2013 (No. 2)

PARLIAMENT OF TASMANIA

SELECT COMMITTEE ON THE COSTS OF HOUSING, BUILDING AND CONSTRUCTION IN TASMANIA

Interim Report No. 4

Brought up by Mr Hidding and ordered by the House of Assembly to be printed

MEMBERS OF THE COMMITTEE

Mr *Hidding* (Chairperson)
Mr *Best*
Mr *Booth*
Ms *Archer*
Ms *White*

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1 APPOINTMENT AND TERMS OF REFERENCE

1.1 The Honourable Member for Lyons, Rene Hidding, the eventual Chair of this Committee, on 1 September 2010, gave notice of a motion in the House of Assembly (the House) that he intended to move for the establishment of a Select Committee of the House to inquire into and report on the cost of housing, building and construction in Tasmania.

1.2 Such motion was moved and debated on 1 September and eventually resolved on 29 September 2010. The resolution was as follows:

Resolved, That:—

(1) A Select Committee be appointed, with power to send for persons and papers, with leave to sit during any adjournment of the House exceeding fourteen days, with leave to report from time to time, and with leave to adjourn from place to place, to inquire into and report upon issues relevant to the costs of housing, building and construction in Tasmania, including:—

(a) costs associated with land development;

(b) costs of Local Government services;

(c) costs of utility services;

(d) public policy settings impacting upon building costs;

(e) cost of statutory levies and contributions;

(f) costs of builders registration; and

(g) other matters incidental thereto.

(2) The Committee shall consist of five Members, being two from the Government nominated by the Leader of the House; two from the Opposition nominated by the Leader of Opposition Business in the House; and one from the Tasmanian Greens nominated by the Leader of the Greens.

(3) The Committee report by Thursday, 31 March next.

1.3 The House further resolved on 16 March 2011 that the reporting date be extended until 30 June 2011.

1.4 The House further resolved on 22 June 2011 that the reporting date be extended until 30 September 2011.

1.5 The House further resolved on 29 September 2011 that the reporting date be extended until 31 March 2012.

1.6 On 22 November 2011, the Committee tabled an interim report which relevantly stated as follows:

- *The Committee finds that the current processes for dispute resolution in the building and construction industry are highly ineffective and do not provide acceptable resolution of complaints, and that an improved dispute resolution process must urgently be developed.*
- *The Committee considers that recent history and movements around the building industry mean that Tasmania is in a position to design and*

implement a best practice model to meet contemporary needs.

- *The Committee finds that interstate systems of dispute resolution should be investigated for their efficacy when developing a new process in Tasmania.*

- *The Committee finds that it needs to investigate further and make recommendations in relation to an appropriate building dispute resolution process for Tasmania in its final report.*[1]

1.7 On 29 March 2012, the Committee tabled a further Interim Report (Interim Report No. 2). This report did not deal with dispute resolution; rather it dealt with a matter which was referred to the Committee: the licence fees for plumbers as proposed under the *Occupational Licensing (Plumbing Work) Regulations 2010*. These regulations were disallowed by the House of Assembly and formally referred to the Committee on 18 May 2011.

1.8 The House further resolved on 29 March 2012 that the reporting date be extended until 21 August 2012.

1.9 The House further resolved on 21 August 2012 that the reporting date be extended until 22 November 2012.

1.10 On 20 November 2012, the Committee tabled a further report (Interim Report No. 3) which dealt with dispute resolution.

1.11 The House further resolved on 20 November 2012 that the reporting date be extended until 30 April 2013.

[1] Select Committee on the Costs of Housing, Building and Construction in Tasmania, Interim Report, 22 November 2011, p142-143

1.12 Members of the Committee have indicated an interest into continuing to consider matters affecting the cost of housing, building and construction in Tasmania, as per the Committee's Terms of Reference.

2 CONDUCT OF THE INQUIRY

2.1 Since the Committee's third Interim Report, the Committee has met on 3 occasions and has considered evidence from a number of witnesses in relation to this issue.

2.2 The 'default' position for the Committee hearing evidence is to examine witnesses in public. The Committee has not resolved to hear any evidence *in camera* to date.

3 BACKGROUND TO CONSIDERATION OF THE BILL

3.1 During the Committee's consideration of dispute resolution in the building industry, the Committee was provided with the draft *Residential Building Work Quality (Warranties and Disputes) Bill 2012* ("the Bill") by the Minister for Workplace Relations.

3.2 This Bill was tabled in the House on 13 November 2012.

3.3 The Committee subsequently tabled Interim Report No.3, with the Committee finding that:

- *Despite in principle support for the Bill from the building industry, there are still critical aspects of the Bill that do not have the support of industry.*
- *Through hearing further evidence and undertaking further consideration of these issues, the Committee could make further*

recommendations which would result in an improved Bill which addresses the above concerns and has the support of the building industry.[2]

3.4 Further to those findings, the Committee made the following recommendation:

- *The Committee recommends that the Bill be formally referred to the Committee for inquiry into and report thereupon.*[3]

3.5 While not formally referred to the Committee, the Minister did not proceed with the Bill in the last session of Parliament in 2012. This provided the Committee with the opportunity to investigate and report further on the concerns expressed by the building industry with certain aspects of the Bill upon the resumption of Parliament in 2013.

4 DISPUTE RESOLUTION IN TASMANIA – THE CURRENT SITUATION

4.1 The submission of the Minister for Workplace Relations summarises the current situation in Tasmania as follows:

> *A number of statutes currently regulate the physical process of building in Tasmania.*
>
> *The Housing Indemnity Act provides that a building practitioner gives the following warranties to the owner:*
>
> - *Work will be carried out in a proper and skilled manner and in accordance with the plans and specifications.*

[2] Select Committee on the Costs of Housing, Building and Construction in Tasmania, Interim Report No. 3, 20 November 2012, p.7-8

[3] Select Committee on the Costs of Housing, Building and Construction in Tasmania, Interim Report No. 3, 20 November 2012, p.8

- *All materials to be supplied by the building practitioner will be good and suitable for the purpose and unless specified otherwise in the contract will be new.*
- *Work will be carried out in accordance with this or any other Act.*
- *If a contract does not stipulate a period for completion, work will be carried out with reasonable diligence.*
- *Variations will be reasonably fit for purpose or for achieving that result.*
- *Provisional sums specified in a contract must have been calculated with reasonable care and skill including assessing the nature and location of the building site.*

The Commercial Arbitration Act 1986 may assist in resolving building contract disputes; however, consumers must apply to the courts to resolve disputes with building contractors. The Building Act establishes standards and oversees the performance of the building and plumbing work through permit processes, the accreditation of building practitioners and sets the minimum technical standards for building and plumbing.

The Building and Construction Industry Security of Payment Act that commenced in December 2009 assists building practitioners with disputes over payment. However, the adjudication processes do not address workmanship other than to allow for the costs of rectification to be used as a set-off against any claims made by a building practitioner. The Building and Construction Industry Security of Payment Act has been established to ensure money continues to flow down the contracting chain and through the building industry in a timely manner. Because the process is designed to happen quickly and efficiently there are guaranteed to be situations where the time constraints placed on parties result in payment for unsatisfactory workmanship.

There is no legislation that specifically helps residential home owners with the problems associated with poor workmanship. While the court process can be successful in resolving disputes, it is often a last resort for parties and is not an attractive option to residential home owners with small workmanship related

disputes because of the cost. As a result these matters seldom find their way into the court process.[4]

4.2 The Committee heard evidence from a number of consumers who had been involved in building disputes, which demonstrated the difficulty and expense in resolving disputes under the current system.[5]

5 PROPOSED LEGISLATION

5.1 The Bill proposes a framework of mechanisms to assist building practitioners and consumers of their services to either avoid disputes or to help them resolve disputes should they eventuate. The framework is based around four pillars:

- Statutory warranty.
- Implied Contract Terms.
- Consumer Guide.
- Dispute Resolution.

Statutory Warranty – Section 19 determines that a Builder is taken to have given the following warranties to the prescribed owner:

- Work will be carried out in a proper and skilled manner and in accordance with plans and specifications.
- All materials to be supplied by the builder will be good and suitable for the purpose and unless otherwise specified in the contract will be new.

[4] Minister for Workplace Relations Submission, Attachment: Workplace Standards Tasmania, Minor Assessment Statement, 24 January 2012, p7-8

[5] Davey, Hansard, 8 October 2012; Bransden/Carlson, Hansard, 8 October 2012; Ann-Marie Johnson Submission; Johnson, Hansard, 3 December 2012

- Work will be carried out in accordance with this or any other Act.
- If the contract does not stipulate a period for completion, work will be carried out with reasonable diligence.
- Variations will be reasonably fit for their purpose or for achieving that result.
- Provisional sums specified in the contract must have been calculated with reasonable care and skill including assessing the nature and location of the building site.

Implied Contract Terms – Section 9 makes it an offence to carry out residential building work without a 'major residential building work contract' if the contract price is above the threshold of $5,000.

Consumer Guide – Before carrying out any residential building work under a major residential building work contract a building contractor must provide consumers with a Consumer Guide issued by the Building Disputes Commissioner that provides information about the operation of the Act including the consumers right to statutory warranty and suggestions on how to resolve a building dispute, should one eventuate.

Dispute Resolution – The legislation provides that a residential building owner can apply to have a dispute resolved if they consider:

- There has been a breach of statutory warranty by the builder.

- Work is defective.
- The builder has failed to complete the work required by the contract.[6]

5.2 In relation to how the proposed dispute resolution procedure under the Bill will operate, the submission from the Minister for Workplace Relations provides the following information:

> *The draft Bill establishes a multifaceted approach to dispute resolution. It focuses on the education and guidance of stakeholders and then conciliation, mediation, mandatory orders and finally prosecution for the offence of not complying with a rectification order.*
>
> *To assist with education and guidance Workplace Standards Tasmania will establish a telephone helpline to provide self help advice and printed materials to Tasmanians involved in a building dispute. If a matter cannot be resolved consumers will have the ability to apply to have a dispute assessed.*
>
> *The application to assess a dispute is intended to commence a process where trained dispute resolution officers will assess the nature of the dispute and then recommend an appropriate course of action in an attempt to resolve the dispute.*
>
> *The legislation provides that these matters within the scope of the legislation (Residential building work disputes with a contract value greater than $5,000 – above the Minor Civil Claims threshold) can be referred to the newly created Building Dispute Commissioner. After an application has been referred to the Commissioner the court will not have jurisdiction until the Commissioner has issued a determination. The intention of delaying the parties from commencing court action is to allow the parties the benefit of assessing the outcome of the referred application before adding the additional cost of court action.*

[6] Minister for Workplace Relations Submission, p1-2

The Bill provides a variety of dispute resolution methods to achieve a much faster and lower cost resolution of building related disputes.

These include; conciliation; mediation; investigation and rectification orders. More complex building dispute matters will be exempt from the process in order to allow parties to access a court process; if that is the direction they choose to take.

In circumstances where parties cannot come to agreement on terms to resolve their dispute, and the building practitioner has been assessed as being at fault, a newly created Building Disputes Commissioner will have the ability to issue an enforceable rectification order. Building practitioners that do not comply with the requirements of a rectification order can be prosecuted by the Building Disputes Commissioner.

Aggrieved building contractors will have right of appeal through the Magistrates Court (Administrative Appeals Division). [7]

6 COMMENTS ON THE BILL

6.1 The Committee heard evidence from the Housing Industry Association (HIA) and Master Builders Tasmania in relation to the Bill.

6.2 Both were supportive of the principle behind the Bill, and acknowledged the need for the introduction of an improved dispute resolution process in Tasmania.

6.3 Mr Stuart Clues, Executive Director, HIA commented as follows:

If there is a dispute between a builder and a client, that costs both parties money and inconvenience, so for our part it is really important that this Bill gets up and that it works. To that end, HIA is supportive of a Bill that introduces a fast, equitable dispute resolution process. This is not a situation where we are seeking to oppose the introduction of its core elements but we

[7] Minister for Workplace Relations Submission, Attachment: Workplace Standards Tasmania, Minor Assessment Statement, 24 January 2012, p9-11

would argue that the drafting of this Bill is fundamentally flawed. It has no confidence of the industry and if it was introduced in its current state it would significantly add to the cost of building because you would end up with protracted building disputes, not disputes that would be resolved in a fast, equitable ways.[8]

6.4 Similarly, Mr Michael Kerschbaum, Executive Director, Master Builders Tasmania, stated as follows:

Like the HIA, we do support the Bill in principle. We believe that since housing indemnity insurance or warranty insurance has gone from the landscape that consumers have been left to some extent vulnerable. We made those comments when warranty insurance was removed. We did say to the government that it is in their best interests, we believe, that there is a system of protection there for the consumer. Also, we would like to see a dispute mechanism that builders can also access, so both parties can hopefully come to resolution using, and one that's effectively put in statute so it's mandated. We currently spend a reasonable amount of our time and resources dealing with complaints against builders and some of those are legitimate and some are not.[9]

6.5 It was noted that a number of the industry's original concerns with the Bill had been resolved through negotiations with Workplace Standards. [10]

6.6 Further, a number of the building industry's other concerns have been addressed in drafting changes that were made to the Bill prior to it being tabled on 13 November 2012.

6.7 The remaining issue raised by the building industry that has not yet been addressed is the dispute resolution mechanism provided in the Bill. This matter can be subdivided into two further issues:

[8] Clues, Hansard, 2 October 2012, p5
[9] Kerschbaum, Hansard, 2 October 2012, p28
[10] Clues, Hansard, 2 October 2012, p16

- The lack of independence, or degrees of separation, between the dispute resolution process and the building practitioner accreditation process; and
- The lack of appropriate expertise and skills being utilised in the dispute resolution process.

6.8 The building industry has argued that there is a lack of independence and separation of powers between the dispute resolution process, including conciliation, arbitration and any rectification or penalties that may be applied, and the building practitioner accreditation process.

6.9 This issue arises where the Building Disputes Commissioner, who is responsible for making determinations with respect to building disputes, may also be the Director of Building Control, who is responsible for the accreditation and licensing of building practitioners.

6.10 The evidence received by the Committee indicates that the building industry remains particularly concerned that a conflict of interest may arise where one person is empowered to undertake both roles. The building industry maintains therefore, that such an arrangement presents an unacceptable risk of compromising the independence of both the building accreditation and building dispute resolution processes.

6.11 It was also the industry's view that they needed to have confidence in the decisions delivered through the dispute resolution mechanism, and that this necessitates having the appropriate technical and judicial skills available to support decision making.

6.12 The industry noted that the current system as proposed in the Bill did not provide any assurance that the appropriate skills and expertise would be utilised in resolving what can be, at times, high value and very complex building disputes.

6.13 Evidence was also provided to the Committee that these issues had been encountered in the past in developing a model for resolving building payment disputes, and had in fact been overcome by the design of the payment dispute adjudication process provided for in the *Building and Construction Industry Security of Payment Act 2009*.

6.14 Mr Clues summarised the building industry's concerns on both of these matters in the following evidence:

> ***Mr CLUES –*** *It really comes down to one issue which is the dispute resolution process. What we would argue is that we would like to see a dispute resolution process in there but the fundamental issue is that it needs to have independence, separation of powers and it needs to have technical and judicial expertise to be able to deliver a verdict and have the confidence of the industry. All of those things are missing at the moment…….At the moment, under this Bill, it is proposed that the conciliation process will be done by officers at Workplace Standards. If the conciliation fails, it then gets directed through to the building disputes commissioner who will make a determination. What we would argue is that you are dealing with disputes that could involve hundreds and thousands of dollars, or potentially millions of dollars for residential homes now – two and three million dollar homes are not that unusual…….You're talking about two or three million dollar homes and very technical arguments. What Workplace Standards are saying is, 'Give us the power to make a determination on that matter because we have the judicial and technical expertise to do so.' You're talking about a matter that, in the current format, would go to the Supreme Court where you have learned persons who are used to*

dealing with technical arguments and making very complex judicial decisions. What this Bill is saying is 'Forget that process; we know as much about judicial and technical matters in the building industry as the Supreme Court does…There is no cap or limit under this Bill as to what the nature of the dispute is that they can deal with. They're asking you to give them a jurisdictional equivalent to the Supreme Court. We would argue that, with no offence, Workplace Standards does not have the technical or the judicial expertise to deal with building disputes of that nature…….What we would say is that if people are going to have confidence in engaging in this process, there needs to be a clear separation of powers. We can't have Workplace Standards putting on a cap, saying, 'We're going to conciliate the matter.' 'Conciliation didn't work; we're going to arbitrate the matter.' 'Arbitration didn't work; we're going to issue penalties.' 'Penalties aren't enough; what we're going to do is put on another hat and take your builder's licence off you.' There is no separation of powers. There is a reason why the people in this room make the laws; the police go out and investigate and make a prosecution, then a court makes a determination. You don't have a situation where the police get up in the morning, make the law, drag someone out of their house and shoot them in the afternoon, which is effectively what Workplace Standards are asking you to do. They are asking for an unfettered right to manage the whole process.

***Ms WHITE** – The proposal you've just made in terms of having some separate independent person issue rectification laws – for example, a court. How is that any different from the process we currently have?*

***Mr CLUES** – I am not arguing that it needs to be a court. What I am arguing is that, like the security of payments model, when it gets to the point of making an adjudication, we need an independent person who is technically and judicially qualified. What we argue is that it is not Workplace Standards.*

I'm not asking that we retain the existing system; I'm not asking that we set up a tribunal, I'm not asking that we set up a

division of a court. What I'm arguing is that this process, at some point in time, has some independent separation.

***Ms WHITE** – Do you have a proposal of what that would look like?*

***Mr CLUES** – No, what I'm asking for is for government and industry to come back to the table and recognise that the principles of separation, independence and having people with the technical and judicial expertise be inserted into this process somewhere…….What I would argue is that the government managed to find its way through the issue with security of payments. So in December 2009, it managed to come up with a process that is cheap, fast, independent, has the confidence of both industries and consumers, and is working really well.*

What I would argue is that it is not a quantum leap to say that a couple of years ago we introduced a very good model that had all the elements of separation. It's very low-cost; it's very fast; it's independent, yet we somehow think that the only way we can resolve a very similar type of building dispute is through this sledgehammer approach under this Bill.

What I would argue is that the security of payments – and I have argued this repeatedly – at the end of the day security of payments are all about quality of workmanship. People don't have a security of payments dispute and say, 'I've run out of cash; I over-estimated what I wanted.' What they do is say, 'I'm not paying you because I'm not happy with the quality of the cabinet work…

***Ms ARCHER** – Would you be happy with an independent adjudicator such as an expert panel; a person could be selected from that panel with he expertise. For example, you could have retired Supreme Court judges on it, which we've had in other systems.*

***Mr CLUES** – We're not coming here today to advocate an alternative model. We would be open to anything that hits those principles that has merit. If you were putting that on behalf of the government we would be open to having discussions around that. We are saying that you can't be both the director of building control and the building disputes*

commissioner; you can't be both the conciliator and the arbitrator.[11]

6.15 This issue was further commented on by the HIA as follows:

> ***Mr FERGUSON*** *– We touched on bias earlier and we accept that there is a legislative bias towards the consumer and market protection because that's what it's there for. We say at the moment – and as we have said, most of it has been resolved – that the Bill in its current state is excessive for the purposes of consumer protection. That's something we're working through and that's a legislative bias. What we're really concerned about is this institutional bias. I obviously don't have time to go through all the notes I have so I'm just going to focus on what the really important things are. One is this concept of separation of powers. I'm not going to argue legally about the separation of powers because we would be here all day and it has a different meaning in state and federal law, but the regulator is really wearing too many hats and I am going to advance that a bit more. They are administrator, conciliator, investigator of everything, prosecutor of crimes, disciplinarian of builders and the decision makers for contractual disputes.*
>
> ***CHAIR*** *– And they can take a builder's licence off him at the end. That is the last one. Livelihood gone.*
>
> ***Mr FERGUSON*** *– That's right. Putting all that in a one-stop-shop seems a very attractive thing for the government. For a government that's great – 'We control everything, we can do that, that's fine'- but if you look at it carefully it's got a huge moral danger and a huge legal danger.'*
>
> *I'm not going to go into that today but the words 'procedural fairness' and 'natural justice' just leap out. At the end of the day I think its going to be unpopular with both builders and the public having this consolidated, all in the one bucket silo-type process. It lacks sufficient checks and balances that appear only when you get to the Supreme Court……The system as it's designed at the moment is broken. It's not going to work. As I*

[11] Clues, Hansard, 2 October 2012, p17-20

said, they look like the technical expert, police, judge, jury and executioner. That is a quote from our members. They're petrified of this and they're not going to have any confidence in it. The administrators and the decision makers – and I make that big distinction – need to be perceived to be independent in their function and the way they carry out their role.
There are two ways that I'm going to tell you about the separation of powers generally. One is in the dispute resolution procedure. We have, first of all, complaint handling and administration. Clearly Workplace Standards can deal with that. Then we have conciliation of disputes. They might handle that or outsource it to an external conciliator. Then we have the production of expert reports, and this is where it starts getting a bit more complex. Well, they're going to need to go outside for that. Then we have determination of an independent nature, and that's going to require a judicial or quasi-judicial function. Not something with a person with a different title, something outside government. It needs to be a role that reports to the Governor-General and not the Minister. It needs to be independent.[12]

***Mr FERGUSON** – The other way I want to look at separating out the power is through the administrative process. As we've said, they want to look after dispute resolution and everything and that is one whole silo that we need to break up a bit. They also want to deal with the conduct and discipline of builders. That is another thing in the same bucket. Then they want to do investigations and compliance for prosecuting them for offences under the Act which are really criminal proceedings which, despite what Workplace Standards say, is in reality going to the Magistrates Court and pleading guilty or not guilty. It is a crime…….It seems tempting for the government to lump all the functions and powers into one government body and one silo and have a one-stop shop, but you cannot treat regulation of the housing industry like some vertically-integrated business. It's not that easy and it won't work. What*

[12] Ferguson, Hansard, 2 October 2012, .22-23

we need is specific separation of those roles and I think it's a lot more complex than Workplace Standards appreciates. We don't want to see the legislation fail or be ineffective for a legal or practical reason. The primary check and balance here is with the Parliament. This is where we need to get it right. We will do our utmost to make sure that if something is not right it won't get through. We can't support something that's going to fail the market.

***CHAIR** – What would happen if this became law? As currently proposed, eventually matters would go to the Supreme Court and a Supreme Court judge would likely be critical. He would look at all the stuff that happened before it got there –*

***Mr CLUES** – I think it would be a situation where 90 per cent of time Workplace Standards would be dealing with small builders and they will have a field day with them because it will be a small dispute and Workplace Standards will manage it and the builder will have to wear it sweet because he doesn't have the resources to fight it.*

Where Workplace Standards and the government ought to be really concerned is where it becomes a very complex matter and you're dealing with a big builder who's not to just be sledge hammered into this. Workplace Standards will make a decision because they don't have the judicial and technical expertise to get the decision right it will be the government who will wear the cost of having erred in their decision and because they do not have the judicial or technical competence to deal with the matter and instead of dealing with a small builder who is going to roll over and take the kicking they're going to deal with someone of some substance who is going to hire a good QC and sue the government for setting up a pretty dodgy-looking dispute resolution process in the first place.[13]

***Mr CLUES** – …….If this Committee or the lower House wanted to do the industry a great service it would come up with a dispute resolution process that works, is independent, has the skills and*

[13] Ferguson/Clues, Hansard, 2 October 2012, p23-24

talents needed to expedite it well, and that industry has confidence in and wants to engage with. I know that when Michael Kerschbaum appears before you today he will say the same thing. We would love nothing better than when a building dispute hits our desk to be able to refer them off to a process we have confidence in and say, 'Go and get it sorted out and the cards will fall where they may', because we have confidence that the people administering that process are independent and have the judicial and technical expertise to make the right call. At the moment this is absent from this process and the only alternative is the court system, which is also timely and costly.[14]

6.16 The Committee also heard evidence from Master Builders Tasmania, who provided the following comments on this issue:

I guess we share HIA's concerns about Workplace Standards being in charge of the whole kit and caboodle. It is more of an issue for us because you have builders' accreditation sitting within the same area and if the Director of Building Control was to wear a number of hats, which was proposed initially and may be the case, it would be a worry because our real concern is that if the issue gets past the mediation/conciliation stage and there has to be a determination made, if the same department is undertaking the initial conciliation and deciding what the final outcome is after an investigation, the builder is almost forced to play along. There will be very little appetite for the builder to push back on the system. This is effectively the same department and potentially the same person who is looking at their professional conduct issues. So we have some concerns about it.[15]

7 RESPONSE OF WORKPLACE STANDARDS

7.1 The Committee heard evidence from Workplace Standards Tasmania in relation to the concerns expressed

[14] Clues, Hansard, 2 October, p.21
[15] Kerschbaum, Hansard, 2 October 2012, p32-33

by the building industry on the proposed dispute resolution model prescribed in the Bill.

7.2 It was acknowledged that there needed to be a degree of separation of powers, however, where that separation needed to exist was where Workplace Standards Tasmania differed in their view from that of the building industry.

7.3 Workplace Standards Tasmania's view was that this separation would be present in the proposed arrangements, for two reasons: there is the capacity for a decision made under the dispute resolution model to be challenged in the Resource Management and Appeals Tribunal (RMPAT); and the Minister has the power to appoint a person, from outside Workplace Standards Tasmania if they so choose, as the Building Disputes Commissioner. Mr Roy Ormerod, General Manager, Workplace Standards Tasmania, provided the following evidence in support of this view:

> *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…….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.*[16]

***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.*[17]

7.4 Workplace Standards Tasmania also acknowledged there may be a need for the Building Disputes Commissioner to be appointed from outside that organisation:

……..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.*

[16] Ormerod, Hansard, 19 November, p.2
[17] Ormerod, Hansard, 19 November, p.4

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.*[18]

7.5 Workplace Standards Tasmania also recognised that there may be some perception of bias if the Director of Building Control was also the Building Disputes Commissioner. However, it did not expect that this issue would manifest itself once the dispute resolution system was implemented. Under questioning the following exchange took place:

[18] Ormerod, Hansard, 19 November, p.2-3

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 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.*[19]

[19] Ormerod,/Shepherd, Hansard, 19 November 2012, p.7-8

8 FINDINGS

8.1 The Committee finds that for any new building dispute resolution process to be successful it will need to have the general support of the building industry.

8.2 The Committee finds that the building industry holds deep and genuine concerns for a new dispute resolution process which would see any final arbitration activity carried out by the same person who conducted the conciliation activity.

8.3 The Committee finds that the building industry also holds significant and legitimate concerns regarding the independence of between the building accreditation process and the building dispute resolution process due to the apparent conflict of interest that may arise with respect to the Director of Building Control also potentially fulfilling the role of Building Disputes Commissioner.

8.4 The Committee finds that the building industry is also strongly requesting that any person who conducts an arbitration process should possess expertise and knowledge of building and construction or related matters and experience in applying the principles of natural justice and procedural fairness.

9 RECOMMENDATIONS

9.1 That the Bill be amended to provide that:

(a) The Building Disputes Commissioner is not to be, nor should this person have their powers delegated to:

- The Director of Building Control; or
- Any officer within Workplace Standards.

(b) The Building Disputes Commissioner is to have expertise in one or more of the following areas:

- Arbitration;
- Natural justice and procedural fairness;
- Building and construction principles; or
- Engineering principles.

(c) (i) The Building Disputes Commissioner be able to appoint any specialist consultant to assist in arriving at a determination; or

(ii) 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.

Parliament House
HOBART
6 March 2013

Rene Hidding M.P.
CHAIR