PUBLIC

THE HOUSE OF ASSEMBLY SELECT COMMITTEE ON THE COSTS OF HOUSING, BUILDING AND CONSTRUCTION IN TASMANIA MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART ON TUESDAY 7 MAY 2013.

Mr MICHAEL KERSCHBAUM, EXECUTIVE DIRECTOR, MASTER BUILDERS ASSOCIATION OF TASMANIA, WAS CALLED AND EXAMINED.

CHAIR (Mr Hidding) - Mr Kerschbaum has recently been sworn in to this inquiry so he does not need to be sworn again. It is a travelling declaration.

Thank you for attending today. We wrote to you with certain matters and you have written back with certain matters. It seemed to us and to you that it would be a good idea to meet face to face so we can discuss these matters.

As is the usual procedure, I will offer the opportunity to make whatever opening comments you want to make and we can go on from there.

Mr KERSCHBAUM - Thank you. I refer to the previous correspondence that I have received from the committee and I was somewhat perplexed as to where they were coming from. I only read it briefly, initially, the *Hansard* provided Ms Johnson and it was pretty apparent to me that there were a lot of half-truths and I believe probably a lot of misinformation being delivered. Whether that was deliberate or not, I don't know and I am not obviously going to say. But, at the end of the day, it appeared as though, judging by the questions that were coming back to us, that something was not being understood about the way we ran our scheme, the reasons for it, and certainly the circumstances in particular.

I wanted to use this as an opportunity rather than send you an epistle back, to be able to address those issues and perhaps address them on the run, so to speak, because a lot of the time that can be easier than trying to address things through correspondence. I just wanted to make that comment.

Mr BOOTH - Chair, a point of technicality or clarification. What you are saying is that there is a lot of evidence that we have received that you say is not correct from Ms Johnson?

Mr KERSCHBAUM - Yes, it is incorrect factually.

CHAIR - Matters that you would refute?

Mr KERSCHBAUM - Yes.

CHAIR - You are welcome to do that and this is your opportunity to do say today.

Mr BOOTH - That is the point I am making. You cannot just generally say that it was untrue without actually showing us where it was untrue. Otherwise, this is the only

evidence we have unless you contest those individual things then whatever you don't contest effectively is uncontested and therefore we have to accept it on its merit.

Mr KERSCHBAUM - I didn't necessarily want to go into the issues one-by-one and the reason for that is I didn't want to take up your time either as a committee. I guess, though, if I perhaps start from the outset that may clarify where we are coming from and it certainly would help to alleviate some of the dot points that were referenced to me.

From my point of view, and I am just going through the letter dated 22 March now from the committee, NBAT wasn't registered by APRA because it didn't need to be. We have never run an insurance scheme in our lives. The scheme we ran was a guarantee scheme. It is not insurance and therefore doesn't come under the ambit of APRA, the Australian Prudential Regulatory Authority. The reason for that is it doesn't fall under the definition of insurance. We had that confirmed when we set up the scheme. That is why it was able to be set up under regulation by this government, or a previous iteration of this government.

To address the first dot point, we weren't registered because we couldn't be, because we did not fall under their ambit. NBA ACT run a similar scheme, which is called a fidelity fund and that operates under a similar premise. So this scheme was not the only one ever set up and it won't be the last one, I don't believe. That is why we are not covered by APRA.

Mr BOOTH - Chair, if we are going to have a flow perhaps it is easier if you wanted to do it that way if we ask questions just on dot points. In regard to that, then, what happened to the guarantee scheme? Wasn't it then sold or handed over to another insurance company?

Mr KERSCHBAUM - No, it was wound up by Judy Jackson, who was the minister at the time. The reason for the scheme coming into being was that in 2001 HIH collapsed. HIH was one of only a couple of insurers in Australia issuing warranty insurance. As you know, warranty insurance at that time was mandatory. We then were forced to go to a very small player in the market called Dexter Insurance. Dexter operated for all of eight or nine months, from memory, and then they went out of business. So we were caught in a position where we couldn't obtain insurance.

The only insurer left in the market of any note was QBE. QBE was underwriting - pretty certain it is QBE, I can't be certain of that fact - the HIAs, Housing Indemnity Scheme, and I think still do to this day. We weren't prepared to enter into negotiations with QBE because they weren't prepared to enter into negotiations with us. They had, I believe, an agreement in place with HIA. So that left us without an insurer. We approached the government and said, 'We think we can run this ourselves.'

Under HIH we actually ran our scheme very successfully for a number of years and, in fact, really we did all the work. We assessed claims on their behalf. We recommended payouts on their behalf. We took the housing indemnity claims in the first instance and did all the processing. HIH really just wrote out the cheques at the end of the day and received the payments upfront. We had run under this model for quite some time with HIH endorsement.

When they went under, we moved our portfolio across to Dexter. That was short-lived and fraught with a lot of pain. We then found ourselves in a situation where, unless our members were going to join the HIA it was going to be very difficult for them to obtain insurance through QBE, and the rates they were going to obtain it at, it was going to be effectively a lot more expensive and put them at a competitive disadvantage.

We set up the scheme with the approval of the state government under regulation; we ran that scheme from 2002 to 2005. In early 2005, CGU went to the market and said, we are going to write warranty insurance in Tasmania. We do not know whether the state government may have initiated that contact with CGU to bring them into the state but, either way, we were forced to take our book of builders across to CGU because our scheme was going to be at an end on 30 June 2005. We negotiated with CGU and took our book of builders straight across to CGU and CGU wrote those policies for three years from 2005 to 2008. We ran our scheme for about three years.

Mr BOOTH - That tail-end that you held with your guarantee scheme, what happened to that in terms of liability after 2005? Did the scheme cease and you were not taking any more policies? Did you call them policies?

Mr KERSCHBAUM - Yes.

Mr BOOTH - So you were not taking any more policies but what happened to the tail liability after post 2005?

Mr KERSCHBAUM - Basically we were left with it. In order to get the scheme up, we had a good track record in terms of our membership defaulting on housing indemnity varying frequently. We were comfortable that we had a reasonably good book and why CGU took it over holus. We maintained the liability for that scheme and still do, technically. It has pretty much expired now. What we initially set up is, we obtained a bank guarantee for $500 000, which is effectively seed funding or some guarantee that if there were a few claims we would have some money in the bank. That has been in place for a long time. That was subsequently withdrawn. I am not sure exactly when, but that was done by the previous executive director. But we had paid all our pay-outs based on actuarial advice.

Mr BOOTH - The previous CEO withdrew the bank guarantee?

Mr KERSCHBAUM - Yes.

Mr BOOTH - Leaving any tail claim to be then taken out of consolidated revenue?

Mr KERSCHBAUM - Yes, that is right. But that would have been before my time in 2009.

Mr BOOTH - Can you inform the committee why they did that?

Mr KERSCHBAUM - Because I think that they were able to under the terms and conditions of the original agreement with the government.

CHAIR - Let us see if we can get some structure into this. That was the first matter that was raised by us with you in a letter to you. We can go down through those, or we can

address your concerns about the information provided to us by a witness. It seems fair to us that if a witness comes in and produces her side of the story, if you do not agree with it, if you take exception to it, you get the opportunity to make public your views on some or all of it.

Mr Booth made the point that if you want to make a specific allegation that something is false, you need to understand that she provided that information under oath. Therefore, that is a little different from you taking exception to the tenor or the way that information was leaning.

You have explained to us in a letter that you are generally unhappy with the material. But, from my point of view and I will see what other members think, we are not here to determine the actual facts of this matter. That witness was asked to come in and give us her side of the story on what, on the face of it, seemed to be a very nasty consumers affairs case, which we wanted to overlay against the current proposal before the parliament to see whether it addresses that.

As it happens, I believe it does substantially ensure that you would not get to that level of a pickle that you found yourself in. We are relaxed about what you told us. We are not relying on any of the facts necessarily. There were some matters relating to some of the facts that she placed on the record that we had questions about and felt that we could rightly ask you, so we want to explore those with you.

Is it your contention that you wish to, as this stage, refute any particular facts that she raised, or do you want to make a general observation?

Mr KERSCHBAUM - I was hoping that some of these issues would come to the fore during our discussions as we addressed the comments that have been made. I didn't really want to get into tit for tat and try to refute everything that she said, or even try to second-guess why they were being said.

CHAIR - That is available to you to do so. All it will be is some words on *Hansard*, which is all her evidence is. The veracity or otherwise wasn't a problem; it was the shape of the consumer affairs complaint that was the issue for us. However, some issues have been raised that cause some concerns around this table and that we felt we should chase down with you.

Mr KERSCHBAUM - I appreciate that. It was really the way it was framed. It seemed as though the association was doing everything it could to frustrate the process. I was going, with your indulgence, to just go through a few of the facts as I saw them and perhaps just to refute a few of the issues and time frames. It seemed to us as though we were trying to obstruct the process when we were doing nothing but trying to fix it.

Mr BOOTH - If you read the letter, your association says that:

> … the association would outright refute and a number of others which the association would disagree with. I would go so far as to say that the amount of false claims and half-truths within the transcript is both confounding and disappointing.

The problem we have as a committee is that you have now said that a witness before this committee has actually lied to the committee or made false claims. That is actually quite a serious allegation and it does raise an obligation for us to make sure that, given that our evidence is published in perpetuity, people should be able to rely on sworn evidence.

I think there are two ways to go here. If you don't refute it and if you don't specify your refutation then we have to simply take her evidence. We cannot accept something and just accuse someone of lying to the committee without substantial evidence.

CHAIR - I will now give you an opportunity now to address those issues.

Mr KERSCHBAUM - I guess the general tenor of her comments was that the association had frustrated the process; nothing could be further from the truth. Probably the association's biggest mistake was that we had a number of claims to Primebuild. They were, in fact, far and away the single largest building firm we had to deal with and they had a number of claims outstanding. Prior to the collapse of Primebuild, all of the claims we had, including up to this one, basically were resolved in fairly amicable manner. The CEO at the time would take the facts, do a simple desktop audit of the facts, and then refer the matter to a building consultant, who was Mr Bloomfield in every instance. The reason we used Mr Bloomfield was that he was - and I say 'was' because he recently retired - the best inspector available in Tasmania, to be honest. That is borne out by the fact that a number of insurers and a number of different schemes operated throughout the course of the last 15 years or so that the housing indemnity insurance operated, all ended up using Mr Bloomfield at the end of the day, including QBE.

A number of people were tried as inspectors for housing indemnity claim purposes and pretty much all of them, for one reason or another, fell away. At the end of the day, when warranty insurance in 2008 was removed from the landscape, we had QBE using Mr Bloomfield. He was the most regular inspector for these types of claims. Certainly we had been using him with HIH since day dot. He was probably the one building inspector out there who had the most knowledge in this area. There was a lot of confusion and misinformation out there from other people who thought they could undertake a housing indemnity claim inspection but did understand the parameters of the Housing Indemnity Act. We found that he was able to undertake all the inspections.

What would typically happen is that we would receive a claim - and this happened in about 15 incidents prior to the Johnson and Ripper one - and the executive director, I do not believe he rejected any, would typically acknowledge the claim as a legitimate one. We would send this Mr Bloomfield out; he would do a scope of work. We would then get three quotes from builders who were always our members. We would go with the builder who quoted the lowest price, as you would a normal building contract. We would typically then offer the client the opportunity to receive a payout from the association which was exactly the same amount as the builder's quote. The client was then able to go and take over and manage that building contract directly with the builder and they had the money in their pocket to do so. That worked very successfully.

The executive director proposed that in the Johnson and Ripper case. They agreed at a meeting and, for whatever reason, the relationship broke down between the parties. I do not know if it is because they sought legal advice, but at a point they had gone down this path, they had agreed this was the way to go and there was dispute in regard to the scope

of the works. Johnson and Ripper believed there was more to the claim than Mr Bloomfield did, and therein started the problems. At that point things seemed to break down. They had lawyers involved and they moved from one lawyer to another.

We are in receipt of a number of lawyers' claims which are almost in conflict with each other in regard to the issues. We are aware that they were on the fourth of fifth solicitor by the time they claimed with us and there were delays of one year between solicitors. We would receive no correspondence at all from Johnson and Ripper for up to 13 months - which was the longest period. We had two periods of over a year where we did not receive any correspondence at all from them in regard to this issue. We brought the issue back. We said, okay, we will follow the process, and then there were a series of delays caused by them, not by us. Probably the longest delay by us would be maybe a month in getting back to them. But there was a whole series of toing-and-froing.

At the end of the time, I found myself still in possession of this claim, even though it had been lodged initially in 2005 with us. It could not be considered until 2006 when it was disclaimed by the creditors. Then what happened was a series of toing-and-froing between the parties up until I took over the job as the executive director in 2009.

In order to try to bring things to a head, I sought legal advice from our solicitors, who said we probably have to take this thing back to the panel. There was always a panel involved - something, again, that is probably glossed over in all of this. One of the reasons why the scheme was given approval by the state government is because overseeing any claims was a panel which comprised an MBT representative - which was Mr Bloomfield, an Insurance Council representative, and a Consumer Affairs representative. We though that by having an interest there on the panel from the Master Builders Association, from Consumer Affairs and by the Insurance Council, you would get a reasonably impartial outcome from that panel.

We convened that panel to meet later in the year, about six months after I took over the executive director's job. Because of delays from the other party, we were able to finally get the panel to convene. The panel basically took into account Mr Bloomfield's reports and accepted them.

Mr BOOTH - Did Mr Bloomfield sit on that panel?

Mr KERSCHBAUM - Yes, but he was one of three.

Mr BOOTH - But he assessed his own report?

Mr KERSCHBAUM - Yes.

CHAIR - I think you are doing a good job there of addressing the general tenor of the previous witness's evidence. You were operating in a strange environment. Not only were you operating a peak body for a builder's group, you were also operating an indemnity scheme, a guarantee scheme. For all intents and purposes, from a consumer's point of view, the insurer before used to be a multinational company that held the insurance. When you had a problem with a master builder you went to see the Master Builders who would say, 'We'll provide you with a consultant who will explore with you some outcome between you and the insurance company', who was someone else, so there

was someone in the middle. HIH go broke and then you become the insurance company as well, the guarantee company.

Mr KERSCHBAUM - Yes.

CHAIR - Then Mr Bloomfield's relationship to the complaint takes on a different nature, does it not, because if Mr Bloomfield is your contracted employee he is representing one side of the argument rather than an interested third party, which is what MBA was before HIH went belly up. From the evidence it would seem that there is some view that Bloomfield was more than just a paid consultant and may, in fact, have been on the MBA board, and I take it that the guarantee scheme was backed by directors?

Mr KERSCHBAUM - No.

CHAIR - No personal assets were at risk?

Mr KERSCHBAUM - No.

CHAIR - No share money?

Mr KERSCHBAUM - No, never. It was only ever the association's funds which were at risk. They were quarantined to the limit of the bank guarantee and the funds held in an account, so that was the maximum payout the association was liable for, if you like.

CHAIR - What backed the bank guarantee?

Mr KERSCHBAUM - The association's assets. The association had substantial assets, well in excess of half a million dollars, which were built up over 122 years, and they formed the basis of the bank guarantee.

CHAIR - At that material time was he a director of the MBA?

Mr KERSCHBAUM - Yes, he would have been treasurer.

CHAIR - Do you accept that there is a somewhat uncomfortable degree of closeness that might have been forced upon the system because somebody had to take over the scheme? A director and treasurer of the peak body, and the peak body is the one at material risk from payouts, is actually the consultant who goes out to try to mediate some sort of outcome.

Ms ARCHER - A perceived conflict of interest.

CHAIR - I am not making the allegation that it is a conflict of interest, but certainly it gets terribly close, doesn't it?

Mr KERSCHBAUM - Yes.

CHAIR - The nature has changed completely from when Dick Bloomfield was a consultant on behalf of - like a disinterested third party - between the insurance company.

Ms ARCHER - I am not saying an actual conflict of interest, but a perceived one.

Mr KERSCHBAUM - For sure; that is why the panel was set up. The panel was there to resolve those disputes impartially and the panel's decision was binding. The association in this only provided secretarial service. The association's role was only ever to act as an intermediary between the parties. The panel was the one that made the decisions.

CHAIR - What would have possessed the MBA, knowing that Dick Bloomfield received most of the assessing work, to put him on the panel?

Mr KERSCHBAUM - Because historically we didn't have to convene the panel. In the majority of instances the panel was never convened because the parties were more than happy to accept the contents of Mr Bloomfield's report, which inevitably supported their claim and resulted in them receiving a payout in fairly swift time. It was not unreasonable for them to get their money within two to three months of making the claim.

Constituting a panel and going through that process added an additional degree of complexity and time to the whole proceedings. As I said, this was also run past Johnston and Ripper. They had been told in the past, especially with Primebuild but with all of the other previous claims, that we would send out our consultant and if we were comfortable with his decision we would just make a payout based on that advice. They agreed with that until they decided to add in additional scopes of work and increase the quantum. Had that particular issue been resolved at that stage, like every other housing indemnity claim we had had to that point, we wouldn't be having this conversation.

CHAIR - However, the reason that you are before us now, and we asked that particular question, is because we are contemplating new legislation, which goes to this very issue of perceived conflicts of interest of people who appear to have one hat on and they actually have another hat on underneath it. Somebody might be trying to set up legislation that actually entrenches that on the other side in the bureaucracy.

Ms ARCHER - Or that even if it may not get to them on the panel stage they are still ultimately going to be on the panel here and also had a different role. An outsider could view that there could be that perceived conflict when they are going to have to ultimately wear another hat if it gets to that stage.

Mr KERSCHBAUM - That is exactly why we have brought the issue, because it is going nowhere quickly and it has resulted in a lot of angst. So that is exactly why we took legal advice. The legal advice was to reconstitute the panel, let the panel make the decision and the panel is then at arm's length to the Association.

The panel looked at Mr Bloomfield's reports and they looked at the other party's reports. It is fair to say that they dismissed the other party's reports out of hand because they were so ludicrous. Mr Bloomfield's reports were reasonable, costed and appropriate. The panel chose not to bother going to another consultant and getting another report because they believed that they had the facts that they materially needed based on the reports that had been commissioned by the Association in order to resolve the issue some three years prior to that.

CHAIR - With the greatest respect, on a panel of three making a judgment on a building assessment, on a dispute assessment done by one of the three, only requires the agreement of one other, doesn't it?

Mr KERSCHBAUM - Yes.

CHAIR - Really it comes down to one person, not a panel. One is already in the game; he wrote the damn thing. It only requires the agreement of one other. Frankly, it does not look like a panel.

We are not here actually to criticise what the government set up back then. We are actually here to identify - and we are greatly interested in what took place in this dispute and where there were perceived levels, and why the previous witness carries so much angst in her heart as to the whole procedure that took place.

I want to suggest that the fact that the very fact that the person who came to do the actual assessment was not a disinterested third party. He was actually the insurance rep and then she finds him again on the panel that has to make a judgment. It is those kinds of closenesses that cause all sorts of concern.

Mr BOOTH - He was also a director of the MBA at the time. He inspected it, wrote the report, was a director in the MBA, and sat on the panel that ultimately made adjudication in terms of the dispute between the consumer and the MBA. Surely there is an apprehension of bias. There is a bias. That is quite bizarre.

Ms ARCHER - He didn't withdraw from the panel process? He didn't say, 'I cannot make a decision on this and declare an interest?'

Mr KERSCHBAUM - We sought legal advice from our solicitor and he addressed the panel exactly on this issue. The panel felt comfortable enough that there was no problems with Mr Bloomfield's reports, nor that they would come up with a position that would be anything other than transparent. In fact, I would have to say having attended that meeting that I don't think Mr Bloomfield said more than a half dozen words in support of the report. The report was discussed by the other two panel members and agreed that it was basically okay.

Mr BOOTH - He still sat on the reconstituted panel? In other words, they reconstituted the same panel. They didn't take Mr Bloomfield off and put another member in his place?

Mr KERSCHBAUM - The panel only sat in 2009 to address the issue the first time. As I said, when I became the executive director, one of the things I did was I went back and had a look at the job, having been previously a building inspector with the council and a builder, and been the technical person at the Master Builder's Association to give advice on the BCA and Australian Standards, I walked through the property and felt very comfortable with Mr Bloomfield's report.

In fact, I have to admit I had a good laugh at the contents of the other party's report because they were so absurd that they defied description.

Mr BOOTH - But natural justice surely must demand that there is more than just an arm's length relationship. They have to be independent, surely. Of course you had a laugh because the guy was sitting on the board of the MBA. He was an executive member.

Mr KERSCHBAUM - When I went through the property and saw the extent of the damage, and saw the claim that was being made by the client, it was ludicrous.

Mr BOOTH - That is another matter. The matter we are talking about here is the actual conflict of interest issue there.

Mr KERSCHBAUM - The conflict of interest issue is a very valid one. That is why we obtained legal advice, which said if he is drawing the report for one purpose and he is sitting on the panel for another purpose, which he was, our lawyer was comfortable in not asking Mr Bloomfield to be removed from the panel or move away from the panel.

CHAIR - For the record at this point and it may well have been the reason behind some of the advice you received and certainly the legal advice. I know Mr Bloomfield and he has a huge respect within the industry for this kind of work. Therefore, no alarm bells would go off in the first instance because he was very good at it. I think the situation just slipped into what I consider a pretty unfortunate period. While you had that guarantee arrangement, he was conflicted without any doing of his own. He has found himself in this quite absurd situation which, the bill that is about to come before us in two week's time in the parliament, I have no doubt some members will reflect why this bill is necessary and why certain other separations are necessary.

Ms ARCHER - There could have been someone with less experience whose report did not stand up but then you have a situation where they are then on the panel. I suppose, from an outsider's perspective, looking in, that is not a healthy situation to be in.

Mr BOOTH - If you use, as an example, an area where there was a dispute that the MBA was involved in, say, with a regulatory body with a builder and the same circumstances applied, that a report was written by someone from Workplace Standards which was critical of the MBA or one of your members, and it then went to a tribunal that had that same person sitting on it as the author of report and then the judge on whether that report stood, you would, I would imagine, have problems with that, wouldn't you, as an industry association? If the regulatory regime provided for conflicts like that, you would be concerned?

Mr KERSCHBAUM - We would. The issue with regard to conflicts of interest, I agree with you, is quite obviously not ideal. The problem is that we do not have, and I am not aware of anybody who has, Mr Bloomfield's experience or ability to be able to deal with these issues. It was probably a dearth of appropriate people who could sit on that panel that caused the situation to arise.

But we saw it for what it was, and that set the alarm bells ringing. That is why we sought and obtained legal advice on what the next move was. Given the panel had been convened and had been set-up since 2002 with the same three people, there was no advice to us to remove Mr Bloomfield from the panel.

CHAIR - I want to explore fully the lack of degrees of separation so that we know and understand the shape of what the situation was back then in order to help us in deliberations on this new legislation.

If an eventual finding on that particular consumer complaint was for a payout of $500 000, or it was for a payout of $100 000, is the difference there, $400 000 out of the bank account of MBA?

Mr KERSCHBAUM - It would have come out of the trust funds that were set aside for it.

CHAIR - It is a direct disbenefit to the organisation?

Mr KERSCHBAUM - It would be, yes, because the association was left with a balance of funds, or left to pay the balance of funds, depending on which way the thing went.

CHAIR - The treasurer of the organisation would be brutally aware of that fact?

Mr KERSCHBAUM - He was not the treasurer. At the time that the panel met, Mr Bloomfield was off State Council. At the time the claim was made, he was on State Council. Mr Bloomfield stepped off State Council in 2008, from memory. When the panel met he was no longer a director of the association.

CHAIR - But very aware of the financial ramifications of a big claim payout.

Mr KERSCHBAUM - Of course, yes.

CHAIR - Whereas, if he had been a disinterested third party from an insurance company, he may well have pursued a $500 000 claim, for instance, if it were warranted.

Mr KERSCHBAUM - That argument could well be made.

CHAIR - With a little more vigour.

Mr KERSCHBAUM - Yes, there is no doubt that whoever the MBT's representative was would have probably looked at the quantum of the claim very seriously, and looked very closely what was and what wasn't allowable under that particular claim. There is no doubt about that.

CHAIR - I think that is plain as the nose on your face what took placed there.

Mr KERSCHBAUM - As I said, when the panel met he wasn't actually a director of the Association.

Mr BOOTH - Was he still a member?

Mr KERSCHBAUM - Only through his life membership as such.

Mr BOOTH - A bit hard to claim, with respect, impartiality when you have - and this is no reflection on Dick himself at all - but it is a bit hard to claim that it is an independent

analysis if you have somebody who is a life member of an association making a judgment, I would have thought.

Mr KERSCHBAUM - Can I say with all due respect, that the panel representative was never going to be - the idea of setting the panel up was the MBT's interests were also represented at the panel's table and there was some reasonable scrutiny and rigour around claims rather than just having a tick and flick format. In exactly the same way that Consumer Affairs was represented so that the consumer's interest - and I would also add the decision by the panel was unanimous, it wasn't a split decision. All three agreed quite convincingly that they would come down on the side of Mr Bloomfield's report.

There were a number of other reports that were commissioned by Johnson and Ripper and they were made available to the panel. So the panel didn't just get Mr Bloomfield's report. They had a variety of reports from both parties and they were able to pick and choose what they believed was the most appropriate report.

It is important to recognise that the panel didn't have a split decision and that the other parties were represented. Mr Bloomfield's report at the end of the day probably became the MBT's position on where things sat. The other parties, I guess, would reflect hopefully the Consumer Affair's representative's position, but he didn't believe that for one second, to be honest.

CHAIR - All right. The next question then is whether the MBT - it is the MBT that you call yourself?

Mr KERSCHBAUM - MBT we call ourselves, but that is fine.

CHAIR - The MBT have sufficient funds to pay out any remaining claims with respect to the period that it provides housing indemnity insurance. We might have explored this with you once before when you were before us. What sort of a tail do you have with this -

Mr KERSCHBAUM - We have none left now. Having said that, we are aware of one potential claim, but it would be an outside chance of being a claim. The build is still on foot. There is a matter going before the Supreme Court and they have advised us - the parties have advised us - that if the builder was to go under they would look to lodge a claim against us. I believe that the six-year period has well and truly expired and we have no liability in that instance. We are fixing up somebody's spa bath, which has been going on for years. I was left with a couple of housing indemnity claims and that is the last one. I think that work may have already been done.

Mr BOOTH - If they have lodged their claim within that six-year period then you would still be liable, wouldn't you? It is not just six years before litigation?

Mr KERSCHBAUM - No, because then everyone would lodge a claim just before the six-year anniversary period and say we have a live claim and we will call it in whenever we are ready. The idea of the six years is that there has to be a trigger that's been met. In this instance the death, disappearance or the bankruptcy of the builder. If the builder has not died, he has not disappeared, and he has not become bankrupt in that six-year period after completion.

The issue in this instance is that a certificate of occupancy was issued then revoked. They are claiming that because it was revoked, the six years hasn't started, but I believe that is a spurious claim.

CHAIR - Can I just ask you in respect of the third dot point whether would place on the record again - I know you addressed it five minutes ago - the short version of what took place when you conveyed your portfolio to CGU? Was it CGU?

Mr BOOTH - QBE?

Mr KERSCHBAUM - No, CGU took over our book.

CHAIR - When they took the book over did they pay you for it?

Mr KERSCHBAUM - No. We came with an agreement whereby they would accept those builders on our record that we had who were receiving housing indemnity insurance. They took them over and basically they took them on as part of their book of builders and dealt with them as they saw appropriate. We acted, virtually, as an intermediary during those three years though as the shopfront for CGU. We took the paperwork and issued the claims on their behalf, but effectively we were just an intermediary for them for that three-year period.

CHAIR - If there was a live claim for $500 000 made in the period prior to handing it over, they would not have taken that?

Mr KERSCHBAUM - No. That is exactly right. Any certificates issued by us entailed our liability very clearly.

CHAIR - The lack of degrees of separation between your consultant and panel member when he was in full knowledge of the finances of MBT simply exacerbated what took place. I am not making any allegation of any wrongdoing. I understand now why at least one person, our witness, carried the angst that she did. She felt that, and I think committee members would agree, that she was on a hiding to nothing against the system.

Mr KERSCHBAUM - That would be true if we did not make any claims prior to her, but we had 15 claims paid out virtually within three months of them being lodged and all to the complete satisfactions of the clients. It is hard to argue that we have a track record of paying out these claims and then all of a sudden we are not going to make a claim to her.

The issue with this one was that we thought the claim, in the initial instance, when Mr Bloomfield went out in 2005, was somewhere around $30 000 or $40 000. By the time I went to inspect it was a $60 000 claim because no work had been done to mitigate the damage and the costs had blown out slightly over that period. It was still only about a $60 000 payout in 2009, yet they were producing evidence that it was a $270 000 claim, including a complete re-roof, $100 000 worth of cladding had to be repaired. The job had $20 000 to $25 000 worth of cladding all up. How you can come up with a $100 000 quantum beggars belief. That is where the dispute occurred.

We would have gone out and fixed the problem. In fact we were ready to go in 2009 after the panel convened and said this is what you must do, which met about 90 per cent

of their criteria. They claim the issue was over the $200 000 maximum threshold, so they wanted the $200 000 payout, which was the only option. Had the claim been under $200 000, we would have been within our rights to send someone out to fix it. But because every quote we received was well over $200 000, there was only one solution to the problem and that was to give him a $200 000 payout.

Mr BOOTH - Which you did not want to do.

Mr KERSCHBAUM - Of course we did not because we knew the work was only worth $60 000 at most.

Mr BOOTH - But didn't you give evidence to this committee in this session that you always gave people the option of either receiving a payout or having the work done?

Mr KERSCHBAUM - We did, but they were not entertaining any cash payouts of the quantum that we were talking about. When we sent the builders through, they confirmed everything that myself and Mr Bloomfield thought about the quantum. They came back with quotes, but the other party was not interested in a $60 000 payout. The lowest was $67 000, from memory, and the other one was $69 000. That was backed up subsequently by a QS. We brought in a QS when things did get nasty last year, and the QS quantified the work at about $80 000 or $90 000. That was three years after we had been there in 2009. The QS pretty much backed up our position and there was no way there was $260 000 or $290 000 or $275 000 worth of work. You could have rebuilt the whole place for that amount of money.

Mr BEST - The quantity survey was based on their surveying of the finished product to the contract, a cost that you could go and get this knocked up and that would be within the standards and that is okay. It is like the right finish that has been requested, not some cut -

Mr KERSCHBAUM - No; all made good and repairs and those things. The other thing to note is that when you looked at the scope of their work it was not all that dissimilar to the scope of our work; it was just the amount. We had a quote from a professional renderer of $17 000 to fix the cladding, theirs was over $100 000. I managed to question the builder in the mediation in the Supreme Court in October when we met. I asked a few questions. I said, 'Why is the roofing $20 000-odd, and we had only allowed to replace some box gutters that were leaking?' He said, 'Well, I have sought advice from my roofer and he recommended we replace the roof.' I said, 'Is it below the minimum pitch for Colorbond?' He said no. Why would you replace the roof? Because it was recommended.

Mr BEST - Are you saying they would not give any evidence as to why it was recommended?

Mr KERSCHBAUM - They had no reason. It was part of the whole scheme. I believe it was manipulated that way to get the claim over $200 000 so that we had no option but to pay it out. The deck was the same. We had a $3 000 or $5 000 amount of rectification work to the deck. The builder quoted $32 000, of which $17 000 was for replacement for all the glass balustrades and handrails. I again queried why that was the case. He said he believed that because they were doing maintenance work on it they had to

upgrade the glass to the new standard. I said, 'That's not the case; why have you allowed it?' He didn't say anything further.

Mr BEST - Sometimes there is a difference to say something is not built properly and then getting it repaired and it's not really what you were buying in the first place. It just isn't what you thought you were buying. You are saying, no, that's definitely not the situation. They were going to get exactly what they were intending to purchase, only that you had quotes that said it could be done -

Mr KERSCHBAUM - A lot cheaper.

Mr BEST - Exactly, and you wouldn't have known the difference. It would have been seamless in that regard.

Mr KERSCHBAUM - The extent of the work on the balustrade was basically repainting the handrail. There is an argument that we didn't have to do that, but we did that as an act of goodwill because we had flaking paint on the handrail and we believed it was probably flaking too early and had not been primed appropriately, so we had allowed a couple of thousand dollars to repaint the handrail. They were seeking to replace the handrail, the glass and redo it again in. I don't know if it was with an equivalent; I didn't ask, but they were the sorts of differences that were coming up. It became pretty apparent to us through the process that they had received, I believe, poor advice initially from the consultant they had and the quantum had been grossed up significantly to exceed the $200 000 threshold.

CHAIR - This committee is not interested in making any finding as to what took place because you have, we have been advised, resolved the matter between yourself and Mrs Johnson. I understand from looking back through this there is still a live case between Johnson and Ripper and the building surveyor. Until that is resolved we will never know the extent of Johnson and Ripper's loss or otherwise because somebody tells me that the property is now sold on the marketplace. Presumably when all cases are settled you could look back and say, 'That was actually the outcome'. It may have been, as you say, poor advice and it may have been a whole raft of other things that contributed to it, but this committee isn't going to make a finding on that. This committee wanted to do a forensic examination of this one case - in fact two cases; one up north and this one - to allow us to properly scrutinise the legislation that is currently before the parliament.

What we have learned here today is probably of interest to us as well, particularly the perception of closeness of Mr Bloomfield.

CHAIR - The current status of the funds; that has gone off to -

Mr KERSCHBAUM - Consolidated revenue, basically. When the scheme finished up in 2005 we were advised, based on previous track record, history of payouts, etcetera, by our external accountants that we should make a provision. We did make about a $66 000 a year provision for any potential payouts during what we call the tail of the insurance, the six-year period. We did that. We held off the last $66 000 for a year or two in our accounts knowing that this claim was there. Coincidentally, the $66 000 was about what we thought we would have to pay out for the claim to rectify the work. Unfortunately it blew out by a considerable amount above that and so we were forced into a position. We

paid the money begrudgingly because we knew that the claim was worth nowhere near that quantum. No matter which way you cut it or shut it, we probably paid double what it was worth in the market to get the work fixed. That is unfortunately our legal system at work.

CHAIR - Did the current or former director personally benefit from any distribution of funds remaining?

Mr KERSCHBAUM - No. That cannot happen because we are a not-for-profit organisation and as with any not-for-profit, the money does not go to any directors. The money went back into consolidated revenue.

Mr BOOTH - When you say 'consolidated revenue', you mean back into your own books? It did not go to Treasury - the government consolidated fund?

Mr KERSCHBAUM - No, back into our normal account.

Mr BOOTH - The profit out of the insurance you are holding is back in your own internal revenue, so if there is some other claim proven that is where the payout for that will come from?

Mr KERSCHBAUM - That is exactly right.

Mr BOOTH - Was it a highly profitable enterprise in running the insurance?

Mr KERSCHBAUM - Less so after 24 December. The association finished up in front, there is no doubt about that. I have not done the figures. I could not honestly tell you what we took in and what we paid out. I would suggest we took in somewhere close to about $2 million to $2.5 million in total, but out of that came running costs and other bits and pieces, as well all the claims, which would have been well in advance of $1 million. I think Primebuild alone would have been a $500 000 liability to the association.

CHAIR - So you ended up with a net benefit?

Mr KERSCHBAUM - Yes, definitely.

CHAIR - $1.5 million?

Mr KERSCHBAUM - I would not have thought in that magnitude but somewhere under $1 million. I have not done the exercise, only because we will still get a small claim for payment from a builder shortly to do with a spa bath. I am waiting for this other issue to resolve itself fully before we even look at a final costing on the scheme.

In terms of supporting our members and offering them warranty insurance and a way to survive, it was the right move. If we had lost $1 million it still would have been the right move for the association because we are a not-for-profit organisation and we are there to represent our members and look after our members. So if we can give them a housing indemnity scheme that allows them to keep trading and operating without sending them into monopoly situation with QBE, that was a benefit for us. It worked and I think we will make a tidy profit. It will be somewhere between $500 000 and $1 million, I would

have thought, but I might be out on that. However, if you were only to take this claim, if it was to come to fruition, it would wipe out all of that and more - the claim in the north-west of the state that is ongoing in the Supreme Court.

CHAIR - Is it of that scope?

Mr KERSCHBAUM - Yes. If you listen to the developer it is. Our understanding is that the builder offered to go back and fix the problem, but they got legal and had consultants involved who, judging by what I have seen of the file, are dubious. It is a multimillion dollar claim that should never have been of that magnitude. The builder went back and offered to fix the problems.

Ms ARCHER - What are the legal costs?

Mr KERSCHBAUM - The legal costs will probably exceed the cost of rectification. I believe they are probably somewhere around $1 million already between both parties.

CHAIR - Is Mr Bloomfield going to sort that one?

Mr KERSCHBAUM - Mr Bloomfield has retired happily.

I did not want to get into a tit-for-tat in regard to what was said on *Hansard* and I do not know why some of those comments were made. When the testimony was taken on 3 December, we were right in the middle of negotiations. We were also advised that the other party were looking at going to the media on this issue. This was whilst they were trying to negotiate a cash settlement. I am not going to say anything other than that. But it just seemed to us unusual that the issue was raised proximate to the time the other party was trying to negotiate settlement and, as I said, we were also being threatened with the media. It seemed to us to be a concerted effort to try to resolve the issue and bring it to a head.

CHAIR - Could I just intervene there, so that the record does not leave things hanging out there, that you have just said. It may well have been Mrs Johnson's last chance to speak to this committee in December because we had to make a finding on the legislation because we was felt it was likely to come back on the first week after the Christmas break and we needed a finding. We had said, 'If you want to speak, you need to speak now, or forever hold your peace.' It was of that nature and certainly we were not aware of any pending settlements and frankly not interested in any case because that was a matter between you and her.

I accept that you have a right to make that statement because if you feel that has coloured the evidence then you are absolutely allowed to reflect on that and you are welcome to.

Mr KERSCHBAUM - It certainly was brought to our attention that she was attending the hearing. It was brought to our attention that she was talking to the media. So it just seemed to us as though there were more issues at play than a genuinely aggrieved client.

The other thing as well is that we, as I said, if you go through the history of the actual case you will see quite clearly that we didn't at any time try to frustrate the process. In fact, our initial idea of approaching them and resolving the issue amicably was all about

getting them a quicker response. We felt sorry for them insofar as they had gone with a builder who had gone under. They had to wait a number of months before the issue was disclaimed by the creditor and we were on to it straight away with every intention, like we did in every other instance, of resolving the issue. Unfortunately, as I said, once especially the legal teams became involved there just seemed to be huge breaks in time and continuity, and the issue had to be picked up at each stage.

CHAIR - One of the issues with consumer affairs is that the wounded party doesn't have all the ammunition that you have as your defence. In this case you were an insurance company as well. They are amateurs basically. In this case it appears she was a business lady and she would have some notions and concepts, but she is an amateur. She signed up for a building project that one would reasonably accept to be dry, and not have mould inside, and all the rest of it, but also included a steep driveway and a retaining wall. In her evidence to us she explained to us that that just isn't there, and by all accounts she was not able to claim for the fact -

Mr KERSCHBAUM - The other retaining wall that wasn't shown on the drawings, no. There was a retaining wall out the back, which I agreed should have been put it, but there was only one retaining wall shown that we didn't put in. The retaining wall she is talking about on the lower end of the property was a suggestion by her consultant after the inspection. He was never shown the drawings and nor was it approved.

CHAIR - What about the driveway then?

Mr KERSCHBAUM - The driveway was there.

CHAIR - The driveway is in?

Mr KERSCHBAUM - Yes.

CHAIR - Sorry. I misread -

Mr KERSCHBAUM - The driveway has always been there. We went off the scope of the documents that they provided to us. One of the things we had asked for from the outset was a full copy. They relied on legal advice that said they needed to settle regardless of the status of the building, then take action against the builder. We had only ever received the first two pages of that letter. We asked for the subsequent pages because we did not know if there was further advice in that letter or whatever else. We still, to this day, have not received that information.

It was those sorts of things that we just couldn't get out of them that I think we had been asking for from the outset. Why would you only provide the first two pages of legal advice and not provide all of it if you are relying on that legal advice to make a claim?

There is an underpinning requirement in the Housing Indemnity Act that says a client should not prepay or pay in advance of where they are at in a building contract. If you pay in advance of where you are at, i.e. you have paid for the completion of a house but you have not started it yet, the housing indemnity doesn't have to make a claim.

We weren't sure whether that advice that she had received prior to settlement was to hold back some money, if she was aware of defects before purchasing, and those sorts of things. She is relying on a piece of advice that directly conflicts with the housing indemnity scheme. We didn't want to go down that path of saying, 'I'm sorry we're not going to pay under the Housing Indemnity Act because you have paid for something in advance of receiving it, or you should have held money back if you knew there were defects.' We tried to do the right thing. We tried to massage the outcomes. Unfortunately, over a matter of time, the mould and everything crept into the property as a result of her inaction and his inaction, not from our inaction.

CHAIR - Okay. I think that is a very good discussion, over an hour or so. Do you feel you have had fair commentary on the situation?

Mr KERSCHBAUM - Yes, as I said without getting into the nitty gritty of what she said and we said, the matter is now settled. I just wanted to really convey our disappointment at the way it went, but also of the fact that throughout the whole process the Association tried very hard to resolved the matter.

The advice she received, I believe, was very poor. Even my solicitor said to her the legal fraternity, he believed, had let her down from the outset. She obviously did not have a very well framed contract initially otherwise she would have been able to withhold funds or withhold settlement on the property initially. That did not happen. Unfortunately, everything that has happened from then has compounded. As I said I read the consultant's report that she had commissioned, the initial one, and I honestly thought that it was so bad that the consultant should be brought into the action, because if she has relied on that advice he has sent her in completely the wrong direction and with the wrong expectations. I think that is where the problem just escalated.

CHAIR - Thank you very much for that.

Mr BOOTH - Do you want to take the opportunity to ask Michael if he has any comments on the conflict with the director of the building dispute's commission being the director of building control, while you are here?

CHAIR - Yes. There is an opportunity for you. I think you conveyed - outside this committee - but I think you have conveyed to various members of parliament your view on the proposed legislation with the building dispute's commissioner, where that should sit in the public sector or outside the public sector. The HIA, you would be aware, has made strong representations on it. I think you have linked yourself to that submission?

Mr KERSCHBAUM - We have, basically. Stuart has taken the running on this from the HIA and we have fallen into step with him. The issue of conflict of interest in this instance is probably closer to the point insofar as if you have the same person investigating complaints, but also dealing with the licensing of builders that becomes very close. We believe that a separation in that instance was warranted.

I know that the HIA's position is that they would like some people from outside the public sector to also be able to apply and the position should be based on merit. Conceptually I have no problems at all with that position. I think it is the way that you should be looking at things, if you have somebody out there who would make a very

good building dispute's commissioner then, regardless of where they come from, they should probably be in that role.

Mr BOOTH - Do you think it is possible for a system to work fairly with the building dispute's commissioner being the same person who is director of building control?

Mr KERSCHBAUM - No, because the director of building control ultimately determines someone's destiny. Investigating someone for an issue of a complaint is one thing, but actually determining whether they have a builder's licence the next day is a very big carrot isn't it - or stick, I should say.

Mr BOOTH - I do not want to words in your mouth - I have my own view on this which is clearly articulated as well, which is not dissimilar to your own - but do you think that would be adverse then to the industry?

Mr KERSCHBAUM - Yes, I believe so, definitely. I think that is without question.

CHAIR - Thank you for that. Does anyone else have any questions for this witness? No. Thank you very much for your attendance and your frank discussions as always.

Mr BOOTH - Yes, as always. Thank you.

Mr KERSCHBAUM - Thank you.

THE WITNESS WITHDREW.