contracting. Stakeholders who met with the review raised unlicensed contracting as a major issue affecting the industry, and this criticism was particularly strong in regional areas. Licensees complained that there was an uneven playing field as unlicensed contractors did not have to meet the same requirements—for example, home warranty insurance—and so could undercut licensed tradespeople.

Then there was the recurring criticism of the owner-builder permit system. The regime, it was felt, was being used to disguise unlicensed contracting—home owners are being persuaded by

unlicensed contractors to apply for owner-builder permits; and contractors unable to obtain home warranty are persuading home owners to apply for permits as a way around this requirement. Some smaller developments are using the regime to build and sell properties applying for permits in the names of family members and friends et cetera. And that many houses that start off with owner-builder have to be completed or fixed up by licensed contractors as the houses are not built to a workmanlike standard and that many submission have claimed that these houses are unsafe.

In reaching its conclusions, and in formulating its recommendations, the review took careful note of the submissions that were received. Many of those are quoted in the final report. I point out that the job of the review in reaching its conclusions, and formulating its recommendations, was very difficult as in relation to most of the terms of reference there was quite a wide divergence of stakeholder views. So for as many submissions we got we got as many views. Given the differing arguments received by the review the challenge was to assess the merits of the differing views, while at the same time applying the best practise principles of regulation. This was to ensure that the recommendations are practical, fully justified and impose a net benefit on both consumers and industry.

The review made a total of 29 recommendations. The review believes that the concept of risk should be the principal criterion to guide consideration of the terms of reference and the issues arising from them. The review considers that the home building industry is made up of several different occupations, each with its own level of risk and skill. However, the uniform licensing system in New South Wales does not differentiate between the level of skill and the risk associated with each occupation. In order to assess whether the level of risk associated with an occupation warrants licensing, the review developer set of factors that should be taken into account when assessing each occupation.

These factors are: first, the type of work that is to be licensed poses a significant risk to public health and safety; second, the type of work being undertaken is critical to the structure of the building; third, the consequences for consumers and third parties for substandard performance of work is likely to be significant; and finally, the work is of a highly technical nature which, if not performed by a properly qualified or trained person, may require costly rectification. When the best practise principles of regulation are applied to the licensing system in New South Wales it is evidence that in relation to many licensed categories the level of risk associated with the occupation or licence category is not commensurate with the regulatory response.

The review finds that there is scope for cost savings to be made in the New South Wales home building industry by reserving licensing for those occupations where the risks are greatest. Now national competition policy principles have also been taken into account by the review in framing its recommendations. The review believes that if implemented the recommendations will lead to a simpler regulatory regime, directed primarily at occupations in the industry that carry the most risk. Cost for consumers and industry will be minimised by delicensing those occupations where risks are not significant. Mutual recognition issues have also been considered by the review. In the absence of a national building licensing system, the review supports the COAG process to put in place more effective mutual recognition arrangements across States and Territories and to harmonise skill qualification requirements for licensed occupations.

CHAIR: Would you please table your opening statement?

Ms MOSS: Yes.

CHAIR: I need to advise the committee that the Hon. Greg Pearce will be substituting for the Hon. David Clarke for the remainder of the inquiry.

The Hon. GREG PEARCE: I was interested in the recommendation in your report that there be no monetary threshold for requiring work to be conducted by a licence holder. Would you please run through that as it seems counter-intuitive to me that you might make that recommendation?

Ms MOSS: We came up with that because we base the whole system on risk, we felt that it was only logical that that threshold be removed. We felt that if we did base licensing on risk, and we would be delicensing a whole range of areas which were, say, of minor risk—minor cleaning work or

something like that—that those areas would not be licensed anyway. If licensing were based on risk, a job be it worth $500 or $5,000, would be equally as risky. For example, in certain electrical work, even if the work were under, say, $1,000 it would be as risky as work over that amount. Electrical work is one of the areas that falls in the category of being specialist work, but we felt that logically speaking if licensing were to be based on risk then it was logical to remove that $1,000 threshold.

The Hon. GREG PEARCE: You just gave a couple of examples where you thought licensing requirements would be removed, would you outline in a little bit more detail what your thinking is?

Ms MOSS: There would be many associations that would probably want to go through in detail why they think their particular areas might fulfil those criteria that we have outlined with respect to risk, but we believe that there would be certain types of occupations where those risk criteria would not cover. I am a bit loath at the moment to start naming those industries because we might get, I suppose, a response that is not warranted because if you go into specific areas perhaps it is warranted.

The Hon. GREG PEARCE: How will that be resolved?

Ms MOSS: I think that if we got together people who understood the industry, for example, an organisation such as Citab, already consists of experts representative of various areas, be it industry, unions, government and they do actually have people who do understand the details of the respective industry in each area, if you are talking about bricklaying or joinery or carpentry or whatever. They would be able to give a much more learned assessment of whether that particular area ought to be licensed or not. We thought it was not our role as such to do that because we could be going on for quite sometime before we came to the end of the list.

There are areas which are not licensed at the moment that are putting up their hands and saying "We want to be licensed". We had submissions from people who said they were not licensed at the moment but they believe they should be. We think that whether they are or are not they should go through a proper process where you have got criteria worked out and that should be totally risk-based, as we have outlined.

The Hon. GREG PEARCE: How does that sit with your recommendation that in relation to owner-builders there continue to be a threshold. You have actually suggested that the threshold be higher. Is there a different test for owner-builders?

Ms MOSS: That is an interesting area. We were actually not asked to look at whether owner-builders should be delicensed or abolished. We did hear a great deal of anecdotal evidence about what a problem area it was, particularly with respect to the engagement of unlicensed contractors, the use of the owner-builder system to carry out what was basically fraudulently practises, people actually having more than one licence in the five-year period and so forth. We thought that what was wrong with the problem at the moment were several things. All the evidence that we got about owner-builders was anecdotal to start with. There were actually no hard, fast statistics with respect to that and I think that it might be something where the Office of Fair Trading might in future try and collect more specific substantial data about the issues of owner-builders. So that was a huge problem. When people came to us to talk to us about the problem of owner-builders it was primarily anecdotal.

One thing that did come out was that there probably was not sufficient compliance activity in that area so that the administration of whether the owner-builder system was being handled properly was probably not being carried out as well as it could be by the officers concerned. So, our recommendations focus very much on tightening up the system with respect to owner-builders. Your works had to be at least $5,000 before you could obtain an owner-builder's permit, but the $12,000 was for a different issue; it was the $12,000 range that you saw concerns whether you had to do a course with respect to owner builders. We thought for simplicity that we would make it that one number. It was a bit confusing to the consumers at the time. We said, "Right, let's peg it at $12,000. If whatever works you are going to do, if you are going to do an owner-builder work let's peg it at $12,000 and you then have to do a course". We then made recommendations with respect to how rigorous that system ought to be addressed and the courses and so forth.

Mr RICE: If I could just make something of a supplementary comment. The owner-builders permit is indeed a permit, it is not a licence, and it rather runs parallel with the licensing regime. So our concern was that people who take out an owner-builder permit had a far better understanding of the risks that they took in managing a process of their own in an area in which they are likely not to have any prior experience. But it in no way affects our risk-based recommendation because the people whom they engage to carry out their work are subject to the licensing regime. So it is not an overlapping matter, it is two matters that run in parallel.

The Hon. GREG PEARCE: I also was interested in the recommendation that only individuals should be licensed, not corporations. What is the basis for that sort of approach?

Ms MOSS: As you know, the present system is a hybrid system: It is an occupational-based licensing system plus a business licensing system. But when people think of licensing as providing a degree of assurance of competency or skill they think about people, they think about individuals. So that if we are saying a person is competent in a particular area, be it electrical work or joinery or whatever licensing category, people think that that person has got the skill for that area. When you are thinking about that very broad area of contractor licensing for builders generally, again, when a person, if they ever do, sights a licence—and most of the evidence we got was that consumers, unfortunately, do not sight licences—you relate it to a person. It is very hard to relate competency or skills with a corporation; perhaps a bit more so with partnerships.

But we thought that if we were looking at competency and risk, particularly now that we felt that licensing should be based on risk, you really needed to relate that to a person, and therefore individual licensing we thought was the most sensible way. We thought that it also had advantages. When we looked at the evidence of the Cole royal commission building inquiry one issue that they raised was the problem of Phoenix companies, and we felt that individual licensing would, indeed, be something that could address that Phoenix company problem. We felt that it was the most logical and sensible way to go if we were going to base licensing on risk.

I think there were many other advantages we thought to having individual licences; we could probably also dispense with other licences so there would not be the dual licensing situation where you had a person who might have a qualified supervisor's licence but then, say, later he or she might want to be able to contract and then that person would have to get another licence. So we thought if you had one licence that was an individual based one and if you were successful in getting that you could use that as the licence that you would also contract with.

The Hon. GREG PEARCE: So you would just vary it as you went into other categories?

Ms MOSS: Yes.

The Hon. GREG PEARCE: I think somewhere you talk about changing the system to recognise the Building Code of Australia for different categories and sizes of buildings. I would have thought that that would have been introducing more corporations into the process.

Ms MOSS: Not so much corporations. We thought that it was important to recognise the differing complexity with respect to home building that you might get. Building a cottage is obviously simpler to, say, building a multi-storey residential block with car park and so forth. When you think back on the Campbell inquiry, that inquiry—which happened I cannot remember how many years ago—already alluded to the possibility of aligning the licensing categories to the complexity of building. We think it is probably hard enough for the consumer when they have a licence to work out whether the builder they have got with that particular licence can build the structure that they are after. We think that if we did align it to the Building Code of Australia, which is a national code, and also to the height, that that would give consumers a much clearer idea of whether the person that is holding that category of licence is able to do the work.

The disadvantage is yes, it probably does mean that the person who gets one category of licence cannot then do whatever he or she wants to do but that it is actually probably a much more logical way to go in terms of risk-based licensing, but that it was also better for the consumer that they understand that whoever has got that category can build that type of structure. I think the thing to

recognise there is that there are complexities in home building and that the building of, say, a cottage is certainly nothing like building a 20- or 30-storey residential block with underground parking.

The Hon. GREG PEARCE: I am still a bit confused though. I find it hard to see how it is going to work requiring only individuals to be licensed to build a 20-storey building in the commercial world.

Mr YOUNG: In Victoria they do have occupational licensing and the way it works there is that for the larger companies, say a Baulderstone Hornibrook or a Leightons, what happens then is one on the board of directors needs to hold a building licence. We talked with them about it and they said they have had no complaints about that system working. Obviously it is a bit different in New South Wales, we only do the residential building. But I think the view of the review was having someone on the board of directors who could actually take responsibility for the workings of the company might be a good thing.

Ms MOSS: We thought it was not a bad thing. Say you are a corporation and you want to build homes, this recommendation would mean that one director of your board would have to have a licence.

The Hon. GREG PEARCE: So the consumer would be able to enter a contract for the company to build, and the company satisfies its licensing requirements by having a director who has a residential building licence?

Ms MOSS: Correct. We did not think it was unreasonable, where a corporation was building homes, that at least one person on the board would have a builder's licence. What is so unreasonable about that?

The Hon. GREG PEARCE: Probably nothing—except if you are that particular director.

Mr RICE: As things stand at the moment, any two persons can start a building company. The local fruiterer and cake shop proprietor can start a building company if they get a contractor's licence and employ a qualified supervisor. We are told qualified supervisors are in very short supply. Qualified supervisors do not particularly like to carry the can, which is what they do; they put their licence on the line. They may stay, or they may not stay. They may go elsewhere. We are told that there are a substantial number of organisations that operate without a qualified supervisor for a good deal longer than the requisite 30 days. And, in any case, they have no influence on the policies of the company at all. It seemed to us that it sheeted responsibility home rather more clearly if our recommendation is adopted.

Ms SYLVIA HALE: Ms Moss, you say you envisage the new licensing model to be based on an assessment of risk, whether it is to public health, safety or danger, or whether the work is critical to the structure of the building, or the consequences for consumers, or whether it is highly technical. Does that overlook the plight of consumers who require work to be done and, whilst the amount of money involved may be relatively small in the broader context of things, to those consumers it may be a massive amount that they are at risk, yet the people undertaking that work, particularly at the cottage building level, may not be required to be licensed?

Ms MOSS: We think, if the system were based on risk, and assuming that a particular area escapes licensing because it does not fulfil the four risk principles that we outlined, there are avenues of redress for that person. That person can still use the complaint process and dispute resolution process to obtain redress for work not done. We thought, when we looked at the review, we would look at it from the perspective of the whole area, so that the terms of reference covered the industry as such—consumers, industry, the public, et cetera. So we had to look at it in terms of best practice regulation and cost-benefit. We just felt that it was not ultimately beneficial to license every area that would be involved in building because that would end up probably costing the consumer, on average, more than it needs to. Licensing does give a sense of assurance, but that was not necessarily the answer. A person can be licensed and yet the job still would not be done well. With that in mind, and taking all into account, it would benefit both consumer and the industry as a whole to base it on risk and to delicense some areas considered not to fall within that high-risk category.

Ms SYLVIA HALE: That may be true in a perfect world, as you say, that redress for consumers may be through existing channels—and I am not sure that you envisage it being through existing channels. However, this inquiry has had a lot of evidence about dissatisfaction with those existing channels, and particularly by people who ultimately, if they cannot get a mediate settlement, are thrown back to the CTTT or the justice system, which puts redress outside their reach.

Ms MOSS: My view is that we should concentrate on improving that side of the system, so that if it takes too long, why is it taking too long? If it is outside their reach, why is it outside their reach? The present system of consumer tribunals is meant to be a system that all can access, no matter where they fall on the accessibility wealth scale. But I do not know that the answer is to license everything. I just feel that licensing everything—and there are still categories, for example, that are not licensed—does not necessarily meant that those same problems will not arise.

Ms SYLVIA HALE: That is true. For example, the Committee has had evidence today about the unsatisfactory nature of relying upon professional indemnity insurances in respect of architects, because people may be in a position where they can easily pursue those matters. There was a view expressed earlier today that it is artificial and wrong to view each of warranties and licensing and dispute resolution separate from the other so that there is not a conflict of interest between trying to regulate all those matters. In fact, there is a convergence of interests between those concepts. Would you agree that you really cannot talk about licensing satisfactorily in the absence of a view of what should be done to improve the system?

Ms MOSS: We were at a disadvantage in that certain areas were outside our terms of reference, being home warranty insurance and dispute resolution. So those were things that we could not directly look at. With those restrictions in mind, I probably could not give an answer that intelligently said, "Yes, I really do think you need to look at it in a much more co-ordinated way." Given our terms of reference, we were comfortable with coming to a conclusion that if we kept best practice regulation in mind, basing it on risk factors was a good way to go. I imagine it would be much more sensible and beneficial to be able to consider the whole lot, which would include home warranty insurance, dispute resolution—being able to stand back and look at the system with all its parts. But we had the difficulty that we only really had one aspect to look at.

Ms SYLVIA HALE: One of your recommendations is that the existing disciplinary system with regard to licence holders should be retained. I presume you are aware that many people seem to be dissatisfied with an outcome that results in a builder having his or her licence suspended where that does not lead to a satisfactory outcome so far as the consumer is concerned. Why did you think it was adequate to retain the existing disciplinary system?

Ms MOSS: I think we went a little bit further than just retaining the present system. We talked about having a database as well where the system would take into account complaints and review those complaints and address those complaints through either extra training, gaps, et cetera.
We also considered with that system a sort of a feedback system, where consumers would make some judgment at the end of their work as to whether the builder had satisfactorily completed that work or not. We did not go down the path of a demerit system because we actually thought that would end up being harder to administer than not; say, for example, comparing one type of bad conduct with another type might not be the easiest way to go by way of a demerit system.

Mr RICE: I read your question saying that consumers are unhappy that they cannot receive compensation in some way.

Ms SYLVIA HALE: They cannot get proper rectification.

Mr RICE: Particularly that. So far as compensation is concerned, certainly I think our understanding of the licensing system is not that the whole process goes through to a judgment that is done in another place. It was not part of our brief, certainly, to suggest that the licensing system should roll on to begin to encompass the settlement in terms of compensation to people. But I would mention that it was put to us a number of times in formal submissions and discussions, particularly in the regions and in Sydney, but builders felt uncomfortable with the fact that the authority that granted and monitored their licence also disciplined them. They felt that these should and could be two

separate functions. We found that difficult to analyse, but it was a very strongly held view among those licensed persons who turned up to argue their cases at our consultation with them.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Has there been any Government response to the Rice review?

Ms MOSS: I am not aware of any yet.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Are you anticipating a formal response?

Ms MOSS: I hope so.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Does it normally do it six months after it is completed?

Ms MOSS: I do not know when it does it, but, obviously, we would hope to see a response.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: When you talk about stopping regulation of no-risk occupations, you have been reluctant to define what those are. Does this mean that we get an insurance company into have a bash, because they are experts in this?

Ms MOSS: No, we would not have the insurance company. You would get industry groups and associations that were involved in that area. I would imagine, of course, that the specialist areas would still be definitely licensed because they are, by definition, or most well known to be high-risk areas, such as electrical and all of that.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: I can see that at one end it is highly regulated, but if you have a bad concrete mixer as being a low-risk occupation, but the slab ends up cracking then it was not a low-risk occupation. It is all very well to say this is not important, but does this not just make it another loophole when you already have owner builders and also, as you say in recommendation eight, the rest of the construction industry is opposed to home building? You already have a cop-out, which has been a problem in commercial buildings. You have a cop-out with owner builders. You are then going to have a cop-out with unlicensed areas. All of that will be regulated by a system that does not work very well in the presence of the increasing use of foreign subcontractors. Are you not writing a recipe for disaster here?

Mr RICE: Could I respond in part? Some of the things that we are speaking about are things such as the building of pergolas and brush fences. If you look at the categories of things that are licensed at the moment, it is almost ludicrous and many of them simply do not make any sense. But it is not our competence. We were not asked to, nor are we competent to, define which of the many occupations that are presently licensed should continue to be licensed under these risk criteria. We have covered it in broad terms. The structural integrity of the building certainly calls into question concrete placement, the placement of formwork and so on, but somebody whose business it is to do risk assessment is going to have to categorise those occupations.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: If my brush fence is badly built and I get ripped off, what sanction is there, apart from stopping, that brush fence builder from building another 100 brush fences and ripping off another 100 people?

Mr RICE: A licensing system frequently does not stop brush fencers from building more brush fences.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: But it should, should it not? What is the use of having it if it does not have any teeth? Lack of enforcement has been another problem, has it not?

Mr RICE: Lack of enforcement goes to another very broad question, which is the way in which the relevant agency is funded and whether it has sufficient resources to do that. You will also find in the report that we draw attention to the fact that, relative to the number of projects under

construction at any one time, there is a relatively small number of inspectors to cover all of that. Certainly the apprehension of unlicensed contractors doing all sorts of work is something that desperately needs attention.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: But most of the licensing systems are self funding, so if you have fewer and fewer licensees you will have less and less money in the till and you will have less and less enforcement, surely?

Mr RICE: You will also note that we suggest that some people who presently do not pay any fees at all would be drawn into the fee-paying net because they get a free ride at the moment. The study of the pluses and minuses of the funding regime need to be looked at.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: When you say there were no statistics on owner builders and you had to rely on anecdotes is that not because there is no systematic inspection of anything?

Mr RICE: Because there is no particularly well-constructed system of the granting of owner builder permits or the execution of the work. That is right, remarkably little information is available.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Would it not be good if there were systematic inspection in buildings in general so that you knew what who was doing when and where?

Mr RICE: Yes. That was once the case when local government authorities inspected buildings, but they resiled from that obligation quite some time ago.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Would you say that the system of privatisation of the inspection system, for another word, has been a success or a failure or is that beyond your terms of reference?

Mr RICE: I would not presume it was a success or a failure. I merely point out that the inspections that are undertaken by registered certifying agencies, whether it is local government or a private person, concentrate on compliance matters and whether the construction complies with the provisions of the building code of Australia and Australian standards. The building code of Australia says very little about the quality of residential construction. Things may comply, but be badly executed. Unless there is somebody such as an architect or an engineer engaged to administer a contract, there is nobody inspecting building works with the objective of determining whether the work is well or ill executed, and that is not really a part of the responsibility of the licensing regime either. Those inspectors are not there to inspect and report on quality. That is beyond their brief altogether.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Is it not a tradition of the Australian building industry to use subcontractors unsupervised? I can remember when Darling Harbour was built in record time as it got closer to its deadline. The Japanese were amazed by how efficient it was, and it was put down to the fact that everything was subcontracted. Everyone was working for themselves and the subcontracts were very clearly defined in a well-managed program. Does that not mean that you really do not have to rely on inspectors and supervisors, and that is a job that is dying because it is maximum hassles and minimum reward?

Mr RICE: I cannot contest your anecdote or the veracity of that proposition as to why Darling Harbour was built quickly and effectively. But I do not think that any building undertaking should be carried out by a lot of unco-ordinated, unsupervised subcontractors. But that is a personal view; it is not a view of this panel.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: If you had a photo license system so that if there were a problem you could nail them and get it wrong only once, surely there would be a professionalism in the system that might make supervision a lot easier?

Mr RICE: You would not want to be the one who was the person on whose project the person was nailed. It is much better to look after it to see that it is done properly in the first place, and

that is why builders have a responsibility to oversee the work of the subcontractors, whether those subcontractors are licensed or not.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: But if we have reasonable training and we have sanction, surely we will not get in the situation where we are now, where you discover that you are the ninety-ninth person who has been dudded by the same contractor?

Mr RICE: That is why I am sure we need a better system than exists at the moment.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: What will happen to the licensing of foreign subcontractors? And will that be managed? As I understand it, under John Howard's new system more of them will come in.

Mr RICE: That is not something that we addressed.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Do you think that continued professional development works? We have had some evidence that it is a farce.

Mr RICE: It is now. It is a total farce now. You can get three points for going to a Dulux sausage sizzle, which is not particularly useful. Dr Moss mentioned the great complaints from the regions and the accessibility of people in the regions to any sort of educative process and the relevance of the courses, symposiums or whatever being offered. Our report, or this brief statement of it, also says that if some minds are put to determining whether the problem areas are and then to designing continuing professional development courses or publications addressing those problem areas, they will be perceived by the licensed persons to be relevant to their needs, and provided you make them accessible to them, there will be a different attitude, but continuing professional development at the moment in the building industry is a joke, and not a terribly funny one.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Is there going to be cross-border information exchange towards a national regulations system or will a builder who is struck off or given a hassle just be able to duck across the border. Has that issue been addressed?

Mr RICE: No, not by us. Apart from mutual recognition across borders, one would assume that what you have suggested would flow from mutual recognition.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Did you look at the Queensland system?

Mr RICE: Yes.

Mr YOUNG: Could I just interrupt? In relation to subcontractors, we have also recommended that subcontractors continue to be licensed and that photo licensing be rolled out.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Yes, I did notice that; recommendation No. 29.

The Hon. GREG DONNELLY: Ms Moss, I go back to something you said in your opening statement about BARG, which provided some evidence to the Committee last Friday. Did you say that you had sought a specific submission from BARG but had not received it?

Ms MOSS: No, we met with them and had a lengthy discussion. We certainly took note of what was said. If you go through the report we do, in detail, itemise their concerns. We requested, as we did of all, written submissions and we regret that we did not receive a written submission but we believe that our final report actually does take into account certainly the commentary that was made to us when they did meet with us.

Mr YOUNG: In relation to BARG, I actually spoke to Mrs Onarati and invited her to make a written submission and she said she did not have the resources to do so.

The Hon. GREG DONNELLY: But the opportunity for the meeting took place and that was taken into account?

Ms MOSS: And you will see in the report that we do try, as best we could, to explain what we felt they were trying to say to us.

The Hon. GREG DONNELLY: I turn to recommendation No. 28 specifically, on page 18, which talks about enhancement of interagency exchange of information. Can you take us into a bit more detail of what you are proposing there?

Ms MOSS: We thought that with respect to how well building work is done, particularly builders who do bad or shoddy work, that the investigation and assessment of that building work is actually done in New South Wales by many agencies and that we would get a better quality assessment of the builder if there was better co-ordination between those agencies and that at the moment it is probably not as good as it should be.

The Hon. GREG DONNELLY: Is there any particular way in which you think that exchange can be enhanced or are you making a general point?

Ms MOSS: We are making the general point and I am sure that if they put their heads together they could come up with a system where they could exchange intelligence and information about bad building work better.

Mr RICE: We met with the inspectors within the area and I think conversations with them would draw out quite a number of suggestions as to how they might be better informed by interacting with other agencies. They have got some very well-developed ideas on how they might operate more effectively.

The Hon. GREG DONNELLY: On the issue of your meeting with the inspectors, last Friday the department gave evidence and spoke in some detail about enhancements in the number of inspectors and greater throughput that inspectors have in terms of dealing with complaints. Can you enlighten the Committee of comments from inspectors about how they believe they could do their jobs more effectively?

Mr RICE: My recollection is that they would like to be sure that all the people doing the inspections have appropriate qualifications, background and understanding of building processes. In some areas, and in particular, plumbing, almost nobody in the field in New South Wales has a background in that trade. While one might look at general building works with a reasonably informed eye, when it comes to some of the specialist trades they are insufficiently resourced. They do cover a very large area geographically, so that is almost an intractable problem perhaps, but numbers would have some bearing on that. The process of pursuing unlicensed contractors is a difficult one and if there were some enhanced information system that enabled them more readily to identify on what projects unlicensed contractors might be engaged, it would help them a good deal.

The Hon. GREG DONNELLY: Recommendation No. 26, which is also on page 18, is the proposition to establish a unit within the Office of Fair Trading policy branch with specific responsibility for driving policy for specialist trades. Could you elaborate on that further?

Ms MOSS: It was felt that not enough attention is given to the expertise of the department in those areas. Of particular concern were issues raised with respect to the electrical specialist trade and airconditioning. You are not going to be able to drive either policy or proper inspections and audits if you have not got people who really understand those areas, which can be quite complicated.

The Hon. KAYEE GRIFFIN: Mr Rice, you made a comment previously in relation to architects and engineers oversighting projects and so on. In evidence earlier today the Master Builders Association made a comment in relation to the fact that the buck stops with the builder and that architects and engineers involved in the design of the projects are not really caught up in the liability process, for want of a better word. Is there an overall view about responsibility for a project? The comment of the Master Builders Association was that the architects and engineers were outside and the builder was the one with total responsibility. Do you have any comments in relation to that?

Mr RICE: Yes. The building process is normally a contractual one between a proprietor or an owner and a builder, so the builder is given a set of documents via the architect and engineers or building designer, and the builder contracts to execute those works in accordance with those documents. So any work that is badly done is the builder's responsibility. He has the contractual responsibility.

Builders do say—and I cannot say that it is without justification—that sometimes the documents they have are inadequate, inaccurate or in some way hamper their proper delivery of the works as described. I think there are two quite separate issues. If in fact the documents are inadequate through the negligence of the professional consultants, the architects or the engineers, remedies exist for the builder, the proprietor or, indeed, anybody to pursue those professionals for negligence but to do that they have to go through the courts and that is very onerous. But it is a contractual relationship between the builder and the proprietor, and the builder wears that responsibility.

Builders, in our discussions with them, also complain— that is not too hard a word—that no matter what subcontractors do, it is the builder who gets it in the neck all the time. He carries the can, even if the subcontractors perform badly. Again, that is the nature of the contract. The contract is between two principals and it is up to the builder to ensure that the people he engages to do the work under his contract do the work properly. That is one of the reasons why you cannot have unsupervised contractors wandering around the place doing what they like. It is in the builder's interest to oversight what they are doing. I think what the MBA says has substance, no doubt, but the contractual responsibility is with the builder. He must deliver the goods. If the documents are in some way inadequate that has to be pursued in some other way.

The Hon. KAYEE GRIFFIN: But there is a separate set of problems for a consumer if the issue is related to perhaps the architectural design or the engineering design. They have maybe another avenue to go to but it is probably an even more difficult one than the ones available through the building process.

Mr RICE: Yes, unfortunately, it often is. It can be resolved by mediation sometimes. They can go to the consumer claims tribunal and so on, but the other avenues are not easy.

(The witnesses withdrew)

ANTHONY FRANCIS CAHILL, Member, Property Law Committee, Law Society of New South Wales, 2 McLean Avenue, Chatswood, sworn and examined, and

JOHN ERIC McINTYRE, Chair, Property Law Committee, Law Society of New South Wales, 170 Phillip Street, Sydney, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee? Are you appearing as an individual or as a representative of an organisation?

Mr CAHILL: I am appearing as a representative of the Law Society of New South Wales.

Mr McINTYRE: I am appearing as the chair of the Property Law Committee of the Law Society.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mr CAHILL: Yes, I am.

Mr McINTYRE: Yes, I am.

CHAIR: If you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Do you have an opening statement to make to the Committee?

Mr McINTYRE: For the benefit of the Committee, the Law Society of New South Wales represents approximately 20,000 solicitors holding practising certificates in New South Wales. It has a number of special purpose committees which deal with matters of law reform. The Property Law Committee is one of those committees. The Property Law Committee comprises about 17 or 18 solicitors, all of whom are extremely experienced in the area of property law and its many facets and many of whom are accredited property law specialists. The Home Building Act has been a matter of great interest to the Law Society and solicitors generally for some considerable time because of the impact it has on the conveyancing process. It is also of interest to solicitors because of the difficulties that consumers often find themselves in in relation to defective building work and the need to seek advice from solicitors in relation to that. Solicitors often provide advice in relation to remedies that may be available to them.

Our submission in this matter is a reasonably circumspect one. It certainly does not deal with all the points in relation to the inquiry, and I will speak briefly to the areas which we have addressed. We have confined ourselves to those areas where we think we have the most, hopefully, to offer. My colleague Mr Cahill has had a particular and longstanding interest in this piece of legislation and is probably, I suggest to the Committee, recognised as somewhat of an expert in relation to the Act, albeit that the Act itself is a minefield of complexity and difficulty largely because of its legislative history. If there are any questions that relate to the peculiar history of this legislation and perhaps some instances of reasons for its need to be repealed wholesale and relegislated, I am sure Mr Cahill can assist.

In our submission we support a licensing regime for fulfilling an important consumer protection function in relation to the home building area. It is quite apparent from the experience of solicitors in this area that a proper and effective licensing system is an essential consumer protection in this area. In relation to the question of whether or not builders' licensing should extend beyond residential construction to more broadly commercial construction, the Law Society, on balance, takes the view that it would be in the best interests of harmonisation throughout Australia if that was the course.

It is our understanding that licensing regimes in other States apply to commercial construction as well. Although I understand that Ms Moss's report comes to a different conclusion, we would suggest that that is an area that could require greater scrutiny. The area of the Home Building Act which our members probably see the greatest number of complaints is in relation to the home

warranty insurance scheme. It is without doubt that there have been frequent complaints to our members by clients in relation to the difficulties of the warranty scheme and the inadequacies and gaps in it. Complexity and inconsistency are just two of a number of things which we have experienced and which we have highlighted to some degree in the paper.

The other area in which we see the greatest difficulty with the home warranty insurance scheme is in the exclusion in relation to multi-storey buildings. There are now many, many strata plans which have been registered with in excess of 50 or 100 lots. Almost all of those are in multi-storey buildings. The extended coverage in relation to people and strata schemes has been significantly watered down by the exclusion of multi-storey buildings. We are not aware of any evidence that building standards and multi-storey buildings are any better than the building standards which are frequently complained of in smaller scale residential construction. In fact, anecdotal evidence would suggest that the level of complaints in relation to multi-storey strata schemes is just as widespread as it is in relation to residential cottages. I think that touches on the areas which we wanted to particularly highlight but we are happy to answer questions from members of the Committee.

CHAIR: Mr Cahill, I might take up the opportunity to ask you from your particularly expert point of view whether you can give the Committee some further examples of why the Act needs to be overhauled in terms of its inconsistency and its complexity.

Mr CAHILL: Certainly, Madam Chair. Taking you to the material, probably the most difficult question that legal advisers and consumers have in the particular area in which the Law Society is most concerned, which is the sale of property—the obligation to disclose the existence of the home warranty insurance—we have a situation at the moment where some but not all sellers of real estate have obligations to attach certain documents or provide certain information on sale. We have a situation where across the three classes where there are obligations imposed by the legislation, there are different obligations imposed. There are inconsistencies in the remedies that are available for breaches of those obligations and there are circumstances where, if there is in particular a successor in title to the building works—someone who has bought from, say, an owner-builder—there is no next generation obligation to disclose, even though it may be that there will still be benefits or life left in the statutory warranties.

At page two of the Law Society's submission, item two on the complexity issue highlights some of those problems and highlights a particular drafting concern which we have. As far as I can see it makes one of these sections completely nonsensical. That is the provision which refers to rights to cure a lack of insurance by providing a copy of a certificate proving that insurance is in place. Logically, that is not going to get terribly much play, one would have thought, and it really appears to be a drafting error and an incorrect cross-referencing provision. On a number of occasions that has been drawn to the attention of the Office of Fair Trading through the Law Society. Despite numerous legislative amendments over the last few years, there has neither been an explanation as to how such a section was intended to work nor has there been legislative reform.

One of the other concerns as far as complexity is concerned is the rate of change of legislative reform. I had a look at the 2001 amending Act which was assented to on 17 July 2001. That has had eight distinct commencement dates. Parts of it have never commenced at all. Other parts were repealed before they commenced. In at least one case the legislation commenced and then by regulation and operation of the section was suspended until, at the moment, 31 December 2006. The sheer complexity of trying to advise consumers about what their rights are in that area alone is fraught with difficulty. There are other provisions. There has been judicial criticism of the operation of the Act or at least concern about certain aspects of the operation of the Act.

The submission from the society refers to the case at page four of the submission of *Chapman v Taylor*. The Court of Appeal pointed out that a comatose builder, where the court had said that the contract had been frustrated, could nevertheless be held liable for breach of statutory warranty because of what was suggested by the Court of Appeal was an anomaly in the legislation in not dealing with the situation where, in this particular case, a contract was frustrated because the builder had lapsed into a coma following an accident.

Again there is a perception that the legislation is very much full of anomalies. Probably the greatest anomaly, as Mr McIntyre indicated, is the lack of coverage for multi-storey buildings. If anything, the consequences to a consumer who has bought, say, six storeys up into a strata building which, because the building is structurally unsound becomes inaccessible, are even more dramatic than someone who has built a house which is structurally unsound. At least with the house one still has the land but in a six-storey strata unit all you have got is air space six storeys up that you cannot actually get to because the building is unsafe to give you access to it. There is also the complication with strata buildings of the interplay between the lot owners and the owners' corporation which typically does not exist in the single storey or two-storey buildings.

Again that is an area where there has been a failure of the system. The decision by the insurers that such buildings were a risk that they were not prepared to insure, as I understand it, could have led to a number of consequences, one of which could have been the setting up of a separate fund. The Act indeed envisages that possibility. I think the Law Society would regard it as most unfortunate that the consumer protection function of the backup of home warranty insurance should be unavailable to what would be a significant proportion of consumers who are living in multi-storey buildings recently constructed.

The Hon. GREG PEARCE: I point out that Mr McIntyre and I have known each other for a long time. He is currently the immediate past president of the Law Society and had a very successful year as president. I served on the society for him for a short time, so I welcome him.

Mr McINTYRE: Nice to see you.

The Hon. GREG PEARCE: Thank you. I just wanted to raise a couple of issues. One of the recommendations coming from Ms Moss is that only individuals should be licensed and corporations should not hold builder's licences. Do you see any implications arising from that proposition? Do you have any views on it?

Mr McINTYRE: We have not had the benefit of reading Ms Moss's report in detail. My understanding is that it became first available on Friday. Although we do have a copy of it, it is 60 or 70-odd pages, so I have not had the benefit of reading it in detail. I do not think the Law Society would have a preferred view as long as the system that is created is effective and there is full accountability and responsibility. I do not see why we are deemed necessarily to have a preference for licensing of individuals or corporations. As I understand it, for example, real estate agency licensing arrangements are licensed corporations but also indicate who the licensee in charge is. I cannot see why a similar system in relation to building licensing might not also work. I think at the end of the day it comes down to proper accountability of those persons who have the responsibility to hold a licence and sufficient processes in place to ensure that some of the operators do not phoenix themselves from one corporate entity to another, using subterfuges to ensure that they are still able to continue trading notwithstanding the perhaps undesirability of their being in the industry any longer.

The Hon. GREG PEARCE: In relation to the home warranty insurance scheme, perhaps you could give us a little bit more of the flavour of your members' experience in dealing with the scheme, particularly lately?

Mr CAHILL: The typical contact for a member of the society is to be instructed to act on the sale of a residential property. One of the questions solicitors would routinely ask is has there been any building work done to which the Home Building Act applies? Has there been any building work done in the past seven years? Has there been any building work done at all? In those cases where the client can say yes, and I have a complete file with all the information and here is the evidence of insurance and there are details of all the approvals, the solicitor can properly advise the client as to the preparation of the contract. In all cases there are certain obligations on sale.

From my experience in practice, the client who is as well-prepared as that is in the distinct minority and the class of client which in some respects causes the greatest difficulty is the owner-builder, because there is often uncertainty as to when an owner-builder permit is obtained and for what worked it was obtained. Frequently owner-builders work on a piecemeal basis and there becomes an issue about whether they have done three distinct owner-builder jobs or whether they have done one big owner-builder job, which is often relevant, for example, about whether thresholds

have been met. There will tend also to be confusion with the client as to whether he or she was truly an owner-builder or not, often because of information or misinformation that subcontractors might have given them about how to best structure the transaction to save some money.

Having overcome that lack of instruction by, for instance, trying to find out through council records or possibly making inquiries of the various insurers in the home warranty sector—often without much success as I understand it because often their records are not as comprehensive as they might be—you then have to advise the client of the risks. The risks are basically that if they should fall into one of a number of categories under the Home Building Act there are certain disclosure obligations that they have to meet and if they fail to do so the purchaser may have a right of rescission.

At the other end, acting for a prospective purchaser, you are confronted with a contract where the client tells you there has been some recent building work done and there is a lack of information in the contract about whether the Home Building Act applies or not. You then advise the client that the lack of information in the contract means they might or might not have a right of rescission if something goes wrong. If you get the opportunity you make inquiries before exchange of contracts from the vendors representatives as to whether there has been any such work. Frequently though, practitioners acting for purchasers do not get that opportunity because often, for example, the purchaser has bought at auction prior to getting legal advice or the purchaser has exchanged in the real estate agent's office with the benefit of a cooling-off period.

The consequences for an owner-builder who gets it wrong are dramatic. In the submission there is an observation that there are certain breaches of the Act where there is a maximum penalty of 40 penalty units, and the corresponding breach in the case of an owner-builder attracts a penalty of 1,000 penalty units. It is difficult to understand why there should be a different approach between the owner-builder on the one hand and those others who have obligations under the Act on the other.

There is also the added complication that in recent years the Court of Appeal has indicated that the only right that a purchaser will have in relation to non-compliance under the Home Building Act will be the rights given by that Act. So, the failure, for example, to have work done by a licensed builder is not a defect in title that gives the purchaser any right of rescission. The only right that the purchaser will have is in the limited classes which are specifically mentioned in the Home Building Act—the owner-builder, which has a very difficult definition; the developer, which has a straightforward definition; and the person who does building work otherwise than under a contract, which has no definition whatsoever.

Mr McINTYRE: You may be the subject of being a purchaser of property for which there are some unexpired statutory warranties but you are unaware of it. So, there are considerable difficulties in purchases of a property also knowing whether they have the benefit of some entitlements under the current scheme. So, a lot of improvement can be driven into this area.

The Hon. GREG PEARCE: Do I take it that having a register of some description, which would be searchable of home warranty insurance being issued, would help?

Mr McINTYRE: It certainly would. It is my recollection that the ability to obtain a certificate existed in some previous legislation.

Mr CAHILL: Prior to 1996, when it was just one insurer, it became easier. If one had a licensed builder you had the benefit of the then current insurance scheme.

Mr McINTYRE: And you could obtain a certificate to ascertain whether or not the builder was licensed.

The Hon. GREG PEARCE: Would that help?

Mr McINTYRE: Yes, it would.

The Hon. GREG PEARCE: You could do something similar to the certificate you get for strata insurance?

Mr McINTYRE: If you had a scheme, for example, that provided some sort of statutory cover if you were using a licensed builder, you would simply need to obtain a certificate to ensure that your builder was licensed and then you would have the benefit of whatever the scheme was able to provide.

The Hon. GREG PEARCE: The other thing I wanted to touch on was, again, Ms Moss has recommended that licensing be done on a risk basis. No view is put forward by her as to which categories should or should not be licensed, but as a corollary of that it is suggested that the requirement at the moment where a licensed owner's work is for $1,000 or more in value should be abolished so that any building work would require a licence. Do you have any comments on that?

Mr McINTYRE: I think having a risk-based assessment may well be useful but as I heard Mr Rice to indicate, to have someone engaged in that risk profiling process and work out which of the various subcontracting trades should be the holders of licences and which were not may well be problematic. I think there are good public policy reasons for having licences in relation to certain of the trades. There are probably other areas, for example, where licensing may not be so useful. For example, painting may not have to be regarded as a trade that you would necessarily licence, but by the same token if you have a very shabbily painted property, somebody has to take responsibility for it. As long as the system clearly sets out that the builder has the responsibility, for example, to supervise the painter to make sure it gets an undercoat and three top coats, the system should work effectively. But in relation to the core areas of activity, such as electrical, plumbing and anything pertaining to the structure of the building, I think a risk analysis would suggest that those trades and some contract area should be the subject of licensing.

Ms SYLVIA HALE: I think you said home warranty insurance is the major cause of complaints or the area of the Act that you deal with most of all. In New South Wales it is a scheme of last resort as opposed to Queensland where it is a scheme of first resort. In New South Wales you can only claim, basically, if the builder is dead, has disappeared or is insolvent, but if the builder has merely gone into voluntary liquidation you have no basis for a claim. Do you have any view as to which is the preferable scheme of insurance?

Mr McINTYRE: I think in an ideal world you would hope that the scheme that would provide compensation to the consumer and then the scheme be subrogated to the rights of the consumer to be able to pursue the builder to recover whatever the builder was liable to pay and was capable of paying. From a legal point of view that would be the ideal system, because the system that operates on a last resort basis puts a very large onus on the consumer to exhaust their remedies first, often exhaust their capacity to pursue the matter before they perhaps exhaust their remedies.

Ms SYLVIA HALE: That indeed has been the subject of a number of submissions to the Committee. You mentioned the anomalies with regard to the inability to obtain home warranty insurance for buildings above three stories. You said it was the reluctance of home warranty insurers to continue to underwrite such projects was your understanding as to why that distinction was made. Is that correct?

Mr McINTYRE: It is my clear understanding, because I was on the Property Services Advisory Council as a member at the time that change was made. I clearly recall being informed that that was the reason that they were making the exclusion. I, for one, as a member of that council was quite opposed to it. That was clearly indicated to us as the reason. It certainly was not justified on the basis of no claims for defective building work, because the legal system is awash with claims which relate to multi-storey buildings and there are a number of them which are almost famous. They are referred to from time to time in the press, they are so well known. They are buildings for example that do not have fire caps and things of that sort.

Ms SYLVIA HALE: It seems extraordinary that nationally there should have been 30 inquiries into the building industry and that at the State level there should have been so many amendments to the regulations and to the Act. Everyone seems to say that it needs a complete overhaul. Is there any factor to which you would attribute this complexity to in particular? Do you attribute it to the privatisation of the insurance regime or the complications in the licensing system?

Mr McINTYRE: I think a fair observation would be that it has been piecemeal reaction to changes in circumstances. For example, a number of changes made to the scheme were made because a number of insurers were finding the level of claims were extraordinarily high and the business was not as profitable as they perhaps wished. Therefore, the changes were made as a result of that. Given the large number of changes made to this legislation, I think the biggest criticism of the piecemeal nature of those changes and the difficulty in having any real rational commonsense behind the way in which the legislation currently operates is, and Mr Cahill has indicated, that the legislation was put through in 2001 and has not yet been fully implemented. I think that is quite extraordinary from a lawyer's point of view.

Ms SYLVIA HALE: That is true of an amount of legislation.

Mr McINTYRE: I think this is a shining example, almost of its own.

Mr CAHILL: When it gets to double figures, one starts to get a bit worried. Up to now 10 relevant dates in the space of five years.

Ms SYLVIA HALE: I knew aware of any building Act that would be a good model for New South Wales to follow? Or, are they in chaos right across the country?

Mr McINTYRE: We are not experts in the law in other States and Territories. We obviously have a broad-brush understanding of the schemes that operate in other States. As a matter of policy, the Law Society is in agreement with the Federal and State Attorney General that wherever possible laws should be harmonised. That is one of the reasons that we suggested that whatever licensing regime is decided on by the Parliament of New South Wales, it should have regard to what the majority of the other States and Territories believe is the best model.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: I suppose the corollary of the answer to Ms Sylvia Hale's question is that you do not know about the Queensland scheme and cannot comment on it, is that correct?

Mr McINTYRE: That is correct.

Mr CAHILL: On my understanding, the Queensland scheme has similarities to the pre-1996 regime in New South Wales.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: But it works better?

Mr CAHILL: It seems to, I am not aware of how many inquiries there have been in the Queensland scheme over the last decade. I do not think there would be quite as many as there have been in the New South Wales scheme, perhaps.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Is there as much legal activity in Queensland as a New South Wales?

Mr CAHILL: I could not say.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Tort law, while a redress in all cases, sometimes has huge evidentiary problems, does it not?

Mr McINTYRE: Any sort of litigation has evidentiary problems. If you cannot prove your case you are not going to succeed. It is as simple as that.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: On Friday the Committee heard evidence that builders could bury their mistakes—reinforcement of the wrong size that is in the middle of a concrete block and other things that were hard to find at the time. People from Building Action Review Group told the Committee that it had been historically difficult to get people to testify against builders, because that would mean they would not get other work in the industry. Is the building industry worse than other cases in being able to get good evidence to back the case for the plaintiff?

Mr McINTYRE: Perhaps I could answer that best by giving you some general observations of the legal principles. First, if you have a statutory scheme that provides a warranty for a certain time, once at that time expires, the warranty expires. As I understand it that was the rationale for having a period as long as seven years in relation to major structural defects. The considered opinion, I suppose, of the architect of that scheme was that within seven years a major structural defect should evidence itself. If you do not have a statutory scheme of that sort and you are relying on common law principles, unless my recollection of those principles is defective, I think your cause of action in relation to other hidden defects that are not ascertainable by ordinary observation, your cause of action in relation to the existence of those defects does not start to run until they become apparent.

You could have a situation where, for example, if foundations were poured without adequate reinforcement in the concrete and then took some considerable time for that to become apparent, at general law, leaving aside any statute law, if you had entered into a contract with the builder and the builder was still around, and you discovered that defect 10 years later, your cause of action would only then start to run. You would still be able to sue the builder in those circumstances.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: But in practice there have been evidentiary problems even when the problem had been evidenced for only a couple of years, well within the statutory period. Has that been your experience within the building industry?

Mr McINTYRE: I think within the building industry whenever it will have two experts looking at one problem you are likely to get two different views. I suspect what might happen, you will have a consumer who says, "Look, I have a problem with this building", and they engage an expert who endorses that view and someone else looks at it and says, "No, that is not the extent of the problem. It is caused by something else." For example, cracking in the building a consumer might think has been caused by defective foundations.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: In workers compensation there are always two people with briefcases saying the opposite. Does that mean the legal system is somewhat clumsy at untangling this? Does it need a neutral expert to say what the situation is and agree to not argue and delay the matter forever?

Mr McINTYRE: No. If you have a defective building there are many independent experts in the professions of engineers and architects who are able to provide you with adequate evidence. If I could finish the example I was getting, if, for an example, the argument was between whether it was poor foundations or caused by shrinkage in the soil due to a long drought, that is a technical issue which should be able to be resolved by appropriate expert evidence. It is not a question that would be easily covered up by a builder.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: If you win is there more difficulty recovering damages or tracking responsibility? We have heard evidence that if the work is subcontracted there is a great deal of argument as to who is responsible and builders tend to want to pass the responsibility on. Is tort an effective way to solve these problems? Is it worse in the building industry than in other tort areas?

Mr McINTYRE: It is not so much the law of tort. You actually are dealing with the law of contract. In a straightforward situation it is an argument between the proprietor of the land who entered into a contract with the builder. The difficulty, however, is that many of these schemes presuppose that they are there for the benefit of the person who purchases the property after the builder or who buys it off a developer who built the building for his own purposes, not for the benefit of a consumer under a contract of construction. If you do not have a scheme that is properly underwritten by either a fund or an insurer, you will have these situations where you are suing the proverbial man of straw, which may be a company that has one $1 share and nothing else in terms of assets. Then perhaps you are going to look at subcontractors and try to see if you have remedies against them in the law of tort. Once you start looking beyond the builder you are starting to engage in areas of legal action, which would be regarded as probably more speculative than your rights under a contract against the builder.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: The point is it does not actually work from the consumer's point of view. It is likely not to work from the consumer's point of view.

Mr McINTYRE: A system will work if it is underpinned properly by a reputable insurer who will meet claims that are made against a builder who clearly is in the wrong. If you have compulsory adequate insurance, then the system will work. If you need any greater example, look at the legal profession. The legal profession carries, on a compulsory basis, $1.5 million in insurance. You cannot practise as a solicitor without it. If a claim is made, the insurer is there to pick up that claim to that extent, even if I have departed the country to places where I cannot be sued.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: Do you think the area of commercial and high-rise not being licensed is a great problem for consumers?

Mr McINTYRE: I think in multistorey strata title buildings it clearly is. If you are talking about multistorey commercial buildings where you have office space, some of those are under strata but many of them would be owned by superannuation funds or other large companies which, in theory, are able to well look after themselves in that area. The difficulty the Law Society has with the proposition that you should simply leave commercial construction out because there does not seem to be a problem about it, there has been no detailed research done in that area because there is not any level of complaint that anybody is aware of. It may well be that building standards and building construction standards in multistorey commercial buildings are no better than they are in other forms of building. It is just that perhaps the people who own those buildings and have those buildings built are better able to look after themselves.

One of the suggestions that we make, for example, in relation to multistorey strata buildings is that if you are not going to have a home warranty insurance scheme that covers them, there should be some alternate scheme that either involves a retention in favour of the owners corporation on completion of the building, which is commonly what occurs in a commercial building, or if not a cash retention that is held for some period of time then some sort of ongoing bank guarantee. You could have a different arrangement for multistorey, but I do not see the rationale for having no insurance for them at all.

The Hon. KAYEE GRIFFIN: Mr Cahill, you said previously in terms of home warranty insurance if a property is on sold there is no obligation the second time around for the home warranty insurance—

Mr CAHILL: That is correct. There is a Court Of Appeal decision that says that the obligations that exist are only those obligations that exist in the Home Building Act. There is no general law duty of disclosure of information about insurance. Typically the way it is discovered where there is an on sale is in the process of what is called requisitions on title, which are a list of questions that are typically asked after exchange of contracts. For at least the last 25 years the questions that have been asked are: What are the arrangements about residential building work? Was the builder licensed? What are the arrangements about insurance? In terms of the actual contract preparation, only the three categories that are mentioned in the Act—the owner builder, the developer and the person who does building work otherwise and under a contract—have disclosure obligations on a sale. That means, for example, if somebody gets building work done by a licensed builder, as a contract with that licensed builder there will be obligations to pass on insurance information to that consumer. But when that consumer comes to sell there are no legal obligations to pass on that information to the next generation.

The Hon. KAYEE GRIFFIN: In the case of strata residential developments—such as townhouses, villas, three-storey walk ups—if the owner/builder/developer, because that is often the way it happens, rents one of the units or several lots for the amount of time that the warranty exists, what happens if a sale occurs after the warranty has expired? Is there a comeback for the new owner?

Mr CAHILL: The way the sections are drafted, it talks in terms of the obligations of disclosure running for a time, I think it is six years, after the work is completed. The logic of that is that the duration of the statutory warranties are now either two years for structural, six years for non-structural. So there is not a lot of point in giving information about insurance when the property is

sold, say, eight years down the track because the period for claim would have almost inevitably expired.

The Hon. KAYEE GRIFFIN: In some of those instances if the developer or the original owner was concerned about the defects, there is no obligation from their point of view because they have gone past that statutory period?

Mr CAHILL: Yes, I believe that would be the case.

Mr McINTYRE: Can I make this observation? The reason the Law Society supports a licensing regime for residential construction and possibly because of the reasons I have already explained is simply if you have a very good licensing system the quality of building work, in theory, will be much higher. It is outside the scope of this inquiry to talk about inspections of the building work. I know some reference was given by a previous witness to that. A licensing system and warranty system are really only part of the whole regime. You need to be looking at some of the other areas as well.

The Hon. KAYEE GRIFFIN: For people who have not contracted to build the building they are buying but come in after the completion of the structure, the question has been put to me as to whether it involves home warranty insurance or building insurance. That point has been bandied around and obviously makes it very confusing for consumers as to their rights in either sense.

Mr McINTYRE: Your building insurance policy, if I understand what you mean, is your normal householders insurance policy. The risks it would traditionally cover would be fire, storm, tempest, lightning, flooding in some circumstances and risks of that nature. It certainly will not protect you or will not respond to a claim, for example, for a building starting to crack because the foundations were inadequate.

The Hon. KAYEE GRIFFIN: Particularly in a strata situation where there seems to be confusion about what belongs to the strata as opposed to what is individual ownership.

Mr McINTYRE: There can be clear confusion about that. The strata titles legislation itself is fairly straightforward in that the structural part of the building is in general terms owned by the owners corporation. When you buy a strata title property in general terms you only buy the cubic airspace within the walls. Anything that relates to the structure of the building is the owners corporation's responsibility to repair and maintain.

The Hon. KAYEE GRIFFIN: I think it is confusing. There are now so many owners corporations and bodies corporate around because of the increase in medium density housing. I know that this is outside the terms of this inquiry, but it is an issue on which most people rely very heavily. They rely on the information they get from insurance as well as strata managers and so on so that they are aware of exactly what is going on.

Mr CAHILL: It might be some utility, given that both the strata insurance and the home warranty insurance come under the ambit of the Office of Fair Trading. Perhaps we should look at harmonising them to see whether there can be some attempt to find what is properly a matter for the insurance under strata legislation and what is properly a matter for the insurance under home warranty insurance. It might be that if they spelt it out in a little more detail legislatively that would minimise some of that confusion.

As soon as you interpose an owners corporation I agree that it can sometimes be confusing as to who is the appropriate claimant—whether some owners or all owners should contribute, for example, to the cost of the litigation that might be needed before you can explore your last resort insurance. When you have statutory insurance for a building there is a great temptation to say to the owners corporation, "We will just whack in a claim on the strata insurer for which we have been paying all this money and let us see whether we can get some value out of it." I suspect that the response will often be, "It is not our problem. You should look to the home warranty insurer."

CHAIR: I thank you both for your assistance today and I also thank you for your submissions. The Committee appreciates your help.

(**The witnesses withdrew**)

The Committee concluded at 4.12 p.m.