

**Presentation to the Productivity Commission Hearings, Melbourne, 21<sup>st</sup> March 2006**

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*Verbal Submission in Italics*  
Terms of reference in Standard text

**Australia's consumer policy framework**

The Australian Government and the State and Territory governments share responsibility for consumer policy in Australia. Australia's consumer policy framework includes policy-making, regulatory and non-regulatory activities. Regulation consists of a combination of self-regulatory, co-regulatory, regulatory and enforcement responses to assist consumers to meet the challenges they face in the market for consumer goods and services.

Within the framework, the principal legislative provisions are those contained in Parts IVA, V (with the exception of Division 1AA (country of origin representations)), VA and VC of the Trade Practices Act 1974 (TPA) and equivalent provisions in state and territory Fair Trading Acts. Australia's consumer policy framework also includes a range of other industry-specific legislation administered by the Australian Competition and Consumer Commission or state and territory fair trading agencies.

The Ministerial Council on Consumer Affairs (MCCA) and its supporting bodies are responsible for considering consumer and fair trading matters and, where possible, developing a consistent approach to these issues. The membership of MCCA consists of the Australian Government, the governments of the States and Territories, and the New Zealand Government.

**Key considerations**

*This presentation will concentrate on the aspect of consumer protection in relation to the Building Industry and in specific relation to the Key considerations and Scope of this inquiry as articulated within the terms of reference.*

*Consequently this presentation will focus on the underpinning to the various State schemes which is the maligned and failed insurance product known as builders warranty insurance. Seventeen documents will be tabled as part of this submission, one is to be kept confidential as the author has whistleblower protection.*

In conducting the inquiry and making recommendations, the Commission is to have particular regard to:

1. the need to ensure that consumers and businesses, including small businesses, are not burdened by unnecessary regulation or complexity, while recognizing the benefits, including the contribution to consumer wellbeing, market efficiency and productivity, of well-targeted consumer policy;
2. the need for consumer policy to be based on evidence from the operation of consumer product markets, including the behaviour of market participants;

*1 and 2. Builders Warranty is an unnecessary burden on all building businesses which builders have falsely been led to believe is necessary for the protection of consumers'. To this day there has not been one piece of independently verifiable evidence provided by any insurance company at any time to prove that this red tape burden has ever provided either adequate or promised consumer protection.*

*All claims and premium evidence provided by insurers to any previous Government inquiry is covered by a cloak of secrecy by the dubious 'commercial in-confidence' claim to withhold information from the public. This claim has been clearly abused<sup>2</sup>.*

3. the impacts of its recommendations on consumers, businesses and governments, including on small businesses and families, in light of the need to avoid unnecessary increases in regulation;

*3. The impact on consumers from the failure of Builders Warranty Insurance to provide adequate consumer protection is a fact that cannot be disputed. According to Justice Stuart Morris President of VCA T has stated that 40% of cases on the Victorian Building list are those where consumers are fighting insurers to honour claims<sup>3</sup>. At the recent NSW Upper House Inquiry consumers were lining up to explain that the cover provided by last resort Builders Warranty is ineffective and not protecting consumers from dodgy builders or costly litigation.*

*The insurers response was to not even provide verbal evidence to that inquiry.*

4. the shared responsibility of the Australian Government and the State and Territory governments for consumer policy; and

*4. The responsibility for last resort Builders Warranty Insurance is a National issue however the Federal Government has been loathe to take any action against insurers, brokers or agents that have profited handsomely from sales and commissions from this statutory produce. The Federal Government have consistently referred complaints back to State Governments<sup>5</sup> however have failed to grasp that complainants have approached the Federal Government specifically because State Governments have turned a blind eye to the failures of this product. The issues surrounding last resort BWI have now become a political football all while consumers and builders continue to suffer. The Federal Minister for small business and tourism believes that this inquiry will provide a way forward<sup>6</sup>.*

5. the importance of promoting certainty and consistency for businesses and consumers in the operation of Australia's consumer protection laws.

*5. While the argument for consistency is valid as it also provides a key basis for Federal Government involvement it is important to understand that a poor performing scheme that is merely consistent across Australia is not a good result for consumers or builder stakeholders.*

### **Scope of Inquiry**

The Commission is to report on:

1. ways to improve the consumer policy framework so as to assist and empower consumers, including disadvantaged and vulnerable consumers, to meet current and future challenges, including the information and other challenges posed by an increasing variety of more complex product offerings and methods of transacting;

1. *The validity of any consumer protection regime can only be measured by the ability of the scheme to represent and defend the most vulnerable consumers that would otherwise have no recourse to any protective mechanisms. The current last resort scheme fails this test by forcing consumers into litigation where a genuine dispute exists. Insurers now avoid becoming involved in any dispute while the builder exists to fix his own work. While the Victorian Government has instigated the BACV process, consumers have no where other than the courts to go if their builder or insurer simply refuses to cooperate. The same also applies to builders with the result being that the 'winner' of the dispute is the one with the deepest pockets to fund what is always a very expensive and complex litigation'.*

*Some sections of the industry mistakenly believe that a `voluntary' model of consumer protection using last resort BWI as being the answer<sup>8</sup>. **Clearly a voluntary scheme will disadvantage the most vulnerable even more than the current arrangements as these will be the consumers that will likely choose not to buy insurance due to financial and information asymmetry issues<sup>9</sup>. A voluntary scheme has been consistently rejected on these grounds in the past and there has been no intellectual basis brought forth to date to warrant a change to that philosophy.***

any barriers to, and ways to improve, the harmonisation and coordination of consumer policy and its development and administration across jurisdictions in Australia, including ways to improve institutional arrangements and to avoid duplication of effort;

2. *The barriers to harmonization and coordination of privatised last resort consumer protection are the same barriers behind the reasons for insurer submissions to be falsely deemed commercial in-confidence<sup>10</sup>. While the insurers give lip service to the goal of providing greater competition in the market, once that competition arrives then so-called commercial in-confidence constraints immediately cause barriers to the effective sharing of resources and information.*

*In addition, privacy laws are also in place to protect the free flow of sensitive information and these laws have already been the cause of a recent lawsuit being brought against the Victorian Building Commission by a Melbourne builder on recommendation by the Privacy Commissioner". This document tabled needs to be held in confidence as the complainant has whistleblower protection.*

*A major warranty insurer has recently identified that a way forward for them would be to exempt insurers from such laws and to enact exemptions from the Trade Practices Act amongst others<sup>12</sup>. **This defies logic and flies in the face of any semblance of providing transparent and accountable consumer protection but frankly is typical of the position articulated by any vested interest with a conflict of interest.***

3. any areas of consumer regulation which are unlikely to provide net benefits to Australia and which could be revised or repealed;

3. ***There has been no publicly accountable cost benefit analysis done on last resort builders warranty insurance. All figures submitted are secret and all data submitted by the insurers are taken at face value by Government with no independent academic scrutiny allowed by Government<sup>13</sup> The current last resort builders warranty insurance could be repealed by***

*the Minister for Planning by revising the Victorian Government Ministerial order S98 May 2003 that has enshrined its current existence.*

4. the scope for avoiding regulatory duplication and inconsistency through reducing reliance on industry-specific consumer regulation and making greater use of general consumer regulation;

*4. The Queensland Government are the only jurisdiction to maintain a public policy based consumer protection regime for the building industry. The Queensland Building Services Authority (QBSA) have control over builder and contractor licensing, registration, security of payment, consumer protection, dispute resolution and warranty. On a National basis the Queensland model could be implemented immediately with no net cost to Government as the scheme is completely self funding, transparent, accountable and fully audited. It is the only scheme to undertake any sort of cost benefit analysis and has consistently proven to be the only scheme in Australia that will protect consumers. (This analysis is freely available via the QBSA website in the form of annual reports that are fully audited by the Queensland Auditor General.)*

*One of the key reasons for a positive cost benefit analysis, if not the key reason is that the QBSA system is free from any sort of private sector financial vested interest dictating this key area of public policy. Neither insurers, brokers or industry associations can make any money out of the QBSA. It is this financial vested interest, coupled with unnecessary commercial in-confidence secrecy that has allowed the perception of corruption to flourish around the scheme as administered in Victoria<sup>2</sup>.*

*Currently the C/U is preparing a recommendation to the Office of Public Prosecutions against the Government and the insurer for fraud and corruption in relation to an insurance claim". This document tabled needs to be held in confidence as the complainant has whistleblower protection. This case is likely to be the first of many.*

5. the extent to which more effective use may be made of self-regulatory, co-regulatory, consumer education and consumer information approaches and principles-based regulation in addressing consumer issues; and

*5. The current privatised arrangements could be described as self regulatory and have been a disaster for consumers but a bonanza for insurers, brokers and commission agents.*

6. ways in which the consumer policy framework may be improved so as to facilitate greater economic integration between Australia and New Zealand and ways to remove any barriers to international trade in consumer goods and services created by the current consumer policy framework.

### **Considerations**

In conducting the inquiry and making recommendations, the Commission is to have particular regard to: 1. the

- complementarities between Australia's competition and consumer protection laws;

*1. Currently all States except Queensland employ last resort consumer protection as the underpinning to their consumer protection regimes. However the coalition of these jurisdictions is under some pressure as the Tasmanian Government has made clear its intention to investigate the QBSA scheme with a view to implementing that system in*

*Tasmania as soon as could be practical. The Tasmanian Government has asked for and received support from the Tasmanian HIA for these investigations<sup>14</sup>*

*Every State Opposition has a policy platform of overturning the current last resort privatised schemes hence the political reality of these schemes is that they simply do not have the public support necessary for their long term survival.*

2. the shared responsibility of consumers, businesses and governments for responding to consumer issues;

*2. The Australian Consumers Association, publishers of choice magazine have labelled last resort builders warranty as making a "mockery of consumer protection"<sup>15</sup> and as 'junk insurance'<sup>16</sup>. Their views have not been considered by Government or business. Consideration to date has been dominated by industry associations (who receive commissions) and insurers who are clearly conflicted in their advice given to Government on this issue.*

3. the nature of consumer markets, including regional, national and international dimensions;

*3. The argument for a National Scheme makes economic sense and is likely the major impediment to the Tasmanian Government to immediate implementation of a Qld type system in that State.*

the implications of its recommendations for the consumer policy framework of New Zealand;

*4. The New Zealand Government have previously rejected the last resort model" however it appears recently that they are wavering as a result of intense lobbying by the insurance industry. A viable self funding National scheme could easily be extended to New Zealand to provide them with a world class consumer protection regime that they may otherwise not be able to implement alone*

5. recent developments in consumer policy overseas; and

6. the need to maintain consistency between the consumer protection provisions of the TPA and the mirror consumer protection provisions applying to financial services in the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*.

*6. Consumer rights and protection have been decimated since the introduction of last resort builders warranty and this is the simple fact that must be reversed as a result of this inquiry.*

*Above and beyond the letter of the law, the spirit of the law must be defended at all costs. The spirit of consumer protection law provides genuine protection in a fair, open, transparent and accountable environment.*

*This is not the reality in all States other than Qld; / ask this inquiry to change that reality.*

The Commission is further requested to:

1. take into account but not replicate significant current and recent review activity relating to the Taskforce on Reducing the Regulatory Burden on Business, the National Competition Policy reforms, Australian and New

- Zealand competition and consumer protection regimes, and the Australian consumer product safety system, as well as any other relevant reviews, including those undertaken under the auspices of MCCA; and
2. advertise nationally inviting submissions, hold public hearings, and consult with relevant Australian Government and state and territory government agencies, other key interest groups and affected parties.

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