

SENATE SELECT COMMITTEE

into

HOME WARRANTY INSURANCE

Submission John Fulton

Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100;
Parliament House Canberra ACT 2600

13/4/2008

Dear Sir/Madam

Re Senate Inquiry into the Home Warranty Insurance

The central issue of this submission into **the Home Warranty Insurance** centres on whether Parliament has been granted the power, by the Constitution, to allow a commercial insurance provider(s) to have total and absolute power over the regulation of the building industry, and more importantly over the lives of the Australian citizens who work within the building industry.

The NSW Grellman Report (Sept 2003) Page 20 provides statistical information that demonstrate the eligibility of builders to hold a full license (due to insurance eligibility) fell to just 42% of the total registered builders. This statistical figure demonstrates the ultimate control insurance companies have over building operations.

It is well documented that the insurance risk management strategies have had far reaching effects within the building industry from directly restricting trade to forcing business to close, resulting in the loss of skilled workers from the industry. Indirectly the financial and social costs are enormous. These costs include Commonwealth Social Security payments when insurance is denied, the cost of retraining qualified builders in another occupation, (up to \$200,000 per applicant) the "breaking up" of family relationships from economic stress to the ultimate penalty, suicide, directly induced by the inability to obtain insurance. (Refer to NSW Hansard 13 May 2003 [refer to addendum])

The critical question for review is; who benefits from this mandatory, last resort Home Warranty Insurance? It is not the average consumer, who misunderstands the nature of the scheme, only to find it is often a callous deception, when the time comes to make a claim. It is certainly not the small builder who must pledge their personal assets in addition to paying the premium or lose their business. The major builders benefit from a reduction in competition through the elimination of small building firms who cannot obtain insurance, but it seems the real beneficiaries are the insurers who have a legislated income stream with negligible risk, together with the insurance brokers whom charge/receive generous commissions to service them.

The second and higher question for review concerns the people's fundamental rights. The following High Court ruling provides;

"Likewise, it is a rule of construction that, in the absence of a clear contrary indication, legislation is not to be interpreted as abolishing basic common law rights and privileges.----- Another rule is; a statute will not be construed to abolish a fundamental common law rights unless the legislative intention to do so emerges clearly by either express words or necessary intendment" (Corporate Affairs Commission (NSW) v Yuill (1991) HCA 28, Sorby v. The Commonwealth (1983) 152 CLR 281 Baker v. Campbell, at pp 96-97, 104, 116, 123.

It is well acknowledged that insurance companies are interfering with the people's fundamental rights and freedoms. Governments in their quest for simplicity of framing and the enforcement of the Home Warranty Insurance have separated the term "business entity" from humanity. There is no reason to support this approach. Granted, companies and corporations are not human and have no rights, but sole traders/partnerships do. Their "business" is the sole expression of their inalienable knowledge and skills. Sole traders/partnerships account for eighty percent of building operations, therefore the people's fundamental rights and freedoms as ruled upon by the High Court have a major impact in the framing of legislation.

The Government organ consistently emphasizes that there will always be "*causalities*" in any regulative process. If the Government organ searched the constitution to its full depth, it would find

that Parliament is denied the power to regulate "*freedom of choice of employment and how that choice is implemented*". Parliamentary powers in the framing of legislation, in this instance, is limited to setting the minimum standard of workmanship that must be produced and minimum qualifications that a person must hold to obtain a license. Any form of insurance for consumer protection must be freely available. The Queensland model would be considered a just and equitable system where the insurance premium remains constant per dollar value of building works but the licensing fee varies according to the number of defect notices issued to each builder.

There can be no "*causalities*" (or forfeitures of the right to work at their elected occupation) where occupational licensing is concerned without trial and conviction (the constitution provides *there shall be no forfeitures BEFORE trial and conviction*). It should be noted at this point, that a small percentage of people (usually creative people) cannot work for an employer "Casualties" from the regulative process require mandatory and unconditional financial relief from government. (The Commonwealth Social Security Act, include tools of trade, workshop plant and equipment as assets, and from experience, any request for financial relief is usually refused, regardless of whether a builder has an income.

"*Black-market*" operations are a direct result of extremely poor government regulation. Stamping out black-market operations, without changing the regulative process will only increase the number of suicides. Again, I refer to NSW Hansard 9 May 2003 (attached in the addendum) People committing suicide under government regulation clearly demonstrates that there is a "*major*" (with "*major*" being emphasized) legal and constitutional problems with the legislation. Setting aside that the consumer has little or no protection from the current Home Warranty Insurance, this select Senate Committee should be extremely disturbed that so many lives have be terminated in this way, directly induced by the risk management strategies of commercial insurance operations.

If it is the recommendation of the select committee to continue with the "*last resort insurance*" for consumer protection then I submit that when an Act of Parliament requires the people to purchase a supply from a commercial insurance provider, then it must be legally taken that insurance provider has accepted, and has agreed, that its commercial operation decisions cannot exceed the authority conserved and reserved by the Constitution. (including the jurisprudence of the Courts) This places the Constitution in its proper place where the people's rights, freedoms and immunities have precedence of law over the commercial operations of an insurance provider(s). This will ensure that no commercial operator that uses an Act of Parliament to enforce its risk management decisions will have ultimate and absolute power over the income of any Australian citizen.

NOTE; A request to a insurance provider (Vero) for Home Warranty Insurance to be offered under the provisions of the Constitution resulted in the application being refused.

Conclusion

Consumer protection against "poor workmanship" can be simplistically resolved by enforcing inspections, at each stage of construction together with a dispute resolution process. This process has already been explained in depth at the Select Committee hearings.

Finally the Tasmanian government should be congratulated for rescinding the "Last Resort Insurance."

Yours Sincerely;
J. Fulton

Addendum

NSW LEGISLATIVE ASSEMBLY

Hansard Friday 9 May 2003

HOME WARRANTY INSURANCE SCHEME

Mr R. W. TURNER (Orange) [12.40 p.m.]: Today I shall highlight the continuing problem of home warranty insurance. Many builders, especially young builders, are unable to obtain adequate insurance. This is a problem not only in Orange and Cowra but also throughout regional New South Wales. It has been estimated that some 30 per cent of builders cannot get enough work and have either changed jobs or are working for other builders. I am told that under the old Building Services Corporation the scheme was in the black to the tune of about \$70 million and the average builder in regional New South Wales could obtain insurance for an average home for about \$300. Builders' insurance premiums now cost about \$3,000—assuming that builders are able to obtain adequate cover.

Builders in Orange need to work on more than one building simultaneously because of the inclement weather—especially during winter—but many can obtain insurance for only a single building at a time. As a consequence, a group of builders led by prominent local builder Mr Brendan Sturgeon has formed the Central West Building Scheme. Upon the scheme's approval, members would be required to put up to \$40,000 into the scheme in order to guarantee their work for the seven-year warranty period on each construction. However, instead of encouraging those builders, the State Government has used Australian Prudential Regulation Authority guidelines to deny the group the chance to get the scheme off the ground. This is a cheap, viable scheme under which it is estimated insurance will cost about \$400 instead of \$3,000 for each home. Mr Sturgeon is quoted in an article that appeared in the *Central Western Daily* on 7 March, which states:

"We have tried to convey to the government the concern of builders, the massive reduction in consumer protection, the rapacious greed of insurance companies and the likelihood of higher prices and reduced competition as established builders leave the industry and young builders are refused insurance cover."

He said public should know that the former government warranty scheme provided full cover for structural defects at a cost of \$300 per dwelling and the scheme was profitable.

"Mr Aquilina has reduced cover to 20 per cent of the building cost, he has reduced the time span from seven to six years, the insurer's liability is now a last resort only if the builder goes bankrupt, dies or disappears, and premiums are reaching \$3000," Mr Sturgeon said.

I will quote from a letter that I received from a young builder whom I had attempted to help in the past 12 to 15 months. He wrote:

Dear Russell,

"A letter to thank you for all of the help in trying to upgrade my insurance.

I'm sure all this Insurance fiasco in the building industry has taken its toll on you and your

staff. I personally thank you for the long work in processing my application for Home Owners Warranty.

However due to not being approved my life has changed completely.

These changes are directly related to obtaining Home Owners Warranty Insurance.

The Home Owners Warranty Insurance that I have had in the past I have obtained without any problems in relation to claims or difficulties. [However] I have had to stand down an employee, *a 20 yr old carpenter, just out of his apprenticeship.*

He referred also to:

"Downgrading and relocation of home + office + shed to a more affordable price range ... My girlfriend left me and town because of stress and my financial future."

He then sent me another little note, which said:

Russell,

"All I am trying to do is earn a living and build homes for clients. Not having enough Insurance is becoming detrimental to my business, my family, and me. I am running out of time before it's too late to save my business and my life."

On 20 April 2003, Easter Sunday, that young builder took his life. He could not handle the pressure of his perceived failure of his family and himself. That is an indictment on a system that has let down him and many other builders, especially our young builders, very badly.

Ms MEGARRITY (Menai—Parliamentary Secretary) [12.45 p.m.]: The home warranty insurance issue is obviously complex and difficult, and all honourable members will be aware that we have debated the problem in this place for many hours. It is obviously part of a greater network of concerns about the insurance industry and the implications that that has for many people in this State. The honourable member for Orange quoted from an article about a builders' group that had approached the former Minister. The honourable member did not say whether he had made any representations on the group's behalf. If he has not done so I will ensure that his comments are directed to the new Minister for Fair Trading. On behalf of the Government, *I offer our condolences to the family of the young builder about whom the honourable member spoke. That is just one example of the very real consequences of this insurance problem for many people across the State.*