REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO HOME BUILDING (INSURANCE) AMENDMENT ACT 2002

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At Sydney on Wednesday 31 July 2002

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. Ron Dyer (Chair)

The Hon. John Ryan

ANTHONY THOMAS GALLAGHER, Property Developer, 13 Clyde Street, Bondi, sworn and examined, and

LIONEL CLARENCE AUSTIN BUCKETT, Builder, Lot B, Mountain Lagoon Road, Mountain Lagoon, affirmed and examined:

CHAIR: Mr Gallagher, in what capacity are you appearing before the Committee?

Mr GALLAGHER: As a citizen.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act?

Mr GALLAGHER: Yes, I did.

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

Mr GALLAGHER: Yes, I am.

CHAIR: Could you briefly outline your qualifications and experience as they are relevant to the terms of reference of this inquiry?

Mr GALLAGHER: My property investment and development enterprises have been successfully providing people with rental and owner-occupied homes for the past 17 years. My activities and experience over the last 17 years cover a large spectrum of home building: contracting tradespeople to do repairs on my residential investment properties; contracting small builders to do renovations, extensions and refurbishments; contracting builders to construct new houses; contracting project builders to construct project homes; and contracting builders to construct multiunit dwellings.

CHAIR: You have made a written submission to this inquiry via the Leader of the Opposition, Mr Brogden. Are you willing to have that included as part of your sworn evidence?

Mr GALLAGHER: With qualifications, I am happy to.

CHAIR: What are the qualifications?

Mr GALLAGHER: I would like to delete paragraph 6 of that letter. When I wrote it I was not aware that a person contracting a builder to construct four or more dwellings is classified as a developer under the Act and is not able to claim warranty insurance.

CHAIR: In that case, we will make that change. We will incorporate your submission, as altered, as part of your sworn evidence. Is that satisfactory to you?

Mr GALLAGHER: That is satisfactory.

CHAIR: Mr Buckett, in what capacity are you appearing before the Committee?

Mr BUCKETT: As a builder.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act?

Mr BUCKETT: Yes, I did.

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

Mr BUCKETT: Yes.

CHAIR: Could you briefly outline your qualifications and experience as they are relevant to the terms of reference of this inquiry?

Mr BUCKETT: I am a builder practising in domestic building work. I have been in the building industry for about 25 years. I have a thorough understanding of the old BSC insurance scheme. I have a very good understanding of the changes to the scheme that have been made over the years. I have been involved in court actions with the Department of Fair Trading, and the BSC in the various courts over a number of years, so I have a fair bit of knowledge in that area.

CHAIR: You have made a written submission to this inquiry. Are you willing to have that included as part of your affirmed evidence?

Mr BUCKETT: Yes, I am. Is it possible for me to have a quick look at that?

CHAIR: Yes, certainly. If either of you should consider at any stage during your evidence that, in the public interest, certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee would be willing to accede to your request. However, I must add that the Legislative Council does have the right to override our decision in that regard, if it so desires. Mr Gallagher, I now invite you to make your opening statement to the Committee.

Mr GALLAGHER: It should be noted that in all the activities I outlined earlier—the different aspects of contracting—I am the consumer under the Act and I am covered by home owners warranty insurance. The only exception relates to multiunit dwellings containing four or more homes. If I decide to buy a multiunit dwelling for investment and I choose to have a builder construct me a new building as opposed to buying an existing one, I am classified as a developer if it has four or more homes contained in it. Generally, my investment properties are held longer than 10 years. The anomaly is that it is mandatory for me to pay a premium but no insurance is provided as developers are prohibited from claiming under the Act.

If my project, a three-storey walk up block of flats, was on the Gold Coast instead of Bondi Beach I would obtain insurance. Queensland limits its multistorey insurance cover to three storeys.

Up until about five months ago I had very little knowledge of home owners warranty insurance. The project I am currently undertaking, a block of eight home units at Bondi Beach, was granted development approval in December 2001. My builder had finalised his tender by early January 2002, and contracts were ready to be signed in mid January.

The Hon. JOHN RYAN: Who had finalised the tender?

Mr GALLAGHER: My builder. I was contracting a builder to build them for me. At the same time my builder's 12-month multiple contract home warranty insurance policy was coming up for renewal with Dexta. Dexta informed my builder that it would not have 12-month blanket policy cover any more, and told him that he had to reapply for a job-specific policy. This meant a lengthy process of becoming eligible for job-specific policies. Contracts for my project could not be signed, and my project was put on hold until my builder could obtain the policy as required under the Act. It took five months to eventually obtain insurance from Dexta. The premium that would have been applicable under the blanket policy was $2,700. The new premium was $22,000, an increase of nearly 800 per cent. The premium for similar cover is available over the counter in Queensland for $9,600. I want to table my receipt for insurance, which also shows the builder's blanket policy expiring in January.

CHAIR: We will accept that.

Mr GALLAGHER: When Dexta withdrew from the market I was drawn into negotiations with the cartel of home warranty insurance companies. These negotiations have been frustrating, time consuming and costly. I estimate that the holding costs and increased premium have cost me more than $60,000. The monopolistic, arrogant terms imposed by this cartel of insurance companies is the biggest hurdle our business has faced during its 17 years of successfully providing owner-occupied and rental accommodation through our property investment and development operations. The crisis can be directly attributed to the balance sheet mandate of the insurance cartel. That mandate is to

strive to increase their earnings/"profits" each year by 15 per cent. To achieve this they have to maximise premium income and minimise claim payments. That mandate is in direct conflict with the needs of consumers, builders and the regulator in this State.

Consumers have to fight tooth and nail to have claims paid. The insurance companies use consumer premiums to set up a legal slush fund to fight nearly every claim. I quote Mr John Smith, Assistant Director-General of the Department of Fair Trading at these proceedings on 11 July regarding the insurance, "They were spending vast sums of money just dealing with the legal and administrative side of matters." I quote Mr Huntley of Royal and SunAlliance last Wednesday at these proceedings in relation to the Fair Trading Tribunal, "We had to appeal to the Supreme Court quite regularly to have them overturned." The regulator, that is the Government, is paying the claims of FAI and HIH, and underwriting Dexta. One wonders what will happen when another insurance company withdraws from the market or goes broke. The regulator is being denied critical statistical information in relation to the number of claims, the amount of claims, the type of claims and who is causing the most claims, thus inhibiting the ability of the regulator to assess shortcomings of the current legislation and implement the reforms when needed.

Builders have been forced, under duress, to enter into commercially untenable arrangements of giving unlimited, personal guarantees to the cartel, which effectively put their assets on the cartel's balance sheet and making them the insurers of the cartel. I again quote Mr Huntley of Royal and SunAlliance from last week, "We are not taking deeds any more", yet he is not in a position to release existing deeds that he is holding. The only conclusion I can come to is that anyone who had any assets worth seizing has already given him a deed, and he does not need any deeds any more. Yesterday I rang Rene Thompson, the person at HIA who is handling our lapsed application, because we went with Dexta. I asked if we proceeded with our application would we still have to sign a deed and she said we would. She faxed me this copy of the deed yesterday. There is also a letter from her about our application.

CHAIR: Would you like to tender those documents?

Mr GALLAGHER: I would like to table them.

The Hon. JOHN RYAN: I move that they be received.

Mr GALLAGHER: Would someone please ask Mr Huntley what is meant by his statement last week, "We are not taking deeds any more"? The cartel has been spruiking the deeds of indemnity as being on par with the deeds of covenant and assurance that builders in Queensland sign when they are undercapitalised. They address the issues of undercapitalisation of entities and persons that wish to carry out building work, but there are major distinctions. The deeds of indemnity place the builder under unlimited liability, and can be called on by the cartel within 28 days of the cartel incurring costs. Please note that incurring costs does not mean that the cartel has paid anything out or had any court order to pay awarded against it, it just means it thinks it might. As outlined in the deed of indemnity, I obtained legal advice from my solicitor about the ramifications of signing it. For the benefit of the inquiry I also had him compare it to the deeds of covenant and assurance that is used in Queensland. I would like to submit my solicitor's letter together with the financial requirements for licensing in Queensland and the deed of covenant and assurance in Queensland.

CHAIR: We will accept all of those as tendered documents.

Mr GALLAGHER: I would like to submit the financial requirements for licensing from the Building Services Association of Queensland. I feel that it should be adapted in this State, and licensees should have to satisfy only the requirements of that paper with one entity, not dozens; or more than one, anyway.

CHAIR: We will accept that.

Mr GALLAGHER: That is about all I have to say, except that I would like to submit this letter from the builder that outlined some of the things that were set out in my previous letter.

CHAIR: We will accept that as well. Mr Buckett, I invite you to make a brief statement.

Mr BUCKETT: Recently I looked at the amendments made to the Act, this last resort business. For the past few years this system has been changing so that builders have been copping a really hard time in being able to access insurance and being able to work. But this last resort has actually thrown it the other way again. I do not think that consumers will be able to access insurance. There will be a crisis in the other direction. The amount of money they will be able to access will be hard to get at, and probably almost impossible to get at. It would appear that the system is variations of the old original system, the BSC system. From reading the evidence the department gave, it looks like the Queensland system is probably a bit of a copy of the old New South Wales system. Hopefully, it has the corrupt section pulled out of it so that it might operate a lot better.

As I said earlier, having been through the court system and having read all the procedures manuals, structures and Acts for the first Building Services Corporation system it actually had most of the issues there to get thrown up. They were covered and developed over probably a 10-year period. The structures are there. The procedures manuals are there. I discovered in my disputes that pretty well everything had already been covered, but it seems that that was all thrown out with privatisation and things were started all over again rather than looking at which sections were corrupt and cleaning up the corruption in that old section. The figures were there, too. The building industry has 99.5 per cent of its starts that do not have disputes; only 0.5 per cent of all buildings starts end in disputes. It is that 0.5 per cent that parliamentarians hate and the department hates, and it is what all the issues and the aggressive activity is about when people lose their homes.

What I found with the systems is that the department seems to want to continue to control it whether it is private or public. At the moment it is basically still running it because it is underwriting it, whereas before at least it kept the profits and put them back into the industry for training. But it now seems that it is sending the profits overseas and probably the cost to the community is as great or greater than it ever was. It also controls the court system. I have been before a referee in the Building Disputes Tribunal and a fellow giving evidence against me is also a referee in that tribunal. I have asked the question, "Who pays you to be here today to give evidence on behalf of the consumer? Is it the Department of Fair Trading?" He has answered, "Yes." I have then asked, "Do you also, when you work for the tribunal, get paid by the Department of Fair Trading?" and the answer is also, "Yes." We then have a conflict of interest.

A couple of days ago I spoke to a mediator for the Department of Fair Trading. He said when they take them into the group sessions they say this is a consumer court, we expect you to rule 51 per cent for the consumer. That is all right if you are the person who ends up on the balance. At the end of the day if you are the builder and the bloke looks at his sheet and he has made however many rulings for builders and he has gone over his quota and your particular case ends up being the one that is thrown the other way—we have a judiciary that is supposed to give us fairness, but we do not have that in our system at the moment. I came across a similar thing when I tried to make a complaint against the BDT referee to the judiciary. They said they are not strictly judicial officers, BDT referees, so there is nothing they can do. My line of complaint was to the Governor-General and the Queen, which I did not go down, but that was about all I was left with.

In the Dodd report he talked about a culture in the BSC. I think that culture is still in control in the Department of Fair Trading and it is a culture that says we have to control these people because their disputes are so aggressive and it all becomes so emotional, we have to be able to adjudicate to stop the huge cost overruns that all these legal things run to. That culture that Dodd talked about is still there today. It is there in the running of the tribunal. I talked to Mr Smith about it at the Ministers' meeting a few weeks ago. The denial that it is there, that the system works and that these people are not paid for by the Department of Fair Trading and that it comes out of Treasury—well everything comes out of Treasury in the end. It would be like the police prosecutor going before a policeman. Everybody is paid.

When this issue was raised by the Law Society four or five years ago the department said we will transfer it over the next couple of years to come under the control of the Attorney General, so there is a separation of powers. That has never happened. Whatever happens, there should be a separation of powers so the department cannot have private insurers come to it and say that these tribunals are pushing all the disputes and making them cost to much, you have to stop it, and the department is in a situation where it can get its referees together—they are all part-time and are reliant

on work from the department—and say the cost overruns are too great, the system is not working, we need it to go a bit the other way. A judicial system should be fair, it should not be based on numbers, cost per head and that sort of thing.

Again, at the moment it looks like the builders have been getting a hard time and ironically it is the pressure of the insurers that has thrown the system back. The legal side of it is a bit better for the builders but it is only the demands of the insurers that have caused that through that last resort scheme. I agree it should be a last resort, people should have a level of responsibility for the decisions they make. They should not be able to make claims and think there is a right to make a claim. The person who ended up giving me all the experience in the courts, when I researched them, was a serial insurance claimant. In building disputes they had three serious claims. After me they made claims. They copped $100,000 out of me, they copped $50,000 out of the next one. I could not get out of the department what they got out of the builder before me. When I research them further, they had bad necks from whiplash, they had workers compensation claims, they had a whole range.

When you look at the royal commission the builders said there are belligerent, opportunistic insurers out there that figure out the system, see how it works and make a quid out of it. They are there, and the system has not got the safeguards in it for them. At the end of the day the vast bulk of the consumers who are honest and the vast bulk of the builders who are honest are suffering because of a small group of consumers and builders who are not doing the right thing. That whole system had a disciplinary system in it for builders and it had a court system that gave them a fair go, which had an appeal system through it. My case that I had in the Commercial Tribunal ran for three years and cost the department about $1.5 million. As a result of that, the department said it is too hard to discipline builders. Look at this builder, he is nearly bankrupting our legal budget. That was the excuse to just push it over to magistrates. When you look at it, that system was a very good system because it regulated builders and let builders know there were things you could not do. It was a process that was very necessary.

I notice you are asking questions like why there cannot be a proposal that we have a scheme like the Queensland one? Why can it not stand beside the private insurance as a possibility of where we go? When you look at the old system, the new system is not providing funds for training. It is not doing any of the education. It is not providing cheap insurance for consumers, because at the end of the day that was what the scheme is all about, protecting people so they did not lose their life savings, keeping building costs down, and it works well but it had some very corrupt areas in it. Dodd said it was the people with the same hat on, which is what I came across. You had an inspector who wanted to discipline you and then he was also the bloke who dished out the insurance. If he liked the consumer he dished out $100,000. If he liked the builder, he did not dish out the money. It would seem to me that it would not be too hard to separate those powers, separate the judiciary from it, so you could have a fair system that worked.

At a meeting of Builders for Active Industry Reform [BFAIR] recently a builder who is retired came up. He handed over one of these indemnities a year ago. He tried to sell his house. He has given the bank a guarantee. He came up to hand over the titles and he has not been able to sell. He wanted to sell his house, get in his caravan and go on holiday. He will not be able to sell his house for six years, because that insurance company will not release that indemnity off his property. So, his retirement, his life, is buggered as well, as a result of this system. It is happening to people across the board. Hopefully you might be able to come up with some changes. It would appear from the questioning of Aird and Schmidt and the rest of them that you seem to be very much on the track of how it is starting to operate.

The other thing that occurred to me is that the senior public servants in the Department of Fair Trading are the same ones who were there when I came across them in 1994. They are still the same advisers, Chris Aird still writes the legislation as he did then. I am sure he is very competent at writing the legislation but I found among that hierarchy, just under that executive level, there was a cynical attitude that politicians come and go and it is only government money, what does it matter if we dish out $100,000 here or there. They had no respect for our tax dollars. It used to offend me enormously that they had that attitude. They had very little respect too for the politicians. They thought they are on a win, they will go this way or that way, we will change the law and you can see the way those changes get made every six months or nine months. All the time they are bouncing off talkback radio and votes. That is not the way to go. This system should be set up so that it is

controlled by the political flavour of the day so we are not governed by a whole range of dodgy builders on television.

My case was that the department and the Minister of the day had decided to make an issue of me. They were going to totally demolish a house I built to show the public that they were hard on builders and they were going to discipline me and do everything to me because my client worked for Channel 7. There are all their notes. They are making their decisions based on public perceptions, not on rules, guidelines or transparent processes. Once that happens you will be having these things over and over and you will end up worse off. I am trying to get out of the domestic building industry. I am reducing my level of work. I think my company has 12 or 13 awards for different areas of work. I do not want to be in it. A lot of my colleagues have gone out of it. All the time I meet builders who are saying they stopped working in it. I made a joke to one of them that one of your clients lost his job and was short of money and so has made an insurance claim against you. The bloke said yes. There is that element. You have to see that against the people who really do have hardship but are quiet people who do not get a go out of the insurance companies. One of the people in Whistleblowers came to me to try to get insurance. I said, "At the end of the day, Barbara, get on talkback radio and if you can get a bit of coverage, the department will pay you out." In a fortnight she had been paid out. But she battled and battled right up to that point.

CHAIR: I am reluctant to interrupt you but we have to go into the questioning.

Mr BUCKETT: I will leave it at that.

CHAIR: We have received some submissions from builders as well as from the Master Builders Association [MBA] expressing some concerns about the reforms, that is the recent amending legislation. Is that a concern you share, namely, the uncertainty created by the reforms or changes?

Mr BUCKETT: The last lot of reforms?

CHAIR: Yes. Before you respond, I indicate that the Committee is inquiring into the Home Building Insurance (Amendment) Act 2002. That is the specific focus of our inquiry, rather than a generalised inquiry into the whole system. Do you have a concern about uncertainty? If you do not, we will move on to another question.

Mr GALLAGHER: In my circumstances with regard to home owners warranty insurance, I can pick my projects so I can circumvent the deficiencies in the current legislation. But home builders I have spoken to are concerned about obtaining insurance and having their work flow disrupted. Some builders have expressed concern to me about making submissions to this inquiry in case it prejudices their current insurance applications.

The Hon. JOHN RYAN: Sorry?

CHAIR: What do you mean by that? Any citizen is entitled to give evidence to a parliamentary inquiry. You are not suggesting that someone has been threatened, are you?

Mr GALLAGHER: I am just saying that there is a perception out there that if builders made a submission to this inquiry it could impede their application for home owners warranty insurance. That is a perception that was put to me and I am just conveying it here.

The Hon. JOHN RYAN: By a builder?

Mr GALLAGHER: By more than one builder.

CHAIR: I hope the perception is not based on any fact because we would regard it very seriously if anyone had been threatened with any adverse consequences as a result of giving evidence here. Mr Buckett, would you like to say anything?

Mr BUCKETT: Can you ask the question again?

The Hon. JOHN RYAN: One of the general concerns the Government was seeking to address by changing the law was to address a level of uncertainty. There was a belief that not only was insurance becoming increasingly expensive at rapid rates but people were not able to get any insurance. The Government's justification for introducing the reforms is that it has made it easier for people to get insurance because at least the existing insurers have stayed in the market and continue to offer the insurance, and the hope is that there will soon be more insurers in the market. You said that you were having some difficulties in obtaining insurance. The reforms have just been implemented in the past two months—

CHAIR: From 1 July.

The Hon. JOHN RYAN: So some of them are only cutting in now.

Mr GALLAGHER: With regard to obtaining insurance, the insurance companies have not changed their procedures. You still have a long process. That submission of the fax that I received from HIA was just yesterday and that was after reading about whoever the guy was from Royal and SunAlliance saying—

CHAIR: Mr Huntley?

Mr GALLAGHER: That is correct — about the deeds of indemnity and what not, and all those things are still present. If that insurance company withdraws or goes broke you will have the same issue of having to get eligibility, which takes months. You have to have it so that once a builder is licensed he is also eligible to have insurance, so if he goes to a different insurance company he can get it over the counter. It cost me nearly $60,000 in holding costs because we could not get the insurance. It is commercially not viable for me to do those projects under those circumstances. That is one of the major issues to me.

The Hon. JOHN RYAN: Can I put to you what the insurers have said in response to these sorts of problems? They said that for a variety of reasons there has been an obvious need to shake the market out and to adapt to a new culture. In fact, many builders are under advice from their accountants basically to hide their assets. They have the assets but they do not put them in the company because that is apparently not seen to be tax efficient. The insurers are supposed to ensure a builder against becoming insolvent, but they believe that it is reasonable for a builder to have a reasonable amount of assets in a company, otherwise it is possible for builders simply to manipulate the system by having a $2 company which becomes insolvent and then it is up to the insurer to take up all the bills.

Mr GALLAGHER: That is understandable.

The Hon. JOHN RYAN: What they said they needed to do is basically to make the assets of companies, in short, more visible so they have asked builders to rearrange their affairs to make their assets more visible. They believe the assets exist but they just want them made more visible. HIA has said that in its procedures it does not propose to use deeds of indemnity from 1 July so perhaps you have been caught by a previous claim.

Mr GALLAGHER: No, it happened yesterday. They asked me for one yesterday, and I have submitted that as evidence.

CHAIR: When you say "they" who are you referring to?

Mr GALLAGHER: HIA Insurance.

The Hon. JOHN RYAN: We have not reached 1 July yet.

CHAIR: Yes we have.

Mr GALLAGHER: It was 31 July. That is four weeks after.

The Hon. JOHN RYAN: Did you not say that it related to a lapsed application?

Mr GALLAGHER: During the process of Dexta withdrawing from the market we approached HIA, the only other insurer in this State, because Reward would not even return our phone calls or do anything. Then they sent all this. The builder sent them a deed and all that and then they came back to the builder and said that I have to send in a deed. I think that is wrong because I am actually the customer in this circumstance. Simply because I am building more than four dwellings does not mean that I am not the customer. So they have come back and asked me for the deed. Dexta came back into the market since that period and then we obtained insurance from Dexta nearly six months after January. I only got insurance on 7 July.

The Hon. JOHN RYAN: Perhaps there is one other piece of your evidence that is relevant. Are you building a multistorey construction?

Mr GALLAGHER: Yes.

The Hon. JOHN RYAN: They have said there is a particular difficulty with multistorey buildings in that they have underwriting difficulties obtaining insurance for multistorey dwellings.

Mr GALLAGHER: In my particular case in Queensland they cover my building because it is only three storeys. They cover multistorey up to three storeys there. With regard to what you said about the assets and hiding assets and what not, in Queensland their deed of guarantee addresses all those issues in a fair and reasonable way, whereas the deed we have here, the deed of indemnity, is an unlimited deed that can be called upon in 28 days. You could have a dispute between Boral, CSR and the architect. It goes to the Supreme Court—a $2 million cost. You have 28 days to pay that and then the interest starts clicking over. It does not even have to go to the Supreme Court and get judgment against it. The insurance company just has to say that it has incurred that cost. So that is the deed of indemnity that they are putting out here. The one in Queensland says the builder has to be capitalised; if you turn over $200,000 you have to have net tangible assets of $15,000. They get you to sign a deed for that, and you are liable for the $15,000, which is limited liability.

That is how people conduct business in the business world. They do not go out and have unlimited liability, and that is what these builders have to have in this State. It is not right. That is why I put in that deed, and that is what should be done here. That addresses the issue of what you were saying about the insurers saying that they have all these different entities and what not. It is not the insurance companies' business how people conduct their affairs, but if they want assets and security that is a reasonable way to do it. I know that the Government is scared of losing these insurance companies but it is cheaper for the Government to buy the insurance as a wholesale, instead of having all these brokers in the middle, and it is cheaper for consumers as well. You should be able to have the insurance by going directly to the reinsurance companies and not going through Dexta. The guy who runs Dexta is just a scammer, and HIA is supposed to be a representative body for builders. Have a look at the scathing things they said here two weeks ago about builders.

Mr BUCKETT: Deeds of indemnity are still asked for.

CHAIR: Do you wish to say anything additional concerning the matter of insurers requiring deeds of indemnity?

Mr BUCKETT: It is quite wrong. It was not required before. Mr Smith reckons the old scheme required it. I was never asked for it under the old scheme. I was asked whether or not I had credit. I had to have credit of a certain amount with suppliers to be able to get a builder's licence, which gave me the right to trade. The Government premium was $240, something like that. So that had licensing, and that is how it worked. We had a meeting with the Minister and Mr Smith said, "The insurers are not asking for indemnity forms any more." When we actually went through it, they are not asking certain groups of builders who show a big enough profit margin in their figures. So they have tiered the builders down, one, two, three, four, five. I think you will see he referred to that somewhere in his evidence.

In the bottom couple of tiers, certainly they are still asking for indemnities. I had a meeting with eight builders on Sunday. Two of them were in tears at having to put their house on the line. They do not want to be belligerent, opportunistic consumers or simply a consultant who does not like

them. They do not want to lose everything they have in an unjust system. So they are still asking for them. It has not stopped. What they should be saying, if they are going to tell the truth, is that if you have a high enough profit margin you will not be asked for an indemnity. I have seen the Royal and SunAlliance criteria for testing the builders in the next round. I do not know where that came from but they put out a document to all these middle people which says how to go out and assess the builders. The bottom line is that if you have a 10 per cent profit in your company or business, they will give you insurance. If your profit falls below 10 per cent they will ask for deeds of indemnity.

Most accountants tell people in small business to set themselves up to keep their profit as low as possible to keep their tax as low as possible. We have a whole culture of an industry that always had zero or a loss, or other businesses like your development or whatever come in and pay for it. Some people ran building businesses for 20 years at a loss, near a loss or negative geared, or a combination of those things. All of a sudden you have a total cultural change; you are being asked to present figures that show a 10 per cent profit, otherwise no insurance.

CHAIR: The Master Builders Association informed the Committee in evidence of its view that there is a lack of control on insurers in the home warranty market, and highlighted the absence of adequate mechanisms to address complaints or grievances about insurers. The MBA also suggested that tighter controls should be placed on insurers. One idea may be to establish a home warranty insurance ombudsman. Do you have any view you would like to express to the Committee regarding the suggestion made by the MBA?

Mr BUCKETT: That is sort of an obvious thing because that separates out the insurer from being able to say yes or no to people's right to work.

CHAIR: So you would be generally sympathetic to that suggestion.

Mr BUCKETT: Yes. There should be something along those lines because at the moment you have only mirrored the old BSC system in the private arena.

Mr GALLAGHER: My view is that we should not have to deal with the insurance companies at the retail level, only collectively at a wholesale level, as in Queensland. When you are dealing with them at the retail level their intermediation dissipates the premiums that are paid by consumers; it is lost in all this administrative nightmare. It inhibits the regulating of builders.

CHAIR: So you are advocating another model of a scheme such as they have in Queensland?

Mr GALLAGHER: Yes.

Mr BUCKETT: The huge cost of private insurance is actually moving insurance away so people are doing deals outside the system and working illegally on their home owner building licence to avoid it anyway. The premiums on some of my jobs would be $5,000, $6,000 or $7,000. People look at that and say, "I'm not going to pay that. Can we do it as an owner-builder and I will pay you 20 per cent to manage it?"

CHAIR: Is the practice to which you are now referring relatively common or rare?

Mr BUCKETT: That is the way the industry is still operating, otherwise it would have collapsed months ago. The industry has simply gone outside the system. All the jobs are being cut down to less than $12,000. If you do not have insurance, you cannot work. The only way you can work in the industry today is to do a job under $12,000 or have insurance in place from an insurer that has not gone bad that you might have had for, say, a 12-month period where the jobs were not specific. As to my own insurance, I have to gauge my jobs because I have approval to do $640,000 of work in a 12-month period—two jobs only.

CHAIR: To interpret your response to my question, you are saying that contract spitting is relatively common.

Mr BUCKETT: Yes, and becoming more so. People have to feed themselves so that is how they are doing it.

CHAIR: Is it also common for people to give themselves the status of owner builder for the purpose of avoiding insurance problems?

Mr BUCKETT: Certainly.

Mr GALLAGHER: If the builder is personally known to them they would do that.

CHAIR: So it does not happen in every case?

Mr GALLAGHER: You would not get someone's name from the telephone book and say, "Come and do a $120,000 job in 10 lots of $12,000". But you probably would do that with someone you knew.

Mr BUCKETT: I have had approaches from people I do not know—one is a $300,000 job—to work on that basis. I used to do six jobs at once but now I can only do two. So those two jobs are very important and I must choose carefully. So I say, "Sorry, I can't do your work". They then say "Do it owner builder". They are also thinking they will save $5,000. They look at my reputation, which is good. At the end of the day, if the house remains standing for more than six years it is meaningless anyway because no insurance applies after six or seven years under the old system. Some people look at a builder's work and say, "I want this person; how can I get around the system?" I had an approach on that basis a few days ago from somebody wanting a $150,000 extension. I presume that consumers cannot find builders to do the work so they are looking for ways around it.

The Hon. JOHN RYAN: In the past couple of days the Minister for Fair Trading, Mr Aquilina, said that home building compliance officers from the Department of Fair Trading had recently blitzed a number of areas and checked builders to ensure that they had adequate insurance. They found that a minimal number—I have forgotten the precise details—were operating without insurance. This was construed as clear evidence that those sorts of allegations are not true and that this is not happening—at least not in the main. Would you care to respond that comment?

Mr BUCKETT: It depends on which area—for example, is it work being done by the big companies, such as Jennings? I have wondered how those companies are getting their insurance and I presume that because they are property developers they have enough assets on their balance sheets to get insurance. Subcontractors do not stop working until the cheques from the builders stop. Therefore, that area would still be insured. I have not yet taken on a job where I am working outside the system. I have only started to get approaches in the last two months, so it is only just starting to pick up now. There must be a band of builders who have not been able to get insurance for six to 12 months. I have heard of good builders asking their former apprentices who have insurance for work because those builders cannot work because they have not been able to get insurance.

Mr GALLAGHER: Thinking about what you said about how many builders would be working without insurance, of a group of 10 builders that I know, I would say that one or two would not have licences as such—they might have their clerk of works certificate, be a carpenter or whatever—but they still manage to get an income. I would not say it is prevalent, but that will always happen. Those builders say, "Fair Trading and all that stuff is too hard for me; at the end of the day my product stands for itself and I can go into the market and do the work." They will just circumvent whatever is legislated. I imagine that will always happen.

CHAIR: There was a recent press report to the effect that the MBA has been examining the feasibility of setting up an alternative indemnity scheme. The amending legislation into which we are inquiring provides that the Minister may approve alternative home building indemnity schemes or similar arrangements. Are you in a position to express any views about what the MBA has in mind? What impact do you think any alternative arrangements would have on the home warranty insurance market?

Mr GALLAGHER: It depends what it is proposing; we do not know. If it is something similar to what HIA has, definitely not.

CHAIR: The press report said that the MBA is negotiating with at least two insurers to create a non-profit corporation offering discounted insurance to what were described as "select builders, subcontractors and developers" who have exemplary records and sound financial practices. The press report goes on to say that all members of what it intends to call the "Master Builders Warranty Corporation" would have to have prior building experience, trade qualifications and be screened for solvency. Do you have any views about that?

Mr GALLAGHER: That proposal has merit, but the devil would be in the detail.

Mr BUCKETT: There are a couple of devils.

CHAIR: What are they?

Mr BUCKETT: I am moving territory. I know a fair bit about that scheme and how it would be set up. It would be based on the old Building Services Corporation scheme and have a disciplinary system similar to that old scheme. It would set up the scheme for the builders in the MBA. The problems I envisage are the same as the problems that HIA had: When somebody has a payment made against them and a lot of disputes arise, all of a sudden the industry is in dispute with its member. The industry is supposed to be an advocate for its members; it is not supposed to sue them for $100,000 because that money was paid out to a consumer on a contract delivered by a court controlled by the Department of Fair Trading. It would be a good thing from the department's point of view because it could claim that there were more insurers in the market. There is also a big enticement for the MBA in that it would bring in more dollars and, the bigger an organisation's budget, the more important the people in it think it is—whether it is a government department or private organisation.

Mr GALLAGHER: On the point about getting more insurers in the market, in Queensland they collect about $19 million in premiums every year. Their market is about one-third the size of ours so I assume—the insurance companies will not give us any details—that the insurance market would be worth about $60 million. Is that a big enough market to have many different insurance companies in competition?

CHAIR: We recently heard evidence from insurers who said that the track record for this type of insurance—namely, building warranty insurance—is that in most years insurers have historically made a loss and it is not an attractive form of insurance.

Mr GALLAGHER: That is what I mean: They do not really want to be in there. That is the view I formed based on their actions. It is not worth it.

Mr BUCKETT: The old scheme used to collect about $30 million in premiums. It paid out $15 million and the rest of the money stayed with the corporation and was built up over time. If there was a calamity—for example, 20 houses were built on clay on the North Coast and the owners had to be paid out or one of the big companies went bad and 150 houses had to be finished off—there was enough in the kitty to pay it. There was $20 million or $30 million if it was needed. They did not underwrite for a few years and took the risk. At one stage they had more than $70 million. It is very profitable. Insurers will be coming back into the market, particularly with this last resort thing, because the risk for them will be zero.

Mr GALLAGHER: I do not know whether you could say it is a profit. If you look at what has happened in Queensland over the last 10 years and take a long-term view, you will see that last year they had a big loss. Business is cyclical and half of that time it was profitable and the other half it was not. It goes with the building cycle. It is not as though the scheme in Queensland is losing a lot of money; it is sustainable. We want something that is sustainable; we do not want to have to jump from entity to entity to try to get insurance and become re-eligible. It is a difficult question.

CHAIR: As you will no doubt be aware, the recent amending legislation specifies a distinction between structural and non-structural defects. It sets different periods of cover for each: in the case of structural defects, the prescribed period is six years and for non-structural defects it is two years. There is an extended and detailed definition in the amending legislation of what constitutes a structural defect. Do you foresee any disputes arising as a result of this definition that is provided in

the legislation? What do you think about the introduction of different periods of cover for structural and non-structural defects?

Mr GALLAGHER: I read the definition. My concept of a structural defect is any defect that renders a building uninhabitable. That is what they have in Queensland and what they used to have here. That said, it is very opaque and very hard to define. When you go to arbitration over a dispute you should have, through Fair Trading or whatever, expert field inspectors who can make the decision. It is very hard to say—it is not black and white—what is a structural defect and who is responsible for it because there are so many intangibles in building, such as subterranean ground movements, the materials, the architect's design, silicon and so on. All of those things can impact on that definition. You must have somebody there who is very experienced and expert to make the call.

CHAIR: So your answer is that it is a question of fact in a given case whether it is a structural defect.

Mr GALLAGHER: It will speak for itself. To prove that, a fair amount of investigation must be done. Once that decision is made and the parties are happy with that arbitrator, that should be it.

Mr BUCKETT: It sounds like a reasonable description of structural defects. A common question in the industry is: What the hell is a structural defect and how do you define it? I had some dealings with Doug Stanley who used to run the BSC and his instruction to inspectors was, "If it hasn't fallen down, it's not structural". I suppose another way of saying it is if it is livable. I think six years is better than seven because it brings it into line with the courts and the six year thing about being able to bring a claim. It was always a year out of whack. It was two years under the old scheme, and obviously things such as painting do not last for seven years.

The Hon. JOHN RYAN: Are you aware that the statutory warranties of the Home Building Act that place requirements on the builder are different from what the insurance scheme carries out? Those statutory warranties that require the home to be fit for the purpose for which it was built, to be structurally sound and so on for seven years remain in the Home Building Act. All that has changed is that the insurance scheme is limited and capped to a level of six years and divides how those homes may be claimed for the purposes of insurance. However, the liability and the requirements on the builder are different. Do you see any problems arising from the fact that the insurance scheme does not cover exactly what the builder is required to deliver?

Mr GALLAGHER: That makes it ambiguous. That is good for lawyers, basically.

The Hon. JOHN RYAN: I do not think there is anything ambiguous. The point is that a consumer may pursue a builder for a standard for up to seven years. However if the builder is dead, has disappeared or is insolvent, you are limited to the requirements of the insurance policy. I do not think there is any ambiguity in that. I am asking you whether you think it is fair.

Mr GALLAGHER: It is ambiguous to me. Do I go to the lawyer, under common law, for seven years, or do I go through the scheme of the insurance company if I have got only six years? I am just saying that that is the ambiguity in it—the common law and the insurance coverage. That is in the dispute.

Mr BUCKETT: With all the changes that have occurred that is an issue. Two or three years ago, when those changes first came out to extend that period from two years, I thought how outrageous it was and how it could only lead to disputes. There is a whole range of things, such as painting, that you cannot guarantee for seven years. If you have a whole lot of things that you cannot guarantee for seven years from a practical point of view, you are giving people a false expectation and you are setting yourself up for disputes. You are going to have people saying, "I want that to be spot on the way it was when I got it seven years later and I am entitled to that", and off they go to the tribunal and make a claim.

Mr GALLAGHER: What is covered in the two years? Do we say, "Okay, the structural stuff is covered in the seven years"? Let us say it is something to do with habitation of the building. There is a lot of devil in that detail. Is everything included in the two years?

The Hon. JOHN RYAN: Let me read to you a couple of things that the insurers said in their evidence to us about a week ago. When I read this I wondered whether or not you and the insurers agreed with each other. Mr Turner, speaking on behalf of the HIA, said:

> The difficulty is that builders are advised by their lawyers and accountants to protect their assets and minimise their tax, quite legitimately. There is nothing untoward about that. But, in doing so, if a builder presented a company that was worth $2 to an insurer and had not made any profit on paper, it is difficult for an insurer to stand up and say, "We are willing to insure you to the tune of $200,000 for every contract that you enter into on the basis of capitalisation of $2." A culture change is required within industry so that builders understand that, when they seek advice from their accountants and lawyers about the structures of their businesses, one of the things they must take account of is their requirement to achieve eligibility in the warranty market.
>
> Because the insurer is being asked to insure primarily against insolvency, the key indicator, of course, is their capital requirement and their financial performance.

Do you think the point being made by the insurer is fair enough? Insurers argue that many of these requirements on builders relate to a culture change. It takes some time to achieve. I do not think it could be more elegantly stated than in the statement I have just read to you that was made by Mr Turner.

Mr GALLAGHER: I reiterate what I said in my opening statement. The cartel has been spruiking the deeds of indemnity as being on a par with the deeds of assurance that the builders in Queensland signed. The builders in Queensland have to sign deeds of assurance when they are undercapitalised. So if you have an entity that is undercapitalised, Queensland has something that is called a deed of covenant which addresses those issues of undercapitilisation. The insurance companies are virtually saying, "Give us an unlimited guarantee." However, in Queensland they guarantee that, if you have a business, it is capitalised at a certain level. So the business will turn over a certain amount. That is all you are liable for.

Those are common commercial terms. That is how most commerce is conducted nowadays. The insurance companies are saying, "We want the builder to give an unlimited liability." You have to address those issues in regard to undercapitilisation. I put it to you that we should use what is used in Queensland in regard to capitilisation, which is a limited guarantee. It is based on sound business practice. If you look at their scales they show you how to go from $200,000 to $200 million. If I were a young builder aged 20 and I looked at that I would say, "I need $15,000 to kick off. I only have a tool box in the back of my ute, but I can get to that point of $100 million—$4 million net tangible assets to turn over that business." Those people in Queensland understand how the building industry works. They have been doing it for years. That is why they have come up with that system. All that the insurance companies want to do is get someone else to pay their claims. That is their balance sheet mentality.

Mr BUCKETT: They want their cake and they want to eat it too. They argue that it happens in other businesses and it just does not happen in other businesses.

Mr GALLAGHER: Who else goes out of their front door every morning and has to risk everything that they own? A doctor does not and a lawyer does not but you are expecting builders to go out and do that.

The Hon. JOHN RYAN: Let me read something else to you. Because of this difficulty in the turnover time, Mr Huntly from Royal and SunAlliance said:

> Recognising that, we did make some concession to the building industry when HIH collapsed in that we set up, effectively, a cover note system for 60 days so that builders could continue to build. We set up a fast-track-style application for smaller builders, sole traders and partnerships. We set up a facility for new builders so that they can enter into the building industry and grow their businesses in a responsible manner. So we are moving.

Have you any access to this "fast-track and cover note system for 60 days"? Was that of any assistance? Were you aware that that facility existed?

Mr GALLAGHER: I was aware of it because I read about it on the Internet, but it was not applicable to us.

The Hon. JOHN RYAN: Why not?

Mr GALLAGHER: With me, my builder's business probably turns over about $30 million. He was having trouble getting insurance. So I read about an overview of the market to try to expedite us getting our insurance, but it was just not possible. Our application was in a queue with everybody else's.

The Hon. JOHN RYAN: I again refer to what Mr Huntly said:

> Effective from 1 July, Royal made the decision not to take general deeds of indemnity any more. We seek to see the strength of the business itself. We take what we call job specific or developer deeds where there is a joint venture product under way. It is a methodology of bringing together all the joint venture project partners to be responsible for the outcomes of the project. Royal and SunAlliance has not had a particular focus on taking bank guarantees. We do take them in extreme circumstances where the strength of the builder would preclude the builder from getting insurance at all. We may take a bank guarantee in those circumstances. The only other time we will take a bank guarantee is when the builder is, possibly, overstepping his technical capabilities.

You have described your difficulties and the fact that you have been required to have a deed of indemnity. Do any of the circumstances, under which you are seeking to get insurance. fall into any of that descriptive material that Mr Huntly outlined?

Mr GALLAGHER: Yes. I read what he said about the deeds of indemnity.

The Hon. JOHN RYAN: Were you a joint venturer seeking to do that?

Mr GALLAGHER: No, I was totally separate.

The Hon. JOHN RYAN: Are you stepping outside your technical capabilities?

Mr GALLAGHER: I do not have any technical input. That is why I am employing a builder. I employ a builder, an architect, an engineer, a geotechnical engineer, a hydraulic engineer, and a mechanical ventilation engineer who are all tertiary qualified. I am expected to be totally liable for all their work. I know very little about building. I am just contracting a builder who is standing in the marketplace selling me a product. I was reading something about the Act. Some developer took the insurance companies to the Supreme Court and won on the point that he was the customer of the builder—which I am in this case—and then you guys changed the legislation.

The Hon. JOHN RYAN: Are you aware of something called a builder's kit, or an accountant's kit, which is being developed in order to assist builders to understand what is required? Have you seen anything of that nature? Do you think that might be in any way helpful, or would it solve all the problems that you are encountering if it existed?

Mr BUCKETT: It will not solve any problems. I imagine that it would be something like the kit that is put out by Sun for its underwriters and in which it says, "Check them out." I have not got it with me, but it states, "Here is how you check out the financials of a builder." The bottom line was looking for a 10 per cent profit. So smart builders will just figure up a company to have a 10 per cent profit and they will gauge it up to suit that. The idea is to have an accountant working for an insurer to assesses the technical ability of the builder. That is just not going to happen.

Mr GALLAGHER: They just want hard assets. I remember reading what the insurance company said at the hearing the other week. They do not place any emphasis on goodwill. They do not understand what goodwill is. Goodwill is future income. That is what the builders have—goodwill. But they only look at balance sheets. The name Coca-Cola has a lot of goodwill, but it is not tangible. It has income that it will produce in the future. The insurance companies do not factor that into the equation when they are dealing with builders. They have got no expertise to deal with the technical merits of builders, which is one of those things that Mr Huntly was alluding to.

The Hon. JOHN RYAN: I refer to what Mr Turner said to the Committee. The Committee put to him the difficulty that was being experienced by builders—and you have largely made this allegation too. It seems to be easier for larger project home builders to get across the line than it is for small builders and sole traders. Mr Turner said:

> It depends on the structure you are talking about. We find that, generally, small builders are either partnerships or sole traders. If they are partnerships or sole traders then they bring to the table within that partnership or sole trader their own assets. Generally, we find smaller entities that are partnerships or sole traders get across the line quite easily because their assets are on the line and, generally, they have well in excess of 10 per cent net worth of their projected turnover. Most of the builders we insure under $1.5 million that are sole traders and partnerships go along merrily without any difficulty at all. It is when they get advice to set up family trusts, discretionary trusts, unit trusts or complicated structures that it is harder to achieve that net capital result, or even a profitable position because they are minimising tax along the way.

Is it your experience that sole traders and partners go along merrily and also have sufficient assets to easily acquit the requirements of the insurer?

Mr BUCKETT: Is that not what most people in business do? Politicians, lawyers, and wealthy people set themselves up so that if somebody makes a claim against them for whatever they do not lose all their assets. Federal Parliament and probably this Parliament are full of members who have family trusts to protect their assets from being sued for whatever reason. That is a general community thing. Why is it that builders of all those people should put their assets up on the table for everybody to have a go at and nobody else has to?

Mr GALLAGHER: I agree with what you just said in relation to the insurance companies. There is probably a bigger risk for bigger builders, as opposed to the smaller ones with a $1.5 million turnover. So what! What is the point of what he is saying? He is just referring to the insurance risk.

The Hon. JOHN RYAN: He is saying, basically, that smaller insurers are having no difficulty. Insurers are saying that there is a category of builders largely represented by the MBA who are just above the small trader level. They are seeking to go into the more risky end of the building market such as multistorey units. They are seasoned and experienced people. They have set up their companies as a family trust and it is that discrete and specific group of builders that is making a large amount of noise about the difficulty of getting insurance, whereas the rest of the industry, as represented by the HIA, is happily and merrily going along with those requirements.

Mr GALLAGHER: I disagree with that. I have spoken to many builders and I have not found one—I challenge you to get one up here—who says that the system is good and it is working well. They would prefer to have either something else or what they had before. That is what I would say to that one. No matter if it were a small builder with a $200,000 business, which is the guy whose letter I submitted, those sorts of people are not happy with it. The bigger guys, like my builder who is building the flats in Bondi, is not happy with it. Last week I was down the South Coast speaking to a builder down there, and he was not happy with it. It is pretty widespread. Okay, there might be only 150,000 builders in the State or people who are registered with Fair Trading, and I would say that most of them would not be happy with it.

The Hon. JOHN RYAN: There must be an awful lot of builders who are members of the Housing Industry Association?

Mr GALLAGHER: Yes.

Mr BUCKETT: A lot of contractors.

The Hon. JOHN RYAN: You would have read the transcript. They spoke quite strongly in favour of the new system and said that it was better for builders. Why have they not got it right within their membership, if that is the case?

Mr GALLAGHER: I read that transcript of HIA and, basically, I reckon that HIA is the insurance company's "lackey". They did not put up any builder that said it was okay. They have a vested interest in maintaining the status quo because they are profiting from it.

CHAIR: Leaving aside their involvement in the insurer, the Housing Industry Association claims to be an organisation that represents members who account for, from memory, some 85 per cent of house building construction within New South Wales. Leaving aside the question of any involvement they have as a broker, and that is what it is, in the home warranty insurance market how could they get away with openly and publicly supporting legislation given that they say they represent some 85 per cent of the housing construction market?

Mr GALLAGHER: That figure of 85 per cent, I would reject that because they have only 8,000 members Australiawide. How many licensed builders are there in New South Wales? I think it is 60,000.

Mr BUCKETT: I think the MBA membership is about 3,000. It misses a lot of people that are not in either organisation.

Mr GALLAGHER: Yes, the bulk is not in that, either. They do not represent a large chunk of home builders. That is my opinion.

Mr BUCKETT: I used to be a member of the HIA, and I thought it had a much higher membership than that. Traditionally, it took in all the contractors. It was not just the builders, it was all the subbies.

Mr GALLAGHER: Maybe they are voting with their feet.

Mr BUCKETT: If the subbies worked for the bigger companies then the HIA can say, "Our people have 85 per cent of the industry", because that is what the big companies do. But a lot of builders in the MBA and the small builders think that a bit of conspiracy is on by the bigger companies and the Government to get rid of all the little builders. That is their view, to get rid of all small builders.

The Hon. JOHN RYAN: There is no doubt that that has been put to me.

Mr GALLAGHER: You also have to realise that a building is not an easy job. If I get somebody to build something for me I try to make it as easy as possible. If I go down to the site and I see that the bricks are down one side and the sand is down the other side I go to the builder and say, "Why are you making it hard for them?" Building is hard. I feel sorry for those guys who actually do that job. This system is not making it any easier for them. You need a system that helps them, not hinders them.

CHAIR: I thank you very much for your submissions to the Committee and also for answering our questions. That really is appreciated.

Mr BUCKETT: I will give you back my document and I will add a couple of pages of notes. Please disregard my handwriting.

CHAIR: You are tendering the documents?

Mr BUCKETT: Yes, I will tender them.

CHAIR: We will accept them.

Mr GALLAGHER: I would like to thank the Committee for letting me come here today.

(The witnesses withdrew.)

(Short adjournment)

PAUL MILTON DELAHUNTLY, General Manager, Swimming Pool and Spa Association, Level 1, 9 Burwood Road, Burwood, sworn and examined:

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of Parliamentary Evidence Act?

Mr DELAHUNTY: Yes, I did.

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

Mr DELAHUNTY: Yes, I am.

CHAIR: Would you please briefly outline your qualifications and experience as they are relevant to the terms of reference for this inquiry?

Mr DELAHUNTY: I have been involved in the swimming pool and spa industry for about 18 years. During that time I have been employed by the Swimming Pool and Spa Association for about seven years, first as a technical training liaison officer then, lastly, as general manager.

CHAIR: You have made a written submission to the inquiry, for which we are very grateful. Are you happy to have that included as part of your sworn evidence?

Mr DELAHUNTY: Yes.

CHAIR: If you should consider, at any stage during your evidence, that in the public interest certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee will be willing to accede to your request. However, the Legislative Council has the right to override our decision in that regard if it chooses to. I understand that you do not wish to make a preliminary oral statement.

Mr DELAHUNTY: No.

CHAIR: Page one of your submission states, "As disastrous as the current situation is for the building industry as a whole, it is even more unfair in its application to pool builders." Would you like to elaborate on that statement for the Committee? What is meant there?

Mr DELAHUNTY: Sure. A little bit further down in the submission it refers to the insurers' lack of understanding of how the swimming pool industry works. Regrettably, the insurers see everything as far as warranty insurance is concerned as house building, home building or unit building. Swimming pools are not, in real terms, dwellings. As we have put in the submission, we are yet to see anyone living in a swimming pool. We can understand the concerns that people have about non-completion and those sorts of things, but to apply the same principle to a swimming pool that is applied to a dwelling just does not work. For instance, the $200,000 limit is the figure insurers tend to take when they are working out worst-case scenarios as far as risk is concerned. That is fine if you are building a $175,000 home. The average home is $175,000. The average swimming pool is $17,000, but insurers still calculate the risk at $200,000.

CHAIR: Before you proceed further, you said that the average price is $17,000.

Mr DELAHUNTY: Yes.

CHAIR: At page two of your submission a statement is made that the price of the average swimming pool is around $27,000.

Mr DELAHUNTY: Yes, that is correct. The figure is $27,000.

CHAIR: The general point you are making is that the cost of a swimming pool is, clearly, less than a house?

Mr DELAHUNTY: Yes.

CHAIR: However, $27,000 as an average is still a substantial sum of money.

Mr DELAHUNTY: Sure.

CHAIR: You are not arguing that there should not be appropriate insurance or other protection of the consumer?

Mr DELAHUNTY: "Appropriate insurance" are probably the key words. But it is not insurance. What we currently have is not insurance.

CHAIR: Could I ask for your association's general response to the reforms or changes, if you prefer, introduced by the recent amending legislation?

Mr DELAHUNTY: The most recent changes, we believe, have been aimed primarily at keeping the insurers in the business, keeping insurers involved in home warranty. When the amendments were first mooted sometime ago, and we are talking back in 2000, 2001 when the first lot of amendments were made to the Home Building Act, the association supported the majority of those amendments. The problem is that since the introduction of the insurers, private insurers and, subsequently, the collapse of HIH the insurers have been the major focus of all of the department's and the Government's amendments, changes and anything they do. For the most part all of those amendments appear to be aimed at keeping the insurers in business. The insurers want to be in business only because they believe they can make good money out of it.

CHAIR: That may well be. However, is not the bottom line the desire of the Government in public policy terms to, by one means or another, provide appropriate protection for the consumer? Whether you regard this model as one that you believe is appropriate or not, is that not the bottom line?

Mr DELAHUNTY: That is the bottom line as far as aim is concerned. That is what the legislation was intended to do. It was intended to be a fair system for both builders and consumers. At the moment it provides some relief or coverage for consumers, but it is draconian as far as builders are concerned.

CHAIR: Why do you say it is draconian?

Mr DELAHUNTY: I heard the gentleman say earlier there is not one other industry where the insurance—for instance, doctors pay public liability insurance but they do not then have to pay the insurance company if there is a claim against them. There is not one other industry that has to cover its own insurance. They have to indemnify their own insurance. Insurance companies argue that the majority of their risk is insolvencies. While ever the builder is in business they have very little risk. They have agreed that that is the case. The warranty aspect of insurance cover is minimal. Their major concerns are insolvencies. That is the reason they argue that they are looking for all this financial backing for the company. The people most likely to have large costly insolvencies are the large companies who find it easier to get insurance and find it easier to cover up the sort of problems that are going to cause insolvencies. A prime example is HIH Insurance—a major corporation that becomes insolvent—and they are trying to tell us, home builders, that they know better than we do about how to run our businesses. It is a joke.

CHAIR: There would have been, however, I take it, a number of examples over the years of smaller or medium builders becoming insolvent?

Mr DELAHUNTY: Yes, certainly, not a problem. In each of those cases one of the things that has never been allowed by the insurers is adding that in the majority of those cases the remaining moneys in contracts in many cases cover the cost of completion of the project. For instance, and I will give you the swimming pool industry as an example, a company became insolvent in Newcastle and it had about 100 pools to complete. All but 10 of those pools still had enough money left in each of the contracts to cover the cost of completing the pools. So, the insurance company only had to pay, if you like, the cost of 10 of those pools. As I say, you are looking at a figure of around $20,000 to $27,000.

The Hon. JOHN RYAN: When you say the money left in the contract, that is, the consumer had not forwarded all of the funds?

Mr DELAHUNTY: Exactly. Most building contracts are done according to a payment schedule. You pay for work as it is completed. If the consumer is doing his part and the builder is doing his part, the consumer only pays for that part of the building that is completed. In a swimming pool, that is the way it works. The builder does not do anything until he gets the money and the consumer is not going to give him the money until he has the work done. At the end of the day the risk to the insurance company is minimal.

CHAIR: Another criticism made early in your association's submission is that there was a lack of community consultation regarding the amending legislation. What is your view as to the consultation that occurred or, in your view, ought to have occurred?

Mr DELAHUNTY: That was primarily with respect to the most recent change that occurred in Melbourne, and that was discussions between the Victorian Government, the New South Wales Government and the insurers. There was virtually no involvement of consumers or builders, either consumer representatives or builders representatives. The rest of it is fine. As I say, the major reforms were mooted back in 2000-01 and a lot of the amendments have been coming since then. That is probably another criticism, that they have been too long coming. The major criticism is that last meeting where it was only the insurance companies and the governments. Again, it goes to support the argument that these changes are only being made to keep the insurance companies in business.

If the aim of the thing is consumer protection, why do we then raise the minimum from $5,000 to $12,000? We now have a whole group of people under $12,000. You said to me earlier that $27,000 for a swimming pool is a substantial amount of money. So is $12,000 a substantial amount of money for consumers to lose. We have now changed that to reduce the insurer's exposure. He is now not exposed to those smaller claims. He has saved some money, that is terrific. The other thing is we have changed from seven years to six years as far as insurance cover is concerned. The builder is still responsible for seven years on both structural and non-structural but the insurance company is now only responsible for six years on structural and two years on non-structural. The builder still has to wear it, the builder still has to pay the insurer if somebody makes a claim. At the end of the day what is the insurer doing? Nothing! What is the risk for the insurer?

The Hon. JOHN RYAN: The insurer would say that interstate, where similar schemes operate, they can point to significant losses extending from what they say is the main cause of their losses, insolvency on the part of the builder, and that may extend to tens of millions of dollars.

Mr DELAHUNTY: How can they do that? That is another thing, the insurers are not being asked. There is nothing requiring insurers to give a detailed account. Nothing. The insurance companies just tell us that. Again, if that is the case, what happens to the money that is in the contracts of those people who are insolvent, those builders that became insolvent? Where is the money that was in the contract? You cannot tell me that every one of those builders and every one of those insolvencies, every cent that was due to be paid on the contract was paid up front. If it was, the consumer needs his head read. Why would you do that?

The Hon. JOHN RYAN: I think we might have thrown you off track a bit. It might be useful to go back to question No. 1 where we were looking at the way the scheme treats pool builders as if they were constructing residential home buildings. Have we completely covered all of the areas where you believe the insurer is treating you as if you are building a $170,000 product instead of a $27,000 product?

Mr DELAHUNTY: In some respects, yes, they do that and in other respects they treat you separately. For instance, I heard earlier the question about fast-tracked insurance. Fast-tracked insurance never applied to swimming pool builders. It was categorically stated that it would not apply, fast-tracked systems, to pool builders. Their argument is that they did not know enough about pool builders and the pool industry had a reputation for insolvency. Asked to provide information on that, two instances were given. One was UFI Pools, which you may or may not be aware of, which was down in the Illawarra area. The company manufactured fibreglass swimming pools and ultimately

those fibreglass pools failed to the extent that they had premature osmosis problems. Some $8.5 million was paid out of the Department of Fair Trading or, as it was then, the Building Services Corporation, insurance policy to replace those swimming builders. That is not a pool builder's problem, it was a manufacturing fault in a product that was installed by pool builders. That problem did not occur for concrete pool builders, yet concrete pool builders are paying exactly the same as fibreglass pool installers, who are classified as builders. But they have absolutely no control over the manufacturing process of the pool.

The insurance companies cite that as an indication of the risk. That has nothing to do with building a swimming pool. It has absolutely nothing to do with building a concrete pool. On the one hand they argue that you are treated the same, we are treating you specifically because you are a swimming pool builder, but when it suits them they treat you as part of the building industry and increase your risk on the same basis that they assume you have the same risk as a home builder. That is not true.

The other thing is the number of contracts that can be completed in the same time. Let us take an average home builder building average homes at $175,000. He will, let us say, build five a year, so he has a turnover of $800,000 or $900,000. A swimming pool builder builds maybe 40 pools a year at $27,000 and he is going to be in about the same turnover category. He will turnover about the same amount of money, but he can complete 20 per cent or 30 per cent of his contracts in the same time as it takes your home builder to complete one. So, why does he have to carry the burden of risk for the full 12 months of the term of insurance, when at least 20 per cent of his turnover has been completed and he is therefore not at risk, as far as the insurance company is concerned, of insolvency. They do not add it back on. If it was added back on at the front end it probably would not be a major drama. The problem is a builder cannot grow his business. Let us assume he builds $30,000 pools rather than $27,000 pools. He is doing really well and has some good customers who are prepared to pay more money. He uses up his insurance and they say no, you now have to apply to increase the amount of insurance you want, irrespective of whether he has finished 20 per cent or 30 per cent of the pools he was allocated for that year.

CHAIR: The amending legislation has a provision that the Minister may approve alternative home building indemnity schemes or similar arrangements. Last week the MBA gave evidence to us and confirmed that some consideration is being given to an alternative indemnity scheme promoted by them. There was a press report in regard to that as well recently. Have you any views you would like to express to the inquiry about alternative schemes and particularly the one they might have in mind? Do you think that is a good idea?

Mr DELAHUNTY: Yes, probably. I am aware of some of the detail of it. We have made a submission to the Minister for approval of an alternative scheme and along the lines of the same scheme that operates for pool builder members in Queensland. In Queensland swimming pools do not come under the legislation requiring mandatory insurance. However, the association provides insurance for member pool builders and other pool builders under a mutual fund.

CHAIR: Is it possible for the Committee to receive a copy of the submission you have made to the Minister and to which you have just referred?

Mr DELAHUNTY: Sure.

CHAIR: So, you will send that in to us?

Mr DELAHUNTY: Yes, I will.

The Hon. JOHN RYAN: Does that mutual scheme comply with all the APRA requirements for insurance?

Mr DELAHUNTY: No. It is not insurance and that is one of the reasons we are keen to get it up and running. It is not insurance per se; therefore, we do not have to approach an underwriter to underwrite the whole scheme. For instance, the scheme that the MBA is promoting must be underwritten by an insurance company, preferably one that will be prepared to jump through the Government's hoops as far as being approved. The system that we have put to the Minister is a mutual

discretionary refund controlled by the fund operators, which would be our industry association. It meets all the requirements as far as the legislation is concerned, other than it being an insurance company.

CHAIR: Is that proposal currently under consideration?

Mr DELAHUNTY: Yes.

CHAIR: We have received some submissions from builders expressing frustration and concern about the difficulty in obtaining home warranty insurance. We have also received some indications that there are concerns about service delays in general from insurers. Can you tell us anything about the experience of your members in obtaining insurance and generally dealing with insurers?

Mr DELAHUNTY: I have here, which you may wish to look at later, a precis from one of our members who provided preliminary financial details to an insurer on 10 January 2002 and did not receive insurance until after 17 May. In fact, it was early June when they were finally approved for insurance.

CHAIR: Which company were they dealing with?

Mr DELAHUNTY: HIA Insurance Services. Similarly, I have some other statements from various other members that indicate similar types of delays. The current status apparently with HIA is a minimum of 20 days from the receipt of all required paperwork and financials. If somebody has not crossed a "T" or dotted an "I" they send it back to you. They do not ask you to correct it. They do not ask you to provide them with faxed details or updates. They will turn around and ask you to resubmit the whole lot again, and your 20 days starts again from the receipt of those amended financials or whatever it may be.

The Hon. JOHN RYAN: Are you saying that the details they gave us that may reflect a quick turnaround in receiving these applications might have been affected by this requirement that the application starts again?

Mr DELAHUNTY: Yes.

The Hon. JOHN RYAN: So the statistics may look a lot better than they really are.

Mr DELAHUNTY: For sure.

CHAIR: I note that at page 6 of your submission you deal with the question of what you say are examples of builders circumventing the current insurance scheme. You say:

> As a result of their inability to obtain or extend their insurance, many builders are suggesting consumers take out an owner-builder permit and they will supervise the work for a fee.

Some passing reference was made to this by the previous witnesses. Can you tell the Committee how common you believe that practice is?

Mr DELAHUNTY: It is difficult to determine because a lot of builders are doing it in conjunction with doing some jobs with insurance. In other words, if it is something that they believe they can split or get down to a point where it will at least look as though it is under the threshold, then they will do it. If it is something that will be very difficult to do in that regard, then they will do it through and apply insurance to it, the idea being that it then negates their requirement to apply for increased levels of insurance and that sort of thing. There are some builders who have been advised that they have not been able to increase their amount of insurance because of the requirement to put in additional equity in the form of cash injections into the business. They just do not have the cash and are unwilling to take bank guarantees and things over their homes. So they then wait, do some jobs as owner-builders, wait for their insurance to be renewed and then continue on again.

CHAIR: With regard to the owner-builder gambit, if I can use that expression, you say that contract splitting to avoid thresholds is something that occurs as well.

Mr DELAHUNTY: Yes.

CHAIR: Is that common?

Mr DELAHUNTY: Recently, yes, particularly for pool renovations for instance. Pool renovation may cost somewhere between $12,000 and $20,000. It is not difficult to get a contract for the refurbishment of the shell for $10,000 and then another contract to reline it, put on new copings, put in new equipment for another $6,000 or $8,000. That is not a problem. The problem is that it is illegal in real terms, but nobody is policing it.

The Hon. JOHN RYAN: How is it illegal?

Mr DELAHUNTY: Under the legislation as we understand it, any builder who knows that a particular job in both parts and labour will exceed $12,000 is required to have insurance, whether or not it is all being supplied by him. If the owner-builder is supposedly supplying part of it, it does not matter because, the way the legislation is written, he knows that the overall job will exceed that amount of money and therefore he should be taking out insurance.

CHAIR: Can I put this to you as well? The amending legislation and the regulations made under it provide that home building insurance contracts may also limit liability resulting from non-completion of building work to an amount that is 20 per cent of the contract price for the work. Are there any views that you would like to express to us regarding that particular provision?

Mr DELAHUNTY: I am not sure how that affects insurance. That is fine as far as the contract is concerned.

The Hon. JOHN RYAN: I think it affects insurance to the effect that in the instance of where, say, a large pool builder becomes insolvent and has a number of jobs that are incomplete, the insurance is limited to the last 20 per cent of the payment. So it probably assists the insurer that essentially it is designed that only the progress payments made by the individuals are covered under the contract in the event of just a simple non-completion because the builder is no longer there. With regard to an average swimming pool contract, that would limit the liability of the insurer to somewhere between $2,000 and $5,000. What sort of premium would be paid to get that amount of cover for the event of that sort of claim? In the instance of a home, it can be $30,000 to $50,000; in the instance of a pool the liability for non-completion of the contract is limited to between $2,000 and $5,000. As I understand it, the premiums for a pool and a home are somewhat similar; they are in excess of $400. That seems to be a high premium to pay for a fairly modest payment.

Mr DELAHUNTY: It certainly is. I agree. The average premium paid by a pool builder is around $800 for a swimming pool.

The Hon. JOHN RYAN: So in the event of a simple non-completion, a premium of $800 would have been paid. If I recall correctly, the policy has an excess in the order of $400, so that limits the payment perhaps a little more. You could be talking about a payment that is only two or three times the amount of premium paid.

Mr DELAHUNTY: Exactly, yes.

CHAIR: We have had quite a degree of evidence from both sides—insurers and builders—regarding the question of insurers requiring either unconditional bank guarantees or deeds of indemnity for issuing insurance. The insurers tend to say that it has become far less common since the amending legislation commenced on 1 July, although in some cases it may still be required if they take a dim view of the risk of the particular person seeking insurance. Would you like to tell the Committee about the experience of your members regarding the practice of insurers requiring bank guarantees or deeds of indemnity?

Mr DELAHUNTY: The majority of insurers still require bank guarantees, and they still require them as a prerequisite for providing insurance. It is not if you do not meet the requirements. I believe—and I have a copy of an indemnity here that I might give you later—that for the most part

they are still required as up front paperwork when you make an application. In other words, they will not even assess your original application unless you have provided a standard guarantee or a standard indemnity form. I understand that that is not the case with HIA Insurance; it is still the case with Dexta and Reward. However, HIA Insurance has basically said that it will simply increase the bank guarantee requirements.

CHAIR: A moment ago you referred to certain documents that you wish us to see. I invite you to tender them now while we are hearing your evidence.

Mr DELAHUNTY: Sure. This is a copy of a deed of guarantee and indemnity that one of our members was asked for, and he agreed to give us a copy. When you read it you will find that it is an amazing document. Basically, you give the insurer power of attorney over all your property and your business; they will not provide insurance unless you sign it.

CHAIR: Is there any other document that you want to tender?

Mr DELAHUNTY: Not that I have with me. I will send you the other documents I spoke about.

The Hon. JOHN RYAN: Does the person who made this agreement agree to have their name known publicly—

Mr DELAHUNTY: No.

The Hon. JOHN RYAN: —or would they prefer it to be kept confidential?

Mr DELAHUNTY: Kept confidential please.

CHAIR: We will take steps to ensure that the name is kept confidential. I turn now to a slightly different matter. When the MBA gave evidence to the Committee last week it said that there is a lack of control on insurers in the home warranty market and, in its view, inadequate mechanisms to address complaints or grievances concerning insurers. On page 3 of your organisation's submission you make a comment to the effect that there is a lack of appeal mechanisms against decisions made by insurers. What do you think should be done to deal with that particular matter to which you refer?

Mr DELAHUNTY: To some degree, that has been addressed with some of the reforms. It is just the introduction of those reforms that still leave it as a problem. With the introduction of technical inspections on site, a lot of those sorts of things will be overcome. Another thing is that by making it insurance of last resort, if you like, then there will not be the same sort of argument. It will only be in cases where there has been a warrantable failure and the builder is not available—he is dead, insolvent or missing—that the insurance company will have to pay. In that regard there will probably not be too much argument because the builder will not be there to argue about it.

CHAIR: You have just referred to the current scheme being one of last resort. Some submissions—for example, the submission made by Royal and SunAlliance—to this inquiry have argued that a last resort approach would provide a more predictable operating environment for builders, consumers and private sector warranty underwriters. At page 6 of your association's submission the statement is made to the effect that the amendment to provide a last resort scheme is detrimental to the consumer. Would you like to elaborate on what you mean by that and what the impact will be for both builders and consumers?

Mr DELAHUNTY: The old BSC system provided coverage whether or not the builder was available, even in situations where the builder had not taken out insurance. So the consumer was extremely well protected under the old system. On television the other night there was coverage about a builder who still argues that he is around and will fix the problems. Yet people have been waiting in excess of 18 months for him to do the work.

The Hon. JOHN RYAN: Four years.

Mr DELAHUNTY: So the insurer does not have to pay: the consumer does not have the benefit of insurance because the builder is not insolvent, dead or missing. The poor old consumer is left trying to get his house finished, rebuilt or whatever and he cannot because this guy is still saying, "Yes, yes, yes, I'll do the work". But the consumer does not have access to the insurance.

CHAIR: I want to ask you about structural and non-structural defects. As I do not have a background in this field and do not have the technical knowledge or expertise, I am not sure how relevant this is for pool building as distinct from erecting houses. However, you will be aware that a distinction is introduced in the legislation between structural and non-structural defects and different periods of cover are set for each: six years for structural and two years for non-structural. The amending legislation contains a detailed definition of what constitutes a structural defect. In the context of your members—pool builders—are any definitional disputes likely to arise?

Mr DELAHUNTY: Very much so. For a start, the legislation talks about structural defects and then refers to structural elements. It goes on to describe what those structural elements are.

The Hon. JOHN RYAN: Foundations, floors, walls, roofs, cons and beams.

Mr DELAHUNTY: We do not have many of them in pools so which part of the pool is covered?

The Hon. JOHN RYAN: Weatherproofing.

Mr DELAHUNTY: That is the interior lining. It is exposed to probably the harshest part of the environment and is also subject to the owner's ability to maintain the water balance.

CHAIR: I suppose whether a structure is habitable is not particularly relevant to a pool.

The Hon. JOHN RYAN: Not to be too difficult, some of the definition might be applicable to pools. It says that, for the purposes of section 103B, "structural defect" means any defect in the structural element of the building that is attributable to defective design, defective or faulty workmanship or defective materials or any combination of that and, in addition, results in or is likely to result in the building or any part of the building being required to be closed or prohibited from being used or which prevents or is likely to prevent the continual practical use of the building or any part of the building or is likely to result in the destruction of the building or any part of the building or physical damage to the building. Those things might reasonably be applied to swimming pools but we require your expertise to tell us whether they are.

Mr DELAHUNTY: That definition would apply to the coping—the walkway—around the pool. For instance, if the coping was damaged—let us say there is terracotta tiling around the pool—it would be wise not to use the pool because somebody could be injured on the broken tiles. It could then be argued that the building is not habitable or useable because of that failure, yet that failure is non-structural: The pool will not leak, collapse or fall down. It is purely a decorative cover around the pool and is subject to extremes of heat and cold and misuse by the owner that could render it unserviceable. However, given the terminology in the legislation, at the end of the day it could be argued that it is a structural defect.

The Hon. JOHN RYAN: The pool fence might be an interesting area of dispute as well.

CHAIR: I would argue that part of the extended definition of the term "structural defect" in the amending legislation is in (b): "prevents or is likely to prevent the continued practical use of the building or any part of the building". Your comment a moment ago about the coping and broken tiles rendering the use of the pool dangerous could arguably be considered to fall within the expression "continued practical use of the building". Do you agree?

Mr DELAHUNTY: Yes.

The Hon. JOHN RYAN: I would imagine there would be a fair argument about what was the "practical use". People could argue that you could still use the pool but it might be unwise to do so.

Mr DELAHUNTY: That would be our argument. The intent is that "practical use" means that you cannot occupy or use the building for fear of its collapsing or because it is unhygienic or whatever in terms of a house. However, our problem is that a legal person will apply the same argument to our product. The other point that must be considered is that the period of six and two applies to the insurance not to the customer's ability to claim. So the customer is still able to claim that defect for up to seven years from the builder. It is the insurance companies limiting their liability.

The Hon. JOHN RYAN: In Victoria some of these problems are resolved by means of a document commonly referred to as a "tolerances document". Is an equivalent document used in Victoria, or anywhere else in Australia for that matter, that covers the difference between structural and non-structural elements of a swimming pool?

Mr DELAHUNTY: No, not at this stage. We used to try to do it in our contracts, but it was very difficult. We have always argued that those sorts of things are cosmetic. It is like tiling in a bathroom: Is bathroom tiling structural or non-structural? It does not hold the walls up or bear the weight. It is the same for a swimming pool. The tiling on a swimming pool has no bearing on the structural integrity of the product. The other point that we argue is that if your average swimming pool has been in the ground for 12 months it will be in the ground for 30 years. Nothing will happen to it. If it is going to break, crack or collapse, it will do it in the first 12 months—it will probably do it in the first six months. If it has been there for 12 months, you can forget it. There will be no problem with it.

CHAIR: I want to ask about your members' experience with claims made against your members. On page 3 of your submission you say that there are instances when claims have been paid without reference to the contractor that were subsequently found to be unwarranted and vexatious.

Mr DELAHUNTY: That is not in the context of the amendments. That is a historical statement about what happened previously—in fact, prior to the collapse of HIH. As an industry body, we had a deal with HIH that it would provide reduced rates and reduced requirements for swimming pool builders. Our approach was made on the basis of it getting in touch with us prior to any insurance claim being paid so that we could inspect and get a report on the failure—or the purported failure—because of the experience of a number of our members, particularly in Newcastle where an insurance company had paid out claims without the builder even being notified that a claim had been lodged.

CHAIR: I have raised this issue before, but in your summation on page 8 of the association submission you say, "The black market is growing. Builders unable to get insurance and consumers unwilling to pay the premiums required are bypassing the system via owner builder permits and contract splitting." Do you believe that is a significant problem in the industry?

Mr DELAHUNTY: It is probably not significant at this stage but it is happening and could become significant if the regime continues—particularly when pool builders are paying an average of $800 but some are being asked to pay $1,800 in premiums on a swimming pool. If you pay an $1,800 premium on a $20,000 or $22,000 pool, the consumer will say, "Gee, I'm not sure about this; what if I go owner builder?" It is the consumer who makes the suggestion in some cases, and it could become much more prevalent down the track.

CHAIR: Are you saying—I want to understand you properly—that there are cases of contract splitting and bypassing the system via owner builder permits at present but the situation could worsen in the future?

Mr DELAHUNTY: Yes. Interestingly, the Minister recently put out a press release that talked about a blitz that had been undertaken and that some 2,200 sites or jobs had been visited and insurance was required in 1,094—or some figure like that—of those jobs. That means that insurance was not required for more than 50 per cent of the jobs they visited. I would be interested to know what sorts of jobs they visited. I would suggest that they are owner builder jobs and their immediate reaction is, "If it's an owner builder job there is no insurance required." However, they did not investigate any further to find out whether a licensed builder was doing the work or whether a licensed builder was consulting for the owner builder. I suggest that they assumed that, because it was an owner builder job, it is fine. They clearly said that more than 54 per cent of the sites visited had no insurance requirement.

CHAIR: You referred a short time ago to an ordinary insurance premium of $800 but in other cases it might be as high as $1,800. Why would there be a difference to that extent? Would it be because the contractor in question had a poor claims record? What would account for the difference?

Mr DELAHUNTY: No, because it applies to builders whether or not they have had claims. It is to do with financial structure.

CHAIR: Are they assessing the financial risk?

Mr DELAHUNTY: And whether a builder is a member of the HIA. HIA members get discounts.

The Hon. JOHN RYAN: How much might those discounts be?

CHAIR: Are you referring to HIA insurance services in particular?

Mr DELAHUNTY: Yes. There are categories 1, 2 and 3 and in February 2002 on contracts per dwelling not exceeding $10,000, HIA members pay $ 1,310 and non-members pay $1,545. If you go to $100,000, HIA members pay $1,782 and non-members pay $2,105.

The Hon. JOHN RYAN: In addition to the discounts, do you know whether HIA members get a better or worse deal in terms of servicing requirements from HIA insurance? Do they receive a preferred level of service?

Mr DELAHUNTY: We have no evidence to prove it but we believe that is the case. We have members who are members of the HIA and some who are not and it is our experience that those who are members of the HIA tend not to have the same number of problems as non-members.

CHAIR: You referred a moment ago to two amounts for premiums according to a schedule or something of that sort. If they are set amounts, how do they take account of risk factors and what provision is there to vary the amounts that you have cited?

Mr DELAHUNTY: None to my knowledge. When you talk about risk factors, they categorise you in relation to the amount of work that you are doing and the average value of the work that you do. Therefore, you have a related risk compared to the amount of equity that you have in your business.

CHAIR: The risk factor that I am referring to would, in the main, focus on the financial structure or integrity of the business in question.

Mr DELAHUNTY: Of course. As I have said before, they argue that insolvency is their major concern; therefore it is the financial viability of the organisation that they believe they need to address. It is not whether the builder is a good builder or whether he has a track record of good or bad workmanship; it is all to do with whether he has enough money on his books and whether or not the money is available. If he has enough money and he can show financial statements that please their underwriter, he is fine. He will get a reduced premium and he will get higher coverage. He would be allowed more insurance.

For instance, you can have a builder who builds a relatively shonky product, but he manages to screw a lot of money out of the consumer and he manages to put that through his books to make his books look good. He would be a better prospect to the insurer than a small builder who has never had a claim and who has 4 or 5 per cent equity in his business. The only reason he does not need any more equity in his business is that he never has a problem because he does the job very well.

CHAIR: If someone though, to use your expression, builds a shonky product, could that not be expected to produce more insurance claims than someone who produces a non-shonky product?

Mr DELAHUNTY: Not necessarily, no.

The Hon. JOHN RYAN: Not if the result is that they have to be dead, have disappeared or are insolvent. Who will claim? I am getting round to fixing that problem.

Mr DELAHUNTY: I will fix it eventually.

CHAIR: You state at page 8 of your submission that you have some concern about the long-term viability of the pool industry. What do you mean by that? I know what viability means, but why do you say that?

Mr DELAHUNTY: There are a number of things that are of concern to us in relation to the pool industry. Probably to some degree, yes, we are the type of people that the insurance companies are referring to when they say that builders have not got their act together and they do not know how to run businesses. But, by the same token, we have in our industry a lot of small businesses that have been in business for many years without any problems at all. Those businesses have provided the husband and wife, the family, with a good income for that amount of time.

The problem with our industry is that it is too easy to get into because there are no qualifications. It is the type of industry in which the amount of money that you can get quickly is quite high. One of the things that we were concerned about—and one of the things that we supported in the reforms when the reforms were first mooted—was that there would be continuing professional development and that there would be requirements for builders to undergo technical training and those sorts of things. That has not come into vogue as yet.

In the last 18 months to two years we have been working to put together a pool building course because there has been previously no pool building course. The way that a pool builder got his licence was to go to the Department of Fair Trading with a reference from his mate which said that he had been building swimming pools for 12 months and he was technically qualified. That was it, and away he could go.

CHAIR: So there is no tailor-made course at TAFE?

Mr DELAHUNTY: Not at this stage. There is now. We have provided it. But it is still not a requirement of licensing at this stage of the game. It is not currently available through any of the TAFE courses because they have no need to teach it. But we are in the process of putting that together and, hopefully, it will be available by the end of the year. The concern that we have is that, because of the problems relating to insurance, we will not have any of these guys left. They will all say, "It is all to hard. I do not want to do this."

Our industry is at the point of a generation change. A lot of the younger guys are saying, "I do not want to be involved in this." Their fathers are not encouraging them into the business because of the problems that they are having. Why would you encourage your son into a business when they have to hock their house to the insurance company? No way. So we are concerned that, ultimately, the industry will suffer as a result of the insurance requirements, unless there is some specific recognition of the difference relating to swimming pool builders.

CHAIR: You also comment on page 8 of your submission that the situation for the swimming pool industry could be relatively simple to resolve. Could you tell us what you mean by that?

Mr DELAHUNTY: As I said before, there are two ways of doing it. They could take it out of legislation, for a start, and make swimming pools exempt from the legislation. That would be fine so far as we are concerned. The other thing is that even if you left it in the legislation but allowed us to provide "insurance cover" under our mutual discretionary fund, in that way we could assess the claim. In other words, the claim is not just paid; it is properly and technically assessed before it is paid.

CHAIR: You seem to be saying in your submission—in fact, I think you state it quite clearly—that you have a preference for the Queensland model?

Mr DELAHUNTY: Yes.

CHAIR: You hark back to the Building Services Corporation system that was in place in this State between 1987 and 1992?

Mr DELAHUNTY: Yes.

CHAIR: Could you tell us why you have that view?

Mr DELAHUNTY: Yes. The reason that the dates are there is that the Building Services Corporation was still there after 1992, but there was a change in its approach. After 1992 it became much more consumer-oriented. One of the things that changed quite dramatically in the time after that was the amount of insurance claims paid. That was as a result of becoming, if you like, more consumer-oriented. It was keen to keep the BARG people at bay. That was one of the things that probably started all of it. But prior to that the department was very similar. It was the model that the BSA in Queensland used to put its system together. In fact, what they have in Queensland is the BSC with the necessary modifications to make it work properly.

We had a BSC which was evolving and which was undergoing change. Probably by now it would have been equal to, or better than, the BSA system. The Queensland people looked at it and believed—as did the Commonwealth Government—that the BSC system and the model that the BSC provided was the best system to legislate and regulate the building industry. There were a couple of major points, I guess, that we believed were good. The BSC was totally self-funded. It was totally paid for by builders out of their licensing and insurance. All the costs of running the BSC were provided by builders. The consumer did not pay anything. There was no cost to the consumer, but the benefit was there for the consumer as well.

The other thing was that a lot of that money was being reinvested in the industry for training and apprentice training. We received a grant from the BSC that put our first training course together. We have since received a grant from the Department of Fair Trading to put the builders course together. But we have received nowhere near the funding. But again, that was all paid for, if you like, by the builders. It was controlled by an entity that understood how the building industry worked, but it also recognised that there was a role for them as far as consumer protection was concerned. If the building industry got totally offside with consumers, the building industry would fail.

The Hon. JOHN RYAN: One of the reforms was to change the entry level for insurance requirements from $5,000 to $12,000. I would have thought that that might have been something that was welcomed by swimming pool builders, because that would have meant that a significant amount of the work that was done by swimming pool builders and renovators would have been exempt from the scheme altogether.

Mr DELAHUNTY: But is that a good thing? We do not believe it is a good thing.

The Hon. JOHN RYAN: Has that had an impact?

Mr DELAHUNTY: Yes, it has had an impact and it has benefited some builders who are providing services under that threshold. But what it has also done, as I said earlier, is provide the opportunity for contract splitting. It is the people that you want out of the industry who are the ones that are supported by this sort of thing. The guy who is doing the right thing, the guy who is an honest builder, is not going to do that. It is the guy who is dishonest, the guy who wants to do some shonky work, who now has an in. He can get in and do the job. I suggest that it should have stayed at $5,000.

In fact, I believe it would have been better to keep it at $1,000 because the consumer would then be protected. There are some people who will pay $5,000 for work which, for them, is a lot of money. To have it fail and then have no recourse is not fair for the consumer. But if the insurance was fair the premium on that work would be relevant to the cost of the work. At the moment it is not. It would also be relevant to the experience and record of the builder, whereas currently it is not.

The Hon. JOHN RYAN: The $12,000 might also be interesting for the swimming pool industry. Are you able to comment in that regard? As I understand it, a common feature of swimming pool contracts is that the parties agree to a contract at the beginning. Contingent on that, because an excavation is involved, a significant cost might be added to the project if, as I understand it, they hit

rock. Where does the insurance cut in? Do you reach a point where a builder might contract for an $11,000 swimming pool, he hits rock and he then adds another $5,000 or $6,000 to the product? Do they then have to set up a contract for $12,000?

Mr DELAHUNTY: No. The legislation covers any variations to the contract. So the insurance covers the original contract cost, plus variations.

The Hon. JOHN RYAN: So it means that, if a variation occurs to the contract which takes it over the $12,000 threshold, insurance must then apply?

Mr DELAHUNTY: Yes.

The Hon. JOHN RYAN: How do you manage that in your business? Do you have a limit to the amount of work that you can do?

Mr DELAHUNTY: It does not happen.

The Hon. JOHN RYAN: What do you mean?

Mr DELAHUNTY: If somebody writes a contract for less than $12,000 and then has a variation that puts its over $12,000, nobody does anything about it.

The Hon. JOHN RYAN: Does that mean insurance is not obtained in most instances?

Mr DELAHUNTY: That is correct.

The Hon. JOHN RYAN: Does that provide another loophole in that people can carry out work that apparently does not require insurance?

Mr DELAHUNTY: Sure. We have had instances where a $12,000 job has ultimately cost $27,000.

The Hon. JOHN RYAN: We have talked about areas where the risk of a swimming pool is lessened. Is it not a fact that because a swimming pool necessarily involves an excavation in almost every case that area of work is significantly more risky? You cannot have a situation in which someone carries out an excavation and nothing further happens.

Mr DELAHUNTY: Yes.

The Hon. JOHN RYAN: Does that represent an increased risk so far as insurance is concerned?

Mr DELAHUNTY: Again I would not think so. We get back to standard contracts or requirements in contracts. The payment schedule in our contract is closely tied to the real cost of the work. In other words, at the point of excavation, the amount of money required to be paid at that stage of the contract would only just cover the excavation.

The Hon. JOHN RYAN: But it would not cover filling in the hole if the whole project failed, would it?

Mr DELAHUNTY: Probably not, no.

The Hon. JOHN RYAN: Does that not possibly represent a risk that is not available at the housing level? For example, you can always complete a house. It might not be seen to be non-completion.

Mr DELAHUNTY: Yes, it is possible.

The Hon. JOHN RYAN: I wonder whether that excavation might be seen by the insurance industry as a significant risk because you can excavate and have a hole that is not a pool.

Mr DELAHUNTY: Yes.

The Hon. JOHN RYAN: The last resort feature of the insurance emphasises the importance, in my view, of the speedy resolution of disputes in that if there is not speedy resolution of disputes the cost of resolving the dispute can eat up the availability of the cost of the insurance. In my view it is important to have a quick resolution of disputes. The Government's answer to that has been that there has been a series of procedures made available at the CTTT involving a fast-tracking system for some dispute resolution. Does your organisation have any experience with that new procedure, and have you found it to be speedy and effective in all cases?

Mr DELAHUNTY: In the small number of cases that our members have had experience with it has worked, yes. We are represented on their management forum, and we believe that if the system continues to involve the way that they believe it should we believe it will be a good system.

The Hon. JOHN RYAN: Do you think that it is a problem that both parties have to agree before an adjudicator takes any sort of role in the dispute? It appears that an enormous number of disputes do not receive a quick dispute resolution because one party can stall.

Mr DELAHUNTY: I think that is always going to be the case. I do not believe you should change it at this stage because of that. It is probably a certain amount of distrust by either the consumer or the builder at this point in time or based on previous experience.

The Hon. JOHN RYAN: If I were a builder seeking to recover the cost from people who were being difficult about paying the bill—obviously the people who do not want to pay the bill will not be interested in a fast dispute resolution service—I would like some of the tribunal to go out and have a quick look at the building to see whether it was adequate and quickly resolve the issue that this was a case of the consumer vexatiously exploiting the system available, and quickly have the resolution which is that they may be ordered to pay the bill. Do you have any experience of consumers who exploit the system because they can delay it?

Mr DELAHUNTY: Not in our experience, no, not at this stage.

The Hon. JOHN RYAN: You mentioned that you might set up a mutual as an alternative to insurance. Does your submission before the Minister describe exactly how you would assess the people who went into the mutual scheme?

Mr DELAHUNTY: Not at this stage, no.

The Hon. JOHN RYAN: How would you assess it?

Mr DELAHUNTY: We would probably use the same sort of assessment criteria that the BSA in Queensland uses, most likely.

The Hon. JOHN RYAN: How would you assess work quality, for example? You have argued that there ought to be some way of balancing the person with a good record by comparison to someone who might have a lot of equity. How would you balance that in your proposed scheme?

Mr DELAHUNTY: Obviously, we would look at the builder's record so far as complaints are concerned. We handled consumer complaints, and have done for years. We would have those records available to us so far as the builder's ability to conduct himself without consumer complaints. We would then apply the financial criteria that we understand the BSA applies in Queensland.

The Hon. JOHN RYAN: Is it fair to say that a lot of consumers do not go to the CTTT, that they come to your organisation for the resolution of the disputes, and that might be the reason that you do not have a large record of disputes to work on?

Mr DELAHUNTY: That would have been true two or three years ago. It is not true now. We do not handle as many complaints. We believe that is for two reasons. There has been a lot of promotion by the Department of Fair Trading for their disputes programs. They have made a big

thing, if you like, of telling consumers that they should approach the Department of Fair Trading with their problems.

The Hon. JOHN RYAN: I have discovered that to be almost pointless.

Mr DELAHUNTY: That is where a lot of people go first. We do not get as many as we used to.

The Hon. JOHN RYAN: You have said that under your scheme you would want to be in the position where you could assess the claim on its technical merits. How would you then assess an order that came from the CTTT that rectification had to be carried out or that the money order had to be paid? Surely, you would have to agree to acknowledge those?

Mr DELAHUNTY: Of course.

The Hon. JOHN RYAN: The deed of indemnity you table does not have the date on it. Are you able to give any indication to the Committee when that was—?

Mr DELAHUNTY: He received it yesterday, as I understand.

The Hon. JOHN RYAN: As in you received it yesterday?

Mr DELAHUNTY: No, I received it this morning. The builder received it yesterday.

The Hon. JOHN RYAN: It has not been signed, so it is current.

Mr DELAHUNTY: It has been signed by him. He signed it. That is a copy. I understand that he sent that to the insurer.

The Hon. JOHN RYAN: In any event, it has been signed within the last month?

Mr DELAHUNTY: Yes.

The Hon. JOHN RYAN: There is no date or signature on it at all.

Mr DELAHUNTY: Sorry.

CHAIR: Is there anything else you wish to say?

Mr DELAHUNTY: No, I do not think so, except to thank you for the opportunity.

CHAIR: Is there any other document that you wish to tender?

Mr DELAHUNTY: No, not at this stage. As I say, I will send you copies of the other documents to which I referred earlier.

CHAIR: Thank you for your association's submission and for your evidence today. It is much appreciated.

Mr DELAHUNTY: Thank you for the opportunity.

(The witness withdrew.)

(The Committee adjourned at 12.50 p.m.)