

2012

(No. 34)



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PARLIAMENT OF TASMANIA

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

**Interim Report No.3**

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

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MEMBERS OF THE COMMITTEE

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

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# **1 APPOINTMENT & TERMS OF REFERENCE**

- 1.1 Details in relation to the Committee's Appointment and Terms of Reference are set out in the Committee's two previous Interim Reports.
- 1.2 The Committee's two previous Interim Reports dealt with all matters before the Committee with the exception of dispute resolution in the building industry.
- 1.3 In its Interim Report No.1, tabled on 22 November 2011, the Committee relevantly found as follows:
  - 1.3.1 *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.*
  - 1.3.2 *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.*
  - 1.3.3 *The Committee finds that interstate systems of dispute resolution should be investigated for their efficacy when developing a new process in Tasmania.*
  - 1.3.4 *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.<sup>1</sup>*

- 1.4 On 29 March 2012, the Committee tabled its Interim Report No. 2, which dealt with matters unrelated to dispute resolution in the building industry.

## **2 CONDUCT OF THE INQUIRY**

- 2.1 Since the Committee's Interim Report No. 2, the Committee has met on 4 occasions and has heard evidence from a number of witnesses in relation to dispute resolution in the building industry.
- 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 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.

## **4 COMMENTS ON THE BILL**

- 4.1 The Committee has considered the evidence received to date in relation to the Bill to date.

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<sup>1</sup> Select Committee on the Costs of Housing, Building and Construction in Tasmania, Interim Report, 22 November 2011, p142-143

4.2 The Committee is concerned that the following important aspects of the Bill do not have the support of the building industry:

4.2.1 Investigation Powers (Part 6); and

4.2.2 Appointment of Building Disputes Commissioner (Clause 81).

4.3 The Committee heard evidence from the Housing Industry Association and Master Builders Tasmania. Both indicated in principle support for an improved dispute resolution procedure in Tasmania, but noted that the above aspects of the Bill did not have the support of industry.<sup>2</sup>

4.4 The industry concerns about the Investigation Powers are summarised in the following evidence from the Housing Industry Association:

*The next section which really rings alarm bells for us is part 6 which goes to investigations. The powers under this Act – I haven't read anything like it. Basically, what it's saying is that the building commissioner can require a person to answer questions, provide any information or document; a workplace standards officer can enter and remain on site at any time; they can inspect anything on site; they can break and open any shed, cupboard, box or container which the officer deems relevant for the purposes of their investigation; they can move or remove a building or a structure; they can conduct tests; they can take photos; they can operate on mechanical, electrical or other equipment that*

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<sup>2</sup> Clues, Hansard, 2 October 2012, Kerschbaum, Hansard, 2 October 2012.

*might be on site; they can seize and retain anything that appears to indicate an offence....If you're a vice squad that's managing a drug cartel then I think that's appropriate but we're talking about mum and dad builders who knock up homes and you're talking about disputes over things like waterproofing or poor cabinetwork. I'm not quite sure where you need powers that are equivalent to a vice squad<sup>3</sup>*

*What we would say is that part 6 is a sledgehammer approach in terms of investigations. It does not sit well with industry but it is consistent with other elements of the Bill, and that give us concerns as to the ethos or the mentality behind it. It is not looking as though it is an equitable dispute resolution process. This is looking very much like a bash-a-builder exercise.<sup>4</sup>*

4.5 In relation to the appointment of the Building Dispute Commissioner, the Bill provides as follows:

*(1) The Building Dispute Commissioner is to be –*

*(a) the person who is the Director of Building Control; or*

*(b) if another person is appointed under subsection (2), that other person.*

*(2) Subject to and in accordance with the State Service Act 2000, a person may be appointed to be the*

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<sup>3</sup> Clues, Hansard, 2 October 2012, p10-11

<sup>4</sup> Clues, Hansard, 2 October 2012, p15

*Building Dispute Commissioner for the purposes of this Act.<sup>5</sup>*

- 4.6 The building industry's concerns in relation to this matter are summarised in the following evidence from the Housing Industry Association:

**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.'*

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<sup>5</sup> Residential Building Work Quality (Warranties and Disputes) Bill 2012, clause 81

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.

**Mr BOOTH** – Is it appellable beyond that though?

**Mr CLUES** – There are rights of appeal but what we would argue is that you shouldn't have to go through all of that process to get to an appeal....

**Mr BOOTH** – It is a prerequisite that you go through their process before you go to court.

**Mr CLUES** – Correct. What we are saying is that that is not acceptable.

**CHAIR** – It is the reverse of what this committee has expressed concerns about in the past – that for minor matters people are being forced to the Supreme Court. We do want a smaller, cheaper, justice by sundown process for them but for the big end of town, clearly, that belongs in the big end – the Supreme Court.



**Mr CLUES** – 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.<sup>6</sup>

## **5 FINDINGS**

- 5.1 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.
- 5.2 Through hearing further evidence and undertaking further consideration of these issues, the Committee could make further recommendations which would result in an improved

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<sup>6</sup> Clues, Hansard, 2 October 2012, p18-20

Bill which addresses the above concerns and has the support of the building industry.

## **6 RECOMMENDATION**

- 6.1 The Committee recommends that the Bill be formally referred to the Committee for inquiry into and report thereupon.

**Parliament House  
HOBART  
20 November 2012**

**Rene Hidding M.P.  
CHAIR**