RESIDENTIAL BUILDING WORK QUALITY (WARRANTIES AND DISPUTES) BILL 2012

SECOND READING SPEECH

Mr Speaker, I move that the *Residential Building Work Quality (Warranties and Disputes) Bill* now be read a second time.

This Bill replaces the *Housing Indemnity Act 1992* and complements the *Building and Construction Industry Security of Payment Act 2009* and *Building Act 2000*.

The introduction of this Bill is the culmination of a consultation process that began with the release of a discussion paper in 2004. This was followed by a further consultation paper in January 2008 that detailed a proposed statutory framework for the resolution of building disputes in Tasmania. In January 2012, Workplace Standards Tasmania released a draft Bill along with a Minor Assessment Statement for further consultation.

Consultation has continued with stakeholders between then and now to a point where most industry bodies are supportive of the proposals contained in the legislation. In addition to broad consultation with industry and consumers, the legislation has also been subject to the scrutiny of the House of Assembly 'Select Committee on the Costs of Housing, Building and Construction'. The committee has reviewed the legislation, taken submissions from Tasmanians that have experienced building disasters and from industry associations concerned about the potential impact on their members.

In considering submissions the committee has made recommendations designed to address the primary issues raised by the building associations.

On 6 March, the committee tabled its fourth interim report in which the committee recommends that the Bill be amended in three areas.

(a) To provide that the Building Dispute Commissioner is not to be the Director of Building Control, or an employee of Workplace Standards Tasmania.

(b) The Building Dispute Commissioner is to have expertise in one or more of the following – Arbitration, Natural Justice and procedural fairness, building and construction principles or engineering principles.

(c) The Building Dispute Commissioner be able to appoint any specialist consultant to assist in arriving at a determination or refer any arbitration case referred to him to any Nominating Authority authorised under the *Building and Construction Industry Security of Payment Act 2009* to make recommendations on the appointment of an independent arbitrator.

The first recommendation appears to be based on the Building associations concern over the proposal to combine the roles

of Building Dispute Commissioner and Director of Building Control.

I appreciate the time taken by the committee to work through this issue with the building associations and to return with a considered and sensible solution. For this reason I will later move a motion to amend clause 81 to provide that the same person cannot be both the Director of Building Control and Building Dispute Commissioner. I will place on the record my assurance that it is not my intention to appoint another employee of Workplace Standards.

In appointing the Building Dispute Commissioner I will be mindful of the qualities highlighted in the second recommendation. However, I do not believe an amendment is necessary to achieve this as the legislation already provides sufficient guidance in this regard. In my view the reliability of any final determination will not require a Building Dispute Commissioner to possess all the skills mentioned, it is more likely that these skill sets will be dispersed throughout the

decision making process combining to provide an equitable outcome. Obviously, a Supreme Court Judge determining a building matter would rarely, if ever, have expertise in Arbitration, Natural Justice and Procedural Fairness, Building and Construction and Engineering principles. In most cases I expect a Judge would rely upon advice from experts in relation to the technical details and ensure the procedure for determining any outcome was fair and beyond reproach. I believe with the changes we are suggesting to clause 81 this can be achieved through this process. I should point out that clause 76 (a) requires that Natural Justice is be observed in any investigation. And clause 88 anticipates that investigators will hold relevant qualifications in order to assess and determine their recommendations for the Building Dispute Commissioner. Furthermore, clause 112 provides for the establishment of Ministerial Guidelines to guide the Building Dispute Commissioner on the decision making process. Expertise and procedural fairness are therefore, as they should be, intrinsic to the decision making process.

In relation to the first part of the final recommendation I would highlight that the legislation currently provides at clause 50 for obtaining expert advice. As a result no amendment is required.

Clause 73 has been included to address matters such as those raised in the second part of the third recommendation. Although formal arbitration like civil litigation are not envisaged to form part of the Alternative Dispute Resolution regime proposed in the legislation. These mechanisms do not align with the policy platform for this legislation which is to create a fast, equitable, low cost dispute resolution system for residential building disputes. Clause 73 is intended to be the circuit breaker between resolvable disputes and matters best determined by arbitration or through civil litigation. It was never intended that this process would replace formal arbitration or civil litigation. Instead the process aims to provide parties with an Alternative Dispute Resolution process to these mechanisms.

Mr Speaker, in summary I believe we can and have addressed all but the second part of the final recommendation in the Bill currently before parliament. I am not saying we will not address this issue but it is not an issue worth delaying the progress of this Bill. That would be unjust. Instead I will refer the matter back to Workplace Standards for further investigation. If it is possible to introduce an arbitration process involving the Nominating Authorities and this will assist with more complex disputes, then I am happy to have this explored.

Mr Speaker, I will now move from the consultation process which I can assure you has been exhaustive and highlight what the consultation process has identified.

Principally what the consultation has identified is a dysfunctional and ineffective environment for resolving residential building disputes. Tasmania's current legal structure has a number of significant gaps in consumer

protection for building and renovation work which the proposed legislation seeks to fill.

Government is mindful that the single most significant consumer purchase for Tasmanians will be the family home. Therefore, it is only fair for the public to expect Government to provide more protection for this purchasing decision than for most others and a cost-effective alternative dispute resolution system will do this.

Mr Speaker, building is not a simple process. There are many variables and many hands involved. Therefore, there is potential for failure and these failures can be disastrous.

I am not suggesting that every time a home owner engages a building contractor there is likely to be a calamity. Nor do I suggest that our building industry is full of people that do the wrong thing. In fact, I would suggest the opposite. Most building contractors understand the benefits for their business of having a good reputation and work hard to achieve

customer satisfaction. Simple miscommunication is often the cause of disputes.

Of course human nature is such that irrespective of the marketplace, there will always be those that seek to use the system to their own benefit. Whatever system Tasmania imposes will regrettably discover incompetence, inexperience, and dishonest behaviour. This has been the case under the current building regulatory framework. It has been the case interstate where there is similar legislation and it will no doubt be the case in the future.

To leave things as they are has the effect of protecting building practitioners that are not performing at an appropriate standard. It does nothing to help those that are doing the right thing. All this simply does is lower the standard of building, increases the cost of building and makes it harder for good building contractors to compete.

Paying to rectify work that should have been done properly the first time is an expensive exercise. Often it costs more to rectify below standard work than it did to build it in the first place. The cost of litigation is so prohibitive that it is not cost effective for residential home owners to pursue rectification through the court system. The risks and costs are simply too high. I will say more on this later when I discuss the alternative dispute resolution process proposed in the Bill.

Mr Speaker, I say again the difference between the home building and renovating marketplace and many other market sectors is the significance of the investment. With the significance of the investment comes the opportunity for a life changing disaster.

I have spoken to people, and I am sure I am not alone, who have lived through home building disasters. These are events that are not purchasing decisions that can be easily forgotten or overcome. These major financial decisions which have

ended in disputes have resulted in many years of emotional and financial distress.

Mr Speaker, I will now discuss the legislation.

Under the new framework, every time residential building work occurs that is valued at more than $5,000 there will need to be a written contract. There will be mandatory content required in these contracts to address common areas of dispute. Workplace Standards will develop a series of template residential building contracts that will be available free of charge from their website.

Industry bodies may continue to offer their own contracts but they will be required to contain the mandatory information required under this legislation.

The Bill contains new requirements for the use of cost-plus residential building contracts, prime cost items and provisional sum estimates. These contracts and clauses have frequently been the source of disputes in Tasmania and elsewhere in

Australia. The regulatory responses to the issues caused by these contractual devises have been developed in close consultation with industry and in most cases are accepted as appropriate.

The statutory warranties that previously existed under the Housing Indemnity Act have been transferred to this Bill. However, there have been some adjustments to provide for fairer outcomes. For instance, if a subsequent owner was aware of a defect at the time of purchase they are not entitled to pursue the previous owner or builder for rectification of that defect.

The Bill also contains the same consumer guide requirements as exists under the Housing Indemnity Act. The legislation requires a building practitioner to provide a consumer guide to their client whenever they undertake building work valued at greater than $5,000. The provisions have been updated to allow for the guide to be emailed.

Mr Speaker, possibly the most important part of this Bill is the part that provides for alternative dispute resolution. This part of the Bill has been developed to address the gaps in the current framework.

The legislation establishes a Building Dispute Commissioner who will have the responsibility of ensuring that the implementation of the legislation strikes a fair balance between the interests of building contractors and home owners.

The legislation does not assume that residential building contractors are wealthy big-business capable of funding their own civil remedies. It considers that the majority of Tasmania's building contractors are small businesses that require similar support to mums and dads building or renovating a home.

For this reason Mr Speaker, the Bill provides for disputes to be referred by building contractors and owners. So both parties have the ability to utilise this process if they find that

they have reached a point where there has been a relationship breakdown.

The dispute resolution regime is extremely flexible as it will need to be in order to address a wide variety of matters likely to be referred for resolution.

Under this legislation, Workplace Standards intends to establish a dispute resolution process that helps parties through the various stages of a dispute. The process as far as possible is established using a 'one stop shop' methodology. This addresses a significant issue for consumers who report that disputes are stressful enough without the confusion of having to go from department to department in order to pursue a satisfactory outcome.

Initially they will have a helpline to provide advice to help people resolve a dispute. If the parties are not able to resolve their dispute they will be able to refer a dispute to the Building Dispute Commissioner who will assess whether there are

grounds for a dispute. If there are, the Commissioner can investigate, conciliate, refer to mediation or issue a rectification order.

If the parties are able to conciliate, the Commissioner can issue a Dispute Record of Agreement, which is a document designed to record the conciliated agreement.

Mr Speaker, I will spend a little time on the rectification order because it has been the source of much discussion during the consultation process. A rectification order is a direction from the Building Dispute Commissioner for the parties to take certain action to resolve the dispute. For instance, the order could require a residential home owner to pay money owing into a Workplace Standards Trust Account and require the building practitioner to rectify defective work - at the end of which the building practitioner would receive payment.

Alternatively, in cases where payment has already been made, the order may simply require the building practitioner to return to the site and rectify defective work.

A rectification order would be issued following an investigation of the building work. A person subject to an order has the power to request a review of that order through the Resource Management and Planning Appeals Tribunal before taking the action required by the order. The Tribunal has the ability to convene an expert panel to assess the merit of the rectification order.

Mr Speaker, the structures and processes contained in this Bill are based upon structures and processes in place in Queensland, New South Wales and Western Australia. In these jurisdictions, more than 90% of building disputes are resolved without the need for a rectification order.

The importance of the rectification order cannot be underestimated. Interstate regulators have advised that

without the power to issue a rectification order, the conciliation process is significantly marginalised. It is reported that many building practitioners will not constructively engage in the conciliation process if there is no power to require them to rectify below standard building work.

While the rectification order is not enforceable, it provides a basis for future Court actions by the parties and a person that does not comply with a rectification order is guilty of an offence and may be prosecuted. In the case of accredited building practitioners not complying with a rectification order could be grounds for disciplinary action including the cancellation of accreditation.

Mr Speaker, the proposed legislation is not intended to be a heavy hand on the shoulder of the building industry. Instead most disputes will be resolved through the light handed and cooperative application of the legislative powers, unless, of course, the circumstances of the matter warrant a more heavy handed approach. But as I have mentioned earlier interstate

experience is that more than 90% of matters are resolved through assisting the parties to reach a compromise.

In developing this legislation, there has been much learned from the experiences of interstate authorities administering similar dispute resolution processes. Most compelling is the success rate of alternative dispute resolution processes in resolving building disputes interstate.

This is no surprise, the Building and Construction Industry Security of Payment Act introduced in 2009 was also based on interstate equivalent legislation and has positively changed payment practices in Tasmania's building and construction industry. This legislation provides quick low cost ADR to resolve payment disputes in the building industry. But where the security of payment legislation falls short is that it does nothing to assist people with problems associated with the quality of their building work.

While building practitioners have access to ADR to get paid, home owners are left to agonise over how to rectification below standard building work. Because of the current gaps in consumer protection Tasmanians are forced to choose between funding the costs of litigation or the costs of rectification. This is unfair, ineffective and does nothing to raise the standard of building in Tasmania.

Mr Speaker, to highlight the injustice, in Victoria they have a Consumer Action Law Centre that provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. They have recently made the following statement to a review of Victoria's building framework:

'…If a consumer sought our advice in relation to a building dispute and the builder wouldn't participate in conciliation, we would probably not recommend pursuing a matter at VCAT unless the claim was substantial (over $100,000).'

Mr Speaker, very few people can justify spending $100,000 to finance legal action with no guarantee that the building work will be fixed at the end of it. Instead what consumers are forced to do under current arrangements is to give up and fund rectification works themselves. This is simply not fair and wouldn't happen with any other consumer purchase. If you purchased a faulty TV, kitchen appliance or pair of shoes in most cases you could return them to the shop for a refund or repair. Unfortunately, because building disputes are complex and on most occasions involve far more expense than the average consumer purchase, these disputes fall into the too hard basket of consumer protection. This is no longer justifiable. The success of interstate ADR has proven that these matters can be resolved in a cost effective manner and that consumer confidence can be dramatically improved.

Mr Speaker, as I mentioned earlier, I would like to take a few minutes to share with you a building experience which I am sure you will agree is horrific. This is the story of Michael

Williamson and Karen Watmore who in January 2008 purchased land at Murdunna in Tasmania's South East in order to build a new house. They engaged a project manager to oversee the building process who in turn employed an accredited builder.

Over the next five years Michael and Karen were subjected to the full impact of the current gaps in consumer protection. I will read now a short excerpt from a statement they wish to have read into hansard.

'In the past 5 years not only have we been let down badly by the Tasmanian building industry but also by the legal system. The complexity of the combination of the failures to act properly by the professionals destroyed the life we were expecting to lead. If it were not for the fact that we have lived these 5 awful years, even we would be suspicious of whether such a catalogue and sequence of events could occur and that such a number of professional people could perform so

disastrously and that a system of control could be so abused and be inadequate to prevent what happened to us.

One could not be blamed for thinking our story is fiction but it is all true and what the past 5 years has taken from us financially is only a small fraction of what it has done to us emotionally and mentally.

At the very beginning in 2009 we were told and warned by several people that building disputes were difficult to resolve and that it was unlikely we would come out of it with a satisfactory outcome. We thought our case was different – the evidence clearly revealed the defects in the building and who was responsibility for the substandard work. Perhaps everyone who commences a building dispute thinks the same but because of the obstacles and difficulties in pursuing their cause is so great they do not continue after a few weeks. We believed in our case the evidence was so strong the perpetrators would want to quickly put things right. We were wrong. We had been forewarned by a friend who had

knowledge of disputes that it was likely that the builder would secure his assets and "do a runner" – he did, the project managers would "never admit any liability" - which they didn't and "would never pay" – which they didn't and that we would not get our legal costs and consequential losses reimbursed – half right, we did get the legal costs back, only part of the rectification cost and nothing for any other consequential loss.

It was only because of our own efforts and circumstances that we achieved any sort of result at all. We are, by character and personalities a resilient couple, we are experienced campers and as a consequence were able to cope with the imposed conditions, we possess management and administrative skills and above all we have a great belief in right and wrong, truth and justice.

As a couple we had the financial resources to fund the lawyers' insatiable demand for cash. For nearly four years we funded their expenditure to the tune of $200,000 only to be told 6 weeks before the scheduled trial in the Federal Court that it

was no longer economic to continue – the solicitor and barrister estimated an additional $200,000 would be required to get to the end of the trial. The first estimate we received of costs to the end of trial was $38,500. Six weeks before the trial the solicitor and barrister's best estimate was in excess of $400,000. In other spheres of business, if, in the course of running their business they made such wildly inaccurate quotations and estimations they would not survive long.

We were prepared to give up our lives for four years (we had no choice really) to devote our time and money to the fight. We had no holidays and no leisure time and had to devote all financial resources to paying lawyers invoices. We had to be a very 'together' couple. All the plans we had made for 2009 and 2010 had to be shelved. The volume of work involved had to be fitted in around our work commitments. When we both retired at the end of November 2010 we were able then to commit all our time to it. Our circumstances were that we had no family commitments, no health issues, our envisaged

plans were dashed so we were able to devote ourselves completely to it. Were it not for these circumstances it would have been impossible to continue. Our first two years of retired life were spent totally engrossed with dispute issues. The passing of time only made us more resolved and determined to seek justice and redress. We are not happy that we have received either.

On reflection we now feel we were fortunate in being able to keep going and at least get some of our money back. No-one should have to go through this.

It seems to us that building professionals are reluctant to resolve building disputes because they know that 'Mr Joe-Public' is up against it; there are so many hurdles to get over from the moment they complain. Once the construction of a building has gone wrong and a dispute situation arises with the professionals, individuals like ourselves are confronted with insurmountable problems.

In the majority of cases professionals can rely on the fact that either time or money will soon make the problem disappear.

When 'dispute' complaints are placed with Workplace Standards their position is limited. They can investigate, and issue what is considered an appropriate 'punishment' to the perpetrator. They cannot however instruct the 'wrongdoer' to 'put right the wrongs' and they cannot obtain any reimbursement for you or get you the funds for the cost of putting the problem right. We discovered, in the case of our builder that by the time we were able to lodge the complaint against him he had conveniently let his accreditation lapse and therefore no decision or disciplinary action could be made against him.

Our experience regarding our only recourse for getting a financial redress has been an exercise we would not/could not recommend to anyone. The civil legal system struggled and was unable, in our case, to get to grips with the complexities of all that is involved in constructing a building. The legal costs

became financially crippling and exceeded the cost of the problem in the first place. It is our opinion that the legal costs become so high that a case, no matter how strong, can seldom actually get into the courtroom. In our case the solicitor for the project manager used every part of the legal system to exert pressure on us, rack up the costs to such a degree we literally had to give in and it was impossible to proceed.

We could not advise anyone to sign a HIA builder's contract – it is a builder's contact and suits the builder not necessarily the client. The basic message is, pay the builder all his money and if there is a problem you must fight for recompense after.

The intangible personal impact cost of the past four years cannot be quantified. How do you value lost time, the annihilation of dreams, the extreme stress one is put under, the changing of your personality and the destruction of your ability to enjoy the precious significant events in your life.

The settlement figure did not reimburse us for:

- Travel Costs incurred directly as a result of the dispute – for example the aborted mediation hearing etc.

- Costs incurred as a result of not being able to put our plans for retirement into action.

- The Interest and inflation losses resulting from lost investment of our finances.

- Compensation for delay in non-completion by the contract date as stipulated in the building contract.

- Non-economic loss such as the physical inconvenience, loss of amenity because the house unusable for four years and vexation and distress.

The whole experience has left us utterly drained and exhausted - physically, mentally and emotionally. The first question and hurdle we have to address is - do we still want to continue with having a home in Tasmania? With our experience you might imagine the answer is NO, but if we

took this decision, we know, we would forever grieve over the loss of the potential wonderful life we could have had there. We chose well when we chose Tasmania as our destination, it is such a wonderful part of the world, and we are more than happy and contented with the location of the block we purchased.

Throughout the past five years, many people have given us a great deal of help and understanding and we have met so many 'good' people we think we were most unlucky that we got involved with the people we did and that things went so badly for us. Despite everything we still think Tasmania is where we want to be and it would be an even bigger disaster if we did not try again.

Yours sincerely, Michael Williamson and Karen Watmore'

Mr Speaker, I consider that record of events speaks for itself.

Let me assure you that this is not a one-off event. Based on interstate comparisons it is expected that over 300 residential

building disputes of varying complexity will be referred annually. Workplace Standards reports that up to four residential building matters of this magnitude are already investigated under the Building Act every year in Tasmania. The major difference on this occasion was the tenacity of those affected.

This was a particularly complicated matter, due to the number of building specialists, the distance between the client and the building project, the behaviour of the legal representatives and the magnitude of the matters in dispute. But Workplace Standards believes if this alternative dispute resolution legislation was in place at the time, the dispute may have been resolved within weeks.

Mr Speaker, it is acknowledged that striking a balance between the interests of the parties is likely to be difficult, on one hand we have the building contractors need for payment and the benefits of that money flowing through the building industry

and on the other side we have the consumer's right to receive an appropriate standard of workmanship.

Both are important issues and both are important to the Tasmanian building industry. These are things that Workplace Standards is accustomed to dealing with through their current administration of other building legislation.

Many State and Commonwealth inquiries into building regulatory frameworks have revealed that the quicker assistance is provided to the parties the better chance there is in resolving disputes. That is one of the objectives of the proposed alternative dispute resolution process.

Mr Speaker, funding for this legislation will be a combination of user pays and industry funded from the building permit levy.

The levy is payable by the applicant for a building permit before the permit is issued at the current rate of 0.1% of the cost of the building work (including related plumbing work). This equates to $300 on a $300,000 building project.

This Government committed itself to the introduction of this important legislation during this sitting of the Parliament. In fulfilling this commitment on behalf of the Government, I am pleased to note that the building and construction industry, and in particularly mum and dad builders and renovators, will benefit substantially from the implementation of this consumer protection and alternative dispute resolution legislation.

Mr Speaker, I commend this Bill to the House.