

DRAFT SECOND READING SPEECH

Hon. Adam Brooks MP

Residential Building Work Contracts and Dispute Resolution Bill 2015

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Madam Speaker

Consumer confidence for investing in the building industry is very important, and a quick and cost effective solution for resolving contractual disputes will be welcomed by home owners and contractors alike.

The purpose of this Bill is to introduce measures to improve the quality of contracts for the performance of residential building work and to assist parties to resolve disputes concerning residential building contracts.

The current processes available for resolution of disputes is to take the matter to Court – this can be costly to all parties and invariably result in delays and most often a breakdown in the relationship between residential owners and their builders.

Sometimes the owner is left without a home they can occupy for a long period of time or the builder is presented with the prospect of losing their livelihood should they not be able to cover the costs of the litigation. Both of these scenarios have been the reality for owners and builders in recent times.

This Bill provides the framework to reduce the chance of a dispute, by better defining the contract and the relationship between the parties and the framework for resolving disputes quickly and at a low cost should they occur – put simply it is a Bill which reduces red-tape by reducing the need to resort to litigation.

Madam Speaker, the former Government removed the requirement for Housing Indemnity Insurance some years ago. However, in doing so consumers were left with little choice but to seek redress through the Courts – resulting in considerable costs to both the consumer and the builder - this Bill brings back balance and provides a low cost alternative to the Courts.

This Bill will provide simple mechanisms for determining:

- what residential building work contracts must contain;
- how contracts are entered, and how they may be varied after signing; and
- the rights given to owners when the residential building work is completed.

Significantly, it also provides the means for parties to resolve contractual disputes through:

- free, voluntary mediation; and/or
- adjudication by expert panel.

It represents the most substantial reforms of consumer building law since 1992.

It balances the requirements of consumers and building contractors, with minimal intrusion by the government into private contractual arrangements.

The Bill replaces the out-dated *Housing Indemnity Act 1992* that no longer serves the needs of either consumers or the building industry.

This new Bill is one part of a package of legislation resulting from the Building Regulatory Framework Review initiated last year that will also include:

- amendments of the *Occupational Licensing Act 2005*;
- amendments of the *Building and Construction Industry Security of Payment Act 2009*; and
- a new Building Bill that will replace the *Building Act 2000*.

This package is also part of the government's comprehensive reform package to reduce red tape and excessive regulation. It also includes complementary reforms to streamline the planning approval process.

The package which this Parliament will be asked to examine during the debate on this and the other Bills I am foreshadowing will make it easier to build in Tasmania; the level of regulation will match the risk.

We will seek to do away with the arrangements that currently exist where the regulatory oversight for a shed is the same as that for a 10 storey building. We will focus more on making sure we have quality buildings that are safe than on the need to have a particular form or permit. Under the existing Framework, it can at times appear that the paperwork has become more important than the building outcome.

In addition, we will propose that all building and construction licensing be dealt with by a single piece of law instead of having it spread across two Acts, this will result in a Building Bill that is about making sure that buildings meet contemporary standards rather than being partly about permit processes and partly about the standard of building practitioners – it will not only be easier to build in Tasmania, it will be easier to understand the law behind the process.

Madam Speaker, this Bill has been widely consulted on and is supported by industry stakeholders. The proposed processes have undergone scrutiny by four Reference Groups established to guide the reform process during the Building Framework Review.

The introduction of reforms for the regulation of residential building contracts is long overdue.

As I have indicated, the reforms embrace the Government's red tape reduction goals as this particular Bill will help to keep disputes out of the courts.

Signing a contract for constructing a home may be the greatest financial expenditure that most people will make in their life. Therefore, consumers will expect that the government will provide laws that establish clear rights and responsibilities of the parties involved in the building process.

Building contractors will also benefit from the certainty that regulation of contracts brings – it establishes a level playing field in a competitive market.

It also provides the requirement to resolve contractual disputes quickly, easily and at a low cost.

Other States and Territories have contemporary legislation dealing with residential building contracts and disputes, but Tasmania has been left behind.

The previous government introduced a Bill in 2012, called the Residential Building Work Quality (Warranties and Disputes) Bill, to try to address these deficiencies. However their Bill was not supported by industry groups, who raised their concerns with specific issues including:

- the Bill did not balance the needs of both consumers and building contractors;
- it contained a bureaucratic approach by the regulator; and
- building contractors were locked out of a dispute resolution process.

As a result, that Bill was rejected by the Legislative Council in September 2013.

The government has taken note of the issues that arose in 2012, and the new Residential Building Work Contracts and Dispute Resolution Bill 2015 will be very different, as it carefully balances the requirements of consumers and building contractors.

Madam Speaker, I will now turn to the contents of the Bill.

The Bill provides for the regulation of residential building contracts between an owner and a building contractor, for work costing \$20,000 or more.

The Building Contractor is the person who contracts to manage or carry out the residential building work.

The Owner is the person who benefits from the contract, and includes a land owner or a lessee.

Madam Speaker, it is not always possible to specify precisely the exact cost of some parts of building a home at the time of signing a building contract, the Bill allows for these items to be dealt with by a provisional sum and allows for the building contractor to take advice on these items from others. For instance, the designer may specify these items and if so the building contractor could reasonably rely on the designers estimates.

This is an area of disputation which arises regularly as there can be situations where the builder estimates the cost of say an oven based on what is available from Harvey Norman, whereas the Owner has an expectation of what would be available from a specialist importer of German Technology. The Bill through the consumer guide will encourage a dialogue before the contract is signed.

I am aware of one residential building company that is very specific with clients and presents them with costs based on packages, for example the Bronze package is a good quality standard package, the silver package gets you better quality appliances and so forth through to Gold and

Platinum packages. There is little room for doubt on the owner's part about what they are contracting to receive, and as a result concerns are minimised.

The residential building consumer guide specified in the Bill will include a template which will assist builders estimating these items and assist them in having the conversation about these items with the consumer.

The Bill will cover residential building work on a detached house or a sole occupancy unit, and associated outbuildings, such as a garage, shed, swimming pool or deck. It includes residential improvements including driveways, fences, retaining walls and landscaping.

Also included is the building work performed with a view to the sale or lease of land and building packages by "speculative builders", or the prefabricated kit homes constructed off-site and moved to the owner's site. These prefabricated homes are included as they must be built to the standard required in the National Construction Code. They are already included in similar legislation in Victoria, New South Wales and Queensland.

The broad definition of "residential building work" in the Bill means that works that are associated with a contract for performing residential building work are also included. Some examples are earthworks as preparation of land for building, and plumbing or electrical work associated with construction of a residential building.

This Bill does not apply to contracts for consultancy services, design work or the certification of building work.

Madam Speaker,

Entering a building contract involves a significant financial outlay for consumers. It is important that they are informed of their rights and are given the opportunity to consider the implications of entering a building contract.

I will outline some safeguards in the new Bill.

First, the minimum requirements for Residential Building Contracts will now be regulated for the first time with specific clauses mandatory in every contract over \$20,000. The standardised contracts developed by builder or architectural associations can continue to be used, as long as they contain these mandatory clauses.

There will be a Residential Building Consumer Guide, that a building contractor must provide to their prospective clients before signing the contract or starting works. The Guide will inform owners of their rights under this new legislation. It will be published by the government and provided to builders to give to their clients, and published on a website.

An innovation introduced in the new Bill is a "Cooling Off" period of five business days after the owner's receipt of the signed contract. Within that time, the owner may re-consider their decision and advise the contractor that they wish to withdraw from the contract. An owner then does not have any further contractual obligations, but may have to pay the builder for their out of pocket expenses reasonably incurred to the date of the withdrawal.

Variations are alterations or omissions from what was agreed in the contract. However, they commonly result in cost-overruns and lead to disputes. Therefore the Bill requires that variations have to be recorded in writing by the parties, and the building work varied must not start until those statutory requirements are met. A new contract price resulting from the variation will have to be calculated and agreed by the parties.

The Bill also provides for comprehensive mandatory consumer warranties that are implied into all residential building contracts, as to the fitness and quality of the building work, including suitability of materials and compliance with legal requirements. The requirement for warranties is similar to those that exist in the *Housing Indemnity Act 1992*, which will be repealed by this Bill.

As in the current Act the Bill provides for the statutory warranty to apply for six years from practical completion. Practical completion is when the builder gives notice and the work is completed. If an owner disagrees such as they allege defects that are minor or indeed not minor, then that is a contractual dispute, but the work is still regarded as having reached the stage of practical completion for the purpose of calculating the warranty period.

Where practical completion is not clear then the Bill provides a mechanism at clause 32 for calculating the commencement of the warranty period.

Clause 28 is a clause similar to that in operation in Queensland, New South Wales and Victoria and is crucial in defining the warranty a builder is giving to the owner where the builder is responsible for the final stage of the work leading to occupation.

In this clause we are not making the builder responsible for the certificate of occupancy, which is a limited check by a Building Surveyor on issues such as connection to sewerage, but the Bill is requiring the builder to warrant that they have built to the plans and the required standard. For instance, on final inspection the Building Surveyor cannot see whether or not the builder has fastened the plaster to the wall in accord with the standard, however if the plaster is not fixed properly and subsequently falls down the owner's occupancy is affected and the statutory warranty would apply.

Deposits and progress payments for work over the \$20,000 threshold are also regulated. The maximum deposit allowed is 10% where the contract price is between \$20,000 and \$50,000. Where the price is over \$50,000, the maximum deposit is then 5%.

If the value of the work performed off-site is more than 50% of the total contract price (for example, custom-made kitchen cupboards), the contractor can charge a 20% deposit.

Owners and building contractors are free to determine the number and timing of progress payments. But the amount of each payment must be related to the actual work performed. For example, the building contractor cannot claim more than 50% of the contract price, including the deposit, until at least 50% of the work has been completed.

Importantly, all of these consumer protections also provide protections for our builders – most homes in Tasmania are built by small businesses such as mum and dad firms and they also end

up having a large financial stake in getting the job completed, delays in sorting out vague contracts or vague variations can have a significant impact on the financial viability of the small builder – this Bill effectively serves to make it clearer what has been contracted, which should reduce the chance the project will go off the rails.

Madam Speaker, there may still be projects that go wrong. Providing a simple means of resolving contractual disputes has been a deficiency in Tasmanian building legislation for too long. While building contractors may use other legislation to claim payment for services, the consumer has currently had to resort to courts to settle disputes. That can lead to expensive and protracted proceedings for both the builder and the consumer, while the building project is halted.

Over the past two years an informal dispute mediation process introduced by the Director of Building Control has been very successful, with three quarters of all complaints regarding workmanship or building contractual issues successfully resolved.

This Bill therefore formalises and strengthens that process by giving the Director functions to encourage parties to settle their disputes by negotiation and mediation.

In this Bill, the parties to a residential building contract (either the owner or the building contractor) may lodge a dispute with the Director with a request that it be mediated. Participation in mediation is a voluntary process for both parties and will be provided free of charge. Lodging a dispute with the Director does not prevent the parties from seeking to use other means of resolving their disputes.

A mediation panel (of one or more persons) may be appointed by the Director to act as the mediator to help the parties to negotiate a settlement. A mediation panel member will usually be a person entirely independent of government, however where appropriate a State Service employee may be used.

The Director will not mediate disputes, but will issue practice directions to ensure consistency of approach.

Consistent with this Government's approach, the Director will consult relevant stakeholders and industry bodies in establishing the mediation panel and in creating any practice directions.

Madam Speaker, I make this statement on consultation by way of foreshadowing the Building Bill I will bring to this Parliament which will require the Director to establish industry reference groups and to consult with them in relation to her or his functions under that and related legislation.

The aim of mediation is to settle disputes. Parties should feel comfortable with that process, and not fear that participation could result in fines or a licence suspension. Therefore, the information divulged during mediation cannot be used in disciplinary proceedings against a licensed building practitioner.

Parties have 20 business days from the formation of a mediation panel to reach a settlement of their dispute.

If they reach a negotiated settlement, the Director may approve it, and it then becomes binding between the parties.

This approval step will be largely an administrative step where the Director will ensure that the Agreement is prima facie fair to each party and that the parties have not been coerced into an Agreement. The effect of the Director not agreeing is that the parties can either revisit the Agreement or decide they will continue with the Agreement, without the sign off of the Director.

There are times, however, when mediation may not be successful. If the relationship between owner and builder has deteriorated to the extent that a negotiated settlement is not possible, an owner can take steps to go through a more formal process.

Madam Speaker, the process I am introducing with this Bill is one that is designed to resolve disputes in a way that is fair to both parties and is not determined by the party with the deepest pockets. The outcome we're seeking is for genuinely defective work to be rectified, so that the owner may enjoy the residence into which they have invested a significant amount of money.

Too often, disputes end up in lengthy legal battles which benefit no one and cost time and money.

We're taking a more pragmatic approach by having the source of dispute assessed by a panel of experts with knowledge and experience relevant to the work in dispute.

This Bill allows an owner to lodge a Work Completion Claim with a building contractor, alleging breaches of a residential building work contract.

The Work Completion Claim will specify the work that must be completed and a Work Completion Date, which is a reasonable assessment of the date by which the work should be completed.

If the building contractor does not complete the work as specified, the owner will be able to lodge an application for adjudication with the Director of Building Control.

The Director of Building Control will then make a decision as to whether to accept or reject the application. The application may be rejected if the Director considers it to be a vexatious or frivolous application, or if the matter is already being considered in another jurisdiction, for example as part of a Security of Payments claim.

If the Director accepts the application, he or she can appoint an independent expert panel of one or more members to assess the application and make a determination. The panel will be drawn from a pool of experts including a builder, building surveyor, designer, architect, engineer, lawyer and any other expertise deemed relevant. Industry stakeholders will be

consulted regarding the individuals included in the pool to ensure a satisfactory degree of expertise and lack of bias.

Once the expert panel has been appointed, the Director will have no further involvement in the decision making – Clause 71(4) makes this clear.

Madam Speaker, the Director is effectively acting as a scheme administrator – ensuring that only those matters which are genuine disputes are dealt with, ensuring that an expert panel is available and providing a mechanism for an initial inspection should that seem likely to resolve the dispute without further cost and then handing over the dispute to the expert panel.

The Director will also endorse a guide to standards and tolerances to aid in dispute resolution – the guide will provide a basis for judging defective work – for instance cracking in concrete is common and is not always attributable to unsatisfactory work by the builder. Common causes of cracking include stress due to adjoining trees, movement due to changes to moisture levels from gardening activities etc. The guide will provide a basis for assessing whether the issue should be seen as attributable to the builder.

An expert panel cannot include the Director or his staff, although other state servants may be in the pool of experts. The use of other state servants takes into account the size of our market, for instance Mineral Resources Tasmania employs a number of geotechnical scientists who are used by industry for advice, these are the very people we would see as adding value to an expert panel dealing with a dispute involving soil classification. Industry Associations will be consulted in putting together the pool of experts who may then form an expert panel.

The panel can order the rectification of works or damages by making a formal order.

The cost of adjudication of the application will generally be shared equally by the owner and building contractor, however, the expert panel may make a decision to apportion the costs in other than equal share.

Adjudication does not replace the right of any of the parties to take the matter to a Court of relevant jurisdiction and indeed the adjudication may be subject to Judicial Review, however the experience of the similar Security of Payments adjudication process is that it has seen a marked reduction in litigation as it is seen as a valuable low cost alternative.

Madam Speaker,

Building a home is a significant investment and its complicated. For many people the contracts and processes involved are new and as such it needs to be as clear and simple as possible.

The Residential Building Work Contracts and Dispute Resolution Bill 2015 will help to avoid disputes and prevent the common pitfalls when entering building work contracts. If disputes do occur, this Bill provides simple, fast and low-cost processes for resolving the dispute and ensuring that building work is completed to the agreed standard.

I commend the Bill to the House.