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TRANSCRIPT
OF PROCEEDINGS

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**PRODUCTIVITY COMMISSION**

**INQUIRY INTO AUSTRALIA'S CONSUMER POLICY FRAMEWORK**

**MR R. FITZGERALD, Presiding Commissioner**

**TRANSCRIPT OF PROCEEDINGS**

**AT MELBOURNE ON WEDNESDAY, 21 MARCH 2007, AT 9.08 AM**

**Continued from 20/3/07**

**MR FITZGERALD:** Welcome to the second day of the public hearings in Melbourne into the review of Australia's consumer policy framework. As I indicated yesterday, this is taking place pursuant to the Productivity Commission Act and, whilst those that are providing evidence to the inquiry are not required to do so under oath, they are required to be truthful. If you can just give your names and the organisations you're representing, and then we'll get under way.

**MR DWYER:** Phillip John Dwyer, Builders' Collective of Australia.

**MR JOSEPH:** Russell Joseph, MR Constructions and a member of the Builders' Collective of Australia.

**MR FITZGERALD:** Fine. Thanks for going first. It's over to you. If you want to lead off for 15 minutes or so, then we'll have an opportunity to discuss the issues or whatever.

**MR DWYER:** If I may, I'll start with a very brief bit of history. Builder's warranty insurance: since privatisation 10 years ago, we've seen over 30 reviews and inquiries into consumer protection in the building industry. Many of these have specifically excluded warranty insurance, such as the recent review of licensing in New South Wales and the VCEC inquiry in Victoria, and yet, to be able to build in any state, the very first criterion a builder must satisfy for licensing is to have warranty insurance eligibility, a factor that can't be excluded.

The most significant inquiry was the Percy Allen inquiry in 2002, which stated the building industry and commission was in crisis and it was a community problem. However, its recommendations were not heeded, and in fact the Ministerial Council of Consumer Affairs chose to ignore it and instead adopted the 10-point plan on 1 July 2002, which came into being through the governments of Victoria and New South Wales inviting the insurers to make a market. In fact, the arrangements surrounding the implementation of this 10-point plan have now been questioned today from a probity point of view.

This was followed by the Grellman inquiry, which chose to ignore the facts and any detractors and so incensed the legitimate industry that some 20 organisations commissioned their own review of Grellman's inquiry and found it an irresponsible document. This review was conducted by Dr Peter Tyler.

Selected industry managers, HIA and Vero, and regulators, New South Wales and Victorian governments, have continued to bandaid the problems and have ignored the fundamental fact that the current regime of consumer protection is flawed. The Builders' Collective submission to the Productivity Commission when inquiring into reform of building regulations back in June 2004 remains applicable and forms part of this submission today. The Australian Consumers Association

summed up the situation accurately in Choice magazine in August 2004, stating, "This regime makes a mockery of consumer protection," a position again reinforced in January 2007 by Indira Naidoo of Choice on the 7.30 Report, when she referred to these policies as "junk insurance".

Particularly since the criminal collapse of HIH, compounded further by the disaster of 9/11, we've seen the insurance industry better their position and significantly reduce consumer protection to such an extent that the insurance policy they now provide offers the consumer no comfort in the event of a failed project outside the three triggers of death, insolvency or disappearance, and even then, with the insurance qualifications, any value as to be questioned. In fact, the ASIC web site as attached demonstrates questionable behaviour by most of the early providers of this product.

A press conference held by the originators of the last resort warranty on 29 September 2003 in Armadale, Victoria, celebrated the value of this product for both the consumer, the builder and the building industry, as the attached Rehane transcript demonstrates. HIA, Vero and the Victorian and New South Wales governments presented the product.

When a consumer is faced with a building dispute, he is faced with costly civil action over a protracted period, sometimes many years, and generally without an acceptable outcome, while the builder suffers the same fate and cannot achieve resolution to a dispute. What may start as a small problem escalates to a very significant problem with the involvement of many, all avoiding responsibility. The insurers sit on the sidelines, claim commercial-in-confidence and collect an estimated national premium take of some $350 million annually. Over the past five years that has amounted to $1.75 billion.

The building industry and its consumers are receiving little or no benefit from this warranty. In fact, in a recent submission by the Office of the Small Business Commissioner to the VCEC inquiry, he cited the unfair market practices of the insurers for his interest while supporting the position of Consumer Affairs Victoria, who suggested to the same inquiry that consumer protection would be enhanced by the removal of the requirement of warranty insurance, as it would remove the barrier for entry to compliant industry.

All states except Queensland are suffering from a noncompliant industry and an enormous increase in owner-builder activity. In Victoria owner-builder permits are running at 42 per cent, down from 52 per cent last year, after the Building Commission made it more difficult to obtain one of these permits. These figures are obtained directly from the Building Commission web site, and CAV states more than half the building industry is noncompliant.

Tasmania's upheaving in the building industry, with the criminal charges laid against the deputy premier in relation to their failed licensing system, further highlights the failure of the current regime. However, the new attorney-general, deputy premier, Mr Kons, appears to be addressing the issues in a professional and forthright manner, and is on the record as a clear supporter of the Queensland model.

The only supporters of the current regime are those that benefit financially from it, and to that end they suppress and threaten any detractors of the current regime. In the case of Vero, they have continually threatened the BCA with legal threats through their lawyers, Minter Ellison, as attached, even to the extent of demanding withdrawal and/or modification of a submission to the VCEC inquiry. Only when this matter was raised in the Victorian parliament did this conduct cease.

HIA, on the other hand, have continually threatened and undertaken various methods to suppress all, including the BCA, by attempting to defame, remove membership and instigate litigation in the Federal and Supreme Courts of the ACT. However, these methods are not confined to the Builders' Collective, as even their own office-holders are not immune, as the attached letter will show. Even consumers are subject to this conduct, as the letters to a Tasmanian consumer will demonstrate.

The Supreme Court action against myself and the Builders' Collective is based on my private letter written to the Prime Minister complaining of the failure of his minister for small business to support the small building businesses of the nation, and the fact her chief of staff, with whom we were dealing, chose to ignore our representations and accept a prominent executive position with the HIA, the very entity we were complaining about. The BCA has recently lodged a significant complaint with the Victorian ombudsman that targets some six segments that are of grave concern, and the covering letter is attached. The detail of these segments can be made available to this inquiry if requested.

Housing affordability has been the subject of debate recently, with claims the reason behind the problem is land shortage or government charge, and a raft of other claims. However, no-one, including the HIA, has been prepared to consider the increase of 71 per cent in the cost of building, as presented in the attached documents and explanations. The Building Commission trumpets record levels of building, but it is misleading, as they refer only to the dollar value, as permits are way down in the last two years to a level dating back to the late 90s. Yet the cost of the building permit has increased from an average of $62,000 to $106,000. In yesterday's Australian Financial Review the immediate past national president of the HIA, Mr Bob Day, called for the scrapping of builder's warranty insurance, stating, "The cost is out of all proportion to the benefit, and it should never have been introduced."

The building industry is a key economy driver. Its consumers and builders

derive every cent of income fROM the industry, and accordingly these two entities are the primary industry stakeholders. This inquiry has terms of reference that allow a holistic approach to the matter of consumer protection, which is exactly what is required. I urge this inquiry to research the Queensland BSA regime of industry management and consumer protection, as their industry is now of similar size to those of New South Wales and Victoria. It is transparent, accountable and cost-effective. It adjudicates for and is fair to both parties and delivers genuinely and time first resort protection for consumers. Contrary to rumour and innuendo put forward by HIA and insurers, this long established industry scheme is totally self-funding, provides no impost on taxpayers, and no private vested interest companies are involved. Its benefits will satisfy all criteria for consumer protection with any of our state's building industries.

We ask the Productivity Commission to adopt decisive leadership and direction in the matter of consumer protection for the building industry, which will in turn provide that legitimate and effective consumer protection, industry management, security of payment, warranty insurance, licensing and dispute resolution issues to be managed in a cohesive, transparent, accountable manner. This is consumer protection and this the outcome Australia deserves, and we ask this inquiry to adopt an immediate position in regard to this warranty insurance in light of the obvious failure of the product, as this farce has existed for far too long.

**MR FITZGERALD:** Thanks very much.

**MR RUSSELL:** I'll probably be lucky to get to 10 minutes. I'm going to follow through on the terms of reference point by point, so if you've got a copy of that, it might be just as easy to follow through and tick off each point. But, as I said, we'll concentrate on the aspect of consumer protection in relation to the building industry, and specifically in 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 builder's warranty insurance. 17 documents will be tabled as part of this submission. One is to be kept confidential, as the author has whistleblower protection in Victoria. Key considerations, items 1 and 2 - - -

**MR FITZGERALD:** I'm sorry, can I just ask, have you given us this submission, what you're reading from, or is this what you're going to give to us?

**MR RUSSELL:** I will give this to you as well.

**MR FITZGERALD:** But you haven't yet given it to us?

**MR RUSSELL:** No.

**MR FITZGERALD:** I was just trying to look through my papers. That's fine. Go on, let's go.

**MR RUSSELL:** No, the points I'm making are the points related to your - - -

**MR FITZGERALD:** No, that's fine. Sorry, I just thought I was missing a piece of paper, that's all.

**MR RUSSELL:** No, that's fine. Points 1 and 2 under Key Considerations: some of this will duplicate what Phil has said, but I suppose that's okay. A builder's warranty is an unnecessary burden on all building businesses which builders have falsely been led to believe is necessary for the protection of consumers. I table a letter to me from the premier of Victoria, Steve Bracks, which is, "BWI is a necessary mechanism to ensure that such a large purchase can be made with confidence." 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 the 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 ahs been clearly abused, and I table the document Commercial-in-Confidence Outsourcing Contracts and Accountability in Public Sector Activities by Alan Barton from the ANU. I will briefly read two sentences out of his conclusion:

> It has been shown how the use of CIC contracts for outsources activities undermines the operation of a democratic government through imposing a veil of secrecy on its activities. This enables ministers and the government to avoid their accountability to parliament and the electorate.

That's quite a detailed report. Point 3 under Key Considerations: the impact on consumers from the failure of builder's warranty insurance to provide adequate consumer protection is a fact that cannot be disputed. According to Justice Stuart Morris, president of VCAT, has stated that 40 per cent of cases on the Victorian building list are those where consumers are fighting insurers to honour claims. I table the document by Justice Stuart Morris. In 2002-03 the list decide 859 cases. 60 per cent of these were disputes between owners and builders, with the balance being appeals against insurers - 40 per cent of the building list.

At the recent New South Wales upper house inquiry, consumers were lining up to explain that the cover provided by last resort builder's warranty is ineffective and not protecting consumers from dodgy builders or from costly litigation. The insurers' response was not even to provide verbal evidence to that inquiry.

Point 4, Key Considerations: the responsibility for last resort builder's warranty insurance is a national issue. However, the federal government has been loath to take any action against insurers, brokers or agents that have profited handsomely from sales and commissions from a statutory product. I table an excerpt of transcript from the Senate inquiry of 2004, Senator Marshall asking Mr Simpson from the HIA: "So there are no commissions paid to your organisation?" This is in relation to insurance. "There are commissions paid, yes." They've also declined under commercial-in-confidence to tell us how much.

The federal government have consistently referred complaints back to the state governments. I have a letter tabled from the Honourable Fran Bailey MP, minister for small business and tourism, which was a letter sent to Phil Dwyer:

> To this end I would urge your organisation to pursue this issue with the relevant government representatives at state and territory level.

To say that that's already been done would be an understatement. However, the federal government has 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 builder's warranty 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, and again quoting from that letter:

> The best way forward is through raising this issue with states and territories and through the Productivity Commission inquiry.

So I'd suggest the buck stops here. Point 5, Key Considerations: 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. Consistency alone is not the answer.

Scope of inquiry, point number 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 exist. Insurers now avoid becoming involved in any dispute while the builder exists to fix his own work - theoretically exists, I should add. While the Victorian government has instigated the BACV process, consumers have nowhere other than the courts to go if their builder or insurer simply refused 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. I table an article in the Melbourne Age

quoting Margaret Lothian, senior member at VCAT:

> "It's going to be expensive, starting at $5000 a day," Ms Lothian says. "Even when you win, you can lose."

Some sections of the industry mistakenly believe that a voluntary model of consumer protection using last resort builder's warranty is the answer. I table a document from the HIA, Options to Improve Home Warranty. Briefly, what they're saying is a consumer-driven scheme is favoured, under which builders would have to provide completion and rectification unless the new homebuyer or home renovator formally waives the requirement. In a roundabout way they've arrived at the point of making it voluntary: consumers can buy it IF they want. We don't see that as being the answer, and I certainly don't.

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. I table the executive summary from the VCEC report from Consumer Affairs Victoria, where he describes exactly that issue. 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.

Point 2: the barriers to harmonisation and coordination of privatised last resort consumer protection are the same barriers behind the reasons for insurers' submissions to be falsely deemed commercial-in-confidence. Again I table a document from the Financial Review, Paul Jamieson, Vero Insurance:

> Mr Jamieson agreed that since 2002 paid claims had dropped significantly. He refused to say how low, citing commercial-in-confidence protection over the information.

Therefore, 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 again rear their heads to cause barriers to the effective sharing of resources and information. Without competitors it's private and commercial-in-confidence; with competitors it also. It doesn't make sense. 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 broad against the Victorian Building Commission by a Melbourne builder on recommendation by the privacy commissioner. I table the document which is confidential. It has information in there which you need to read, and the author of this has whistleblower protection.

**MR FITZGERALD:** You've marked it confidential?

**MR RUSSELL:** It's submission number 11 or attachment 11. I'll write "Confidential" now. I won't read it all. Suffice to say that the ombudsman - - -

**MR FITZGERALD:** I should just make the comment that anything you do read out is on the public record.

**MR RUSSELL:** Right. Well, perhaps I won't read it out. I'll let you read it for yourselves - that might be better - but the comments in there are quite damning. A major warranty insurer has recently identified that a way forward for them in builder's warranty would be to exempt insurers from such privacy laws and to enact exemptions from the Trade Practices Act, amongst others. I table a document from Vero Insurance, from their web site, where they're looking for specific legislative override of privacy and trade practices and specific exemptions for FOI and related procedures to ensure data information submitted cannot be accessed by others, and also remove CAV, Consumer Affairs Victoria, and the small business commissioner from any involvement. I think that document speaks for itself.

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.

Point 3: there has been no publicly accountable cost-benefit analysis done on last resort builder's warranty insurance. All figures submitted, and all data submitted by the insurers are taken at face value by government, with no independent academic scrutiny allowed by government. I table an excerpt of the VCEC's submission, given by Vero Insurance, with no data, marked "Strictly confidential." The current last resort builder's 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, ministerial order only.

Point 4: the Queensland government is the only jurisdiction to maintain a public policy based consumer protection regime for the building industry. The QBSA has control over licensing, registration, security payment, consumer protection and dispute resolution warranty. It could be implemented on a national scale without any problem, with no net cost to government, as the scheme is completely self-funding, transparent, accountable and fully audited. One of the key reasons for a positive costs-benefit analysis is that it's free of any private sector financial vested interest. Nobody makes any money out of it. I also tender the commercial-in-confidence inquiry by Alan Barton from the ANU, articulating that when things are kept secret is when the perception of corruption is allowed to flourish.

Currently the CIU in Victoria 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, and again that's detailed in that confidential document. I believe this case will be the first of many. The current privatised arrangements could be described, point 5, as self-regulatory and have been a disaster for consumers but a bonanza for insurers, brokers and commission agents.

Under Considerations will cut to the chase fairly quickly. I know we're running out of time. 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 it. I table a speech given the attorney-general, Steve Kons, given to the HIA awards last year, where he had invited the QBSA down and he was looking for a positive report.

Every state opposition has a policy platform of overturning the current last resort scheme, so the political reality of these schemes is that they simply do not have the public support necessary for their long-term survival. Again, the Australian Consumers Association - Phil has already mentioned that. I won't go into that again. Under Considerations, point 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 Queensland scheme; that is, they're only a small state. If it was a national scheme, I'm sure they'd be in it immediately. I also table the 7.30 Report, where the ACA described it as "junk insurance".

We've talked about New Zealand, point 4 under Considerations: the New Zealand have previously rejected the last resort model, and I table a letter from the Honourable Chris Carter MP, minister for building issues:

> The introduction of homeowner warranty insurance was ruled out at that time because of supply issues and because it was not clear that the benefits of the mechanism outweighed its costs.

So they've already looked at it, and this was in 2005, and decided that it wasn't worth it. To finish off, consumer rights and protection have been decimated since the introduction of last resort builder's 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, and 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 Queensland, and I ask the inquiry to change that reality.

**MR FITZGERALD:** Thank you very much. We do have a little bit of time, so I just want to explore some issues. Can you just explain to me a couple of things.

What is it about the QBSA scheme that appeals to you over and above what you regard as the failed state schemes that exist elsewhere? What are the essential feature of the QBSA scheme that you maintain shows that it's a much better model than the others?

**MR DWYER:** I've maintained this position right from when the Builders' Collective was first formed, because I went up there and spent some four days researching that scheme and the QBSA made me very welcome, et cetera, so I went right through it. It's half the cost. The insurance industry will refer to average premiums and so on, which might involve just little tiny jobs and so on and so forth. If we take what's termed an average home, which is about $220,000, we're looking at around $3000 in New South Wales, $2500 in Victoria, for the cost of insurance for that, and that's last resort insurance. In Queensland it's $1680 for first resort insurance, to the level of $400,000 cover, whereas in Victoria it's $200,000 cover. It is first resort, and it also in Queensland includes subsidence and settlement if there are faulty footings and so on. So it excludes the builder from that circumstance and brings that back to the engineer.

As well as that, what the Queensland system does - and this is the aspect that we want to see - is adjudicate. One person makes a decision on the complaint between a builder and a consumer. The consumer is told he's being unreasonable or the builder is told he needs to fix it. He's given 30 days to fix it, and if he doesn't, the fund pays for it. That gets the consumer out of the equation straightaway. QBSA then take their necessary action against the builder for his conduct, if it's found to be wanting. It's a system that does work quite well.

We don't have to have exactly the same system as Queensland, as long as we have a system of adjudication, because building is such a personal issue. We invade people's private space and so on. It becomes very personal because it's their home. So we need a system both for the builder and the consumer that is adjudicated in a very timely fashion. Warranty insurance become a secondary circumstance that does look after the last resort aspects if a builder goes broke and is not available to fix it.

That's why we should have warranty insurance, not for rectification of problems. Builders should be accountable. If they enter into a contract and say they'll deliver a certain project, that's exactly what they should do. If they don't do that, they need to be flicked out of the industry altogether and dealt with in a very timely manner, none of this five or six years and millions of dollars later through the legal system. We want a system of adjudication where a person makes a decision on the complaint, whether it be from the builder or the consumer, because all these things are a two-way street. So we must be seen to be fair. While an adjudication system may on very rare occasions make a mistake, it will be a very small price to pay in relation to what everyone is paying now.

**MR FITZGERALD:** Can I just go back in history, then. Did we have an adjudication system and what you call a first resort system in the states that now have the last resort system?

**MR DWYER:** Yes.

**MR FITZGERALD:** We moved from that. What was it that caused the governments of the day in a range of jurisdictions to move from what you regard as a first resort system?

**MR DWYER:** Money.

**MR FITZGERALD:** Whose money?

**MR DWYER:** The government-run schemes in Victoria and New South Wales had considerable funds when it was privatised in 1996. Therefore - we'll refer to Victoria - some $140 million in reserves was grabbed by the Kennett government and privatised and handed to the insurance industry. Initially it was a bad mistake. We fumbled along and so on and so forth - no big issues until HIH came along. That created an absolute disaster. Thousands of builders lost their livelihood overnight, lost their businesses. Many went to the wall. There were eight suicides in New South Wales alone, none more prominent where the one from Orange, where young Adam Regan took his own life, simply because his income stream was cut off. We went through this huge amount of angst, with the insurance industry claiming that so many builders were going broke and so on, which is totally to the ITSA in terms of insolvency. Vero Insurance, in submitting figures to the VCEC inquiry and others, has turned around and claimed enormous amounts of insolvencies, yet ITSA's, for the whole of every sector of the building industry - not builders, every sector of the building industry - are a fraction of what they present to inquiries and so on.

**MR RUSSELL:** Can I just mention something goes back to the HGF, which is what you were asked about. I know someone who was on a panel of three that used to adjudicate on building issues, and out of 300 adjudications that this particular panel did I think there were six appeals and only two of those appeals were upheld. So it's not a bad strike rate. I don't know whey the HGF was rolled. I think at the time - and possibly the PC was involved - it seemed to be a good idea: if the private sector could provide something, why should government be involved? Queensland, by the way, decided not to go down that path. They went their own way.

But what we've seen, unfortunately, as this has rolled out over 10 years, is what government can't do is abrogate their responsibility to the private sector. Consumer protection is one of those areas that the private sector hasn't managed well at all because, by definition, more consumer protection will be provided if they make less

money. They're in business to make money, so by definition less consumer protection will be provided and they will make more money and be more profitable.

That's been the problem. Philosophically it defies logic. It doesn't work. It's a very key component of a government's responsibility. So I don't know why it changed other than the fact that there seemed to be this overriding theory that, if the private sector could provide insurance, let them provide it and let the government get out of it. But it's not the insurance; it's the issue. It's the philosophy underpinning it which is the problem.

**MR FITZGERALD:** Can I just deal with a couple of things there. I'm not expert at all, so let me ask some very basic questions. One is about the coverage issue. It strikes me that in your paper you're talking about last resort only covering those situations where effectively the builder has become insolvent or disappeared.

**MR RUSSELL:** Or died.

**MR FITZGERALD:** Then in your comments just a moment ago you talked about rectification. Am I correct in understanding that QBSA deals with rectification as well as insolvency and what have you, covers that field?

**MR DWYER:** Yes.

**MR FITZGERALD:** Whereas home warranty as it's been developed in the other states is only about last resort, not about rectification work?

**MR RUSSELL:** Yes, the consumer by definition of last resort - - -

**MR FITZGERALD:** But what happens with rectification in the other states, with home warranty insurance. I take out home warranty insurance - I'm compelled to do that - but that only covers me if the builder goes broke. What happens if the builder refused to rectify?

**MR RUSSELL:** You have to pursue him civilly yourself, and that's where we're getting to VCAT and the enormous cost of litigation and the complexity of it. You can go to BACV, or Building Advice and Conciliation Victoria, and try to mediate something, but if one party wants to be difficult, forget it, because nobody is actually making an adjudication and saying - - -

**MR FITZGERALD:** Let me deal with that. Are there compulsory adjudication or mediation processes in the other states?

**MR RUSSELL:** No. They're not compulsory, it's voluntary, and builders can - - -

**MR FITZGERALD:** So it's voluntary on both sides?

**MR RUSSELL:** No, consumers are the only ones that can access BACV in Victoria. As a builder, I can't see a dispute with my client and suggest we go there. They have to instigate it.

**MR FITZGERALD:** Okay. But if a consumer raises a complaint, a consumer may or may not choose to use that mediation process?

**MR RUSSELL:** Correct, yes.

**MR FITZGERALD:** But if a consumer does in fact choose to use that mediation process or adjudication process, is the builder required, either by law or by something, to actually participate?

**MR DWYER:** No, it's non-binding.

**MR RUSSELL:** It's non-binding, and the only thing that ends up happening is if there's a genuine dispute - and they're complex when they occur, and they do occur - is that it ends up in VCAT, and I think one of the people speaking later will testify to how many hundreds of thousands of dollars they've spent on litigation, with still no progress.

**MR FITZGERALD:** In relation to Queensland, however, it's a compulsory arbitration scheme?

**MR RUSSELL:** No, it's not arbitration.

**MR DWYER:** It's adjudication.

**MR RUSSELL:** It's adjudication. Somebody will go there and adjudicate and say, "This is the problem, this is the problem." It happens I think even sooner than 30 days, as Phil said.

**MR DWYER:** It does.

**MR RUSSELL:** I think it's within two weeks.

**MR FITZGERALD:** Again, can I just stop you there. Is it mandatory? In other words, if there is a dispute, you have to go to adjudication?

**MR RUSSELL:** Yes.

**MR DWYER:** There's a direction made, yes.

**MR FITZGERALD:** And both parties are obligated to enter into it?

**MR DWYER:** Correct.

**MR RUSSELL:** You can't bypass it and go to the Supreme Court.

**MR FITZGERALD:** And that's for rectification and the last resort?

**MR RUSSELL:** Yes, that's right, and if the builder just doesn't want to participate or doesn't want to fix it, the scheme isn't going to argue about that for a year or two or anything else in court; they will sideline the builder, as Phil said, they will fix the problem so the consumer is looked after, and then they will pursue the builder if necessary. It's worth noting that, even with those costs, the QBSA scheme is self-funding and profitable and that the premiums are half the price of what we pay similarly here as a category 3 builder. There's a lot of misinformation around, and even from government departments, about the viability of the Queensland scheme, but it is completely transparent and accountable.

**MR DWYER:** And it is very well worth noting that the increase in the building activity in Queensland over the last five years is some 45 per cent, compared to Victoria at 1.4 per cent and New South Wales at 9.4 per cent. Western Australia is at 38 per cent, but that's only brought about because two builders only do 85 per cent of all the building in Western Australia and those builders are underwritten by the government for any catastrophic events over $10 million.

**MR FITZGERALD:** Can I just understand, in relation to the QBSA, where there's a premium - is it called a premium paid by the builder into that fund?

**MR DWYER:** The builder provides the premium on behalf of the consumer.

**MR FITZGERALD:** Yes, so they pay it. But over and above that, the builder also has private insurance to cover any problems or difficulties in the work itself, doesn't it?

**MR RUSSELL:** Just normal contract works public liability.

**MR DWYER:** Contract works, yes, as we all have.

**MR RUSSELL:** But there's no warranty insurance such as what we have. That's completely covered in-house, managed completely by the QBSA. They look after, as you said, licensing, warranty insurance, security of payment, dispute resolution. It's all managed under one roof so that they can control who's coming into the industry and who's going out.

**MR FITZGERALD:** That separate insurance is also taken out by builders in all the other states at the same time as the home warranty. What I'm trying to understand is, in the home warranty one, is the home warranty covered as part of a package of insurance which covers everything else?

**MR RUSSELL:** No.

**MR FITZGERALD:** It's completely separate?

**MR RUSSELL:** It's complete separately insurance.

**MR FITZGERALD:** So when you say the premiums in Victoria are much greater than the premiums in Queensland, that's not offset by any other reduction in the insurance you pay?

**MR RUSSELL:** No, not at all, and in fact, as Phil said, the cover that we have in Victoria for last resort builder's warranty insurance is only to half the value and it's virtually impossible for a consumer to claim on anyway, whereas up there consumers are getting paid all the time.

**MR FITZGERALD:** As I understand it, there have been numerous inquiries, and you've referred to a number of them now. Why do you think at the end of the day governments have continued to use the private insurance route if it's not delivering the benefits that are claimed?

**MR RUSSELL:** Phil will have some comments, I'm sure, on this, and I'll briefly say that, with all of the evidence available, last resort builder's warranty is not working and has failed consumers. It's clear, it's obvious. Every opposition, Labor and Liberal, around Australia, whether it's federal or state, can see that it's a farce, but government has refused to move. This has gone on for so long that the only conclusion that I can draw is that there has been a deal done with the insurance industry to maintain the status quo, and I cannot think of any other reason why they continue to deny the obvious.

**MR FITZGERALD:** Two questions. Could they be saying that the problem is not as great as you say? In other words, could they be saying, yes, they acknowledge the problem, but the problem is not sufficient to warrant a wholesale change of the scheme?

**MR DWYER:** No.

**MR FITZGERALD:** What's the evidence that the problem is as great - - -

**MR DWYER:** It's a complex issue. We have this arrangement. The arrangement is - and you've got to keep in mind this 10-point plan was devised and put together by Vero Insurance, Royal Sun Alliance at the time, the HIA and the governments of New South Wales and Victoria. They are the four parties that are party to this 10-point plan. The governments for some reason decided after the HIH collapse that they had to have consumer protection, so they asked the insurers to make a market, a term used in the VCEC inquiry. If we refer to the attorney-general in Tasmania, minister Judy Jackson at the time - and this in Hansard - the insurers held the states to ransom when they made a market. So they produced this product.

Now, that was under an arrangement. New South Wales have entered into a deed of arrangement to assure the insurers that they will change anything. The industry itself, such as MBA and all other associations such as ourselves - and I might add MBA support the position of the Builders' Collective, not everywhere because it's fragmented, but most certainly New South Wales totally and publicly support our position. Victoria sometimes do, depending on the mood of them.

**MR RUSSELL:** Phil, can I just cut you off there because I know we're going to run out of time. You asked me is the problem big enough. That is what you originally asked.

**MR FITZGERALD:** If the government has moved from a government-run scheme to a private scheme, which effectively what it's done, and that's the - - -

**MR RUSSELL:** Why move back if the problem is not big enough?

**MR FITZGERALD:** Then the question for governments will be: why move back? There's a second question, but one of the questions is: is the problem under the current scheme sufficient to warrant a change?

**MR RUSSELL:** Correct. That's right, the evidence of the problem is at the moment bound up in those 850 cases in VCAT in Victoria every year. Every one of those cases, suffice to say for probably the three or four that you'll hear about through this inquiry, is bound by secrecy. It's litigation, and the advice from lawyers is, "Don't go public, don't do anything." Any settlement to an insurer is usually not a settlement; it's a capitulation. Someone has been deep-pocketed out of it; they can't afford to do this any more. The problem is there and it's huge, and one of the key issues in this is that there is no evidence provided by the insurance industry as to the amount of premiums they take and claims that they settle in favour of consumers - none whatsoever.

Until that information is on the public record, independently verified and audited, then we simply don't know, but we're allowing these insurers to continue to exploit consumers at VCAT, and we don't even have any evidence of anything. We

don't know how many claims are settled.

**MR DWYER:** We must also really target the insurers' intrusion into small business such as small building businesses or larger building businesses. Everyone is subject to an annual eligibility certificate. Without an eligibility certificate, we can't get registration. Without warranty insurance, we can't get a building permit. These insurers limit the turnover of our business and limit the size of projects that we're able to build. It doesn't matter what we might have done for 30 or 40 years; every year builders go through the angst of whether they're going to get eligibility or whether some consumer has made some complaint and the insurer may make an arbitrary decision to withdraw eligibility.

This is not appropriate. Why does this industry have such an intrusion on their business? We live in a democracy. Such control over our businesses and so on is not appropriate. Every building business in Victoria hates this insurance, will not put their head above their parapet for fear of losing eligibility, as many have in the past. This suppression of our industry and so on is just not appropriate.

**MR RUSSELL:** There's a large amount of fear of retribution from the insurance industry on behalf of builders. They will not complain. They won't come here and speak. They are terrified that insurers will take vengeance upon them. We've had that experience and, because we've got a profile in this, we have to be very careful. Many people are very intimidated.

**MR FITZGERALD:** One of the arguments could be that in fact insurance companies are very good at risk assessment. That's their business. They might say that governments are poor at risk assessment whereas insurance by nature has to be good at because that's their business.

**MR RUSSELL:** We understand that, but again we need to look at the evidence in Queensland. It has operated since 1996 successfully, without hitch. It has been improved and streamlined and modified continually. It is a completely transparent, accountable system. The risk assessments are there and published. Everybody knows; it's quite clear. The only thing in Queensland is that not one insurance company nor trade association nor insurance broker can make one cent out of it.

**MR FITZGERALD:** From what you've been indicating, I presume that the HIA is in favour of the current home warranty arrangements.

**MR RUSSELL:** Their position at the moment is to make it voluntary, like keep the same product but make it voluntary so a consumer can choose whether they want to buy it, like home insurance.

**MR FITZGERALD:** Why would you do that?

**MR RUSSELL:** You'd have to ask them.

**MR DWYER:** If we go back to 2000-01, HIA weren't in a great financial position . You've got to keep in mind also that HIA is not a trade association that represents members per se. HIA is a private company with 10 directors. They also have the brand name HOW, homeowners warranty, which is the vehicle to deliver this product. It's also a private company with private directors and so on. When 146 HIA members called for a general meeting under 249D of the Corporations Act to address this issue back in 2004, they were told by the HIA, by letter to the whole 146 of them, that they are not the class of person that has any voting rights. Here we have an organisation that purports to represent its members. The members have no say in it. Any member that puts their above the parapet and criticises this circumstance gets it knocked off or their membership withdrawn, as was my case after 18 years. They withdrew my membership for no reason at all, which of course denied me access to insurance. Now, that's denial of income.

Is this appropriate sort of conduct? Here we have a trade organisation that's supposed to be representing the builders. However, they don't and, if we look at their returns, they have increased their asset base by $32 million since the introduction of this compulsory - - -

**MR FITZGERALD:** So, to clarify, HIA receives an income stream from the sale of this insurance through the home warranty.

**MR DWYER:** Huge.

**MR FITZGERALD:** But can you just clarify for me, are you saying that if you are not a member of HIA, whatever that means, then you can't access that insurance?

**MR DWYER:** No. That was the case. They had a monopoly, according to the Grellman inquiry. The duopoly of Royal Sun Alliance and HIA - and this is public in this public inquiry - had 92 per cent of the market, because that was the only place that you could access it. Our complaint to the ACCC opened that market up, but nothing alters the fact that they had a captive audience of 92 per cent of all builders in Australia. That's been manipulated ever since and so on, where they've sort of moved them over the CGU because they had a fall-out with Vero. They by stealth have moved everyone over to CGU. But it doesn't matter: we can have a million providers of this insurance; it still comes down to the fact that you can only have eligibility with one insurer, and you can't go out to a so-called competitive market, because you can only have eligibility with one insurer.

So we don't have an open market. This is a democracy we live in, for Heaven's sake, and this is supposed to be consumer protection product. We're paying these

billions of dollars in consumer protection; no-one is receiving any benefit from it. Do you like paying for something and getting nothing for it? It's like burning money in an ashtray. What's the point of it? As Consumer Affairs Victoria have stated, "Remove it altogether and we will enhance consumer protection." They're the people that should that should know more about this than you and I do from their perspective. That's what they're there for.

**MR FITZGERALD:** Is it not possible to have private insurance in relation to these areas and incorporate into that an adjudication process?

**MR DWYER:** No. We don't want that. What is the value of the insurers? The evidence is so blatant that the insurers are not providing any benefit. Why have them? We can run the building industry a lot better ourselves, with proper adjudication and warranty insurance and so on. The industry can run it ourselves.

**MR RUSSELL:** I think they are a bit tainted, and if you read that confidential submission that I've tabled, you'll see that where there's so much money involved it's not appropriate to have those sorts of private companies involved in something like consumer protection. The insurance industry have their own ombudsman, but here we are putting the industry in charge of consumer protection. It makes no sense.

**MR FITZGERALD:** I'm just throwing questions at you so that I get a better understanding of it. In most other areas of risk we do in fact use private insurance as the main way by which we protect ourselves. In most areas of activity private insurance is the way by which consumers are protected over and above anything else we might do. There are very few government schemes that have compulsory adjudication in them. Admittedly, the dollar amounts we're talking about are much greater here and home building is different from any other products, but nevertheless as a general notion we do deal with risk by private means normally.

**MR RUSSELL:** The QBSA is exposed, I suppose, realistically, to reinsurance, which is obviously private companies, but that's a different matter from the up-front retail insurance. They have also imported into that organisation professional people from the insurance industry who know how to assess and manage risk. They haven't, with all due respect, just got people from different departments of various bureaucrats to run it. They have imported and hired professionally capable people to manage and run that scheme, and that's why it succeeds. It's not just something run out of a government department somewhere with whoever is available. They have actively recruited the brightest and the best to manage that scheme.

**MR FITZGERALD:** When you say there's no need for the insurers, you're not saying there's no need to cover the risk, are you? You're saying that there's no need for private insurance but there is a need for a scheme that covers the risk of insolvency and all those sorts of issues?

**MR DWYER:** Absolutely.

**MR RUSSELL:** It's not even insolvency; it's the fact of when a builder is not able or available or willing to fix the problem, and in Queensland that's called first resort, where he doesn't have to die. The first option for the consumer is to go to the QBSA, and they will fix the problem regardless.

**MR FITZGERALD:** What about New Zealand? You mentioned that New Zealand rejected going to a last resort model. What have they got over there, do you know?

**MR RUSSELL:** My fear at the moment is that they seem to be wavering, because the lobbying from the insurance industry is intense that they can provide them a much better option. Again, I would challenge the insurance industry to come up with verifiable, audited facts and figures to prove it, and we're talking about consumer protection figures.

**MR FITZGERALD:** Explain to me, what would the insurance industry be saying, say to the New Zealand government, that would encourage them to even contemplate it? When you say they are putting forward a better product, what would be the benefits that - - -

**MR RUSSELL:** I've got no idea what they would say, none whatsoever, and I think you'd need to ask them what they see as the great strength of the scheme that we've got in Victoria. I think the insurers need to actually answer that question.

**MR FITZGERALD:** You make a comment in the paper, just in your points, that HIA and the insurers seem to indicate that the program running QBSA is not necessarily cost-effective. You maintain that it is.

**MR DWYER:** Yes.

**MR FITZGERALD:** Can you just explore it for me briefly.

**MR DWYER:** It's 10 years of balance sheets from the QBSA and so on demonstrating that it's totally self-funding and it is profitable.

**MR RUSSELL:** They produce an annual report every year which is audited by the auditor-general, and the rumour has always been that it's propped up by the taxpayer with millions of dollars pumped in every year to support it. That is false, utterly false, and there is not one shred of evidence to support that anywhere. We've met with former minister John Lenders and I had the annual report - this is in Victoria - and there was a table full of department staff and other politicians. I said, "I defy

anyone to tell me, find me in this annual report, where this money has been injected." Nobody put their hand up, and I'll guarantee you that it doesn't exist - and we've clarified that directly with the QBSA.

**MR FITZGERALD:** Okay. Are there current inquiries being undertaken in some of the states at the present time?

**MR DWYER:** Yes, one in Tasmania, but it's been shut down until the criminal charges against the former deputy premier are heard; one in New South Wales, which was shut down by the calling of the election two days before the draft report came out; and a third one which would have been submitted to the notice paper in the Victorian parliament last Thursday, however the paperwork wasn't able to be finalised, and it will be resubmitted.

**MR FITZGERALD:** So you expect the Victorian one to proceed?

**MR DWYER:** Yes.

**MR FITZGERALD:** The New South Wales one, you say, is shut down because of the calling of the election.

**MR RUSSELL:** There's a word for it, "prorogued".

**MR FITZGERALD:** Prorogued, yes.

**MR RUSSELL:** Yes, that's right.

**MR FITZGERALD:** And the Tasmanian one is in abeyance?

**MR DWYER:** In abeyance until such time as criminal charges against the former deputy premier are heard over the matter.

**MR FITZGERALD:** Okay. I'll be pleased to look through all of those papers that you've just tabled and will do so.

**MR DWYER:** I will also be tabling this lot of papers as well, which supports everything that I said in that document.

**MR FITZGERALD:** Okay, that's fine. Are there any concluding comments you'd like to make before we wrap up?

**MR DWYER:** We need proper consumer protection. The consumers that need this product are the ones that are being very adversely affected at the moment. We do need timely consumer protection. We don't need this farce to continue. The

Australian Consumers Association got it right with "junk policies". We're paying a lot of money for nothing. We can provide our own consumer protection within the industry, which the industry is quite happy to have, to have a properly regulated and managed industry, because we're not happy with the management of the industry either. If we had these arrangements put in place, we would have a properly serving consumer protection regime and industry management regime. We do need private entities out of our businesses and our lives.

The building industry should not be the only businesses in Australia or anywhere else in the world that has such intrusion into the operation of a normal business in a democracy.

**MR FITZGERALD:** All right, thank you very much for that. That's great.

**MR DWYER:** Thank you.

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**MR FITZGERALD:** I'm Robert Fitzgerald. I'm the presiding commissioner on the inquiry. There are two other commissioners, Gary Pott and Philip Weickhardt, also, who are doing public hearings elsewhere. If you could give your name and your position and the organisation you represent and then we'll get on with the task at hand.

**MR McALOON:** David McAloon. I'm head of regulation and government relations at TRUenergy.

**MR HAMILTON:** Graeme Hamilton, regulatory manager at TRUenergy.

**MR HRISTODOULIDIS:** Con Hristodoulidis, regulatory manager at TRUenergy.

**MR FITZGERALD:** Fine. If you want to give us some key points for the next 15 or 20 minutes, and then I can ask some questions and have a discussion.

**MR McALOON:** We don't believe for a minute that energy is unique in that it's subject to regulation. We think energy might be a little bit more unique than some other industries in that the level of jurisdictional regulation and derogation is probably considerable, and we'll expand on that. We'll talk to start with about the current framework: vulnerable customers in energy, and I know that vulnerable customers is one of the matters that the commission was particularly interested in; whether there's a requirement for generic versus industry-specific regulation; what the jurisdictional responsibilities should be; and the gatekeeping arrangements.

In terms of the current policy framework in the energy retail sector - so we're talking retailing here - the energy sector is divided into three parts really, which is generation, distribution and retailing. Generation is a merchant business, market facing business; distribution is a regulated business - that's transmission poles and wires; retailing is a merchant business, but a tangled-up business in terms of price regulation and so on. So it faces a merchant market in terms of the wholesale cost impost, which fluctuates according to market forces; it faces the charges that regulated entities pass through; and then it has a price cap on its own ability to pass those costs through the market.

Within that context, distribution companies are responsible for supply reliability and quality. Our framework generally is based on a combination of generic federal and state laws, state based legislation, licensing, industry-specific codes and guidelines. In particular they apply to things called default supply contracts, which is the contract that prevails in the event that there is no other contract entered into, so it's a deemed contract or a default contract; credit management, sales and marketing, where there's considerable jurisdictional specific legislation and regulation; disconnection processes, obviously sort of unique to our

industry, and information disclosure. Con, if you could just run through the general framework in terms of this document, which we'll table, unfortunately.

**MR HRISTODOULIDIS:** Yes, the table that we did is probably not very clear.

**MR FITZGERALD:** I've got that, yes.

**MR HRISTODOULIDIS:** We have some bigger copies, if you like. We can leave them behind. The table that we have really looks at the industry-specific laws and regulations that the industry faces, and what sits above this, which is not on this diagram, are the generic laws that are in place, such as the Trade Practices Act, the privacy laws, and other bits of legislation which are generic across most of the sectors. Here we just put forward the industry-specific one.

In each jurisdiction we have energy industry acts. They basically govern the structure of the industry, and from that we flow into regulations, where we then get the details around how we interpret the legislation, and underneath that we have a licensing, code and guideline system. The licensing comes out of the legislation, but part of the licensing requirement is that we adhere to all the codes and the guidelines that the state jurisdiction regulators in the energy sectors produce.

All state jurisdictions have an energy retail code, except for New South Wales, where the provisions of the codes from other jurisdictions are embedded within the regulations themselves, which is a little bit different, and then in most states we also have guidelines which build on what's contained within the codes. As you move down the diagram, the level of detail obviously becomes far more prescriptive and there's far more detail.

Just to give you an example of how it all works, in the act you'll find things like energy is an essential service, and the requirement of that is that we need to ensure that people stay connected. Part of our licensing obligation, then, is that we provide energy to people without disconnection for nonpayment, and then that goes into the code, where the code then details the provisions that we need to follow before we can disconnect somebody for nonpayment. Those are things like the number of notices we need to provide, the length of time for which those notices need to be provided to them, and things like that, and then in some jurisdictions, like Victoria, we then have guidelines or operating procedures. For example, we have an operating procedure for wrongful disconnection which not only goes into the detail of the amount of notification we have to provide and the time between the notifications, but also tells you what time of day, such as business hours or after hours, that you need to contact somebody, the type of information that needs to be contained in that notification.

That's generally how the structure flows, and that's not just Victoria, but across

all jurisdictions where we have FRC, and we're just going through that process in Queensland as well - FRC being full retail contestability.

**MR McALOON:** We touched a bit on dealing with vulnerable customers in the energy sector through that example getting down to operating procedures that are written for us by a regulator that don't take into account necessarily an understanding of our business or our business processes. We're not disputing that the needs of the vulnerable and disadvantaged in the community need to be managed. I guess the question is whether they're best managed through generic approaches or targeted approaches as opposed to industry-specific approaches that seem to impose considerable cost burdens on businesses such as ours.

Retail price controls are often referred to as safety nets by governments. Governments rarely ask themselves when they set the price for a safety net, "Is this the most efficient price in the market or could energy be any cheaper?" In fact, they are setting a price which historically is the price to beat in a competitive market, and that is the highest price in the market. It always seems to us there's a bit of a disconnect between getting a consumer who's vulnerable and disadvantaged and insisting that they pay the highest price in the market.

**MR HRISTODOULIDIS:** There are probably two distinct groups of vulnerable customers in the energy sector. There are the vulnerable customers from a sales and marketing perspective, so you're looking at people like the elderly, people with disabilities, people under the age of 18, and obviously there are requirements under the Trade Practices Act for unconscionable conduct, and there are also Fair Trading Act requirements in jurisdictions that regulate that activity, but in the energy sector each jurisdiction also has a marketing code of conduct, which not only takes what's contained in the generic legislation but also builds on that and provides a few more restrictions in terms of our activities, and I think Graeme will go into a little more detail when we talk about industry-specific versus generic legislation.

But the other group of vulnerable customers in the energy sector are those with financial difficulties in meeting their energy needs. Again, in both those scenarios, as David has alluded to, the state governments have relied on price caps predominantly to provide protection for them, but more recently in Victoria we've had a situation where, when we've renegotiated our price cap with the state government - that's ourselves and the other two host retailers in the state - we forwent part of our gross margin over a two-year period to actually provide some targeted and specific programs for customers with financial difficulty. We had to prepare a program, which was approved by the minister, and going forward that program will now be approved by the Essential Services Commission here in Victoria.

The question you need to ask yourself is: is using the price mechanism the best way of providing financial support for these customers? We would potentially argue

no, it's not. By using the price cap to deliver these programs, you're actually asking another group of vulnerable customers who have stayed on the default or the deemed contract and are paying the regulated price to actually fund the activities for those who are in financial difficulty. In some cases it may be one of a kind in terms of the customer base. We believe that this type of approach does create barriers to entry and it makes it difficult for other new entrants. We also believe, as David alluded to, that it doesn't promote competition, because these customers would tend to fall back on the deemed or the default provisions as a way of protection, and if they were actually to go out in the marketplace they'd probably source a better product in terms of pricing outcomes and therefore a better outcome on their financial position .

We believe it continues the process of embedding subsidies in the pricing of the retail product. One of the reforms of the COAG report into the energy sector back in about 2003-04 was to remove cross-subsidies between different retail customer bases, but this approach continues to promote that type of approach and therefore customers aren't seeing the true costs of their energy consumption.

So we believe in terms of those in financial difficulty a better approach is to have a process where the programs are funded through some open and transparent program which is also funded across the whole of the tax base, whether you do it at the jurisdiction level or across the federal level through the tax system. At least the burden then is spread. It's a social decision made as a taxpayer and a vote that you're willing to provide a level of support through the tax you pay for these customers to continue to maintain supply.

**MR McALOON:** One of the perverse outcomes of the gross margin foregone model is that that's actually $8 of additional headroom that can be competed away. So the subsidy is slowly eroded anyway by the effect of competition, and you have fewer customers on those tariffs paying a greater burden in terms of providing this type of program. So it's not a sustainable model.

**MR HRISTODOULIDIS:** Just moving across to those other groups of vulnerable customers, the elderly, people with disabilities and the youth, again we don't think a case has been made why we need specific market retail codes in our sector. We don't see the difference between a consumer that would be buying energy as opposed to buying some other product or service that would have additional requirements on top of what's in the generic legislation, but I think Graeme will go into a bit more detail on that as well.

**MR HAMILTON:** Thanks, Con. The issue that's always in the back of our minds is: what is unique about energy? Obviously there are unique aspects in terms of the supply of the commodity that we're providing, and they're captured in terms of retail code. The disconnection procedures, the reconnection procedures, access to meeting arrangements - those sorts of things are obviously required because of the unique

nature of energy. When it comes to the marketing of energy itself, that's when I argue that's probably the clearest example of duplication with the generic consumer protection framework that's unwarranted. Essentially the sale of the product is no different from the sale of any other commodity in the marketplace.

Instead what you've seen emerge over time is a framework to deal with marketing codes of conduct, which essentially, I'll say, set out to initially restate the general consumer protection law through trade practices and fair trading legislation, invariably restate them and extend them, providing their own jurisdictional interpretations. For things like misleading and deceptive conduct, the jurisdictions will attempt to come up with their own interpretations of what those breaches would actually incorporate in terms of a breach for an energy retailer.

Similarly, in Victoria they have an explicit informed consent code, which essentially re-interprets the Privacy Act. The Privacy Act talks about the reasonable expectations of a consumer being marketed by a third party. The ESC came through with a decision that essentially a customer supplied by an electricity retailer wouldn't have a reasonable expectation that that same retailer would market them for the provision of gas. That's interesting, given that almost all retailers are dual fuel marketers. Certainly from our point of view, the Privacy Act is there; it's there for interpretation. It doesn't need a regulator to come and interpret it and put it into black letter regulation. Despite the evolution of the market across the past four or five years, in which it's been very explicit in terms of the base upon which we're marketing customers, the Victorian or the ESC haven't seen fit to go back and revisit that code.

So certainly from our perspective those instruments are the clearest example of the duplication through energy regulation. It's also fair to say that none of those regulations imposed upon us have ever been subjected to any form of cost-benefit analysis, let alone the rigorous analysis you'd expect through an RIS process, whereby there has to be some assessment, surely, at some point in time of whether the customers are actually benefiting from the additional compliance costs that are being imposed upon retailers. It's never been considered as part of the process that the jurisdictions can just implement these things with no consideration whatsoever in terms of the costs imposed.

The fact that we do have state based regimes at the moment provides some benefit in terms of being able to benchmark the regulatory burden across jurisdictions. That's the chart that you have in front of you. Essentially from our point of view, the consumer protection framework in South Australia or Queensland provides the same level of consumer protection as is provided for in Victoria. Certainly, the consumer groups, the ombudsman and the regulator in those jurisdictions would also agree with that. The additional burden imposed in Victoria provides no consumer benefit whatsoever, but imposes additional costs on retailers,

which at the end of the day diminishes the competition benefits that are provided through to consumers.

Whilst we are going through a national reform process and the jurisdictional arrangements will be standardised, our concern is that the level of regulation will be raised to the level in Victoria or, even worse, built upon as jurisdictions bid in for their favourite pet projects, if you like. From our point of view Queensland was the most recent jurisdiction that went through the FRC process, and that's from our point of view why it is the most efficient: because we've built on our learnings from the other jurisdictions, and with consumer groups we came up with a framework that provides consumer protection but does it by the most efficient means possible.

In terms of the last set of dot points, they essentially pick up the guidelines issues by the Office of Best Practice Regulation, and that's something that we'd be very keen to see adopted in energy regulation. As I say, it's notorious for not having any cost-benefit framework whatsoever, which is quite extraordinary when you think of the RIS process that regulations are generally required to go through, and that regulators have the discretion not to take into consideration costs at all or whether there's a net benefit to consumers of going down that path. That's a process that does actually need to be addressed.

**MR McALOON:** Historically it's been entirely clear to us in various jurisdictions that network price decisions, because they're subject to review, do attract from the regulator a greater degree of diligence than decisions about non-price regulation. Non-price regulation has a cost impact. So the functional requirements of non-price regulation do impact on the building of systems and on the delivery of services, and there hasn't been a case of a regulatory impact statement or any sort of cost-benefit analysis being built into either the marketing code or the confidential and explicit informed consent code in Victoria at least.

I suppose where we're at now is that we've talked to the point that we wished to raise with you, Robert.

**MR FITZGERALD:** Thank you very much. I appreciate that and I appreciate the few pages of dot points. That's terrific. I wish obviously to raise a number of questions. We've had private discussions with some people in the energy industry. We've decided in our review to specifically look at utility services - electricity, gas, water and telecommunications - so these submissions are particularly important to us. The reason for doing so is because of their national significance as well as the enormous amount of consumer policy activity that's taking place in the utilities area. So we are going to be looking at this area in more detail than some of the others.

It doesn't much matter where we start, but I suppose I can start in the sequence you've done, the vulnerable consumers. Yesterday we heard from Telstra, and we've

heard from telcos in relation to their concerns about the imposition of community service obligations. In the case of Telstra, their major concern was they're asked to bear that responsibility, they would say, in a way that differentiates them from the rest of the market - so they are specific to Telstra; nobody else has them. But their view was that the key issue was not the obligation but that it be shared equally across all providers. In this case, do you think that the sharing of the burden in relation to low income or disadvantaged people is fairly shared across all players? That's one issue. The second is, we'll talk about the nature of those imposts. But is there an issue about the way in which those imposts are in fact shared across all of the retail providers?

**MR McALOON:** There is and I think it goes back to what we would call the obligation to offer in Victoria and South Australia, which is where if you are one of the original franchisees or a local retailer - so in Victoria that's AGL, Origin and TRUenergy - you have an obligation to supply customers at a benchmark set of terms and conditions and at a benchmark price. That obligation does not extend to new market entrants. In Queensland, however, the obligation is slightly different and it is the obligation of whoever the financially responsible market participant for the supply point is to provide that service to the consumer. We think that's a more effective way of dealing with this issue because what it means is that anybody's obligation at any point in time is proportional to their participation in the market. From our point of view, we started in Victoria with probably roughly the same number of customers that we've got now, however, the distribution of those customers has changed significantly over that time. So the idea of a local area or a host area has effectively become redundant; most of our customers are no longer in that area.

**MR FITZGERALD:** Can you clarify something for me. In relation to Victoria and South Australia, or particularly in Victoria where you have these default provider contracts, do the obligations in relation to low income measures and price capping in particular only apply to the default contracts, or do they also apply to the generally competitive contracts?

**MR McALOON:** There are two parts to that question. The benchmark customer contract applies universally, but it can be varied. The default price only applies to the local retailers.

**MR HAMILTON:** Having said that, there are very few aspects of the default contract that can be varied. The way you pay the bill, whether a graph appears on the bill, there's not very much flexibility in the way that market contracts can be varied, which is quite ironic because one the market is evaluated in terms of the effectiveness of competition, one of the invariable benchmarks is product differentiation and innovation, whereas retailers are actually constrained in the extent to which they can offer new product offerings by the fact of we're constrained by the

default terms and conditions which can only be varied in very limited circumstances.

**MR FITZGERALD:** So what percentage of the customer base actually takes the default as distinct from the non-default?

**MR HAMILTON:** No-one really takes the defaults these days. 50 or 60 per cent of the market would be on market contracts now. Those who are still on the default contracts would be overwhelmingly those who have never changed, have been in the same residence since the start of competition, have never chosen to enter the competitive market. Invariably when someone moves house or contacts a retailer, it will be a market contract they'll be seeking because they'll get the benefits for actually entering into that contract.

**MR FITZGERALD:** But on those figures you're saying about 40 per cent would still be on default.

**MR HAMILTON:** Correct.

**MR FITZGERALD:** So it's still a significant but diminishing percentage of the market. Would that be right?

**MR HAMILTON:** Yes,

**MR FITZGERALD:** Just in relation to price capping, which does exist in a number of the jurisdictions in relation to a whole range of the utility area, if you replace those, what are the measures that you would put in place to deal with hardship and financial disadvantage? There is an argument that in fact it should be a social policy generally because what the reason problem is, is the financial hardship experienced by people and their ability to purchase goods and services generally, not just essential services. But clearly the political mood and the mood of the community is that in relation to essential services, they want something over and above that approach. So what would be your approach to dealing with financial hardship if you were to remove the financial capping?

**MR McALOON:** The decoupling of, if you like, the retail price or the regulated price cap, the impact of that could be one of several scenarios, and in fact it may be keeping the price artificially high at this point in time. This has been an ongoing question. The question of affordability needs to be delinked from the question of whether or not the price is set at an efficient level. People who cannot afford an energy supply very often can't afford others of life's essential as well. We do understand our obligations as a provider of an essential service and the benchmark contracts do deal with the issue of disconnections and giving customers every opportunity to remain connected, and also giving customers opportunities over and above what you would experience in normal transactions, even not to pay

proportions of the amount due in order to remain connected, to enter into long-term payment arrangements. We forego debt on a reasonably routine basis for customers who are experiencing financial hardship, often on the advice of financial counsellors. We don't see that any of those would be removed.

**MR FITZGERALD:** But all of those are voluntary or determined by yourself.

**MR McALOON:** No, they're not, some are voluntary. The fact that you must offer a customer many opportunities to remain connected is regulated. The mechanisms by which you do that, some are voluntary and some are an extension of the regulation. For example, one of the biggest problems that we have in terms of dealing with the most vulnerable customers is that they won't talk to us. So their concern about not being able to pay means that they don't actually want to deal with the issue at hand. There is a requirement for us to send a minimum of three notices to that customer but we send five and we send people in person as well to try and make contact with that customer prior to disconnection, in particular where there's a history of nonpayment of a specific concern regarding that customer. I suppose there's also a little bit of a commercial imperative too: it is better to get a customer on payment plan and start to receive some income from them, than have them disconnected, shut off, and receive absolutely none.

**MR FITZGERALD:** In the negotiations that the industry is having as part of this national energy market, have you been able to articulate the sorts of approaches to do with financial hardship that you think should be incorporated into this new national consumer code? I understand they're still under discussion.

**MR McALOON:** Yes, we have provided to them a copy of a benchmark customer contract that the industry believes should prevail. It does have provisions for dealing with disconnection and consumers who are experiencing payment difficulty. We probably have to provide that under separate cover. That's a document that's been developed by the Energy Retailers Association and we'd be more than happy to put it on the table.

**MR FITZGERALD:** No doubt they'll probably provide it too, but if you can that would be helpful. Let me deal with a broader issue then and that is the notion of unfairness in contracts, which you haven't raised but I want to raise in this context and a number of participants have. One of the issues that has been raised - and not only for those in financial hardship, but more generally - is the complexity of contracts both in terms of the actual contracts themselves and the bundling that's now taking place and so on and so forth. The approach, as you know, in Victoria has been to introduce unfair contracts law. It is likely that that will occur in a number of other states. In some of the industries that we've spoken to, including telecommunications, they have now incorporated unfairness as a concept within their customer codes. What's your approach to the move towards the ability of regulators

to be able to look at the fairness of the contractual terms?

**MR HRISTODOULIDIS:** As a starting point, the default contract is already a negotiated contract between retailers and regulators, so you would argue that that default contract already has provisions where unfairness has been dealt with. The code itself, I'm pretty sure has the term "unfair" in it. I think it deals with the issue.

**MR McALOON:** Repeatedly throughout the various concepts there.

**MR HRISTODOULIDIS:** Yes, so the issue of unfairness is already embedded into the codes across all jurisdictions. This is one of the things that we grapple with. Across different jurisdictions, because we have these marketing codes, at the time of going into a contract with the customer, there is a number of obligations that we need to provide in terms of the information we need to provide to a customer. If you look at the New South Wales regulations around marketing - they have a marketing code too - they have something that ranges from A to about W in terms of issues that you need to raise with the customer. Then you need to get the customer's consent that those issues are raised. Some of those issues are important, we wouldn't disagree with them, things like telling the customer what the price of the products are, the break-up between a fixed charge as opposed to a variable charge, any exit fees that the product may have, issues around cooling-off periods. But when you start to get into details of where they are regulating things like you need to give the customer your street name and address and you need to get explicit informed consent that the customer has obtained that, you're starting to get into areas where the information is not really impacting on their decision to enter the product.

It's not information that's relevant of whether they want to switch to your product or not, and it is getting to the stage where we're getting a lot of anecdotal feedback where customers are saying, "This is way too much information." You're constantly grappling with how to meet your regulatory obligations in terms of what you market to customers and what's requires as opposed to what's relevant and is going to allow the consumer to make an informed consent and not confuse them. It's a really difficult issue.

**MR McALOON:** I think one of the problems is that the early attempts at energy-specific marketing guidelines were genuine in their attempt to aid customer-comprehension, especially as regulated entities or often state-owned enterprises who'd been monopoly entities moved into a competitive market. The problem is that the regulator often thinks that the things that it believes are important consumers also believe are important, and where they've been covered off somewhere else, such as in a benchmark contract that couldn't be varied in any case, there's probably little point in running the consumer through that level of detail. The consumer needs to understand what they're getting, how much they'll pay for it and when it will arrive.

**MR FITZGERALD:** One of the central issues in this inquiry is in fact information and disclosure and trying to work out a better approach, because the current approach doesn't seem to suit anybody's needs or objectives. Everyone agrees with that, but the question is where to from here. How do you know, or how does the industry know, what the right level or right type of information is? Are there energy retailers conducting surveys of customers that meaningfully give us information about what customers really want to know to make those decisions? We agree with your comments, and the comments of everybody, including consumer groups, that the provision of more and more information is not achieving the objectives that information is mean to. So the question is: what do we do about that?

There are two approaches. One is to work out a better way of providing information; the other is to say that information is not the right response and you actually have to go into the contracts themselves, be they default contracts or, as in the case of Victoria, any contracts. How in the energy sector do we know what is the most relevant to the decision now? I presume as part of marketing one would have to have a handle on that, but how do policy-makers know what is important to consumers in this market?

**MR HAMILTON:** The nature of the question itself is interesting, because your question relates to making an informed choice. Most of the items we're actually required to customers don't relate to the choice; they relate to broader consumer protection issues, such as dispute resolution procedures, the fact that you have a right to raise a complaint with the ombudsman - those sorts of procedural issues which don't different one contract from another. From our point of view, I think the starting point is exactly that, assisting the customer to make an informed choice, but what is the nature of that choice? Products are at the moment differentiated on the basis of price, term of contract, termination fees, and it's those aspects of the contract that differ from the benchmark contract that are of importance that should be conveyed to the customer prior to entering the contract, not the generic protection mechanisms which will exist regardless of who actually provides it.

**MR FITZGERALD:** I like the separation you've done there of choice and effectively rights I suspect we could put into that. What would be your approach, then, in terms of providing both pieces of information? Does the supplier provide those two pieces of information, or does the responsibility to provide effectively generic rights lie somewhere else?

**MR HAMILTON:** They're provided, but they're provided subsequent to the marketing decision, if you like. It's the entering into the contract, it's the signing of the contract or agreeing to it over the telephone whereby you've gone through those specific things, and there's a separate document, our customer charter, that every retailer has to subsequently provide to the customer that provides a summary of their

rights and entitlements. It isn't required prior to the marketing decision itself. It's subsequently provided, which outlines all the rights and responsibilities - - -

**MR FITZGERALD:** Is that how it operates now or is that how you'd like it to operate?

**MR HAMILTON:** It is. That's how it operates now.

**MR McALOON:** Yes, it's how it operates now.

**MR HAMILTON:** Except we're required to, prior to the customer making that decision, list a lot of the things that are generic.

**MR McALOON:** We have almost a duplicate obligation. We have an obligation to rattle on about a lot of things at the doorstep in the event of an in-person sale, as well as then to provide a copy of a customer charter and the contract terms and conditions, obviously, in writing as well, where they've been confirmed over the telephone, for example. If they're confirmed in person they're provided at that point in time.

**MR FITZGERALD:** One of the issues in relation to information is comparability of price and general terms and conditions. Can you explain, where is the industry up to in relation to an agreed position on comparability of basically pricing provisions?

**MR HAMILTON:** They're not comparable.

**MR FITZGERALD:** I thought that, but I just wanting to make sure.

**MR HAMILTON:** In Victoria we've been through a process which has extended for five or six years in terms of the Victorian regulator trying to come up with a simple way to compare energy products. The issue with the way energy is structured is complex, and most of that complexity comes from the network tariffs themselves, the fact that you have a tiered product, seasonal variation, fixed and variable charges, and step blocks throughout that process. So price will vary depending upon the consumption.

**MR McALOON:** And time of use.

**MR HAMILTON:** And time of use tariffs as well in terms of the time of the day. So by their nature it is a complex commodity in terms of the way that it is priced. Various regulators have come up with means of making that simplified, and South Australia uses a method whereby we need to provide the customer with the estimated annual cost of the product based on different consumption levels. So, for example, at three megawatt hours it would cost you $250, next level at $500 and so forth. That's disclosed prior to the customer entering into the contract.

The problem is there are so many assumptions built into the calculation of that figure it's essentially meaningless to the customer. If they go out and buy a new appliance, if someone is home for home duty purposes, consumption will obviously increase. If someone is out of home, consumption will decrease. Depending upon the weather it will change. So although we're required to actually provide that estimate in advance, it's likely to bear no resemblance to the eventual consumption.

**MR FITZGERALD:** So what do you think is the way forward? Once you acknowledge, as you have, that it's very difficult for the consumer to compare pricing, which is a key component of choice, don't you end up leading to a situation where the government at some stage, or the regulators at some stage, decide to impose some sort of standard unit of comparability, even though in 95 per cent of the cases it will be variable from that? Isn't that a tension that's already existing? As I understand it, in this area there is some push for regulators to in fact come up with some standard form of comparator, if you use that term, whereas the industry is saying that all this complexity means that you'll never be able to do that. Where do you move on this?

**MR McALOON:** It's such an interesting dichotomy, because the regulator is also accountable for the proliferation and complexity of underlying network tariffs as well as the proposed roll-out of time of use interval metering. That will again proliferate the complexity of retail tariffs as they move to smaller time samples and so on. I think savvy customers is probably the best opportunity we have, and therefore, rather than attempt to make the comparison for the customer, it might be incumbent on us to attempt to explain how to make the comparison based on the information that you already have. People know what their consumption is. They've got a previous bill generally, or where that's not available there's previous consumption at a premises. But that sort of information enables a customer then to make their own choices and their own decisions. That information is available already, but it's not marketed from that angle; it's marketed, I suppose, or the regulator sees it as needing to be marketed, from the angle of, "We'll give you an absolute dollar figure for an annual cost." As Graeme said, it becomes incomparable fairly quickly.

**MR HAMILTON:** Potentially you have the danger of distorting the competitive market. If you come up with a way of standardising the figure, products will be developed to come up with the lowest figure against that benchmark, and that may not be the best product for the customer. That was one reason why the Victorian regulator was heading down that path: it was going to become apparent that the diversification that we're all seeking would be lost as all retailers head towards maximising the benefit that would appear from the standardised approach.

**MR FITZGERALD:** Sure.

**MR HRISTODOULIDIS:** Just an interesting side issue: on our web site we developed a calculator for customers to go in, and as part of the calculation for them to try and obtain a more accurate quote we obtained information about street number and street address, which gave us more information about the type of meter the customer was using, which then gave them a fairly accurate quote in terms of the tariffs that would be applicable to them. When the Victorian government put out their price disclosure guidelines here in Victoria, we were actually told that that calculator didn't suit the guidelines because the guidelines said that you weren't supposed to gather personal information from the customer to given them a quote. So then when we went back to the regulator we said to them, the quote we're going to give the customer then becomes very generic and it's very hard for them to say whether it's relevant to them or not. So the problem is once you start tinkering with pricing and having some sort of comparator with pricing, you tend to lose those opportunities in the marketplace.

**MR McALOON:** There was a view that the customer had a right not to disclose their address but as Con said, that leads us to a position where we can't obtain the level of regularity we need in terms of information to give site-specific prices.

**MR FITZGERALD:** So how do you think this will be resolved, or won't it be resolved? As you move to the national market, what do you think is the likely outcome - if you can crystal ball it - for this issue about price comparability? We will be here in a couple of years saying it's still as difficult as ever, or do you think there is going to be a way forward on it?

**MR McALOON:** We think that the way forward is that the information that a customer already receives from their retailer, rather than have a price comparator web site, have a web site that tells you how to make the comparison yourself. Every retailer will send you a price; there's no doubt about that. The other thing is of course that door-to-door sellers and so on also make something inroads into consumer education here as well. They've often got little charts and templates that demonstrate, "Okay, if you're on this product this is what it would mean to you. If you're on that product, here's what it would mean to you," but that's difficult to do over the telephone and it's also difficult to do over the Internet because you've got to be able to collect enough information to make it site-specific, and to some extent we're prohibited from doing that.

**MR FITZGERALD:** Just related to a couple of those, the ombudsman structures, as you've indicated on your sheet, most states have industry ombudsmen in this area and, as I understand it, some decision has been recently made that the state based ombudsmen will remain under the new national regime - in what shape or form I have no idea at this stage. How do you see that scheme working from your experience and how would it be improved?

**MR McALOON:** That there will be multiple jurisdictional ombudsmen?

**MR FITZGERALD:** Possibly, yes, rather than one ombudsman.

**MR McALOON:** When ombudsman cases come into the business they're on an exception basis. We have a specific group that deals explicitly with ombudsman cases and the incremental cost of developing the expertise for them to be able to deal with South Australia versus Victoria is very small. They're an expert group in any case. Whether the ombudsman is a single scheme or multiple scheme, from an industry perspective is a tenth order issue. Probably a higher order issue would be that the ombudsman schemes might behave a little bit more consistently, but that would be handy as opposed to that's going to save us a lot of money, or improve productivity in any way, shape or form. The number of ombudsman complaints we get as a proportion of our customer base is very small. Most issues by and far are resolved before they get to an ombudsman and it normally requires specialist intervention, there's no doubt about that, so it doesn't really matter.

**MR HRISTODOULIDIS:** The fixed fee for an ombudsman scheme is quite low. We pay a higher fee through the amount of cases that are before the ombudsman, so that component of the fee which I think makes up about 80 to 85 per cent of the total fees we pay, is not going to change if we don't change the amount of cases, so the fixed fee components are small.

**MR FITZGERALD:** So broadly you're reasonably satisfied with the ombudsman scheme?

**MR McALOON:** I didn't say that. I said that I don't see a benefit in the structural change.

**MR FITZGERALD:** Provided there's greater consistency or not too much inconsistency.

**MR McALOON:** Yes.

**MR FITZGERALD:** All right, then I won't paraphrase you about what you think of the scheme. But now I'll ask the question: what do you think of the performance of the ombudsman schemes?

**MR McALOON:** We're members of schemes in the New South Wales, Victoria, South Australia, and soon to be Queensland. Each of those schemes has pretty much the same charter and constitution, so it's driven very much by the chief executive of the business who is the ombudsman, and there are some differences in the approaches that they take. Some are more interventionist than others. Some are more inclined to expect the retailer to sort out a consumer's problem even when it's

obviously a consumer's problem - it really just depends. That's a function of the leader of that entity. ANZOA, which is their association, to some extent attempts to standardise the approach that they take or talk about that. But as I said, the ombudsman is essentially a tenth order issue from our point of view.

**MR HRISTODOULIDIS:** I suppose the most critical aspect of that is that you have some ombudsman schemes with, as David said, some charter that they operate under or take cases on jurisdiction, therefore they tend to behave as more of a consumer advocate as opposed to an objective arbitrator of a dispute. Other ombudsman schemes will take cases on merit, so at the front door when the customer comes in they'll make an assessment of the merits of that case and then tell the customer, "No, you don't have a case," or, "Yes, you do have a case and we'll pursue it for you." I suppose we would lean towards the merit based approach as opposed to a jurisdiction approach. We see a number of cases that come through to us in those jurisdictions that operate under the jurisdictions approach that you think, "Why has this got to us?" It's being vexatious and the ombudsman has taken on the principle that what fits in the jurisdiction so we're going to delve into the case, and they tend to look for other issues, not specifically what the complaint was raised for.

**MR FITZGERALD:** In relation to your issue about industry versus generic - and I hear your view that generic would probably apply - it strikes us at this very early stage that it's very unlikely that in relation to the essential services or the utilities that we've mentioned there would be a move away from specific purpose regulation generally. But what I am interested in is, one of the terms of reference we're required to do is to identify or aid in the identification of unnecessary or overly complex regulation, and I was wondering whether at some stage you'll be able to identify for us those areas that you think could in fact be removed either from the regulation itself or the codes that exist. To this stage we've had very little feedback from any of the organisations as to what specific regulation could be removed, and at some point we'd be keen to get that, or at least the principles which would guide you to determine that, and I'll come to that in a moment. But are there stand-out issues that you think as you move to a national market that do warrant removal? Are there any that you could say that you think there are areas where it's clear the costs of the benefits simply warrant the removal of regulation?

**MR HAMILTON:** Again, just to clarify, we would certainly argue that there's a strong role for industry specific regulation in areas in which energy is unique and that again relates to reconnections, disconnections, metering arrangements, those aspects of the regime and we provide the retail code that from our point of view does actually have quite a comprehensive consumer framework because in some respects energy is unique. One of the problems is that when that is extended and the extent to which all it does is constrict customer choice, so when you've got things like security deposits being regulated and the fact that all that's actually doing is limiting the extent to which market contracts could otherwise be provided to customers who may

not otherwise have access to those products, so the amount that you may request from a large business customer is actually constrained. If you've got a business who has a problematic rating, a way of them actually accessing the competitive market and innovative products is to obtain a security deposit. We should be able to do that with respect to the risk that business actually faces with you carrying their credit risk. You're constrained from doing so because of the operation of the consumer protection framework because of the level of security deposit you can obtain.

**MR FITZGERALD:** So in most jurisdictions the quantum of that security deposit is regulated, is it?

**MR HAMILTON:** The circumstances upon which it's requested; how it may be used; the arrangements for paying it back.

**MR McALOON:** In Victoria you've essentially got to be a bankrupt, I think, before you can request one. Business represents a greater risk to us as a customer than the fact that someone might have been a bankrupt. In answer to your question about what could be dropped immediately, if we were to take the marketing codes, guidelines dealing with explicit informed consent, guidelines dealing with product disclosure, all of those things, and we could probably either consolidate it onto a single page or drop it tomorrow and there would be no difference at all in terms of consumer outcomes. There has never been an assessment done as to where there is a benefit and our observations tell us that there's really not. We have to comply with the trade practices law and with the privacy law anyway. We have to do that anyway, so there are some low-hanging fruit. There's some stuff that could just disappear tomorrow.

**MR HAMILTON:** The low-hanging fruit is the difference between the Victorian level of regulation and the Queensland level of regulation.

**MR FITZGERALD:** I note your trial, and I'd be very keen if you're going to identify the 85 pages or more that is surplus. But, in a serious way, that's exactly what we're looking for. We're not doing, I might just say, a regulatory review of every single industry in Australia, but clearly we are looking to say if you are right, that what we currently have in place is not delivering consumer benefits over and above that which we could achieve through a much more concise range of consumer protection codes or regulations, we'd be interested in that.

But what I am interested in is why you think Victoria, for example, has such a high level of regulation if you measure it by the number of pages, which is what you've done, which is not necessarily a great indicator of its effectiveness but is just a benchmark compared to Queensland. You mentioned that Queensland has come on later - in fact they were quite slow to introduce FSR - so there could be a learning from that, or is there a fundamental ideological difference? I don't mean political in

that sense, but I mean it's more than just that. What is underlying one state's view of the world compared to another?

**MR McALOON:** I cannot recall the name of the specific parliamentarian that released the data, but there was information provided recently as to the propensity of the governments to regulate.

**MR HRISTODOULIDIS:** Michael Ronaldson.

**MR McALOON:** Michael Ronaldson, that's it. Victoria was the stand-out as having twice as much regulation as its nearest competitor state - this is in a general sense - and more than the Commonwealth. So in terms of the cultural propensity of Victoria to regulate, there's no doubt in our experience that that is a factor. It's a big factor. Beyond that, I suppose, it was the first state to move to retail competition. While I probably shouldn't say "stronger" because that implies something about effectiveness, but there's certainly much more vocal consumer rights advocacy in Victoria than there is in other jurisdictions, and while that tends to perhaps not represent the broader community, it still gets a pretty good hearing. So there's a bunch of issues.

We talked a little bit before about leadership of the ombudsman scheme. in terms of leadership of the various regulators, subordinates behave like their leaders. In South Australia, with Lou Owens, and now with Patrick Walsh as chairman of ESCOSA, for example, they are people who probably have greater faith in markets and who are less likely to be interventionist. In Victoria, I have a lot of respect for John Tamblyn as a regulator, but he does have a propensity to think that you can manage this by regulation.

**MR FITZGERALD:** Isn't John now the head of the national regulator?

**MR McALOON:** He is, yes.

**MR HAMILTON:** One thing in his defence is that as chairman of the ESC in Victoria he did a review of the effectiveness of competition in Victoria in 2004, and he found that competition was effective down to a very low level of consumption and recommended a large rollback of the regulatory framework. The Victorian government dismissed that with no formal response.

**MR FITZGERALD:** That was in 2004?

**MR HAMILTON:** 2004. It was a comprehensive 12-month review to which we provided significant data, as all retailers did, and not one regulatory instrument has been rolled back since. Indeed, it has significantly increased since that time.

**MR FITZGERALD:** That raises the whole issue you've mentioned about gatekeeping and particularly review arrangements. One of the issues that we're looking at is that there's a great deal of emphasis on gatekeeping for new regulation, but one of the more serious issues, I suspect, is in fact how you review regulation once it's been in place and then remove it or change it. That seems to be a real problem, because often in this area people don't know what the effect will be until it's actually in. The problem is once it's been in, there seems to be no capacity to remove it.

But that raised just one issue. In all of the industries we've spoken to there seems to be a significant tension. As a starting most people would say, "We prefer generic and broad based legislation." The larger the organisations, the more they like broad based or principle based regulation. But after that it leads immediately to the second this: "But we also want certainty." It seems that a trade-off needs to be made. To what extent in the energy area are you able to work with a broad based or principle based regulation, which by its very nature leads to some uncertainty, because it's not a tick-a-box approach, or are you inevitably going to move down to a much more prescriptive but more certain regime? It strikes us in every single industry at the end of the day industry itself continues to want certainty and therefore you get greater and greater prescriptiveness. But in the energy area where is that tension and where are the trade-offs, and how are you going to resolve them?

**MR McALOON:** The greatest area of uncertainty for us is in regulated pricing, where governments try and replicate competitive outcomes. They're not a market and they're not qualified to do it. As a merchant facing or a market facing business - as a merchant business - we need to be able to compete on that basis and not endure, if you like, interference. Also, obviously, there are political imperatives as well. No government would like to see in an election year, for example, a significant hike in energy prices, even if there had been a significant movement in the cost of wholesale energy. So it distorts the market too, but that is the greatest area of uncertainty that we face.

In terms of the benchmark customer contract, and the way we do business with our customers, I think we've indicated that we understand that energy is unique and there are some issues that are energy-specific and do need to be addressed. They need to be addressed in a way that's fair and equitable, and we think that that can be done with roughly half the pages and, given that each page has about 14 functional obligations on it, a whole lot less obligation as well.

**MR FITZGERALD:** Right. My last question, relating to your last set of dot points, is this is both a black letter law regulation area and also a co-regulatory area in relation to the codes and that. Your view about its general structure: in relation to the framework, given that we're moving to a national scheme, is it appropriate to continue to rely on the co-regulatory model that we currently have, or are there

significant changes to that model that you think are now warranted?

**MR HRISTODOULIDIS:** Probably the biggest change would be in the licensing. At the moment you're getting a fairly detailed licence which is underpinned by the code and the legislation. Our licence contains a page and a half on what the ombudsman scheme should look like. Why does that need to sit in the licence? That sits in the code anyway. It sits in the legislation. So there's a lot of things in the licence which are really a repetition of what's in the code and/or the legislation, and I think that there can be a fair bit of work done to pare that back.

**MR FITZGERALD:** Are there any other fundamental changes in the structure of the scheme itself?

**MR HAMILTON:** I think the benefit of the national forum process - and it is actually on track - is to simply and streamline the process whereby you take all the various functional obligations, be they in licences, codes or guidelines, and put them in a set of national rules which the AEMC requires a rule change process to amend, and a clear, transparent process where benefits and costs must be considered in terms of making those changes.

From that point of view there is some comfort that the process itself is on the right track, as long as we can get the right balance in terms of the generic and specific share of the coverage. That's really the challenge in terms of the AEMC process or the national reform process itself - striking that correct balance from the start - because trying to unpin it through the rule change process and going through a regulator to make those necessary changes is going to be difficult. It does raise some of the uncertainty issues that you mentioned before, because they'll be living documents and it won't be at the discretion of the regulator in terms of when they get changed. Anyone will be able to put through a rule change and it will be subject to the outcome of that process.

**MR FITZGERALD:** I just need to understand that a little bit further. The rule change will be approved by whom?

**MR HAMILTON:** The AEMC.

**MR FITZGERALD:** The AEMC itself?

**MR HAMILTON:** Yes. So they won't be able to initiate it. It will be initiated by stakeholders, but it could be a consumer rep, could be industry, could be anybody. So at the moment we've pretty much got lock-down codes that are changed on the basis of regulatory discretion. The regulator might say, "This is a big enough issue to open the code for consideration," depending on various lobbying. But moving forward, the national electricity rules and national gas rules will be subject to a

defined rule change process whereby any stakeholder can actually put forward a proposed change. So to that extent we are in the lap of the gods in terms of what might come through that process.

**MR FITZGERALD:** Any other comments before we close?

**MR McALOON:** We talked a little bit before about the difference between a consumer's choice and a consumer's rights and obligations. As an industry, more recently we've convened what we call a retailer round table which was to try and deal with - obviously through our own market intelligence we get complaints about what our competitors are doing and periodically what we're doing ourselves in terms of consumer responses and whether or not consumers believe that they are or there has been attempt made to mislead them. That is working through a document that will deal with quite simply what you must tell a consumer and also explicitly what you must not say, because there are some common themes that emerge in terms of the practices of door-to-door sellers and so on that we have to deal with as every industry does. It's also examining whether or not there's a capacity to identify - most of our sales provides are third party providers - and whether or not there's a capacity to identify individuals who keep on popping up as they move from business to business, and try and prevent them from getting back in front of consumers again; firstly, bringing disrepute to us and secondly, creating problems for us in terms of consumers.

**MR FITZGERALD:** Who is on the round table?

**MR McALOON:** That is every licensed retailer on the eastern seaboard that's active in the marketplace, so in the NEM states that's active in the marketplace. So there are a couple of people who have just applied for licences but are not active in the marketplace who are not represented, but they will be invited to be.

**MR FITZGERALD:** All right, that's terrific. All right, thanks very much for that, that's great.

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**MR FITZGERALD:** If you could give your name and in what capacity you appear that would be terrific, Mark.

**MR BALKIN:** Mark Andrew Balkin, I'm an affected consumer who has bought a house that I'm yet to have the house, rectified, finished, completed, built as paid for.

**MR FITZGERALD:** Okay, Mark, if you want to make your comments that's fine.

**MR BALKIN:** Thank you. Can I just make a comment in relation to the previous speakers.

**MR FITZGERALD:** Sure, by all means.

**MR BALKIN:** I heard them saying how in Victoria there is so many pages of regulation compared to Queensland which has 70 pages less. They completely, I think, overlooked the fact that Victoria naturally needs a lot more regulation because in Queensland the distribution is still government controlled, it is not privatised, whereas in Victoria there are five distributors and the distribution side probably demands a lot more regulation than the retailing side.

**MR FITZGERALD:** Yes, there are often reasons why the regulation may be different in different states and part of the inquiry's terms is to try to look at that. The ultimate aim is to have the most efficient and effective regulation that's possible, so we'll be looking at that. Thanks for that.

**MR BALKIN:** I just make that comment as a person who works in the electricity industry and has worked at this time last year in Queensland and currently in Victoria.

**MR FITZGERALD:** Yes, that's good.

**MR BALKIN:** But onto my issues.

**MR FITZGERALD:** Yes.

**MR BALKIN:** Just on my one sheet of paper of notes I have in front of me I could speak for the whole day and the next day on just about any one of those dot points. I might just say what they are and then perhaps decide which one of those might be more appropriate to discuss at length.

**MR FITZGERALD:** Sure.

**MR BALKIN:** There's contracts that have been broken with the builder on

numerous occasions. I have a contract with a builder to build a house to certain specifications, not done. I have a contract with the builder to buy the house back off me. They walked away from that at substantial cost to me to have that then reinforced in the Supreme Court which I had to walk away from. Probably the key thing is there is no effective insurance. Everybody assumes that houses have a 15-year, or a five-year, or a seven-year, or a 10-year guarantee. It doesn't exist. Your only recourse is through the legal system where the builder says, "Well, I've got bigger pockets than you. I'll wait until you capitulate." The only way the insurance can be claimed is if the builder dies, becomes insolvent, or is bankrupt, and even those three I understand are not as straightforward as they may appear, but I haven't tested those waters from personal experience.

I have issues with the bank. The bank who made an agreement to fund the progress payments said quite clearly, "Do not make a progress payment if the house is not up to that standard." They haven't said anywhere in their documentation or anywhere afterwards what to do if the builder does claim progress payment and the house is not up to that standard. They haven't said, "These are the consequences: you risk years of going through the legal system." The bank does not give any support to follow up what they said to do. They've just said, "It's on you. That's your responsibility. If you don't want us to make the payment don't come looking at us," yet they said, "Do not do it." That same clause also applies to the insurer which is for the insurance I can't access which I spoke of before, but it has the same clause, "Do not make a progress payment if it's not up to that standard," but they refuse to say what do you do if it's not up to that standard and who is going to wear that risk.

The HIA are not interested in pursuing actions against their members while the matter is before the courts. Ditto with the MBA and because I'm not a member of those institutions, I cannot get the support from that organisation against its membership. The ACCC are also not interested. I've contacted them and they have said it's predominantly a state matter, not a federal matter, and they wouldn't do it if there was just one case, they would need a lot of cases, and even if they were to take it on they would refer it on to the equivalent state body, in this case Consumer Affairs Victoria, which leads me on to Consumer Affairs Victoria.

They are not interested in my situation one little bit. They cannot even write me correspondence that is professionally written - and I'm speaking in terms of correct and they can't even get the name of the builder correct, they refer to companies that are no longer trading. They twist the facts, they misrepresent them, and they try and write to me as if I'm the guilty one. I've already said to my member of parliament, "Can I take Consumer Affairs to Consumer Affairs?" There's a bit more to that than just the sarcasm.

Consumer Affairs have reluctantly accepted my complaint but don't take any action, despite their words and rhetoric to the contrary. Actions speak louder than

words; there's no action. They do not mention to prospective consumers the builder's history. I have rung them up, and I'm not the only person to have rung up and asked for the history of my builder. First of all they say it's privacy information that they can't reveal, and then they say that they haven't had any prosecutions against that builder. The reason they haven't had any prosecutions against that builder is that if they do have one, as they have done, they refer it on to the Building Commission, which takes the prosecutions against that builder. Then Consumer Affairs says, "That wasn't our action; that was the Building Commission." It's a red tape quagmire.

This is probably more in reference to what I said before and the letter I received last week, but years later - because my complaint goes back to when the house was contracted for July 2002, just after the change from first resort to last resort builder's warranty insurance, which I was never advised of, and I'm still through the courts - the write to me to make us feel that we are the guilty ones, that we are taking action against the builder. The builder has taken us to VCAT. We didn't initiate proceedings; we are just trying to defend ourselves. I could go on further on CAV. I'll move on to BACV.

**MR FITZGERALD:** Can I ask a question. I just want to pull out a couple of things. At the moment is the action at VCAT still going?

**MR BALKIN:** It is, at VCAT, yes.

**MR FITZGERALD:** So that's still proceeding, and the action was brought by the builder against you for non-payment of your amount?

**MR BALKIN:** Correct.

**MR FITZGERALD:** You've been to a hearing in VCAT yet?

**MR BALKIN:** Many times. For hearing?

**MR FITZGERALD:** Hearing?

**MR BALKIN:** There have been directions hearings, mediation hearings, compulsory conferences.

**MR FITZGERALD:** Just from my point of view, once a matter is initiated in VCAT - and you indicated just then that there's a mediation process in that that you've been to; you've been to a mediation process - - -

**MR BALKIN:** Yes.

**MR FITZGERALD:** Why is it that the VCAT system - it's an administrative tribunal so it's less costly than the normal court - - -

**MR BALKIN:** In theory.

**MR FITZGERALD:** In theory, I know. If you look at that, you've got a body in which somebody has initiated an action. It relates to the dispute in hand, which is the non-payment by you, but for a failure to deliver the work that you required. It has a mediation process and it's ultimately going to have a determination, which hasn't yet happened. Is that right?

**MR BALKIN:** Correct.

**MR FITZGERALD:** What is failing in that process? I would have assumed that when VCAT was established, as all the administrative tribunals were established, there was a view that tribunal process was a way of diminishing, but not eliminating, the most costly aspects of outright legal proceedings through the district and other-courts. So far in that proceedings - and notwithstanding it hasn't determined - why has that not been able to achieve resolution to date - and I appreciate there's no determination yet so you just have to be a bit careful?

**MR BALKIN:** There's a number of reasons: one is the builder says, "I don't owe you any money, let's negotiate," and then if they finally do say, "Okay. I'll give you some money for that," it hasn't even gone anywhere equal to the legal fees.

**MR FITZGERALD:** So the mediation failed.

**MR BALKIN:** Yes.

**MR FITZGERALD:** Was the mediation process itself, and the processes that have been used in VCAT, have they been reasonable? I'm not asking you for a comment about the way in which the actual case has been handled by a particular tribunal member, but has the process been - - -

**MR BALKIN:** No. I'd also put it to you that it's fundamentally flawed because there are building regulations and building codes that says, "This must be done, that must be done," and when it goes to mediation, "That's all put aside. Here's whatever, take it or leave it."

**MR FITZGERALD:** Right. Okay.

**MR BALKIN:** So the mediation should not be for any structural work, that should not be - in my opinion - for any noncompliance to standards and codes, it should be over, "I thought you wanted it pink, oh, we've done it blue. Here's a figure for you."

In my case, the building commissioner said, "The entire brickwork is defective and must be replaced," and the builder says, "If you like I'll give you a couple of grand to render it, as a final payout."

**MR FITZGERALD:** If I might ask a question then about the Building Commission. What is the role of the Building Commission in these matters? You've made a complaint to the Building Commission.

**MR BALKIN:** I've made a complaint to the Building Commission, I've made a complaint to the Building Practitioners Board.

**MR FITZGERALD:** No, just the Building Commission. What's the role of the Building Commission? Once you lodge a complaint what is their role? Is it to resolve the issue, is it to - - -

**MR BALKIN:** In my case perhaps because it's before VCAT the Building Commission has been very hands-off, despite having produced a report that says, amongst other things, that, "The builder must replace the entire brickwork in the house," let alone other issues, and that goes back 18 months, two years ago. That was done.

**MR FITZGERALD:** Upon receiving your complaint, the Building Commission initiated an investigation.

**MR BALKIN:** No, I had to pay the Building Commission because I couldn't get VCAT to make an order for the Building Commission to do a report so I had to pay for that as well as the other expert reports I've had done.

**MR FITZGERALD:** The Building Commission goes and does a report, indicates whether there's a defect in the workmanship - - -

**MR BALKIN:** On disputed items, yes.

**MR FITZGERALD:** - - - which you indicate was found to be the case. The commission itself, is it able to order rectification or not?

**MR BALKIN:** It says it can but I think once again that's theory; in practice they haven't.

**MR FITZGERALD:** Is that because there's a concurrent action in VCAT or is that because of another reason?

**MR BALKIN:** I know this is a public forum but I would suggest that the Building Commission is corrupt.

**MR FITZGERALD:** Well, you mean procedurally corrupt?

**MR BALKIN:** No, no, I'm talking about officers that are currently there; officers that have left the Building Commission.

**MR FITZGERALD:** I should warn you that these are public hearings, so it's up to you as to what you say, but anything you say is on the public record. So we can proceed on the basis - - -

**MR BALKIN:** I have valid evidence that there is collusion and corruption within the Building Commission. I am yet to get any satisfaction from the Building Commission. When it comes to the end of the day they cannot force a builder to do anything anyway, they can only threaten.

**MR FITZGERALD:** But do they not have the power to actually make an order for rectification?

**MR BALKIN:** I think you will find that is the Building Practitioners Board.

**MR FITZGERALD:** Okay. So you've been to the Building Practitioners Board - - -

**MR BALKIN:** Yes.

**MR FITZGERALD:** - - - and you lodged a complaint with them?

**MR BALKIN:** Yes.

**MR FITZGERALD:** What's the procedure that has occurred or - - -

**MR BALKIN:** I am totally confused by the Building Practitioners Board. I have letters from them - and/or emails - saying they are going to have an inquiry into the builder I contracted. I also have letters from them saying, "No, no, no, we're not going to do this any more." I then have other letters saying, "We've started our inquiry. We called them in last week but we're going to keep you informed." I do not know where it's at.

**MR FITZGERALD:** So at the moment you've accessed a range of bodies - the Department of Community Affairs, ACCC, VCAT itself through the action taken by the builder, the Building Commission, the Building Practitioners Board and the industry associations, HIA and MBA.

**MR BALKIN:** Yes.

**MR FITZGERALD:** In taking those multiple actions, was there any spot that you could find in the system which could give you appropriate advice as to which was the most appropriate means of having this matter resolved or was that a weakness that you found in the system itself?

**MR BALKIN:** No, they all kept on saying that VCAT is the appropriate forum for this type of dispute.

**MR FITZGERALD:** Could you have brought an action yourself in VCAT or did you have to wait for the builder to bring that?

**MR BALKIN:** The builder brought that.

**MR FITZGERALD:** Brought it.

**MR BALKIN:** Yes.

**MR FITZGERALD:** But you could, I suppose, have brought that yourself - or not?

**MR BALKIN:** No, I doubt that I would have. I believe I would have gone to BACV who may well have been more proactive than they were, because the builder knows the system because he goes through it all the time. He took me to VCAT, bypassing BACV, and cutting me off from the assistance I could have expected there.

**MR FITZGERALD:** At the end of the day VCAT may make a determination in favour of either party - yourself or the builder - and it has the capacity to deal with your issues, so there's no question about it having a capacity to be able to deal with the issues under dispute, does it? Is that right?

**MR BALKIN:** No, that's not quite right. The matter has already left VCAT and is now back again. It went to the Supreme Court because VCAT couldn't handle it over a breach of contract at the compulsory conference by the builder to buy the house back. VCAT couldn't handle that.

**MR FITZGERALD:** It was out of jurisdiction?

**MR BALKIN:** Yes.

**MR FITZGERALD:** I see.

**MR BALKIN:** At the end of the day, even if I had a favourable ruling from VCAT I am still going to lose hundreds and hundreds of thousands of dollars.

**MR FITZGERALD:** Because of the - - -

**MR BALKIN:** VCAT will not award legal costs.

**MR FITZGERALD:** At the end of the day you're saying they don't have jurisdiction in relation to certain aspects of the dispute which is about the buy-back contract. They have jurisdiction in relation to the actual building contract. Is that right?

**MR BALKIN:** That's right.

**MR FITZGERALD:** I'm just trying to understand the system - rather than the actual facts, okay, because obviously you're in a position where you have just about accessed every single body there is, so I'm just trying to work out how this all works together.

**MR BALKIN:** Okay.

**MR FITZGERALD:** The Department of Consumer Affairs in Victoria I think is where I perhaps interrupted you, and you've indicated that you're unhappy with what they have done which is basically saying, "Well, it's VCAT, so we won't do anything until VCAT has resolved the matter." Is that right?

**MR BALKIN:** Yes, but also CAV ignores the Building Commission reports. The member said the Building Commission report is no different to any other expert report. You can pay for whatever one you get and the builder pays for one, he's going to get one favourable to him; if a consumer goes for one, they're going to get one favourable to them. At the end of the day the Building Commission one comes in, not as the authority, not as the definitive, "This is what's right and what's wrong," as far as they're concerned that's just one of the mix. Yet that is not what is said in the Building Commission documentation on their web site and what they publish, nor is what is said also at CAV, but that's certainly what happens at VCAT.

**MR FITZGERALD:** So given this experience which is still ongoing - and obviously it has been ongoing since when, since 2003?

**MR BALKIN:** 2003 the builder took us to VCAT, yes.

**MR FITZGERALD:** Right. The dispute obviously happened during 2002-2003. Is that right?

**MR BALKIN:** The house should have been completed towards the middle of 2003 but to this day it's still not.

**MR FITZGERALD:** Right. I suppose you may not know but why has it taken VCAT so long to be able to address this issue? Is it because the matter went to the Supreme Court and that delayed it, because it seems an unusually long period of time for a tribunal matter. They're normally relatively quick - relatively.

**MR BALKIN:** I'd put it to you because the builder is not interested in having to face up to their liabilities. They are quite happy to spend whatever money they can on their legal side to delay, defer, twist, turn, so at the end of the day they don't have to face up to their liabilities, and also, of course, their legal costs, they claim that as a legitimate business deduction. My legal costs are post-tax.

**MR FITZGERALD:** Sure.

**MR BALKIN:** It's totally unfair.

**MR FITZGERALD:** What do you think would have made a difference there, looking back now with your experience which is still ongoing, what do you think should have been in place for a consumer that's significantly aggrieved?

**MR BALKIN:** When the matter was taken to VCAT, VCAT should have said, "No, we can't look at that yet, it should go through BACV first.

**MR FITZGERALD:** BACV being?

**MR BALKIN:** Building Advisory Conciliation Victoria.

**MR FITZGERALD:** What role is that? What role does it have?

**MR BALKIN:** It's a joint venture between the Consumer Affairs and the Building Commission.

**MR FITZGERALD:** Its role?

**MR BALKIN:** To mediate, intervene in building disputes in Victoria.

**MR FITZGERALD:** Can it make a determination or can it only try to mediate? Is it a mediator or is it an arbitrator, if I can use that expression?

**MR BALKIN:** I believe if my case had gone through BACV and wasn't successful, BACV then would have taken action against the builder through whatever jurisdiction they felt was appropriate.

**MR FITZGERALD:** I must say there's an awful lot of bodies. That's an

astonishing number of bodies. So the fundamental problem here was not being able to access, for whatever reason, the BACV at an appropriate time, and you think if that had occurred the matter could have been resolved by now?

**MR BALKIN:** I can't go back in time but I would probably think so.

**MR FITZGERALD:** No, but that's your feeling. So what was the missing link? Why weren't you able to access BACV? Did nobody tell you about it or is it - - -

**MR BALKIN:** Because the builder lodged a - - -

**MR FITZGERALD:** He pre-empted that action.

**MR BALKIN:** By going straight to VCAT.

**MR FITZGERALD:** I see. At the end of the day the builder is continuing to trade and so therefore you can't access the last resort warranty insurance anyway.

**MR BALKIN:** The builder at one stage was claiming to be Australia's most awarded builder. The builder, despite me being in dispute with them and having been noted by Consumer Affairs in their annual report of 2004-2005 and the previous year of 2003-2004, was one of the 10 worst traders in the state, and despite on other cases not involving mine, the Building Commission did take them to the Melbourne Magistrates' Court on 42 charges. They still go out and the Building Commission gives them Display Home of the Year awards.

**MR FITZGERALD:** I see. So as a consumer at the time that you entered into the contract with the particular builder, you wouldn't have been aware of that chequered history.

**MR BALKIN:** No. A search of the ASIC web site, when typing the company name, fills up an A4 sheet. The company that I signed the contract with has not been trading that long. They're quite happy to tell the Building Commission on their press release, having had the charges found against them, that they've been successfully trading for 50 years.

**MR FITZGERALD:** Okay. Yes. From our point of view the issues are about the system, I suppose, and what are the gaps and failings in the current consumer policy system. So if you look at this very unhappy experience with which you're still living, you mentioned one thing that would have made a difference and that has been notifying the Building Advisory Council of Victoria earlier. What other things do you think - and it's hard to look back because you're still in it, this dilemma, but what are the things that would have made a significant difference to you?

**MR BALKIN:** One of the things that would make a real significant difference and would provide real consumer protection is if somebody buys an established house the vendor must provide a section 32 statement of any known defects on the property, and if they fail to disclose something that is subsequently discovered afterwards, they are liable for any non-disclosure of that information at the time. The building industry would lift its game a lot if the builder had to do the same thing when handing over a new house, to list the known defects. If the builder did that - because as it is at the moment it's up to me as the consumer to find them, to identify them. I might find some, more likely than not there's others there I don't know about, like I've now got raw sewerage coming up through the floor of the house, and I don't know how I'm supposed to get that fixed but I'm digressing. If the builder had to sign off to say there are no defects on this house, and by doing so the builder is then subject to later litigation if that statement is incorrect, or saying, "Yes, this hasn't been done to code. This is not right. This here is another error." Knowing that, is an allowance put for that or whatever, everybody knows. If that was up-front rather than hidden I think that would provide enormous consumer protection and cut out a lot of red tape.

**MR FITZGERALD:** Right. And beyond that? If the certificate of defect were proved to be false, you'll still end up in a litigation model?

**MR BALKIN:** It may do. It would probably need to be reinforced with the builder's history being actively, or proactively followed, by whatever regulatory body to say, "There's something wrong here. There's been X number of - your proportion of charges to the number of houses you build, you're a lot higher than the average."

**MR FITZGERALD:** The other thing that strikes me is somehow or another to ensure compulsory arbitration at a very early stage after the dispute has been acknowledged, isn't it? I don't pretend to understand where all of these various bodies, the commission and the BACV all fit in and VCAT at this stage, but that seems to be a fundamental - in terms of redress, given that there were problems, given that they were identified as problems, there seems to be in your case a significant problem in finding an entry point to having it arbitrated quickly. Is that right?

**MR BALKIN:** Yes, they've all just done the hands off, "I can't help you. It's before VCAT." They won't get involved. You're on your own.

**MR FITZGERALD:** Yes, okay. The actual builder itself, however, is obviously insured for building work and that. So in this case at this moment in time it's not an issue about the insurance of the builder or anything like that because the builder is both solvent of trading and presumably able to meet it's requirements if there was a finding against it.

**MR BALKIN:** Presumably.

**MR FITZGERALD:** But you're saying with VCAT they're not able to order costs, legal costs?

**MR BALKIN:** VCAT does not do that.

**MR FITZGERALD:** And that's where you're going to suffer considerable loss, irrespective of the outcome.

**MR BALKIN:** No matter which way the outcome is.

**MR FITZGERALD:** Yes. Are there any other points that you want to make which would help us in terms of looking at the public policy issues?

**MR BALKIN:** Yes. Lawyers.

**MR FITZGERALD:** Yes.

**MR BALKIN:** The legal system. Lawyers see me as an opportunity for them to make money. Their interest is not in me, their interest is in themselves, and they are quite happy with the system the way it is because that generates a lot of work and a lot of income for their colleagues.

**MR FITZGERALD:** Right.

**MR BALKIN:** They're not interested in having the system improved because it would reduce their collective income base. I think the lawyers should be taking those that are familiar with my case and other ones similar they should be making representation on behalf of their industry to the Bar Association or whoever. I'm not a legal person to say this is a problem in the legislation, in the laws, this needs to be changed, this isn't right.

**MR FITZGERALD:** Mm'hm.

**MR BALKIN:** But no, they're more interested in creating the money along the way. Some personal views, in discussions with my wife, the questions we ask a lot, "Have we done wrong? What did we do? Why have we ended up in the situation we're in? Why are we made out to be the guilty ones? Why do we not get any help?" We didn't build a shonky house, the builder did, yet we can't get ours fixed, whilst the builder lives a life of luxury. The directors of HIH are in jail. It's my wife and I that are paying the price of them going to jail, because HIH had ripples right through the insurance industry, the government changed the rules; it's my wife and I that are paying the price for that. Each of the organisations I refer to, and you note

there's a lot of them, on their own each one is a David and Goliath battle. One dispute with one builder leads to multiple battles with other organisations simultaneously - no-one's there to help, everybody's there to point me out to be the bad guy. I just do not have the resources, and by resources I don't mean just financial, I also mean emotional, I mean energy levels to continue the fight. It is so overburdenly taxing on so many fronts. So far I have spent $200,000 in legal fees, and I've still got a house that leaks water in five rooms, with shoddy brickwork, no appliances, no certificates. We're now illegally squatting in our own house because we haven't got a certificate of - a final completion certificate - just the system is an absolute disgrace, disaster. And I'm not alone.

**MR FITZGERALD:** Thanks for that. I appreciate that. One of the things we are keen to do is to work out - I mean, there's two levels to this inquiry: one is what are the consumer protections in place, and the second thing is how are people able to access those. Your story is very much around both of those issues, so it's helpful for us trying to understand how the system either facilitates or mitigates against consumers being able to access their rights quickly and effectively, and yours is a story that shows that there are significant weaknesses in it. Of course, the problem for all of this is that whilst the VCAT matter still remains unresolved, one doesn't actually know the final outcome of this. Have you got any indication as to when that determination will be made? You've still got to go through - have you got to go through a determination hearing, or is that held and you're just waiting for the decision?

**MR BALKIN:** At the moment it's still tied up in legal debate, but even though I had that moved on and it was set down for trial, I've now got to find 50K in legal fees to finance the trial, having exhausted my income to date. When I first knew that the builder had taken the matter to VCAT, I thought, "Good. Bring it on. VCAT can come here, they can see that it's not built to plan. They can see where the water is going through all the plaster. They can see all this." We're heading for five years down the track, VCAT has not seen it, and I'm now exhausted of funds.

**MR FITZGERALD:** I appreciate the difficulty that you're now in. Are there any other final comments that you want to leave us with, Mark?

**MR BALKIN:** I'm happy to speak on any of those items I've mentioned at more detail and provide any substantiation that you may require.

**MR FITZGERALD:** No, that's fine. We may come back to you. The reason is to try to get an understanding so until we get a clear understanding of how all of those components work, it's difficult to ask meaningful questions about it, because there's so many organisations that you've just referred to. But I am curious as to why an effective and early intervention in terms of an arbitration or mediation couldn't have been effected well before it led down this extraordinary path of inaction.

**MR BALKIN:** The other one I didn't mention is my local member of parliament hopes that my issue just fades away, goes under the carpet, despite having raised it in the floor of parliament; is not following through actions that I've requested as a constituent; receives letters back that are wrong but doesn't take any address to deal with them; refuses to actively help.

**MR FITZGERALD:** All right, well, you've made that comment. Thanks very much.

**MR BALKIN:** Sorry, there is one more. Today's paper. Page 15 of the Herald Sun. There is an important notice to consumers issued from Consumer Affairs and Fair Trading against a builder. I don't know why that hasn't occurred in my situation.

**MR FITZGERALD:** I see, they've actually got injunctions against the particular builder in this case. Thanks for that. We will get a copy of that. Fine, thanks very much. We'll move on to the next participant. If you could give your name and whether you represent any particular body or organisation.

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**MR KORFIATIS:** My name is George Korfiatis and I'm representing my family collectively, these 10 people.

**MR FITZGERALD:** All right, George, over to you.

**MR KORFIATIS:** I'm just going to make the submission on behalf of, as I said, of my whole family, it's not an individual matter. My submission is about a builder who failed to complete our homes. The situation was he was unregistered for a fair part of that time whilst he was constructing. My submission is about an inaccessible insurance product. It's a product that was forced on us. This product doesn't discriminate. You could be a newly-married couple, you could be a middle class family, you could be an elderly retired couple in your final years of life. It's product that gets forced on you and it's the same product for everybody.

In this country most consumers are afforded what I believe is high levels of protection. I have travelled overseas and had a look. So if you're purchasing faulty goods and services there is a high level of protection, I believe. But when it comes to your home or building, one of the greatest assets in the big Australian dream, building even with a registered builder is fraught with absolute danger, danger that shouldn't need to be. Our families ages range from 11 to 80 years and they are the ages of the people that have been affected by our matter, so we're all of the above. We've been all but wiped out from our young children to their grandparents, which is my parents, in a clear example of what useless consumer protection there is when a builder fails to meet statutory obligations.

In 2001 we decided as a family to replace our ageing family home and we were going to build one home for my parents, one home for my brother's family - and he's got four children - and one home for myself. We have lived there for 30 years, it was an exciting time which always is for people when you're building. This is the first time we have built. My mother worked in a factory in the same street all her life. My brother and I attended primary school across the road from our home. So it was an emotional time. There was significant memories attached to this site and to the family.

In 2003 we signed three domestic building contracts and forced on us was a product called Builders Warranty Insurance. I guess in the unlikely event that the works were incomplete or defective we believed, like everybody else, the builder would fix it and if the builder wouldn't fix it you'd contact your insurer. We paid all the necessary fees, levies, we even paid a levy for HIH which we had nothing to do with as part of that process and it was forced on it, so we don't know why we pay that, taxes and insurance premiums; things for people who have committed what's been said in the press, you know, criminal conduct.

So everything was paid for, including approximately $3000 in insurance premiums which we found out that's what it was later on. There was no clear information at that stage of the risks of building, but there were many misrepresentations and in the media about the wonderful system of using registered buildings and being offered protection of seven years' warranty without clear disclosure of how impossible it is to access if the builder refuses to make good on anything or even if he's unregistered and cannot make good. In our case even the failure to meet fundamental inspections during concrete pours, statutory obligation breaches have meant absolutely nothing.

Our homes have only got as far as part-frame stage so we don't have anywhere to go, whether we like it or not. We employed an architect and an engineer and a supervising agent, so we weren't going through this totally blindly trying to manage the job. This matter has consumed our life for the past three years. Action was taken in June 2005 on advice from lawyers but the only enforceable course of action or any compensation or rectification was VCAT, a low cost forum to hear domestic building disputes. The trial was set down to be heard since May 2006. We are now there to return for recommencement of trial in August 2007. We don't like our prospects of finalising this matter.

We have got nowhere in a hurry. My brother and his wife are unable to devote time to their children. The whole family lives in misery over the home we lost. We fear it's going to consume our life for many more years and when it comes to making a claim for the insurer, well, even if the builder does become insolvent, that becomes another issue in VCAT possibly, another round of litigation. Consumer Affairs have tried to assist, but have been unable to assist. The building commission is unable to assist. The nightmare gets worse because the family home was my elderly parents and they are in their late 70s and my mother is nearly 80 years old now.

With the significance of the three homes, three families and the builder was already paid around $165,000 for defective works, or what we say is defective works, it was not possible to just walk away, as suggested by others. In hindsight that is the only sensible decision for any consumer in this current climate. All we have is a useless part-frame and part of that's blow into the street and emergency work under orders from council which are enforced on us. My brother suffered and his young family, as well as our business. We have a family business, we have laid off three staff, we are down to one staff and this is all directly because of what has happened and the time and money this has consumed of ours.

Our parents live in unsuitable rental accommodation and they have just been given some notice that they need to move again, the person is selling the house. This is the third time. The system that we found provides very little assistance to consumers, very little useable assistance. It's almost cruel and heartless. Consumers must fight for any of their rights in the justice system, a system that really to date has

failed us. Lawyers, well, they are expensive and you pay whilst they argue between themselves on technical matters. Defects are there. It hasn't made any difference how much money we've spent to try and enforce our consumer rights. We can't get out of the cycle of madness all because the insurers and the builder keep dragging their feet and have used every opportunity to possibly prolong proceedings and we are very frustrated and they know that.

As I said, we've got a part-heard trial and we expect to return in August 2007. We budgeted to run the hearing to conclusion since last year and again we've been delayed and grossly disadvantaged. It is because of the above that I believe the insurers are happy to sit back and watch consumers capitulate or run out of money and, I guess, frustrate them as long as they can because for them it's not an emotional thing being kept out of your home. Consumer Affairs is powerless to do anything, anything of real substance. The insurers, the builders, the politicians all blame the legislation in place for what is occurring, yet we've got an unprecedented situation in this state where the government supports the current regime, refusing to embark on any change for the protection of consumers at all. The funds seem to be available whilst you pay this massive insurance premium, so it's not like the funds aren't available.

You might ask me how bad are the works and I said "part frame". The contract term, in 2004 when it was terminated, had expired and only 20 per cent of the works were complete. They are deemed most ineffective by experts. The slab has never been inspected prior to pour so it doesn't comply with Australian standards; court tests have proved that. Our experts have concluded it's a demolition job. We've spent over $100,000 just on reports because it's become a legal argument now to show how defective the works are. The builder has since abandoned the works; hasn't returned to fix the defects - the serious defects on the site, but to enforce our rights we must go to court and waste hundreds of thousands of dollars on legal costs and reports.

Why is it that every defect, including non-compliant slab, is a legal argument for lawyers? More money has been spent investigating our situation by all parties than it would have cost them many years ago to demolish and rebuild what was there. My parents say they've done nothing wrong. Their health has deteriorated; both stressed; both been hospitalised. It's looking like they'll never end up in the home ever and that's through no fault of their own, and my brother and myself blame ourselves for doing that. Unfortunately the private insurers who are legislated to protect us are probably hoping that, irrespective of the facts of the case or the defects, the case is going to be fought on legal issues and not just technical points on defects. Consumers are victims of the law because it can't be enforced quickly and economically to mitigate the losses. The tribunal we are in is a de facto court. It is with QCs and with senior barristers. This was supposed to be a low-cost forum.

I have quizzed VCAT internally and they - some of the solicitors there have said there is no QCs in the place. I said, "Well, there is QCs in our case." So it's proven to be extremely expensive. All along, we believe due to statements made by the Building Commission, the Victorian government minister's press conference, and assurances by the builder, that you can trust a registered builder and that they're insured. "Use a licensed registered builder because they will have the necessary experience, knowledge, qualifications and insurance as well as meeting rigorous quality standards to complete your home." Well, we can prove otherwise on most of those points. So as a consumer we felt protected engaging a registered builder and that's proven to be false and misleading in our case. The builders holding the registration, we believe there is some flaws, and I won't say anything further than that.

The licensing system has failed us and we don't believe there is consumer protection there. We thought insurance was insurance as you know it and the word "warranty" in it hasn't turned out to be that; obviously when it's been too late. Nobody disclosed anything to us until it was too late. We've discovered obviously that the insurance is not accessible until the builder is dead, disappears or is insolvent. It's forced on us and then it's highly conditional and unlikely to access it. It shouldn't be called warranty insurance the way it's currently structured because you've got to finish your court battles with the builder and then you've got to start another one with the insurer. If consumers knew the whole process, and the legal system and the way it's set up right now, they would not bother.

The commercial decision would be, "Forget about it." The most you'll ever get is 200,000 if you are one of the lucky ones that I've never heard of. But it will cost you far more than that to try and get it, so commercially it's ridiculous. It's a win-win situation for the insurers. The current system protects rogue builders, fleecing consumers and then they've finally got no access to this builders' warranty insurance. Instead they're faced with huge legal bills they can't afford and this system destroys the very people and their families who most need the claim on their insurance. We've spent the last two years in court; three years without a home; and no other option available. The contract was signed in 2003; it's now 2007. No decision is going to be made probably, the way it's going, to at least 2008 if we're lucky. So will we ever build our homes?

This apparently is normal if a builder fails to fix defective works or walks off the job. Imagine that happening every time somebody had a minor car accident and had to wait five years to resolve it. Whilst the car depreciates you continue to pay registration, more insurance and, worst of all, having this useless policy forced on you without disclosure of the product. We never got any disclosure of the product. All this because no-one was interested in mitigating loss early, as you forced in the court. I don't believe this unnecessary pain should be inflicted on consumers. No-one, especially elderly people, should waste their last years of life in court trying to

save their home because of a rogue builder or misleading insurance. We have now spent in excess of half a million dollars as a family; we're individuals, we're not a corporation. It's not money we've got to throw away.

The builder hasn't returned the $165,000 we approximately paid him. We've been ruined, firstly, by the builder and then Consumer Affairs' inability to take swift action and finally by VCAT's slow process and escalating costs and encouragement to allow the matter to drag on. How can we get justice without spending more years and hundreds of thousands of dollars with lawyers and courts, and what will it eventuate in? How much longer are we expected to continue as a family with this and with the outcome - will the outcome result in our homes being built? Why are we fighting a $2 company with no assets and which does not trade? Now we are told to expect to lose if you win at this stage. The big black hole just keeps getting bigger. Why should anybody suffer this sort of loss whilst trying to build a home? The 10-point plan the government enacted and instigated by the minister does nothing to protect consumers, in our opinion.

It only serves to manage risk down to nearly zero, so where is this consumer benefit? We are caught in a system created by the government and we are reluctantly going through the exhaustive process without any assistance from anyone. If the money runs out and the lawyers walk, the banks then move in and we all join the welfare queue. How does that help the system? I know consumers whom this has happened to and I also know criminals that have been able to access more assistance than law-abiding consumers or pensioners about to lose their home. It's a bizarre situation where we have no insurance to claim on yet we were made representations by the government builder about the insurance in place. Many consumers who have attempted to have had houses built over the past few years have found the whole system has fallen apart when their only enforcement action is VCAT.

The VCAT Act was set up to place an emphasis, and a strong emphasis, on prompt, efficient and inexpensive resolution of these sorts of proceedings. We have proven, beyond doubt, it is not true. Why do we need to use expensive lawyers in VCAT? To get justice. If it's so economical why are QCs representing insurers and intimidating consumers with costs awards of thousands of dollars per day? If we don't use lawyers and barristers, even if we have a strong case, we stand to lose to the best lawyers money can buy in VCAT. Insurers would rather pay lawyers than victims; they would rather set precedents - set the message out there. How do we feel when insurers acting for the - sorry, how do we feel when insurers acting, look at your home of 30 years and think, "If we can win on legal argument there is money behind that old couple because there is some equity left in their home"?

I find that totally disgusting and so are some of the lawyers involved in some of these cases. Even if a consumer's case is proven against the builder, there may well be not enough money in the current warrant insurance scheme, even if they were

to pay out, because of the escalating completion costs of the time taken to resolve the matter and the escalating legal costs which you don't get back. This is a situation whereby the insurers are happy to stand by and watch the costs escalate rapidly knowing that the most cover a consumer has under builders' warranty insurance at best is 20 per cent cover for completion of works and a total sum of $200,000 per policy. That is it. Their liability does not grow. The consumer's does, with time, to get defects rectified which is why it is of relevance for the insurers to keep consumers in there.

We are in a no-win situation created by the delays of not being able to mitigate losses quickly with an accessible insurance or even an enforceable body that doesn't take years to hear a building dispute. Even if you prove your case in court against the builder there is every chance the insurer will then reject the claim and force consumers back into the court system - the same court system they've just come out of - for years, until they destroy them emotionally and financially with more legal costs creating this illusionary compulsory consumer protection warranty insurance and handing it to private insurers thirsty for ever-increasing profits. It's absolutely disgraceful in this day and age. We call on the federal government to protect consumers.

I would expect the federal government should now put whatever pressure on the states and insurance giants that inflict this pain on consumers in the name of their profit and have them mitigate losses and actually pay valid claims immediately at the very least. No consumer should have to fight legal battles against a huge insurer with the resources they have at their disposal. It's a David and Goliath battle and I've just been trying to get through one. This is an issue that is of vital importance and I know that many members of parliament we have met would agree with me, and it's time for the federal government to force the states to implement a real builders warranty insurance scheme to make sure the money paid in premiums is used for consumer protection, not for private organisations' profits. We would like to repeat an extract from Minister Lenders' press release when he was minister for consumer affairs in Victoria:

> The Bracks government will not tolerate builders who betray the trust of families and people who do not have technical building or expertise to know when things are going wrong.

Every Victorian has the right to pursue their dream home without worrying about getting ripped off by builders. So what's happening when they do? This begs the question: why are we still homeless - our whole family? What has Mr Lenders done to protect consumers all those years? If it's our right to pursue a dream home, then why are we in court fighting for our rights and spending extraordinary amounts of money and getting nowhere? Why are Victorians, as legitimate victims of faulty and defective building works, being made to suffer?

There is more protection, simple economical courses of action, and stricter regulation, on purchasing a $5000 motor vehicle, used, that's nine years old, than when you build a home; the single biggest investment you're ever going to make for your family. Why? Because there's a guarantee fund in that situation run by the government for the benefit of affected consumers, just like there is in the TAC and WorkCover. There is a reason behind it. Why can the states run the TAC and WorkCover profitably and for the benefit of the community, but not administer a home warranty scheme to protect the biggest decision in most people's life; to build a home.

These are not business transactions. We're talking about ordinary people building a home that just so happens to be a large sum of money, an amount of money that most people pay over a lifetime, an amount of money that a builder's failure and legal costs can send an ordinary person bankrupt unnecessarily through no fault of their own. Why is VCAT, the courts, the first and only enforceable resort for consumers when things go wrong in this state, and why are consumers being subjected to QCs' and barristers' costs in that forum? Will this government now stand up and protect innocent people, or ignore them in favour of rogue builders and multinational insurers destroying families?

Even when the builder becomes unregistered and is unable to return and complete the works there is no enforceable, effective process except the courts. Our builder is unregistered, cannot return to fix the works. Why is it up to the consumer to take civil action for professional misconduct and to rectify faults and defects when the builder has clearly breached the Building Act? Where is Consumer Affairs protecting and enforcing consumers' statutory rights? Why bother with legislation that only the rich can enforce through the courts? The compulsory builders warranty insurance is totally inadequate when things go wrong. The builders warranty insurance paid for is not fair, it's totally not realistic, and in terms of cover the amount of major loss - as in our case and many others - is not transparent at all. We've not heard a single word from our insurers. Even after notifying of our intention to go to VCAT some two years ago, they have not to this day even replied to our fax acknowledging it. Why? Because legislation protects them and allows them to do absolutely nothing.

**MR FITZGERALD:** We'll just need to conclude it in a moment. Are there any final comments, and then I just want to ask some questions if we can.

**MR KORFIATIS:** There was a little bit more.

**MR FITZGERALD:** Just a couple more points.

**MR KORFIATIS:** The current builders warranty insurance scheme means

taxpayers and consumers are funding VCAT to run useless mediation compulsory conferences with lawyers, often when it's too late. So taxpayers are funding building and insurance disputes while insurers maximise profits from its existence in not paying out early in times of disaster. To date approximately 800,000 to 1 million dollars estimated to be spent on our legal case collectively for our building dispute, which is ridiculous and all we're trying to do is resolve the matter. A straightforward building dispute has become into a relatively complex issue with the courts and the lawyers and it's become too complex for even junior barristers swamped by QCs, which gives us no option but to use senior barristers. Their hell-bent on sending a message to consumers, "Walk away," and that's what this system does, it sends that message out, "otherwise you could possibly be bankrupted."

We don't believe consumer protection is existent. It just exists as another impost on building. It's paid to insurers and just adds a false sense of security to unsuspecting consumers and should be immediately abandoned or made voluntary. A government-run scheme, similar to what we spoke to before with the TAC or WorkCover, could replace it to get rid of these cruel misrepresentations. It's been an unnecessary burden on a lot of consumers and our family. It's been poorly put together in the self-interest of others and incorrectly branded as warranty insurance. We have the evidence it's a dismal failure in all aspects. Needless to say, our case is not new, it's just a horrifying situation faced by all consumers who have been abandoned. It's in the public interest, we believe, that it's abandoned in its current form immediately.

**MR FITZGERALD:** Just a couple of questions. You would have heard me raise some questions with the former participant, Mr Balkin. Looking back there are two elements: one is whether the insurance itself operates, and in your case it doesn't operate yet because they're neither insolvent, nor disappeared, or dead, so it doesn't come into place at this stage and so there's an issue about whether or not you'll ever access that particular insurance. But going right back, the same fundamental issue is about at the time of the dispute in relation to the building works, how were you advised and who did you seek advice from as what you should do at that moment? Because again, just referring to the previous discussion, the BACV, the Building Advisory Council of Victoria or whatever it is, has an arbitration scheme and so on and so forth. So what happened at the beginning that could have made a difference to where you are at the moment?

**MR KORFIATIS:** Firstly, we had an independent report when we were concerned about the way things were going and if we could get an expert in who actually works for an insurance company. He quickly put together a few pages and concluded at that stage it's a demolition job. It was probably a little bit early to say that, but that's what his conclusion was. We did contact BACV at one stage and we got incorrect information, because it's only a phone call and somebody could say something wrong. But then when we terminated the builder because he was unregistered - we

discovered then he was unregistered as well - there was no option but issue a notice of intention to terminate and then terminate. It was lawyer's advice that, "It's too complex, there's too many things wrong, BACV won't be able to enforce what needs to be done here, so off you go to VCAT."

It took us six months to go to VCAT and that was because we needed to make sure that if we're going to VCAT if the builder doesn't intend coming back to fix anything or compensate us for the damage there, that we need to have clear evidence that there's some serious defects there that we can't continue building. That's what the conclusions were from everywhere, and it's just been getting worse and worse and worse and worse, the more people look at it. So we didn't use that.

**MR FITZGERALD:** So effectively your first real avenue was through VCAT itself.

**MR KORFIATIS:** That was the advice we got because how big the issue was, the amount of money that was involved, and the builder being a small builder wouldn't just write a cheque out or rectify it; in fact he said he had no intention of rectifying it.

**MR FITZGERALD:** At the moment the builder actually still exists but he can't build.

**MR KORFIATIS:** The individual exists.

**MR FITZGERALD:** You're suing the individual or are you suing a company?

**MR KORFIATIS:** The individual and the company. The company does not trade. The company has no assets; it's been said in the witness box.

**MR FITZGERALD:** Yes, but the individual does.

**MR KORFIATIS:** Unfortunately the company probably is conscious of the guarantee behind the policy which then stops you being able to get realistic about the situation, so it's been funded by a third party.

**MR FITZGERALD:** Who is funding it?

**MR KORFIATIS:** I believe from the comments made, possibly the son.

**MR FITZGERALD:** So it's another party, it's not the insurance company at this stage funding it.

**MR KORFIATIS:** No, not the insurance company.

**MR FITZGERALD:** So at the moment the insurance company is not involved.

**MR KORFIATIS:** So how can it be a realistic situation if you're are faced with going through all this and then starting it all over with the insurer? I know some people might have that problem with the insurers. Look at the amount of money and time spent, we still haven't got to that stage. Where's the short circuit? There's no short circuit. This will start all over again. We're unfortunate enough, it's a complex issue.

**MR FITZGERALD:** At the end of the day you've got three home owner's warranty insurance policies, what are they called?

**MR KORFIATIS:** Home owner's warranty policy.

**MR FITZGERALD:** Yes, you've got three of those. So the maximum compensation you can receive at the end of that is $600,000 - $200,000 on each. Is that correct?

**MR KORFIATIS:** That's correct.

**MR FITZGERALD:** But that won't cover the legal costs and all those sorts of things, even if you were able to access that.

**MR KORFIATIS:** Correct, and the losses that flow from the time taken, how to finish the job, rentals - I mean, it doesn't include in that the consequential - - -

**MR FITZGERALD:** No, no, it's just - - -

**MR KORFIATIS:** They're just, "Bad luck," you just keep paying thousands a week in rental. There's three families here displaced. I'm talking about one.

**MR FITZGERALD:** Yes, I'm conscious of that. You said in one of your comments that you could get rid of the homeowners warranty scheme because in your mind this misrepresents what it actually does. But getting rid of the insurance makes no difference to the fact that at the end of the day you need a means by which you can have the matters dealt with quickly. I mean, central to all of this in your case, surely, is the issue about how do you actually identify that there's a defect and then have that matter resolved quickly. That's the central argument.

**MR KORFIATIS:** There should be a low-cost forum - a true low-cost forum. There should be an adjudicator and there should be some professionals - one, two, three - depending upon the matter, who then put forward a submission and both parties - it's enforceable and they accept it, because there is always an argument - we have an argument where something doesn't comply with the statutory obligation of

the Building Act. We have someone who says, "My opinion is, even though it doesn't, it's fit for purpose." So this argument will go forever. Another expert will say, "Fit for purpose, I don't agree with that. I don't think it's going to have the longevity that it should have." So you need someone to say, "Under the circumstances, look what's there, what sort of money has been spent? What's the best outcome for everybody?" not go sending the builder, the consumers broke, everybody, and it must be binding and that's it, end of story. If you don't like the frame, it's a little bit out by three mill, so be it. You can't expect to have a wall knocked down if it's still going to be pretty much okay. Someone has got to make that decision, just like a member will, or a judge in a court, you have the complexities of the arguments because they go on forever, ever.

**MR FITZGERALD:** The Builders' Collective of Australia this morning made representations that they believe that the Queensland system which has some form of early arbitration is a far superior system than what exists in Victoria. Now, we haven't yet looked at those systems, so I don't want to comment on that. But it is your understanding that the scheme that previously existed in Victoria would have been able to aid you or assist you better, or you're not familiar with it?

**MR KORFIATIS:** I'm not familiar with the earlier system but I'm familiar with all the press statements when this new system came out that this is the system, this is the minister's press statements that this is the system that will sort consumers' disputes out quickly now and more economically than the last system. So I can't imagine what the last system was like.

**MR FITZGERALD:** Okay.

**MR KORFIATIS:** I am not familiar fully with the Queensland system but I have looked at the process, I guess the flow chart of what happens, and it really seems to make sense in the way you flow through what happens where finally if the builder can't or won't, you get someone in and you fix it, and it costs $103,000, rather than a million dollars in legal costs and another 500 to fix it. I mean, that's mitigating the loss and I guess that's what this system is missing in this state. How quick do you get this resolved and how quick do you get it fixed, because our frame, whether it can be saved or not, cannot now. It's been exposed to weather for three years because no-one is able to come in. So if it could have been saved - you know, you've got to be quick with these things like every matter.

**MR FITZGERALD:** Yes. You initiated the action in VCAT.

**MR KORFIATIS:** We did initiate the action, yes.

**MR FITZGERALD:** When did you initiate that?

**MR KORFIATIS:** That was in June 2005.

**MR FITZGERALD:** That was, what, six months after you'd terminated the contract?

**MR KORFIATIS:** About seven months after. We had to make sure - it's no good initiating action unless you know who the parties are and what evidence there is. We thought it was going to be a straightforward process. We've been pushing as fast as we possibly can to get out of there; we just seemed to not be able to.

**MR FITZGERALD:** Good, thanks for that. That's obviously a very detailed submission, and you're giving that written submission to us or not, at some stage?

**MR KORFIATIS:** Yes.

**MR FITZGERALD:** You can do it, it's up to you. You've got parts there that you didn't want to read out, so it's up to you whether you can or not.

**MR KORFIATIS:** There's a couple of things if I can just finish as an overall thing.

**MR FITZGERALD:** Absolutely.

**MR KORFIATIS:** So in my submission I guess where I was trying to go with the whole thing, without making it a personal matter, more of an overall view of what I think is wrong, is I believe the insurance is unrealistic. I believe it provides no risk management for consumers. I don't believe it's in the public interest, what's in place now. It's inaccessible by the poor and definitely now inaccessible by middle-class Australians in this state. So I guess it's only available to the rich and I don't think they would bother with a $200,000 claim. Consumers who run businesses are burdened with a long and expensive litigation, so it's regressive to their business and it has been to mine. It adds costs and a false sense of security to the job. Using the word "insurance" and "warranty" I believe are misleading under the circumstances of the way the regime is set up. There is evidence that the market players are profiting to the detriment of the poor old consumers in the way they handle claims. Consumers find themselves in unnecessary litigation, sometimes for the first time not realising the risks and the costs associated with trying to make a claim.

There's a lack of consistency with other policies of consumer protection and available courses of action. The burden or responsibility is on the consumer to access the insurance when claiming. I believe that's unfair. Not being able to access the insurance clearly ends in financial hardship for consumers, trying to access it in litigating. At the end of the day, if consumers aren't careful it ends in tragedy where they lose their homes. There is a lack of disclosure on this insurance product. It's dealt with differently as opposed to other insurance products under the Financial

Services Disclosure Act. For some reason it falls outside that, and I believe if we had information on that we would have thought more clearly about what courses of action to take at that stage.

There is very little disclosure in our contracts about the product and what we were paying and where it was going, and no disclosure about the builder. There is absolutely no simple mechanism that you can enforce an insurer or builder to make good on any of their contractual obligations. I think that's a major failure. Allowing insurers to regulate who can build in this state I think is a failure, because at the end of the day if they don't have that insurance policy based on assets and how much they guarantee behind the policy, they can't get a licence. We've raised this matter with ASIC, ACCC, Insurance Council of Australia, the state ombudsman, the Building Commission, the insurance ombudsman, the Master Builders Association, Consumer Affairs Victoria, state and federal politicians - and I met with them in Canberra, both there, and also the state politicians. All of the above have been very sympathetic. Some have been very critical of the system, but unfortunately it all comes back to the state legislation in place, and unless there's change nothing will happen.

VCAT puts aside during the mediation process all the building regulations, all the statutory obligations to be met, and it just becomes, "All in, let's just deal with this." So mediation is very difficult. We don't believe VCAT has the capacity to hear issues that become very complex by lawyers. These are well oiled, well qualified QCs. They know what they're doing. Insurers are able to get conflicting reports and opinions, so even if a builder hasn't met any building codes, there's conflicting opinions and arguments. It might still come back to the code but why the argument, why spend the money? There should be one independent report in times of dispute. That's extremely important. That's been the biggest failure of what's happened with us. Every time there's a report, there's another argument, another report. So a specialised body that deals with all of this enforcement should not throw consumers in the courts. It has been the biggest mistake of this government doing that to poor old consumers. Very few consumers have the capacity to see a matter to conclusion, so the courts will not work for them. They will exhaust themselves with costs, the damage will already be done to their families and their businesses and an insurance regime needs to look at that very carefully and quickly.

**MR FITZGERALD:** Thank you very much, that's terrific.

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**MR FITZGERALD:** If you could give your name and the capacity in which you appear.

**MR DALTON:** Yes, my name is Ray Dalton. I'm here as an affected consumer, having entered into a building contract with a registered builder on 15 December 2000 to build two homes for myself in Hawthorn and two homes for my partner in Hawthorn on the adjoining block. We were both using the same builder. We were covered by, as I understood it, homeowners warranty insurance. The contracted period was for eight months for the homes to be completed. It became obvious to us fairly quickly that he was behind and we raised the issue with him and with others along the line and we were advised not to sack him, not to end the contract because it would hold the building works up for more than a year by having to get other reports and get other builders to do it.

Eventually the builder abandoned the site in June 2003, some 30 months later, and we were left with four houses that were incomplete, had no certificates and were full of faults and defects. Not knowing what to do my first port of call was to our family solicitors. Their recommendation was to bring the contract to an end, to commence proceedings against the builder in VCAT and to immediately lodge a claim on our homeowners warranty insurance with the insurer. We were able to do that because, unlike like the previous two gentlemen, we were under first resort insurance which meant that we could actually claim on the insurance day one as soon as problem arose.

So in August 2003 proceedings were issued against the builder in VCAT. In August 2003 we logged a claim on Vero Insurance and by December 2003 had no word back from the insurer. I chased the solicitors. They suggested leaving it until the New Year and in January we approached the insurance company to be told that they had never received our original claim, even though we had correspondence back from them in relation to the original claim seeking further information. So we then resubmitted the claim in January 2004. 87 days later the insurer decided to advise us that given 90 days was fast approaching and after 90 days it would have been deemed to have accepted our claim, they were denying our claim. In fact they taught us a less that in January they were already deemed to have accepted our claim.

At that stage the solicitors suggested that we tie the insurer to the existing action in VCAT against the builder, which we did. Subsequent to that the builder had other actions against him at VCAT by other consumers. An order was given in VCAT against him for $236,000 for another consumer in Hampton and the next day he put his $2 company into liquidation. So we are left fighting the insurer. It was early 2004 that in fact we were given details of our homeowners warranty insurance. We signed the contract in December 2000 and we had no disclosure as to what the policy was or what the product was until after the builder had actually left the scene.

Then we find that the builder is actually acting as an agent of the insurer throughout the whole episode in the issuing of the policy.

So we had no disclosure as to what the product is until it's too late. We're left fighting a multibillion dollar insurance company who, at this point in time, we have documents from the building commission who have investigated our case, have visited the insurer in their office in Sydney, have a statement from them that our claims are valid and should be paid and all they want us to do is to quantify our losses. Our losses have been quantified for VCAT for more than a year, and we still haven't got a cheque. We have had compulsory conferences in VCAT where the member has said to us off the record that this insurer will litigate us into non-existence, litigate us to bankruptcy because it is cheaper for them to do that than to pay our claims. Their own barristers have said the same thing.

So we are fighting a company that doesn't like paying. We're fighting a company that the history shows and demonstrate, with figures that obtainable from the Victorian government, where they've have to take over from failed insurers and in fact the claims payments constitute about 2 per cent of the actual premium payment received by the insurance. You've got an insurance company that's taking $300 million a year in this product alone and is paying out less than $6 million and attempting to send consumers broke.

We have spent the last 12 months - this has had a dramatic effect on our family. At the end of 2005 I suffered a severe heart attack, spent a considerable time in hospital. I suffered another one in April 2006, and the effects of those are ongoing. I am now no longer able to work. As a result of my incapacity to work at that point in time the insurer actually made the application to VCAT to have our matter struck out because I wasn't able to give instructions at the time. The last seven months have been spent with the insurer trying the tack that we're in the wrong jurisdiction and applying for it to be thrown out of VCAT and taken up and for us to have to reissue, some four years later, in the Supreme Court of Victoria. Only when the matter came to being argued did they back down. That cost us six months, that cost us $20,000 in legals and at the last minute they back down. They're playing the game of litigating us out of existence. Yet we have documentation saying that our claims are valid.

We have got the situation where we've got insurance companies that, even when they acknowledge that the claims are valid and they should be paying, they'll go down the other avenue so that they don't have to. The only answer to our situation would have been that if the system, as in Queensland, had been affected in Victoria and when the builder walked off the site - and I asked him why he walked off and he said he couldn't afford to complete the works. If I had been building my homes in Queensland the Queensland insurers would have sent other builders in and the job would have been finished within the next two to three months. We would

have got on with our lives and we would still have our homes.

The result with ours was that we were told not to continue work on them because we had to get reports of our own. The builder had to get reports of his. The insurer then had to get reports of their own. That all took something like 15 months by the time the insurer was involved in the case et cetera. Our funder had had enough after about 15 months. In fact our funder had had enough about 30 months. When I advised them that the builder had abandoned the site, being up-front and honest with that organisation, I was immediately slapped with we were in default under construction loan agreement because there as no further construction happening and I was paying penalty interest instantly.

After a further 15 months the bank took possession of all the properties, including my home which was separate to them, and sold the lot. Bear in mind those homes were not complete, they had faults; they had no certificates and they were sold for grossly under their value had they been completed. I'm left with my lifetime work evaporated overnight. My wife's inheritance through her parents evaporated overnight and we're left with nothing out of the lot of it. We're now renting. I'm on a pension. We should be retired and have probably three homes in Hawthorn, two of them rented out earning us an income and one that we're living in. I'm fighting an insurer that has vastly more resources than I do. That fight looks like going for at least another year and a half.

My VCAT action is 717 of 2003 and I was fortunate enough to be able to go after the insurer immediately. These guys have had to go after the builder first. They've still five years of litigation against the insurer to go to get to the end of it. I don't know if I can be any more help to you. If you have any questions, fire them.

**MR FITZGERALD:** Thanks for that. Can I ask a question just out of ignorance. Why were you able to access a first resort insurance policy?

**MR DALTON:** Because our contracts were signed in the year 2000. Last resort insurance didn't come until the 10-point plan was instigated in 2002.

**MR FITZGERALD:** All right, so it was just a timing issue.

**MR DALTON:** So anybody that was in a contract prior to 2002 was in fact first resort.

**MR FITZGERALD:** Okay, so that's why you were able to do that.

**MR DALTON:** Yes.

**MR FITZGERALD:** You've done compulsory mediation through VCAT.

**MR DALTON:** Yes.

**MR FITZGERALD:** Your view clearly is that the insurance company is simply as, you've put it, playing the litigation game.

**MR DALTON:** We had compulsory mediation with the builder initially that the insurer attended as well. The builder admitted that he didn't have the funds to complete the works, but then wanted to argue over every point of defect. We've had them since with the insurer. The insurer knows we're hurting. The insurer knows they've run us out of money and the last time we had a compulsory conference with them was, "We'll walk away if you do. Bear your own costs." So they're happy to walk away now knowing that they've spent probably 150,000 in legals. We've spent 200. They're happy to walk away knowing that they don't have to pay me what our losses are that are detailed to VCAT that total something like 4 and a half million dollars. But even if we were able to access the maximum under our policies and because we're first resort, our policy has only got a maximum of 100,000.

**MR FITZGERALD:** On each of the properties or on the totality?

**MR DALTON:** No, under the policies you're only allowed to access $100,000. My argument is, and always has been, that had the insurer taken a real look at our case and said, "We've already got a very, very similar case that's being litigated in VCAT with the same builder, in fact the McDonalds from Hampton's case." They signed their contract with the builder three days away from ours. They signed theirs on 18 December 2000. They let him stay there building their single house for two years. They sacked him two years into an eight-month contract. They were then that much ahead of us in VCAT.

Had the insurer looked at it honestly and said, "We have almost an identical case already running against this builder, we should try and sort the problem out." If they'd sent a builder in and finished our houses and fixed our houses, as would have happened in Queensland, they would have been entitled to the final payments under the contract. In fact they wouldn't have suffered a huge loss at all, in fact they may have had to tip in 10,000 or 20,000 dollars, not 150 in legals over five years.

**MR FITZGERALD:** Can I ask a question, just in relation to the builder itself, is there anything prior to entering into the contract which would have signalled to you that the builder was not a reliable builder? Was there anything available - I'm not suggesting you didn't do it - but I'm just saying was there anything available or at the end of the day, like most of us, we take the builder on face value, they're registered, and that's about it.

**MR DALTON:** Nothing whatsoever. The builder was registered. He had

homeowners warranty insurance. Everything was supposedly right and ready to go and in fact I'll go one step further that the builder has put his $2 company into liquidation. He's protected. I've been screaming since 2003 to everybody, and none of them would listen, was that through this litigation all that was happening was that the builder was being given time to rearrange his finances and in fact that's exactly what he did. Eight months later he sold his home. He's now living in another home that's totally in his wife's name. He goes home to his home every night. I haven't gone one any more. He's protected himself.

The thing is also still if he goes in to the building commission, he can pay his $186 or whatever it is and his licence is now valid again. He's inflicted pain on the McDonalds in Hampton and on another family in - - -

**MR FITZGERALD:** Is that because so far he hasn't breached any law or regulation or been deemed to?

**MR DALTON:** The building commission say to me, even though I've complained to them and I point out that this man can go and do the same thing again, their attitude is I haven't got an order against him out of VCAT so they can't act on my complaint. The fact that there have been others is irrelevant to them.

**MR FITZGERALD:** So what they're basically saying to you is that unless there is a court determination against him or found to have breached something in law, then his quite entitled to continue to trade.

**MR DALTON:** Yes. But he's not trading currently because he's sitting back and waiting for it to blow over before he goes back and does it again.

**MR FITZGERALD:** Sure.

**MR DALTON:** The interesting thing is that again with insurers at this point in time insurers are selling homeowners warranty certificates for the princely sum of $250 at the moment, some of them, and the reason for that is that they understand that they'll never have to pay out on them. This is last resort insurance. The policy is not worth the paper it's written on. They'll issue the document knowing that they're never ever going to have to pay out on it.

**MR FITZGERALD:** Your insurance was different in another respect. As I understand from the Builders' Collective this morning the homeowner warranty insurance as it exists today is not only last resort in terms of the sequencing but it's last resort - that the person has to have actually disappeared off the face.

**MR DALTON:** He did disappear.

**MR FITZGERALD:** But in your case - and correct me if I'm wrong - that's not the case. This is insurance whether or not the builder continues to trade or otherwise.

**MR DALTON:** Absolutely. But you still can't access it. I mean, I've proven that I've got a case where they admit that my claims are valid, but they still won't pay them. They want to litigate me. These guys have proven that they can't get a claim up under last resort. I've proven I can't get it up on the first.

**MR FITZGERALD:** When you say that they've admitted.

**MR DALTON:** Paul Jamieson, manager - - -

**MR FITZGERALD:** Yes, I know, but that's still to be contested in the court. They haven't actually legally admitted.

**MR DALTON:** No, they haven't legally admitted.

**MR FITZGERALD:** No, I just want to clarify it, otherwise there would be no case.

**MR DALTON:** I will certainly be presenting the document from the building commission and certainly be subpoenaing the - - -

**MR FITZGERALD:** I understand that. I just wanted to clarify, because if they'd actually admitted it there would be no point in going to - they'd settle.

**MR DALTON:** They've admitted in VCAT that our claims are valid and all we have to do is quantify our loss under the policy. My loss is huge because it's consequential loss so I've got to argue the consequential loss argument.

**MR FITZGERALD:** Can I just clarify that. Are you only arguing now - what you've just said is they've legally admitted liability, you're only arguing now about the costs, the actual damages?

**MR DALTON:** I'm arguing for my actual loss. They're saying that I can only claim the loss under the policy.

**MR FITZGERALD:** So it's about the quantity.

**MR DALTON:** Yes.

**MR FITZGERALD:** Once you've admitted liability it's a different game. Thank you for that. Those three presentations we've just heard are very helpful to us in trying to understand the system.

**MR DALTON:** Just one other very quick point. George touched on it very briefly talking about warranty insurance and it not being a warranty. We've all seen, and it's available and we can get the documents to you, where the state government, HIA and insurers have all been trotting out press releases and everything else saying, "This is a wonderful consumer protection product." HIA went as far as registering the name, Homeowners Warranty Pty Ltd, as the company that would supply homeowners warranty insurance. They did that in 1996 when the old system was abandoned here and it went to private insurers.

In August or September last year the CEO of the Housing Industry Association who flogs this garbage on behalf of Vero came out with a press release that the rest of the population was wrong, that they'd been marketing homeowners warranty insurance as homeowners warranty insurance but "warranty" is the wrong word and went on to explain that in fact he wasn't selling a warranty in the true sense of the word, he was selling something entirely different. But everyone else was wrong, not him. So if that wasn't deceptive and misleading conduct for 10 years, I don't know what was. That press release is available as well.

**MR FITZGERALD:** Let me ask this: given your case and a number of others - and I'm sure this is replicated in other states - why do you think the government in Victoria, for example, has failed to respond to these issues?

**MR DALTON:** I think the government in Victoria has done a sweetheart deal with the insurers, that was done in 2002. I think the insurers - Vero particularly - have got a history of getting close to governments. I think the history is there and the proof is pretty much there in Tasmania that there's inappropriate arrangements between the insurer and government to the point that there are now criminal charges outstanding in Tasmania in relation to it. I think that we're only just about to hear the same things in Victoria.

**MR FITZGERALD:** All right. Are there any other final comments you'd like to make?

**MR DALTON:** I think I've said enough.

**MR FITZGERALD:** That's terrific. Thank you very much for that presentation. We'll now conclude the public hearings for Melbourne and the public hearings will commence in Adelaide tomorrow. Thanks very much.

AT 1.08 PM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 22 MARCH 2007

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