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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 MONDAY 19 NOVEMBER 2012

Mr ROY ORMEROD, GENERAL MANAGER, **Ms KERRIE CROWDER**, DIRECTOR BUILDING CONTROL, AND **Mr KERRY SHEPHERD**, PROJECT MANAGER, WORKPLACE STANDARDS TASMANIA WERE CALLED, MADE THE STATUTORY DECLARATION AND WERE EXAMINED.

CHAIR (Hidding) - I am required to place a number of things on the record but considering you are from within the system I just need to point out to you that this is a proceeding of parliament. It has parliamentary privilege and is recorded. You would understand what all that means.

Thank you, Mr Ormerod and the Director of Building Control. We have Mr Best here in spirit if not in body.

Mr BEST - And in voice too, thank you, Mr Chair.

CHAIR - Indeed, a speaking spirit.

Mr BOOTH - How do we know it is your voice, Brenton?

Mr BEST - You should know my dulcet tones at this point of your career.

CHAIR - The matter before us for this inquiry has telescoped now to the point where there is a bill before parliament and we are aware that the minister is of a mind to bring that bill on this week and in fact hoped to have brought it on last week but chose not to as this matter was down for discussion at this committee today.

Mr Ormerod, is there anything you or your officers would like to raise with us generally about this legislation? I think all parties have been briefed in terms of the officers giving very good briefings to our party rooms. I will preface the submission from Mr Ormerod by saying that, from my point of view, this has been many years in the making. It would be very sad if we were not able to bring in strong consumer legislation that didn't have as great as possible support from the other players - the building industry. To bring in a bill that doesn't have the support of the building industry sets it up to fail from day one.

Mr ORMEROD - First, I have a handout for you. I will table this document for you to look at at your leisure. It seeks to address some of the comments expressed to this committee before about this legislation. It seeks to put a different context to some of the expressions made and hopefully give you some balance on the intent behind the legislation. I won't talk to it; you can look at it at your own leisure.

This bill has some history. It has been going around for some time. You are right, Mr Hidding; like any legislation, it is best to get support across all industry groups when we get to the point of bringing it into parliament. It seems to us that the most contentious

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area is around rectification orders. I will talk to that briefly but then I will hand on to our resident expert. In a nutshell, the idea behind the rectification order is to give an incentive for parties to a dispute to come to a resolution quickly through either the conciliation or remediation process, knowing full well in the legislation if they don't get to the point, there is an opportunity later on for rectification that can be directed to one party or the other. The issue around rectification sits on both ends. The legislation is open to all parties to lodge a complaint - not just the building owner; it can also be the contractor. That helps to give some balance to the whole model.

The issue around rectification orders is that we wanted something that was quick and effective, but we also wanted an opportunity for a pressure relief valve. The last thing we want is any miscarriage of justice. There is a risk or fear this could happen and sometimes this is an area that causes people the greatest concern. For that reason, we like to highlight the point that in legislation we have an opportunity at the end of the process where conciliation and mediation fails and a rectification order is issued. That rectification order is issued based upon technical advice. It is not based upon something plucked out the air. Assuming that the person complaining is the builder, that builder has a right then to go to RMPAT and seek to have the matter reopened and re-examined in a tribunal-type arrangement, which in itself is good because it gives the opportunity to have a look at the issues around law, if necessary.

We expect in most cases, based upon the model we picked up here, which is what has been operating now in Queensland and New South Wales in particular, that the success of these has been quite overwhelming for both parties to a dispute that come to a quick resolution and that has caused satisfaction for all concerned. There is that pressure relief valve, which is perhaps not fully understood. The greatest fear has always been that Workplace Standards becomes the person that directs the regulation of builders; it can also direct restitution orders and have this sort of threat hanging over the building: 'If you don't do what we ask you to do, you could lose your licence'. This indicates that we have that separation which can be there.

The other important thing is -

CHAIR - Are you saying there is separation there?

Mr ORMEROD - Yes, because you have RMPAT that can step in if you have rectification orders that are not acknowledged.

Second, the rectification order does not have to be issued by the Director of Building Control. It is a statutory office-holder within the State Service Act and so it is open to an appointment made, I think, by the minister and it can be, for instance, the Deputy Secretary of the Department of Justice - someone away from Workplace Standards who can be the person issuing the order.

CHAIR - Does the bill say that?

Mr ORMEROD - Yes. It implies that there is a default. If no appointment is made, it falls to the Director of Building Control but there is an opportunity there that someone else can be appointed other than person.

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Ms ARCHER - Can it be someone outside of government, like a retired judge or something like that?

Mr ORMEROD - No. They are appointed under State Service Act. It is usually a state servant because it is often cheaper that way.

CHAIR - Are you talking about the appointment of a building disputes commissioner?

Mr ORMEROD - Correct.

CHAIR - To act for all building disputes?

Mr ORMEROD - Yes, that's correct.

CHAIR - Section 81 says, 'the building dispute commissioner either to be the Director of Building Control or another person'.

Mr ORMEROD - That's correct.

CHAIR - Now you are saying the good news it could be another person but it's not going to be, is it?

Mr ORMEROD - It can be. The minister can say, 'Because of the concerns expressed by the building industry, the Director of Building Control will not be the person holding that position; it will be someone else'. Once that person is appointed, that is the person with all the authority.

CHAIR - That's a ministerial decision to make.

Mr ORMEROD - Yes, after the legislation is passed.

CHAIR - The other thing would be to not have it in there so that it's the decision of the parliament that the Director of Building Control is not the building disputes commissioner.

Mr ORMEROD - If there's a strong enough concern, that is something that is in parliament's hands.

Ms ARCHER - Why does it have to be someone under the State Service Act? Or could someone be appointed under the State Service Act so they are not already currently in a job in the government? I am exploring the independence aspect.

Mr ORMEROD - I guess people tend to look upon the State Service as independent anyway. But I think the most important feature of this is that it is someone who can be looked upon as being independent and not having any particular bias in holding that position.

Ms ARCHER - But they have to be appointed from someone already employed under the State Service Act?

Mr ORMEROD - Yes. That's how it currently sits.

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Ms ARCHER - Why can't we appoint an independent commissioner who is not employed under the State Service Act? Is there a reason for that?

Mr ORMEROD - No. The bill is just written that way at the moment. Most statutory office holders are those who currently hold State Service positions because that way you are not seeking to set up a separate - the last thing you want is another whole new body, another organisation, another statutory body out there doing this work. It just adds more cost to everyone and to industry. Therefore it is often the cheapest way. We follow this model with the Asbestos Commissioner. We made it the person under the State Service Act who can be appointed; the person in that position is the Deputy Secretary of Justice, Michael Stevens, because it costs the government nothing. That is an important component of this idea.

Mr BOOTH - Roy, I am intrigued as to why you think that a person who is an officer appointed by either the Director of Building Control or the Director Building Control themselves - but setting that aside, someone made the point that if they are from the State Public Service, would be seen to be somehow unbiased or whatever. It seems there is a persuasive argument that there needs to be a separation from the authority that accredits builders and is effectively in control of their life.

Mr ORMEROD - That is where the separation is, Mr Booth, because they are not appointed by the Director of Building Control, they are appointed by the minister. If you want to have that separation, the minister would appoint someone outside of Workplace Standards to do that role.

Mr BOOTH - Okay, outside of Workplace Standards.

Mr ORMEROD - That's right.

Mr BOOTH - Why not roll both these securities of payments legislation together with this one in the sense that the notion, at least in securities of payments, is that you have the same elements there of justice by sun-down, an ability to appeal and an independent adjudicator appointed by the appointing authority so there is some difficulty in terms of a builder or a consumer manipulating the outcome.

Mr ORMEROD - Bear in mind that we are modelling this on a proven system in other states where it has been working very successfully at a minimal cost and that is why it has been built along these lines. The fear we have is that if we go too far down the level of appointing someone outside of the State Service there is a risk of it becoming a cost exercise and also you have a risk of it being overly legalistic. The idea is to try to keep the legal process out as much as we possibly can and only allow them to step in if there is a major problem with the decision at the end of the day. That is the idea behind it.

Mr BOOTH - How different in complexity, then? Some of the disputes will be very simple and some of them would be complex but that is similar, isn't it, to securities of payments in that the adjudicator effectively makes a judgment on, say, 60 per cent or 90 per cent or 100 per cent of the work and makes an order that is effectively binding as if it had been made by a court.

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Mr ORMEROD - True.

Mr BOOTH - I am just wondering here - similarly, you would similar complexities like if it goes to a standard rather than a payment, they almost merge into the same thing.

Mr ORMEROD - They are similar but one is all about the payment chain - payments being made when they fall due - but this is all about either defects that occur at a time a progress payment is due or it could be latent defects which have developed a year or two later and therefore it comes down to a point as to whether this a problem the builder should rectify or not, and so it is all about determining the degree of the problem. The other side the payment is all about money, it is all about payment, the payment chain or about the work.

Mr BOOTH - Yes, but there is still a judgment done on the standard. If there is a security of payments dispute there is still a judgment sometimes made that this part of the bill is an arguable matter and the rest of it is not, like 90 per cent is fine so I am ordering a 90 per cent payment and 10 per cent can go to dispute but those disputes then would be handled by this particular legislation beyond that?

Mr ORMEROD - Perhaps I will defer to Mr Shepherd; he probably has a better knowledge on this.

Mr BOOTH - He is certainly nodding his head.

Mr SHEPHERD - What Kim has just said is correct and it is quite a good point in that what an adjudicator will typically do is assess payment on those matters that are quite straightforward, which is what you have alluded to there, so therefore they will say there is no dispute about 80 per cent of the payment but there is a dispute about the last 20 per cent for whatever reason and it might be a defect or it may be a variation of a contract that wasn't agreed to - all of those types of things. What the adjudicator will do is say, 'I'll pay out on the 80 per cent, my determination will deal with that and the other 20 per cent remains unresolved'. What this legislation will allow the parties to do is to say, 'I couldn't get justice there, I'd like you to assess the work or assess the variation process and come up with a solution for us'. What it will also do is in a lot of cases both parties will come through with their payment issue and their defect issue to the Building Disputes Commissioner and argue those there rather than go to adjudication, so they were theoretically putting it up -

CHAIR - They will bring in two live processes.

Mr SHEPHERD - One, the payment process will paused while they go the other way, so they won't be incurring costs in that regard but the hardest thing is that there have been a couple of theoretical suggestions about moulding security of payment into this process and they have been made by nominating authorities which are the organisations that run adjudication interstate. Their desire obviously is to expand their role, which is fine under their commercial entity so we should not be hard on them for that; they are trying to expand their role into another area. So far no state has moved in that direction.

I know that Queensland at the moment is looking to put out a discussion paper about bringing in rapid adjudication for disputes that occur throughout the contracting process,

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not after practical completion but before that. That might be teased out in Queensland over the next 12 months. It won't deal with latent defects. It won't deal with those disputes that happen after practical completion. What it will mean is if a dispute arises between the two parties during the build they will have somewhere to go to quickly get that resolved so that they can move on. The same things are intended to happen here as well.

CHAIR - We have just been diverted because I think there are two matters on the table now. The one we have just been talking about is where security of payments or the process fit into this bill, if at all, and you have just explained that. Can we just go back to the matter we started speaking about, which is pretty central to the concerns of the building industry, and that is as to who the person of the Building Disputes Commissioner could be.

It seems to me that there is, the more I think about it, a stronger and building case for it not to be the Building Disputes Commissioner, particularly in a state like Tasmania which is a pretty small state where a builder may well have an issue with a client which is an 80/20 kind of thing. It could be cracking in concrete after the slab was poured; these things are complex and we have been through some of that stuff - surface cracking and all sorts of things.

He just gets that resolved and somebody is out there talking about Joe Smith the builder and thinks, 'Oh, I have concrete cracks as well,' and it triggers a dispute on the last payment to Joe Smith the builder and there he is again in the process, wondering what has happened to him but he is in the process. Then they go through conciliation and the mediation process that is laid out in here and he feels he is being ripped off.

He feels that it is just not fair so he says, 'I am being stitched up here, I want a determination.' He goes in and finds a determination and he is sitting in front of the very person who has his livelihood in his or her hands, which is his licence. The moral suasion on him, the unspoken pressure on him, when a case is put to him by the Building Disputes Commissioner with that hat on, saying, 'Now listen, young Joe, this is the second time you have been here. I think, mate, you need to tidy your act up and I think you need to accept that you should. I am finding in favour of the client here and I think you should pay.'

At that point he knows absolutely that he has right on his side but he is dealing with somebody who in five minutes' time is going to take that hat off and put on the hat that has his livelihood and his future in his or her hands and at the moment it is a her. I would be very pleased to hear from the Director of Building Control how that moral suasion would not exist on him to have to be forced to roll over.

Ms CROWDER - At the moment the only way that we can receive complaints about a building practitioner is through the Building Act which does not deal with defects and rectification. The reality is what most people want is rectification of their work. If that happens they are not interested in making a complaint about the builder.

By making a complaint about the builder under the Building Act, it is not resolving their issue. It may resolve it for the next person, when I believe is when this comes in there

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will be a lot more rectification and much less complaints under the Building Act because once they get the rectification, that is all they are asking.

CHAIR - I could not agree more but if that person found himself in front of you, as the Director of Building Control for, let us say, an unrelated matter, is he in better shape or worse shape having dealt with you, with another hat on, in a rectification agreement. I would say he is in worse shape.

I think he would be nervous to have to sit down and well here I am again and I have \$2 million worth of debts, I have \$4 million worth of work, I have my children in private school, my heart in my mouth and I had better just roll over. I understand you did tell me you went to the Solicitor-General and got advice and he said there is not a separation of powers issue but I would not be at all surprised if the Solicitor-General did not consider that there were crossover issues between one of your roles and the other role.

In a small state like Tasmania that an honest, hard-working young building operator or an old building operator finds himself in the situation of moral suasion that is brought about by a decision that parliament is about to make is my concern.

Mr BOOTH - I think it even goes beyond the small state. If you look at the issue here, the director of building control has a duty to remove somebody's accreditation if their 'moral behaviour' is inappropriate - whatever that's supposed to mean.

Ms CROWDER - Their professional behaviour.

Mr BOOTH - The director of building control who makes that judgment - to remove somebody's licence - could also be sitting on a defects dispute concerning that same person. Could they not be seen to have some sort of potential bias, if that person had come to their notice previously, or could they potentially use this mechanism of a rectification order as a way of persuading a builder to lift their game? Is it possible the rectification order may be based on more than just the defect dispute? It could be influenced by other considerations. I find it difficult to see how you could not fall victim to a claim of bias in such a case. With the best will in the world - and I'm not trying to imply anybody here would do this deliberately, or against the best interests of the industry - but in terms of the way I understand natural justice, it seems to be a bit close to the bone.

Mr ORMEROD - I agree. There could be a perception out there, but it would be dismissed very quickly once the system is up and running. That's the reason the other provision is there - if the perception becomes too strong for anyone, a person other than the director of building control can be appointed to that position. That takes it away and you then have separation, where that person is outside Workplace Standards altogether. They do not have the authority to take a person's licence off them - they take the facts as they are, and make the orders.

CHAIR - It's been drafted in a manner that would suggest you believe there may be a problem.

Mr SHEPHERD - That clause follows the same structure as security of payment. With security of payment the default official is the director. The security of payment official

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defaults to the director of building control but it can be another state servant. It's the same structure. It's more to cater for workload - that is more the issue. If the workload become too great, or government decides it wants to introduce a separate tribunal or area of government to deal with these things, it's easy to separate the whole thing out and pull it across to somewhere else.

CHAIR - So security of payments would be best characterised as resolving disputes amongst professionals?

Mr SHEPHERD - Absolutely.

CHAIR - Here we're in a whole different ball game. This goes into consumer protection, and people now have a heightened sense of what their rights are and how they can work them. I would say it's a little different.

Mr SHEPHERD - From our experience, most consumers don't understand building. They don't understand the structure of building or how the building process works. If they have a defect, they don't know where it's coming from or which expert to go and see in order to determine what the next step is. They are lost in the mire of a technical environment. They don't know why those tiles are starting to fall off the wall in the bathroom because they don't realise it needed to be waterproofed, or there is water entering the building behind the wall causing the plasterwork to swell and the tiles to fall off. They just don't know why it's happening.

Can I add one thing in relation to the issue of not having the rectification order integrated into the legislation? Queensland, New South Wales and WA have the rectification order integrated into their legislation. Queensland has very good statistics about their process and in their case 90 per cent of matters are resolved before a matter gets to the rectification order stage. When a rectification order is issued, and an appeal is made against the rectification order to a separate tribunal, similar to our RMPAT, up to 95 per cent of those matters are upheld in favour of the original authority. Those statistics are fairly common across Australia.

The only jurisdiction that doesn't have the rectification order integrated at this point in time is Victoria. In Victoria's case, they are currently working through a review of their building framework and one of the matters on the table is integrating the rectification order into their current conciliation, mediation and dispute resolution process. The body that issues the rectification order at this point in time is the Victorian Civil and Administrative Tribunal and their submission is relatively supportive of the rectification order moving back into the conciliation stage, but they preface that by saying a review by VCAT of the rectification order should be available. They are saying the rectification order should be issued at the earlier stage, similar to what this legislation does, but there should be provision for a review process afterwards.

CHAIR - Doesn't this legislation provide for the building disputes commissioner to make a rectification order, at which point the builder can choose to go to RMPAT?

Mr SHEPHERD - Yes. If Victoria follows this process - and it looks like it will - then Victoria, Queensland, New South Wales and Western Australia will all have a very similar process to what is outlined in this legislation at the moment.

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CHAIR - I don't think there is too much argument against rectification orders being part of the process, but is it the case in Queensland that a building dispute commissioner can slap a \$500 000 rectification order on? Are there any limits to this?

Mr SHEPHERD - There is no limit in the legislation to the value of a matter that a rectification order could be issued on, because value isn't always an indication of complexity with buildings. There was a fairly recent court matter in Launceston where a builder had failed to put reinforcement in the slab for the building. They had to drill the slab and found there was no reo in the slab. That was a fairly simple defect but the value of the rectification work was quite considerable. A dollar value isn't always an indication of complexity but -

CHAIR - But, you could have a circumstance where a slab has a problem and an argument could be mounted that you could refit it without having to break the slab out, or you could break it out. Either way it is fixed but a building dispute commissioner might say, 'Let's go for the big one because we know the builder won't be able to afford it, and it will go straight off to RMPAT'. It could be like a big union ambit claim, 'We want the lot'. So, it might be \$50 000 to fix it one way, and \$350 000 the other, and the commissioner might go for the \$350 000 and RMPAT has to decide. Do those states not have any limit on the size of the rectification order?

Mr SHEPHERD - I can't say. It think maybe one jurisdiction might have a \$500 000 limit, from memory, but -

CHAIR - It's that big?

Mr SHEPHERD - Yes, but the legislation does provide something a bit unique for these types of legislation, which is a certificate to allow a matter to enter the process, and be assessed. Then, depending whether blame can be attributed to the party that has had the complaint lodged against them, a certificate can be issued saying, 'We can't attribute blame, or the matter is so complex that you will need to work through a full civil process to work out where costs and blame lie, so unfortunately this process can't deal with it'. It allows an escape on almost any value, depending upon the complexity or upon -

CHAIR - That goes to competence of the process, being able to deal with it? We don't have a competence, so it has to go to civil?

Mr SHEPHERD - Yes.

Mr BOOTH - Or people would have the right to appeal more, would they? There would be a determination and then, if you didn't like it, you would appeal to RMPAT.

Mr SHEPHERD - There are two pathways there, Mr Booth. From that perspective, one is that the building dispute commissioner can't attribute blame. We don't know if this person who has had a dispute referred against them is the person to blame in this instance. Therefore, we can't attribute rectification to anyone. We can't resolve a dispute because we have tried that with you and you are not able to come to a resolution and that is, again, because they may not be able to attribute blame -

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Mr BOOTH - How could that be the case? If you have a contractor to do something and he demonstrably doesn't do it, then surely that -

Mr SHEPHERD - It could have been the design, Mr Booth. The design may have been wrong from the beginning. These matters can become very complex, very quickly because the designer says, 'I just followed the national construction code'. Teasing that out is not something that can be done very easily sometimes and therefore, in those situations, it might mean that the parties need to work through a civil process.

CHAIR - Can I come back to the security of payments thing that Kim raised earlier? You're suggesting that none of those processes are built into this and that a builder could start or a consumer could start that process under the SOP process?

Mr SHEPHERD - No. The SOP process finishes in the residential homeowner. The subcontractors and suppliers can work from the bottom through to the builder and the builder can claim against the residential homeowner, which is something that the building associations requested that government do as part of the process. It is a win for building industry.

CHAIR - You might have picked up that there's some approval around members of parliament of the security payments process in that what is attractive about it is that it is almost a justice by sundown arrangement in there. Was there no opportunity for you to build some of the best benefits of that at least as a pathway into the earlier arrangements? You go on a long conciliation and mediation process. It might well have been that a test stroll down the SOP process might have brought it all to a head much quicker and might have even had a solution quicker. Is there no way we can build that in as an alternative route or does it get too messy?

Mr SHEPHERD - It's certainly something we considered as part of the legislation development process but when you see a process working in three other jurisdictions with the success that this has had - and I hate to go back to that all the time, but as a baseline, where 90 per cent of matters are being resolved through this process, they are irrefutable and compelling statistics.

Mr BOOTH - Kerry, sorry to interrupt. If you didn't analyse why those statistics were being solved - and I'm not saying this is the case - but it could be that that builders always run up the white flag when they get to that point because they know that they're going to be belted to buggery for it. If the justice is unequal and I am not suggesting it is, but it is something that might -

Mr SHEPHERD - That is quite relevant, Mr Booth. I'm sure that there would be situations where the builder may feel like that. But I also don't think that these matters are as straightforward as that because that provides the sense that the determination being made is based upon some kind of arbitrary, unknown, not transparent standard.

Mr BOOTH - Or it could be that the appeal process is impossible. In other words, they accept the determination, 90 per cent of them, because they know that to try to argue for that 10 per cent is just not worth it for whatever reason.

Ms ARCHER - Costs.

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Mr SHEPHERD - I'll come back to that but what they have at the most under the security of payment in the building industry at the moment is the ability to - as the professional, they have a leading hand in that process where they can be paid for work that may not necessarily be at the right standard. What this legislation tries to do it knit with security of payments legislation and say, 'Well, you may have been paid for work that was not of the right standard over here but this legislation falls a little bit your way and allows that little bit of extra care and attention to your needs as a consumer to make sure that there is an equitable outcome'.

To go back a stage, a rectification order generally would be issued based upon a standard, a predetermined standard, for the work concerned either through the national construction code or some other standard. From that perspective, it is not an arbitrary assessment of whether that should be fixed or not; it is an arbitrary assessment of whether the standard established that everyone is aware of or has the ability to be aware of was ever reached.

What the Building Disputes Commissioner's role is is to say to both the building practitioner and the residential home owner - and I know from interstate that there are plenty of occasions where the home owner has an unrealistic expectation of what the standard of work should be. So, between their contract which establishes the standard and the national construction code, there is plenty of transparency about what that person purchased as far as the standard goes and so therefore it is not arbitrary - the assessment of the work.

It is not arbitrary at all. They knew what had been purchased; they know what they are supposed to build generally, and even if they do not, they have the ability to have someone who is a technical expert explain what it should have been. In most cases, in 90 per cent of cases, they are happy to accept the 10 per cent that way, just like sometimes through security of payment the owner might end up paying for something that is not 100 per cent of what they purchased. They say, 'Really, to fully litigate and get to the end of the process, it is going to cost me more than it would for that difference'.

What we hope to do is knit these two pieces of law together to get an equitable outcome for both consumers and building practitioners. All I would say that is you cannot think about the building disputes legislation without actually also thinking about security of payment.

Mr BOOTH - Is it kind of like if you went to a building disputes thing, like you would presumably might have gone through a security of payment, or you may not have and it would depend - you could have gone through a thing where a customer resisted paying a builder or whatever - but if it had not been picked up, then you get to the building disputes process. Is it contemplated that as a result of the building process a rectification order could be just simply compensation?

In other words, if it has got a bent wall but structurally it is not going to make any difference and the point of a rectification would be virtually pointless - I mean, if it was a bottom garage wall, for example, on a two storey house, he might have to demolish the house to get the wall straight. To all intents and purposes, it does not affect the house structurally at all. Do you contemplate that there could be a rectification - or I suppose

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what I am getting to here is that it was odious or oppressive in its outcome. Does it contemplate that if practically there is like a deemed to comply solution?

In other words, this does not comply with the national building construction code or whatever because the depth to span ratio says the beam should be slightly more. But actually to fix that up, you have got to pull the house down, so you can be ordered to put in some laminated new lumber next to it to stiffen it up or some other engineering solution. It does not require something to be created back to the original specification that might not have been done.

Mr ORMEROD - It is quite possible. I go back to my old days when I used to conciliate building disputes. There was a pole house where one of the poles was offset - now you would not want to pull the house down. With the co-operation of the designer and the builder and the owner, they came up with a way of actually hiding the crooked pole by putting a tank in a location in a tree or something and it fixed it.

It is actually very important for a person building a house. It is not just a case of living in a watertight place; you want a place that looks nice. The crooked wall in the garage - I mean if it is really bad, you want to do something to try and conceal that. There could be all sorts of options available to you.

Most people are quite willing to look at options to make it work. That is why conciliation often works really successfully because you get people round the table. The last thing they want is a house pulled down for the sake of a crooked wall. Most people -

Mr BOOTH - Some, yes. This is a rectification order we're talking about here, so that's specifically - and I'm pleased to hear that is how it can work, but I am intrigued as to how the legislation specifically will allow that to be the case.

Mr SHEPHERD - It does.

Mr BOOTH - So a commissioner of building disputes could then - you have a case about a defect in a building and the outcome could be the commissioner says, 'The house isn't going to fall down. It looks bad, so I'm going to order you to pay \$10 000 for the aesthetic damage you did to this house'. Is that possible?

Mr SHEPHERD - Or not pay the \$10 000 that is still outstanding.

Mr BOOTH - No, but that would have been security of payment rather than -

Mr SHEPHERD - Maybe, but if this process begins before security of payments the parties are stopped from using security of payment.

Mr BOOTH - I see, so effectively it would have the same determination as security of payments but slightly more power to be able to order a final determination on the bit that couldn't be resolved by a 90 per cent payment, so the 10 per cent is in dispute. This would resolve the dispute as well, with an order not to pay for it.

Mr SHEPHERD - You've walked us to a very important point. At that point there are a multitude of options available to the Building Disputes Commissioner which are not

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available to an adjudicator. An adjudicator can only determine, 'I had a contract. Were the contract works undertaken? If there's any difficulty about the quality of the work, all I can do is not pay out on it'. There's only one option: not to pay out.

Mr BOOTH - To get directly to this legislation, it has more power than the security of payment, so it can resolve 100 per cent of the dispute, but with that rectification order there is a broad range of mechanisms to enable the commissioner to order a default payment from the builder, perhaps, if it's a problem with the builder? If it's a problem with the consumer, such as a payment for work the consumer claims is not done properly, the commissioner can say, 'It is, you have to pay them'. Alternatively, if it's found to be some aesthetic issue, it can be a complete rectification, such as repainting a wall or pull off sheeting and put it on straight, but if it's impracticable there could be a deemed-to-comply solution even if it was not to the standard, so you could then go through a process of ringing an engineer and saying, 'Put an extra steel beam under there and that will bring it up to standard as deemed to comply'. Is that the case?

Mr SHEPHERD - Yes. Can I add one thing, and it falls between what Mr Booth was talking about and what Mr Hidding was talking about with the Solicitor-General's advice earlier, because the two fall together here? We took a submission from the building associations that said we believe the process being proposed is unconstitutional or maybe at the very least illegal. We then went to the Solicitor-General and said, 'We need to check that this isn't the case and we would appreciate any advice on how to improve these processes to address some of the concerns of the building associations'. He came back and said, 'There is no issue with the legality or whether it's constitutional. That's not the issue, but what I suggest is that typically mediation is an environment for an open and frank discussion without repercussions'. The Solicitor-General's advice is to create a process which can be distant from the Building Disputes Commissioner, where the parties can enter that room without repercussion, they can make admissions of guilt, fly suggestions by and try to come to a mediated outcome where there is no repercussion on their licence or livelihood.

That is what the bill now does. That was an adjustment from an earlier version to the current version: mediation is undertaken by a party away from the disputes environment. Parties can have an honest and frank discussion. The only thing that comes back from the mediator is acknowledgment that the mediation occurred, was completed and there was an agreement reached and what the agreement was, but no admissions of guilt can be used. Any report that comes back can't be used as evidence in relation to an investigation. Both conciliation and mediation are voluntary and 90 per cent of matters are resolved through conciliation.

CHAIR - Yes, it's a good process. We all know that. That is where the legal profession has gone to and without prejudice discussions are an important part of that. Could I ask a question about - and it is somewhat comical when you read it in a bill like this - the powers of the officer in investigation? How necessary is all this? A builder could say, 'This is going to cost me a fortune and I'm going to nail the place shut'. Could not all this be replaced by 'the builder will provide full access to everything or he is out of the game?' I don't know.

Ms ARCHER - It's very heavy handed.

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CHAIR - It is, but it sounds ridiculous.

Mr ORMEROD - It was extracted from the Consumer Affairs Act 1970, wasn't it? It has been around forever.

Ms ARCHER - That's a good enough reason not to use it.

Laughter.

CHAIR - It sounds like bikies -

Mr ORMEROD - I understand what you are saying and I think they have put this in to try to give some authority to ensure that there is exchange of information. All I can say is that there has not been any evidence in the past of how they are misused; you have more powers than a police officer -

Ms ARCHER - I was about to say it reads like police can enter premises when drugs deals are going on and all that sort of thing. It makes it a very serious matter for the builder.

Mr ORMEROD - There has always been the control. The first thing is that people operating under this legislation are state servants as well and have a code of conduct and all sorts of provisions which ensure that they act reasonably at all points, and you would never put an officer in a position where a builder with a nail gun is saying 'Mate, if you come in here you're in trouble.' You just walk away, you are not going to do it, so in those circumstances -

CHAIR - What is interesting here is the two perspectives of elected members and senior officers where you are seeing this legislation, these words, as being a great success because they have never been used. We would see them as an invitation to be used, particularly in new legislation.

Ms ARCHER - The power is there.

CHAIR - The power is there and having just been legislated it sends a jarring note into the whole process. The loving nature of the conciliation and mediation goes clean out of the window when you get to this point.

Mr BOOTH - This is residential work, it's not like -

Mr ORMEROD - That's true.

Mr SHEPHERD - My only comment is through working alongside because my background is that I worked with Consumer Affairs for a period of time before I commenced work with Workplace Standards, so working alongside the conciliation officers who have no powers, who are really there by invitation of the parties, I saw that the doors are shut fairly quickly if one party thinks that they are going to lose. The powers that are outlined there are those that came across from the Fair Trading Act and are not dissimilar to other legislation that the organisation uses for building matters, so the difficulty is that you have these investigatory staff who are accustomed to dealing and working within these parameters about whom we virtually never get complaints about their continuing to use

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those types of powers. It is not like they are powers that aren't untested and haven't been used before; they are established powers that have been used for a number of years without incident, in effect.

Mr BOOTH - But that only means that nobody has been able to do anything about it, possibly.

Ms ARCHER - Why can't it be narrowed down to a builder will comply with a request for documentation and list? It has the same effect but it just doesn't have that criminal aspect to how it currently reads.

Mr ORMEROD - Yes.

Ms ARCHER - Just to finish off, I would have thought that most builders would see that as a reasonable request that they hand over documents for the purpose of conciliation or an investigation and it maintains that conciliatory attitude without saying, 'You will do this or we'll enter and we'll shut you down'. It's very threatening.

Mr ORMEROD - Yes.

CHAIR - If all this was replaced with a clause that said, 'Both parties must provide information as requested'.

Ms ARCHER - Both parties, exactly.

CHAIR - The absence of which could see the whole thing go straight to the building disputes commissioner for a rectification order, based on the fact that you are not providing material. In other words, things could be very adverse as a consequence. Then it goes off to RMPAT and RMPAT says, 'You didn't play. There was no other opportunity here'. I would have thought that was stronger persuasion than these threats.

Mr ORMEROD - That's what the provision is doing. This provision requires a person to provide information and answer questions truthfully. If they don't provide information, they are in breach of legislation. That's what it's all about.

Ms ARCHER - But it's very one-sided. If you want both parties to a dispute to resolve a dispute, you need a requirement that both parties do that.

Mr ORMEROD - That's right, you do. It sits on both parties.

Ms ARCHER - I thought there were a few that were isolated.

Mr ORMEROD - You could be right.

CHAIR - There could well be. It is aimed at builders.

Mr ORMEROD - Workplace Standards would have a similar power.

CHAIR - I guess it would have for safety issues and those things.

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Ms ARCHER - You are dealing with safety issues and possible fatalities, so it is quite serious.

Mr BOOTH - I want to get back to the director of Workplace Standards being the default position. Why can't we have a requirement that the person just be appointed - even if it is considered by the committee that it is arms' length enough for it to be any public servant, but not necessarily the director of building control? Why couldn't we just leave it that an appointment must be made, without that default position. In other words, if the minister fails to appoint someone, there is just no person in that role.

Mr ORMEROD - It is a recommendation the committee could make.

Mr BOOTH - Do you see any reason why that would be a problem? If it's a problem, in terms of either perception or reality, then it probably ought not be in the act, but I couldn't see a compelling reason why it should be a problem. Is there any reason why the legislation cannot simply say that the person 'shall be appointed by the minister'? It would be an obligation on the minister, and it would be more likely you would get an independent person appointed rather than the minister just defaulting it to the director.

CHAIR - As the issue appears to be the wearing of two hats, I would be more of a mind that it can be anyone but the director.

Mr BOOTH - Yes.

CHAIR - That's what has been identified.

Mr SHEPHERD - To answer your question - at a very basic level, the two things that would come out of that are cost and delay. There is an additional cost to government in time, and how much time that is, we are not to know. The other one is delay because that person is not going to make a decision without testing the waters to see what the options are.

CHAIR - Let us just explore that. Let's say it was as per asbestos, and Mike Stevens gets a new badge to wear. He can delegate a large amount of the paperwork that you're talking about to the office of the director of building control to get that stuff before him as a case for adjudication. That would take care of haste and money. In any event, even if it was a bit more money, you could say the parties to the dispute would have to stump up the extra money in the interests of it being fair to everybody.

Mr SHEPHERD - My response was to highlight those two things, the degrees of which I don't know if we could ever know - how much time, how much cost.

Mr ORMEROD - I think the Michael Stevens example is a good example. That could work if it remains within the department. It may be a little more difficult outside, but -

Ms ARCHER - While we are on costs, aren't we increasing the costs of the director of building control by having to deal with disputes, on top of everything else that position currently deals with?

Mr ORMEROD - More work for the same pay.

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Ms CROWDER - It does not equate to more money.

Ms ARCHER - No, exactly, and that is my point. If you have a lot of disputes, it is terribly onerous on that office. While we are talking about costs and delays, without additional funding - and I am not suggesting that is on the table - how would you resolve any issues if the Director of building control was so busy with disputes that they could not deal with their other functions?

Mr ORMEROD - You would obviously employ someone to provide support for the Director so there is a cost, yes.

Ms ARCHER - Well, that is the cost.

CHAIR - Are there not costs to be paid at application time?

Mr ORMEROD - Yes there are.

CHAIR - You see, that is where you resolve it.

Mr SHEPHERD - There are costs, exactly, which would cover that, yes.

Mr ORMEROD - But a director of building control only has so much time in a working week.

Ms CROWDER - I do not think we are going to have numbers which will require anywhere near a full-timer. I also expect the complaints under the Building Act to decrease as a result of this, so there will be freeing up of some staff.

Mr BOOTH - Evidence was given here, contrary to your proposed bill, by various parties, and the Housing Industry Association was one of them. Have you got anything you want to add?

CHAIR - We might use that to bring this to an end because time wise the committee needs to have a chat and we might even call another witness yet.

Mr BOOTH - Okay. Although we can take this into evidence, there is a submission which I presume deals with it, and it is not on the *Hansard* record.

Mr ORMEROD - I think the comment Mr Shepherd made before about the Victorian model - it was the sort of model that the HIA were leaning to, which is a separate tribunal model away from the conciliation model. It has been made pretty clear that the particular model they had in mind is something that has been in place in Victoria. But, it has created problems for those who are party to it and resulted in the Victorian system looking at following what is happening in Queensland and New South Wales, because it is more effective.

Mr SHEPHERD - Other than that, the only residual issue was one raised by the MBA about prime cost items and provisional sum estimates. At the time there had been a change to

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the bill which the MBA would not have been aware of, and we have had discussions since then.

Just to explain that, feedback from the building associations was that the process should follow the contract - in effect the contracting parties - and should not extend beyond that. That is, it should not extend to designers. It did not concern us to remove that, because we already regulate the behaviour of designers under the Building Act. This issue arose in relation to pre-establishing greater design detail, and so a related -

CHAIR - Much better documentation.

Mr SHEPHERD - Much better documentation, that is right.

CHAIR - Which would knock a lot of this stuff out.

Mr SHEPHERD - That is right. The director of building control at Workplace Standards commenced a related project under the Building Act to deal with this issue, and increase the detail in documentation. The bill was amended to say that the builder's defence is that their estimate only needs to be 'reasonable'. The test of reasonableness will be based on the information they had at the time they did the estimate. If they are given greater quality documentation, there is an expectation that there will be a better quality estimate.

CHAIR - Good. Thank you. Can I wrap it up by saying that the future of these discussions is in the hands of the minister, as to what he chooses to do? It seems to me that there is a degree of expertise in this committee which would be of use to bringing the government and the building industry to resolution of matters that appear to be sticking points. If he is of a mind to have this legislation through this week, that isn't going to be possible and it may well stall in the process somewhere. This committee exists much as we did with the plumbers - there didn't appear to be an answer there, but there was.

Mr BOOTH - I think the work that's occurred as a result of the plumbing issues has been outstanding in resolving some issues so far as the trades go. I hope there is a path that is being taken in good faith that will lead to a better relationship between plumbers and the department and ultimately between plumbers and clients as well. I am happy with the work that's been done there.

Roy, could you or Kerry put on the record again about the extension cord issue and cord tagging, that it's not a requirement of the act because there's still some confusion there?

Mr ORMEROD - There is nothing in the legislation which requires regular tagging of cords on a building site, for obvious reasons. Whenever a builder uses a cord he would satisfy himself that the cord is safe when he uses it. A tag in itself is no guarantee that a cord is safe.

CHAIR - Thank you all very much.

THE WITNESSES WITHDREW

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Mr STUART CLUES, EXECUTIVE DIRECTOR, HOUSING INDUSTRY ASSOCIATION TASMANIA, WAS CALLED AND RE-EXAMINED.

CHAIR (Mr Hidding) - Mr Clues, this is an opportunity for us to ask you a question on the record. You've heard members of this committee express concern that the building disputes commissioner ought not be the director of building control and then an explanation from the department that if we were not to go that way it would be better that someone were in the system, such as has happened elsewhere. Could we have your views on those matters?

Mr CLUES - Thank you very much for a second opportunity to address the committee. The committee's concern is our greatest concern. HIA, MBA, the PCA and industry associations generally are not opposed to this bill. We would like nothing more than to see a dispute resolution bill get up. Despite the submissions that were made today, we are not opposed to having rectification orders issued under this bill. We think this is a very important part of the process and you need to get to that point where someone can issue rectification orders. The most poignant issue is who is going to issue those rectification orders. Who is going to make a determination or an adjudication? We have consistently argued that should not be Workplace Standards and that should not be the Director of Building Control. We are talking about giving somebody the powers equivalent to a supreme court. They will have no caps or limits in relation to the value of the rectification orders or the sums of money that are issued in compensation.

CHAIR - What would you call RMPAT then if you called this a supreme court, like the High Court?

Mr CLUES - It would have to become like the High Court. We are talking about creating a judicial process with judicial powers beyond anything that we have seen in our industry before and it is not for Workplace Standards to dismiss those as lightly as I heard today where they say, 'If it involves a large sum of money it doesn't necessarily make it complex'. These matters -

Mr BOOTH - Sorry, to interrupt, Stuart, but the same thing applies, doesn't it, in the securities of payment stuff? It is not the rectification order but it is a dispute that could be \$200 000 potentially and the same effective powers are handed over.

Mr CLUES - And we are not asking for caps or limits, we think that is completely and wholly appropriate.

CHAIR - There are two issues then?

Mr CLUES - The issue is the same issue that you have identified, who is going to issue it, and what we are saying is this is a really powerful, significant role that carries with it an enormous carriage of justice and we are arguing that Workplace Standards does not have either the judicial or the technical expertise to administer that function, and even if they could argue that they do, we would argue that it is inherently wrong that they should perform that function given they are also the accrediting body and -

CHAIR - So the degrees of separation issue.

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Mr CLUES - A degree of separation does not exist and what we would argue - and you heard from the words of Mr Omerod today and you heard it from Kerry Shepherd and I have heard it from Kerrie Crowder- that the reason they want that power is because they believe it will make them more effective in the conciliation process if they have the capacity to have that big stick waving over people's heads, and those were virtually Mr Omerod's own words. He said, 'If you want this thing to be dealt with speed and expertise you need to have the power of rectification'. We would argue that that stops them having an effective role in conciliation and we start talking about coercion.

There is a huge difference between conciliation and coercion and what they are saying is, 'Unless we have the ultimate power to issue rectification orders we don't believe that we'll be as effective in the conciliation process,' and we would argue that that mentality is the very reason why they shouldn't have that power because they believe that coercion or having that additional power will make them more effective in the upfront conciliation process. We are saying that -

CHAIR - I didn't hear them express it quite like that but, for the record, either way it is on *Hansard*.

Mr CLUES - I am more than happy to stand by it. What I would say is that the only difference that lies between us and where the government is at at the moment is in relation to the fact that we are saying you can't have a director of building control act as the Building Disputes Commissioner; nor would we accept that it should be the secretary of the department. We say that is this is a judicial function and it needs to be an external appointment independent of any government agency other than the Department of Justice in terms of having - it should be a judicial appointment - it should be something that sits under the court system as a separate building dispute commissioner and that person should be appointed as such. And it should not become, I think Mr Stevens was recommended and we would have just as much problem if it was Mr Stevens. It is a -

CHAIR - Because he is in the same department?

Mr CLUES - Because it is an administrative function that they are performing. Let us make no mistake, this is a judicial appointment. It is a judicial function they are being asked to administer. There should be no government public servant appointed to this role who holds an administrative capacity. It needs to be a judicial appointment. You are talking about Supreme Court powers and not just for our benefit as builders; you are talking about somebody's home, you are talking about the family's biggest asset being determined by a public servant.

Mr BOOTH - But that is not dissimilar, is it, then, to securities payments in that it is not a departmental person? It is an external independent person but they don't have the judicial experience that you are seeking there with this commissioner to be appointed as actually a judicial authority. Where is the difference, then? I understand you are very content with the securities of payments legislation and that aspect of it; it is an independent person who does not have judicial experience, so why would this one need to have judicial experience? They have slightly bigger powers but -

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Mr CLUES - Yes, the powers are quite significant, but I would be far more comfortable following your recommendation that we tweak the security payment system to resolve these issues than the model that is being proposed. I think that the government has consistently dismissed the security of payments options way too lightly. There is a model that was introduced in December 2009 that has independence and works quickly; there hasn't been any real criticism from industry or consumers and it deals with significant building disputes very quickly. Under this legislation, they are talking about having up to six months for the department to make a decision - that is 180 days. Under the security of payments model, issues are resolved with 30 to 40 days.

CHAIR - But the model lacks the element of conciliation and mediation, doesn't it?

Mr CLUES - Yes, but that's only 14 days of the process.

CHAIR - Yes, so there are some timing issues. Do you agree that with conciliation and mediation, 80 per cent to 90 per cent of these will go?

Mr CLUES - Yes, absolutely. I am more than happy with the fact the government has moved. If you want to talk about an institutional bias, which is what I believe exists within Workplace Standards, the original bill had their own people as building disputes officers doing the mediation. Under section 28, there was no provision for a builder to even lodge a dispute. Workplace Standards and the author of this bill are of the belief that the only people who are at fault in a building dispute are the builders.

CHAIR - But you re-educated them on that, clearly, because that's changed.

Mr CLUES - I think they took my word seriously when I said, 'You don't have a hope in hell of getting that through government in its current format', and hence they recognised it. Today they talk about balance and the like but if you look at this bill, it is absolutely littered with an imbalance. I am prepared to accept that, but let's call Workplace Standards what it is. Workplace Standards is a pro-consumer organisation, and that's fine, but let's declare it upfront. You have an enormous consumer bias that exists within Workplace Standards and within this bill, but that doesn't mean government needs to sign off the bill and say, 'We're going to give the director of building control Supreme Court powers and have a complete absence of separation'.

CHAIR - Mr Clues, I think you have cleared that up most comprehensively. Thank you for your opportune presence and we were able to get that on the record.

Mr CLUES - Thank you for the opportunity.

THE WITNESS WITHDREW.