



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON ECONOMICS

Reference: Australia's mandatory last resort home warranty insurance scheme

WEDNESDAY, 24 SEPTEMBER 2008

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

<http://www.aph.gov.au/hansard>

To search the parliamentary database, go to:

<http://parlinfoweb.aph.gov.au>

**SENATE STANDING COMMITTEE ON
ECONOMICS**

Wednesday, 24 September 2008

Members: Senator Hurley (*Chair*), Senator Eggleston (*Deputy Chair*), Senators Bushby, Cameron, Furner, Joyce, Pratt and Xenophon

Participating members: Senators Abetz, Adams, Arbib, Barnett, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Ellison, Farrell, Feeney, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Hanson-Young, Heffernan, Humphries, Hutchins, Johnston, Kroger, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams and Wortley

Senators in attendance: Senators Eggleston, Furner, Milne and Pratt

Terms of reference for the inquiry:

To inquire into and report on:

Australia's mandatory Last Resort Home Warranty Insurance scheme, including:

- a. the appropriateness and effectiveness of the current mandatory privatised Last Resort Builders Warranty Insurance scheme in providing appropriate consumer protection and industry management;
- b. the reasons for and consequences of the ministerial decisions relating to the removal of consumer protection provisions in respect of Corporations Regulation 7.1.12(2);
- c. the ramifications for the future supply of this insurance product following the draft recommendations from the Productivity Commission report released in December 2007;
- d. any potential reforms and their costs and benefits which may lead to appropriate consumer and builder protection and improved housing affordability; and
- e. any related matters.

WITNESSES

**CHISHOLM, Mr James, Manager, Consumer Policy Framework Unit, Department of the
Treasury 2**

**WRITER, Mr Simon, Policy Analyst, Consumer Policy Framework Unit, Department of the
Treasury 2**

Committee met at 5.09 pm

ACTING CHAIR (Senator Eggleston)—I declare open this public hearing of the Senate Standing Committee on Economics. The committee is inquiring into home warranty insurance, and I welcome the witnesses here today. The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules in the order of the Senate of 23 August 1990 concerning the broadcasting of committee proceedings.

Committee witnesses are protected by parliamentary privilege with respect to their submissions and evidence. Any act which may disadvantage a witness on account of their evidence is a breach of privilege. While the committee prefers to hear evidence in public, we may agree to take evidence confidentially. The committee may still publish or present confidential evidence to the Senate at a later date. However, the committee would consult the witnesses concerned before doing this. The Senate can also order the publication of confidential evidence.

[5.10 pm]

CHISHOLM, Mr James, Manager, Consumer Policy Framework Unit, Department of the Treasury

WRITER, Mr Simon, Policy Analyst, Consumer Policy Framework Unit, Department of the Treasury

ACTING CHAIR—Do you wish to make an opening statement?

Mr Chisholm—No, Senator.

ACTING CHAIR—In that case we will proceed, so I will hand over to the senators for questions.

Senator FURNER—I will ask some questions similar to those which I asked witnesses yesterday. Appreciating that a number of submissions have been submitted to the inquiry and also that some issues have been referred to in the *Sydney Morning Herald* about adopting the Queensland model, I can understand the implications behind the pure adoption of such an issue having application to all the other states nationally. I am just wondering whether you could enlighten the committee about what impact procedurally and economically that would have on such a model should that ever be considered.

Mr Chisholm—I understand the committee has previously received evidence from officers of Treasury with responsibility for insurance issues and, in particular, evidence in relation to home builders warranty insurance. We are here on the understanding that there may be some questions asked about the processes for implementing the report of the Productivity Commission more broadly. We can answer questions about that, but the specific issue of home builders warranty insurance and how it applies in states and territories or the potential for reform in that area is something that, I would suggest, was dealt with in previous evidence by Treasury officers.

Senator FURNER—I have not been to every inquiry but I am not certain whether the committee has been privy to that sort of response. Are you suggesting that you are not in a position to provide that information?

Mr Chisholm—No, Senator; I am not in a position to provide that information.

Senator FURNER—The alternative, of course, is looking at a national trade licensing arrangement. Are you able to establish how those arrangements might apply and what sort of procedural and economic processes might be involved in an implementation of that?

Mr Chisholm—I understand that you will be hearing evidence tomorrow from officers of the Department of the Prime Minister and Cabinet who currently have some responsibility in relation to projects concerning national trade licensing issues following COAG Business Regulation and Competition Working Group consideration of those issues. National trade licensing issues are, once again, something that we are not examining as part of our reforms in relation to a national consumer law but, beyond what is in the Productivity Commission's recommendations for that issue and the current implementation of those issues through COAG and the BRCWG, there is not really anything I can add in relation to that.

Senator MILNE—Could you describe this initiative of the Ministerial Council on Consumer Affairs? Apart from getting consistency, could you run us through where it is up to, what are the expected outcomes and whether the problems with home builders warranty insurance have come up in that context, given that it was subject to the Productivity Commission and evidence we had from them suggested the COAG process might be an appropriate way of getting this addressed. Before we go to any more questions, could you give me a sense of where it is up to. I think it would benefit all of us to get a sense of where this might fit into what is actually going on.

Mr Chisholm—Certainly. As you are aware, in April this year the Productivity Commission released its report on a national consumer policy framework. Following the provision of that report to the government, this year COAG decided that the Business Regulation and Competition Working Group, in consultation with the Ministerial Council on Consumer Affairs, would develop an enhanced national framework for consumer policy.

What has happened is that in August of this year the Ministerial Council on Consumer Affairs reached an agreement which broadly accepts a number of the key recommendations from the Productivity Commission report regarding a new national consumer law. Those proposals have been put to the Business Regulation and Competition Working Group and will be considered by COAG on 2 October.

What that essentially means is that, as the proposal goes and following the PC's recommendation, there would be a new consumer law based on the provisions of the Trade Practices Act and picking up the various

eight state and territory generic consumer protection provisions so that there will be one single national law. That law would contain a number of new provisions. One of the issues that were looked at following the PC's report was a new unfair contracts prohibition. That will apply to unfair terms in standard form contracts. As you might be aware, Victoria already has such a provision, and there will also be such a provision in the national law.

Other recommendations which were also agreed upon included enhanced enforcement powers for consumer protection regulators, including the ability to seek civil penalties for breaches of the consumer protection provisions, disqualification powers, substantiation notices, public warning powers et cetera. Those were all recommendations that the PC had made about improving the national law. But the key focus of that agreement at the ministerial council and which will be considered by COAG was to have a national consumer law to be enforced by both the national consumer regulator, the ACCC, and state and territory consumer protection regulators.

You also asked about the relationship between that and the home builders warranty insurance issue. As you are well aware, the PC recommended that the committee look at home builders warranty insurance. What we are doing is focusing on the development of this national law which will pick up particular recommendations but into the future will also deal with other issues as the case may be. We are not developing home builders warranty insurance provisions as part of that national law as it is currently being handled through a different process. The PC did not recommend that home builders warranty insurance be dealt with as part of that national law; it had very specific recommendations about what should go in it. So that has been the focus of our efforts to date.

Senator MILNE—So what you are saying is that at the moment the COAG process to achieve this national consumer law does not or will not address this issue of home builders warranty insurance?

Mr Chisholm—The COAG process for a national consumer law is not likely to include reference to home builders warranty insurance as part of that national law. Of course that is based on the work that has been done to date to develop that national law and on the understanding that home builders warranty insurance is being looked at separately because of the issues that arise in relation to that.

Senator MILNE—You say that it is being looked at separately, but who is looking at it separately?

Mr Chisholm—This committee.

Senator MILNE—And that is it?

Mr Chisholm—I understand that this committee is looking at home builders warranty insurance. States and territories are responsible for home builders warranty insurance. Further evidence about the Commonwealth's views in relation to home builders warranty insurance has been provided by Treasury in terms of how that might interact with other processes currently being developed at the Commonwealth level, but it is not being considered as part of this national consumer law, no.

Senator MILNE—Will this national consumer law deal with things like dispute resolution and that sort of thing?

Mr Chisholm—There is the likelihood that COAG will commit to enhanced procedures for dispute resolution or improvements to dispute resolution procedures. As you would understand, the national consumer law is focused on those parts of the PC's recommendations that were focused on enhancing the new consumer law, picking up both state and territory and Commonwealth provisions, but dispute resolution raises issues beyond what would be in a consumer protection law regarding the Trade Practices Act itself but also other areas of both Commonwealth and state and territory responsibility concerning dispute resolution. So it is not something that is specifically going to be handled as part of the national consumer law, but it is certainly something that is being considered in terms of improvements to the national consumer framework.

Senator MILNE—If we wanted to get builders warranty insurance into this process, how would we do that?

Mr Chisholm—This process is very focused on those recommendations of the PC report about developing the national law based on the PC's recommendations. Home builders warranty insurance raises a number of other issues to do with the operation of state and territory laws, the interaction between consumer protection and insurance and the trade licensing issue that you referred to before. How that would be linked into the national consumer law I cannot really see. They are separate processes dealing with separate issues.

Senator PRATT—In that context, how is it proposed that national consumer law will deal with similar situations to the situation that people find themselves in with a lack of adequate home warranty insurance? For example, someone could spend a substantial amount of money on a holiday that they never get because the company disappears or goes bankrupt, or they could go to install a swimming pool that never gets completed, or they could prepay for a service that they never get. This really is no different to those kinds of situations. Are you saying that this new national consumer law is not going to address any of those situations?

Mr Chisholm—No, that is not what I am saying. All of those scenarios that you have referred to are potentially issues that would give rise to concern under consumer protection law now, both at the Commonwealth level and at the state and territory level. Misleading consumers about the availability of services and providing false information are all things that a consumer regulator could take action on were there evidence to prove that in fact misleading conduct had occurred. The national consumer law will in fact contain enhanced protections for consumers by improving both the investigatory and the enforcement powers of consumer regulators to enforce those laws against misleading and deceptive behaviour or false representations. So, to answer your question, we are not saying that issues like that could not be considered under the national consumer law, because they can currently be considered under state and territory and Commonwealth consumer protection law if there is evidence of misleading behaviour. In addition to that—

Senator PRATT—But not issues like bankruptcy or death. You really need a system whereby you can make a claim against someone's remaining assets because someone has died or has gone bankrupt.

Mr Chisholm—Bankruptcy law is dealt with under separate legislation. It is not part of the consumer protection framework, so that would not be something that would be considered as part of this law.

Senator PRATT—Is that one of the reasons why home warranty insurance also naturally does not have a place within this law?

Mr Chisholm—It may be a reason why—as I referred to before—home warranty insurance gives rise to multiple issues in terms of a regulatory regime trying to address the situation that home builders warranty insurance gives rise to. The consumer law is a generic consumer protection framework that is not industry specific. It applies to all business if they engage in the conduct, such as misleading conduct, or, under the new law, enter into an unfair contract term. It is not intended to regulate industry specific situations, which also home builders warranty insurance would be.

Senator MILNE—How applicable then is a generic consumer law to housing complaints? If I have a house under construction and then the builder does not go bankrupt or die but just will not finish the job, or it is so badly built and so on, I have nowhere to go. It is currently alleged that people think they are covered and they are not. Would I be able to go somewhere under this new consumer law or not?

Mr Chisholm—If there was evidence that a person had been misled, for example, or that they were not given the full information that an ordinary reasonable consumer would expect about the nature of their policy or about the building contract that they had entered into, that is something that could be considered under the national law, as it could be considered now. It gives rise to contractual dispute issues but also, as you would be aware, the consumer protection laws under the Trade Practices Act and state and territory law sit above that contract law and will crystallise over certain conduct if it is alleged to have occurred. Where you have a situation where a builder has not been able to complete a job for reasons beyond misleading behaviour or false representations or promising something that would be delivered but, because of circumstances beyond their control, they are not able to deliver then it is a separate consideration that gives rise, as I said, to those issues concerning industry specific regulation and the issues that come up there.

Senator MILNE—I guess the real problem I have here is that once again this is going to be left out and not captured by a generic national consumer law. Once again, the Productivity Commission did not make specific recommendations and sent it to this committee. This committee is now left with no way of engaging this with the COAG process. How would you suggest we can get uniformity across the country in this particular matter?

Mr Chisholm—Home builders warranty insurance is not an issue that I am able to provide evidence on, as I mentioned earlier. The committee has received evidence from Treasury officials who are responsible for considering how home builders warranty insurance might operate in a broad insurance framework, and I have nothing to add to the evidence that they have provided.

ACTING CHAIR—I would like to ask you about alternative dispute resolution processes. I wonder if you could tell us about Treasury's work on consistency of alternative dispute resolution. Have you yet any conclusions or proposals for ADR in the home-building sector?

Mr Chisholm—In relation to alternative dispute resolution, one of the things that we are developing is ways in which we can achieve that kind of consistency across consumer protection laws. As you would appreciate, it gives rise to issues under a number of areas of legislation, not only the Trade Practices Act but also the corporations regulation and the role of both the ACCC and the Australian Securities and Investments Commission, as well as a multitude of state and territory laws and how they operate with ADR schemes. We have been working with colleagues in the Attorney-General's Department to look at ways in which we can improve that framework to try and bring some consistency to it, and that is an ongoing project.

ACTING CHAIR—Do you have any time lines there for consistent ADRs in consumer law?

Mr Chisholm—There is no time line as yet because at this stage we are still working on the timetable for COAG's consideration of the PC recommendations. Once COAG has had the opportunity to consider that, work will commence on implementing that recommendation.

ACTING CHAIR—The other thing I want to ask you about is state tribunals. We have had a lot of evidence given that these tend to be long, drawn out and expensive hearings. Has that been part of your consideration in developing ADR processes for consumer protection? There are many tribunals obviously.

Mr Chisholm—There are many tribunals. An aspect of the new national consumer law framework will be the ongoing availability of tribunals for hearing consumer protection disputes or complaints. It was considered that this would be important to ensure a greater level of accessibility to processes beyond courts, which tend to be even more drawn out and expensive than tribunal procedures. So they will be retained as part of the national consumer framework for both consumers and state regulators to use to try to get outcomes for consumers concerning consumer protection disputes. They will be considered as part of the Commonwealth's consideration of ways of improving consistency across dispute resolution procedures both at the Commonwealth level and at the state and territory level.

ACTING CHAIR—If an individual has a complaint—we will make it a generic complaint; it does not have to be a building complaint—under your new system, what would be their first point of contact? Will they go to a magistrate? Where will they go and who will direct them to ADR or a tribunal or whatever? Will they go to the tribunal first—a builders' tribunal or something like that in this case?

Mr Chisholm—I am not aware of the actual processes for dispute resolution concerning home builders warranty insurance beyond saying that the current process for involvement by existing state and territory regulators in resolving home builders warranty dispute issues or involvement in those sorts of issues will continue. They are not affected by these changes. If, as I said before, there was evidence that a dispute involving builders and consumers had evidence of misleading conduct or breaches of other consumer protection provisions then consumer protection regulators will be involved in those disputes as a first port of call for consumers who have a problem and for helping them to resolve that dispute. As I understand it, they are currently involved today.

Senator PRATT—You talked about national provisions providing an opportunity to deal with misleading conduct. I want to go down the path of misleading conduct of someone failing to meet a particular standard and how we can give more force to meeting detailed standards and tolerances in, say, a building code. Does someone failing to meet a particular technical building standard qualify as misleading conduct?

Mr Chisholm—It would depend on the circumstances of the case. For example—I am loathe to give specific, hard and fast evidence about this in the absence of a particular case—if a builder agreed to perform work for a consumer and did so under a contract or even made verbal representations and simply refused to do that work, then that would give rise to a question about whether the consumer had been misled by the builder.

Senator PRATT—What if it was a matter of competency and they just failed to meet the technical standard? You are misleading really about your competency to do a job.

Mr Chisholm—That can be a question of judgement in the circumstances of the case. Again, if a builder had represented that they had a certain level of competence and they simply did not have it, then, yes, that is an issue that could be considered under misleading conduct rules. But it would depend on the nature of the understanding between the consumer and the builder and whether in fact the builder said certain things or did not say certain things.

Senator PRATT—What about a habitable house versus an uninhabitable house? If an independent building inspector says to you, 'Sorry; your new house is not habitable,' surely something like that would clearly breach that standard?

Mr Chisholm—Potentially, they are issues that could be considered under the consumer law now; that is right.

Senator PRATT—Should there be a national standard for something like that? Or is it about meeting each local state's building standard but simply having a national forum for resolving those issues?

Mr Chisholm—Arguably, there is already a national forum for resolving those issues because the provisions of the Trade Practices Act apply nationally. A consumer can raise concerns about misleading conduct with the national regulator, the ACCC. They also have the option of taking it up with their state office of fair trading—who, I understand, are often quite active in the area of building disputes and often provide information publicly about the number of building disputes they are involved in resolving. That is something that is just dealt with now, under existing consumer laws, in terms of misrepresentations made to consumers about either the competence or quality of the work performed.

Senator PRATT—In terms of protections for consumers, should there be some kind of provision that says, 'These things need to be resolved within a certain period of time'? Timeliness is a big issue. One of the problems that consumers have had is that state tribunals take an extraordinary length of time and that then relates to whether someone ultimately has a claim against insurance.

Mr Writer—The PC did make a recommendation that there should be greater consistency in terms of dispute resolution processes, in the context of both state and territory tribunals, which exist in some states and territories, and also small claims court processes. That is an issue that is being looked at by the Commonwealth.

Mr Chisholm—So we would agree that, yes, greater consistency in terms of the timeliness of resolving disputes is something that can be considered and will be looked at following COAG's consideration of those recommendations.

Senator MILNE—Should we have, then, a national, legally binding set of standards and tolerances in relation to what constitutes a defect, what constitutes timeliness, and all that sort of thing? To cut to the chase: under national consumer law, why can't we have sets of standards? The building code is not necessarily specific and there are a number of standards around but none of them are legally binding. So, under national consumer law, wouldn't it be helpful to have national standards and tolerances in relation to defects and so on?

Mr Chisholm—The national consumer law is not an industry specific consumer law. It contains generic prohibitions against certain types of conduct and contains remedies for consumers and regulators to enforce that law. It currently applies to conduct by builders and does not have industry specific regimes contained within it, in terms of a consumer protection framework. So the question that you ask, about whether this national law should contain those issues, is not something that would we are considering as part of that process. We are focused on improving the operation of a national consumer law by, at first, developing a single national law that would operate in all states and territories of the Commonwealth and contain enhancements to improve its enforcement. But further issues to do with industry specific consumer regulation are being dealt with after or following COAG's consideration of that and the BRCWG and the skills task force that, I understand, you are also hearing evidence on.

Senator MILNE—Yes, but there is nothing that would preclude, underneath that national consumer law, establishing a series of industry specific national standards.

Mr Chisholm—The question of industry specific national standards can be considered irrespective of what happens in the national consumer law. I understand that a central part of the current process between the Commonwealth and states and territories is a way of developing single national processes or single uniform processes in the area of standards and trade licensing.

Senator MILNE—Is there any proposal to standardise references to statutory warranties in state building legislation?

Mr Chisholm—The Productivity Commission looked at the issue of statutory warranties broadly and suggested that a review be undertaken of statutory warranties to improve consumers' and businesses' understanding of the nature of statutory warranties. That is something the Commonwealth will do. Again in relation to how it might operate in a particular industry, that is something to be considered under a separate process in relation to trade licensing regulation but it is not something that we are considering as part of the national consumer law.

Senator MILNE—Just to go back to the trade licensing arrangements, which were asked about in the beginning, who is doing that? Where do we go to talk to those people?

Mr Chisholm—It is being dealt with by both the Commonwealth and the states and territories, and at the Commonwealth level the Department of Prime Minister and Cabinet contains the skills task force, the trade licensing skills task force. I may not have the correct title of it but that is at the Commonwealth level where question should be developed.

Senator MILNE—Okay. And what is this trade licensing skills task force meant to be feeding into?

Mr Chisholm—It is following a COAG decision to focus on the issues raised by the PC regarding industry specific consumer regulation. I guess ultimately it feeds into COAG.

Senator MILNE—We are going around in a circle now. I do not have any other questions.

ACTING CHAIR—It looks like the division bells have intervened. I think we will conclude this hearing. We thank you for appearing.

Committee adjourned at 5.42 pm