

**THE DOMESTIC BUILDING CONTRACTS BILL 1999
AND THE QUEENSLAND BUILDING
TRIBUNAL BILL 1999**

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PORTFOLIO:	Minister for Fair Trading
HANSARD REFERENCE SECOND READING:	Weekly Hansard, 29 October 1999, p 4610-13.

1. INTRODUCTION

The building industry is one of the foremost industries in Queensland. In 1997-1998, building works to the value of more than 7 billion dollars were approved in Queensland: residential building approvals accounted for more than half of that figure.¹ The Queensland Building Tribunal in the same period received 945 applications relating to domestic building disputes and disciplinary and review proceedings arising under the *Queensland Building Services Act 1991* (Qld).² The QBT has forecast that this figure could increase to an estimated 1355 applications in the current financial year.³

On 2 March 1999, the Honourable J C Spence MLA, Minister for Aboriginal and Torres Strait Islander Policy and Minister for Women's Policy and Minister for Fair

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¹ Queensland. Statistics Queensland. 'Building approvals: Type by number and value, Queensland 1985-1986 to 1997-1998', Australian Bureau of Statistics, *Building Approvals, Queensland*, Cat No 8731.3, downloaded 16 November 1999, <<http://www.statistics.qld.gov.au/stab/table110.htm>>

² Queensland Building Tribunal, *Annual Report 1997-1998*, p 5.

³ Queensland Building Tribunal, *Annual Report 1998-1999*, p 19.

Trading announced the government's **Better Building Industry Package** which proposed changes to the existing regulatory mechanisms for the building industry contained in the *Queensland Building Services Authority Act 1991* (Qld)⁴.

The first part of the reform process was the introduction of reforms in the areas of licensing, unlicensed contracting, audit powers, five year insolvency bans and liability of executives and directors by the *Queensland Building Services Authority Amendment Act 1999* (Qld) which commenced on 1 October 1999. The second and final part of the reform process is to be effected by two related Bills which were introduced into the Legislative Assembly on 29 October 1999: the Domestic Building Contracts Bill 1999 and Queensland Building Tribunal 1999.

The existing statutory arrangements relating to domestic building contracts and the Queensland Building Tribunal are currently located in the *Queensland Building Services Authority Act 1991* (Qld).

The Domestic Building Contracts Bill 1999 removes the regulation of domestic building contracts to a discrete legislative environment and provides for more comprehensive contractual arrangements between domestic building consumers and building contractors. The Queensland Building Tribunal Bill 1999 re-establishes the Tribunal under its own legislation, broadens its current jurisdiction and powers and provides the Tribunal with a greater range of procedures to resolve building disputes within its jurisdiction.

This Legislation Bulletin briefly discusses the Domestic Building Contracts Bill 1999 in the context of consumer protection legislation. It also examines some of the key provisions, and notes changes to the current legislation where appropriate. The *Domestic Contracts Act 1995* (Vic), on which the Queensland Bill is based, is also briefly discussed.

The Queensland Building Tribunal is the main forum for resolving domestic building disputes in Queensland. It also has jurisdiction to review decisions of the *Queensland Building Services Authority Act 1991* (Qld) and to conduct disciplinary and debt recovery hearings on applications brought by the Queensland Building Services Authority (QBSA). This Bulletin, however, will focus primarily on those aspects of the Queensland Building Tribunal Bill 1999 relating to its general jurisdiction and its particular jurisdiction in the case of building disputes. The Bulletin concludes with a brief comparison of tribunals of related jurisdiction in Victoria and New South Wales.

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⁴ Hon JC Spence MLA, Minister for Aboriginal and Torres Strait Islander Policy and Minister for Women's Policy and Minister for Fair Trading, 'Solid foundation for a better building industry', *Ministerial Media Statement*, 2 March 1999.

2. THE BUILDING INDUSTRY REVIEWED: THE SCURR REPORT AND THE IMPLEMENTATION STEERING COMMITTEE REPORT.

The review of regulatory arrangements for the building industry in Queensland has been ongoing for some years. This process has involved extensive consultation with industry stakeholders and other interested parties.⁵ Part of the earlier review process is discussed here.

In September 1996, the Scurr Report on the Inquiry into Security of Payment within the Building and Construction Industry was submitted to the Government. The Scurr Report was never publicly released. The Government subsequently released a Discussion Paper in October 1996 which contained a series of 99 recommendations which had received the unanimous agreement of all remaining industry and consumer nominees involved in the Inquiry.⁶ The recommendations proposed changes to licensing, contracts and dispute resolution.

In response to requests for comment on the Government Discussion Paper, key industry stakeholders proposed the formation of an industry led committee to further develop and implement the reforms. The Government adopted that proposal and appointed the Implementation Steering Committee (ISC) to provide detailed advice to the Government on how best to implement the broad thrust of the recommendations.⁷

The ISC released its Report entitled *Securing Our Industry's Future* in October 1996. The **Summary of Reforms** from the ISC Report is contained in **Appendix A** to this *Bulletin*.

Some of the particular recommendations made by the ISC in relation to contract requirements, dispute resolution procedures and consumer protection in the building sector included:

- The requirement for all contracts in the building sector including variations to contracts to be in writing and set out the scope of work to be done, time for completion and amount to be paid.

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⁵ *Explanatory Notes*, Domestic Building Contracts Bill 1999, pp 1, 8; *Explanatory Notes*, Queensland Building Tribunal Bill 1999, pp 2, 11.

⁶ Queensland, *Security of Payment for Subcontractors in the Building and Construction Industry: Discussion Paper*, October 1996.

⁷ Implementation Steering Committee. *Securing our Industry's Future, Report of the Implementation Steering Committee on Security of Payment in the Building and Construction Industry*, October 1997, pp 1.

- The provision in contracts for prescribed payment periods and progressive payment of variations to ensure prompt payment.
- A standard contractual requirement for the resolution of disputes through a newly created Dispute Resolution Unit or court processes unless the parties otherwise agree to use another dispute resolution approach, including arbitration.
- The introduction of a two-stage dispute resolution model incorporating a non-judicial stage as the first phase, underpinned by a judicial phase with a particular focus on building matters. The ISC envisaged the creation of a Dispute Resolution Unit within the QBSA to conduct the non-judicial side of the process coupled with the replacement of the Queensland Building Tribunal.
- A standard industry plain language domestic building contract.

3. THE DOMESTIC BUILDING CONTRACTS BILL 1999

3.1 CONSUMER PROTECTION

Consumer protection is a predominant objective of the Domestic Building Contracts Bill 1999. According to the Explanatory Notes, the Bill is “*designed to help consumers avoid pitfalls in procuring building services*”.⁸

Consumer protection laws serve as an important underpinning or safety net for the consumer. Goldring, Maher and McKeough, in their text, *Consumer Protection Law*, explain the rationale underlying consumer protection laws:

The majority of traders with whom the consumer deals are reputable and honest.. In most cases, the consumer will be satisfied with what they get. Even if there is cause for dissatisfaction with the goods and services acquired, in most cases the supplier, even if not at fault nor subject with a legal liability, will try to assist. The need for legal regulation of the activities of those who deal with consumers arises from the small minority of unscrupulous or reckless people whose desire for short-term profit overwhelms their responsibility for the goods and services they provide. To some extent it flows also from an acceptance of the inequality of power in economic terms of the supplier of goods and services, or the person responsible for goods and services, if that person is not the immediate supplier as opposed to the consumer. Rights must be created by law and conferred on the consumer⁹.

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⁸ Explanatory Notes, Domestic Building Contracts Bill 1999, p 1.

⁹ Goldring J, Maher LW and McKeough J, *Consumer Protection Law* (4th Ed), The Federation Press, Sydney, 1993, pp 8, 9.

Most consumers come to a building transaction – the largest financial transaction they will ever make – with no experience of complex negotiation and no first hand knowledge of building technology or processes.¹⁰ It is observed in the Explanatory Notes to the Bill that:

*For most consumers, signing a large building contract for a new home, extensions or renovations will be something experienced once or twice in a lifetime. For building contractors, it is an everyday occurrence. This disparity in knowledge and understanding of contractual principles between the parties frequently disadvantages consumers.*¹¹

The Domestic Building Contracts Bill 1999 “*seeks to address these market inequalities*”¹² by placing the bargaining power of building contractors and their consumers - building owners - on a more equal footing. This is to be achieved by limiting the freedom of contract between the parties in favour of statutory intervention in the bargaining process.

This rationale is reflected in the objectives of the Domestic Building Contracts Bill 1999, as stated in **clause 3**:

- To achieve a reasonable balance between the interests of building contractors and building owners; and
- To maintain appropriate standards of conduct in the building industry.

3.2 GENERAL

The Domestic Building Contracts Bill 1999 replaces Part 4 of the *Queensland Building Services Authority Act 1991* (Qld), which currently regulates domestic building contracts.

The Bill applies to domestic building contracts over \$3,000 for the construction of single detached dwellings and duplexes and the repair, renovation or maintenance of any home – including units in high-rise buildings. The range of building contractors covered under the Bill includes builders and trade contractors such as painters, plumbers and carpenters. It should be noted that, in a number of instances under the Bill, offences are prescribed for non-compliance on the part of the building contractor with the mandatory contractual requirements contained therein.

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¹⁰ Trade Practices Commission, *Final Report of the Trade Practices Commission Review: Home building – consumer problems and solutions*. November 1993, p 33.

¹¹ *Explanatory Notes*, Domestic Building Contracts Bill 1999, p 1.

¹² *Explanatory Notes*, Domestic Building Contracts Bill 1999, p 1.

3.3 CONTRACTS

The current legislation regulating domestic building contracts is less intricate in concept and operation than the regime provided for under the Bill. At present, a contract for work exceeding \$3,000 in value¹³ must be reduced to writing and have a sufficient description of the building work and building contractor's details and include matters such as the contract price or cost estimates.¹⁴ Subject to certain provisos, damages are available for non-compliance with the completion time specified in any domestic building contract.¹⁵

Although the Domestic Building Contracts Bill 1999 does not create a statutory contract as such, it prescribes numerous aspects of the contractual bargain. For example, the Bill imposes a range of formal requirements for domestic building contracts and stipulates a list of conditions that must form part of each contract. Additional requirements are also specified for major domestic building contracts.

Clause 26 requires that all contracts must be in writing, or put into writing within 5 business days after being entered into, before any work is commenced under the contract. Failure to do so is an offence.

Clause 27 sets out the formal requirements that must be contained in a domestic building contract to which the proposed Act applies. In addition, **clauses 28** and **29** define the matters that must be included in a contract, including:

- Building contractor's licence details
- Starting date if known, or how the date is to be decided if not known
- Completion date or the number of days required to finish the work once it is started
- Contract price or in the case of a cost plus contract, how the contract price is to be calculated
- Detailed description of the work to be done under the contract
- Definition of key words and phrases

The building contractor must give to the consumer a **contract information statement**, approved by the QBSA, containing general advice about consumer rights and dispute resolution procedures. This statement must be provided at the time of entering the contract or within five business days after the contract is entered into **clauses 40, 99**.

The building contractor must give to the consumer:

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¹³ *Queensland Building Authority Regulation 1992* (Qld), s 4.

¹⁴ *Queensland Building Authority Act 1991* (Qld), ss 58, 60, 61.

¹⁵ *Queensland Building Authority Act 1991* (Qld), s 63.

- a copy of the signed contract or in the case of residential construction work, a copy of the contract imprinted with the building contractor's licence card: **clauses 36 and 37.**
- any contract related documents received from an assessment manager or a service provider such as an electrician or plumber: **clause 39.**

A contract must be signed by the building contractor and the building owner (or their authorised agents). Failure to sign renders the contract of no effect against the owner: **clause 30.**

Under a "cost plus" contract, the building contractor must make reasonable allowances for delays caused by inclement weather or the occurrence of non-work days, where such delays are a reasonable likelihood: **clause 33.** If delays are likely to arise from other causes and the builder believes it will not be possible to calculate the period of likely delay that fact must be stated in the contract along with the general effect the delay is likely to have on the progress of the work: **clause 34.**

3.4 WARRANTIES

Statutory warranties are terms that are implied by a statute into a contract regulated by that statute. In the context of consumer transactions, these warranties generally place obligations on a supplier of goods or services to perform a contract for the supply of goods or services to a particular standard, and cover matters like the quality of the work performed or goods supplied under the contract.

Statutory warranties are not provided for in the current legislation regulating domestic building contracts.

The Bill provides a series of statutory warranties to people who contract under domestic building contracts - most of these apply to all contracts. A provision to contract out of any statutory warranty is void and of no effect: **clause 50.**

Statutory warranties implied into every regulated contract are:

- Suitability of materials: **clause 42.**
The suitability of the material for its purpose is based on relevant industry standards and manufacturer's specifications. The warranty only applies if the building contractor responsible for carrying out the work supplies the materials. It does not apply to materials supplied by the building owner or specified by an architect. Materials supplied by the builder that are specifically nominated, without prompting or steering, by the owner are also not covered.
- Compliance of the contract work with legal requirements: **clause 43.**

- Contract work carried out with reasonable care and skill: **clause 44**.

There are also other particular warranties that are specific to limited classes of contract:

- Suitability of a detached dwelling or home for occupation: **clause 46**.
- Contract work performed in accordance with any contract plans and specifications: **clause 45**.
- Contract work on a cost plus contract with no stated date for completion to be carried out with reasonable diligence: **clause 47**.
- Calculation of any provisional sum provided for in a regulated contract with reasonable care and skill: **clause 48**

The warranties continue to have effect even if the building is sold, and are enforceable by future owners except where the breach of the warranty was known to the new owner at the time of transfer: **clause 49**. The warranties run for a period of 6 ½ years after the completion of the work, or if the work is not finished, the stated completion date or period. In proceedings for a breach of an implied statutory warranty, it is a defence for the contractor to prove that the deficiencies complained of arose from instructions given by the consumer to the contractor contrary to the contractor's written advice: **clause 51**.

3.5 CONTRACTUAL RESTRICTIONS

A number of statutory prohibitions relating to domestic building contracts are contained in **Part 5** of the Bill.

3.5.1 Licensing

A building contractor cannot enter into a regulated domestic building contract unless he/she holds the appropriate license for that kind of domestic building work: **clause 52**.

3.5.2 Prime Cost Items and Provisional Sums

In its 1993 Report on the Home Building Industry, the Trade Practices Commission noted that price increases in contracts could occur for a number of reasons, including the inappropriate estimate of costs for prime cost items and provisional allowances. The Commission further noted:

Many price increases are, of course, a legitimate response to changes in circumstances. On the other hand, it is apparent that builders sometimes intentionally quote unrealistically low in order to secure a job, making subsequent

*price increases inevitable. Consumers are often not in a position to judge whether a builder's original quote is a reasonable estimate of the price.*¹⁶

Many owners are not aware that the quoted contract price contains allowances for certain items that are estimates only. Included in these estimates are allowances made for prime cost sums and provisional sums. In its Report, the Trade Practices Commission noted, in some instances, the use of clauses concerning provisional sum and prime cost items to substantially increase the contract price. The Commission recommended the inclusion in such clauses of elements such as: defined terms, schedules showing sums for each item and the agreement of the builder to provide the consumer with documents to evidence the actual cost of the work.¹⁷

Clause 57 regulates all price change contractual provisions other than cost escalation clauses. Such items include prime cost items and provisional sums. All contracts containing price change clauses must contain a warning near to the first reference to the contract price that the price may be changed by the relevant clauses. The contract will otherwise be enforceable only so far as the contract price is decreased. Reasonable estimates for prime cost items and provisional sums must be stated in the contract: **clause 59**. Contracts providing for prime cost items and provisional sums must contain a separate schedule stating cost estimates and breakdowns of those items.

3.5.3 Payments Under The Contract

Deposit

The deposit under a regulated building contract is limited to no more than 5% (or 10% if the contract is under \$20,000) of the contract price: **clause 64**.

Progress Payments

In the case of progress payments for contracts without designated stages, such as cost-plus contracts and most trade contracts, payment is limited to an amount directly related to the work progress, unless the parties contract out of the requirement in a way prescribed under a regulation: **clause 65**.

In the case of progress payments for designated stage contracts, payments are set as maximum percentages of the original contract price for contracts to build a dwelling: **clause 66**.

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¹⁶ Trade Practices Commission, p 22.

¹⁷ Trade Practices Commission, pp 35, 36.

Completion payments

Clause 67 prohibits contractors from demanding a completion payment under a contract unless practical completion has been reached and an amount for minor defects or omissions is deducted for the cost of remedying any defects.

Payment orders

If the court finds a contractor has committed an offence relating to payments and received an overpayment of money, the court can make a payment order for the contractor to repay the amount with interest, in addition to imposing a penalty for the offence: **clause 69**. If the contractor does not comply with a payment order, the building owner can terminate the contract by giving notice in writing: **clause 70**. In that case, the contractor is entitled to recover a reasonable amount for the work done under the contract prior to termination: **clause 71**.

3.6 COOLING-OFF PERIOD

One of the new consumer protection provisions incorporated in the Bill is a cooling-off period. A cooling-off provision is designed to give consumers, in some situations, the statutory right, exercisable within a stipulated period after entering the contract, to opt out of the contract without having to ascribe any reason or establish any good cause for so doing.¹⁸

The Bill provides for a cooling-off period of five business days, during which the building owner has the right to withdraw from the contract. The cooling-off period commences from the day on which the building contractor provides to the building owner a copy of the signed contract or the approved contract information statement, whichever is the later: **clause 72**.

However, the cooling-off period does not apply if:

- The building contractor and building owner previously entered into a contract for substantially the same work; or
- Prior to entering into the contract, the building owner received formal legal advice about the contract; or
- When, or after the contract is entered into, the building owner tells the building contractor that he/she obtained formal legal advice about the contract prior to entering the contract: **clause 73**.

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¹⁸ Goldring J, Maher LW and McKeough J, p 410.

“**Formal legal advice**” in this context means paid advice obtained from a qualified practicing lawyer: **clause 73(4)**. This limited definition is meant to rule out casual advice given, for example, by a friend who happens to be a lawyer.¹⁹

If the contract did not contain the required notice about the cooling-off period, the building owner can withdraw from the contract at any time within 7 days of becoming aware that the contract should have contained the notice: **clause 74**. This provision was included to ensure that contracts contain the required notice. According to the Explanatory Notes, the provision complements the general cooling-off provision by recognising that a cooling-off period is ineffective unless the owner knows about it and is able to take advantage of it.²⁰

If an owner withdraws in the cooling-off period, the contractor is entitled to keep \$100 in addition to any reasonable out-of-pocket expenses: **clause 76**. Where the owner withdraws from the contract for failure under the contract to warn of cooling-off period rights, the building contractor is entitled to receive a reasonable amount for the work done up to the time of withdrawal but not more than was payable under the terminated contract: **clause 77**.

A similar provision is contained in the *Domestic Contracts Act 1995* (Vic).

3.7 VARIATIONS OF CONTRACTS

Under the current legislation, variations of domestic building contracts exceeding \$3,000 in value must be in writing and signed by the parties. A variation that does not comply with this section is not enforceable by either party.²¹

Clause 79 of the Bill specifies that all contract variations agreed to between the building contractor and owner must be put **in writing within the shortest practicable time** and, if the variation is for additional work, before such work is done. This requirement does not apply, however, where the variation is for work

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¹⁹ *Explanatory Notes*, Domestic Building Contracts Bill 1999, p 23.

²⁰ *Explanatory Notes*, Domestic Building Contracts Bill 1999, p 23.

²¹ *Queensland Building Services Authority Act 1991* (Qld), s 59. Although s 59 of the *Queensland Building Services Authority Act 1991* (Qld) provides that a variation not in writing could not be relied upon by the builder or the owner, Healy J in *Johnston v Panton*, unreported, Qld Dist Ct, [95/0087], 4 May 1995, held that owners who receive the benefit of work done as a variation to the contract where the variation was not in writing have an obligation to pay the builder the reasonable cost of that work. In *Van Wyk Hans T/A Van Wyk Constructions v McDonald Doug* (unreported, QBT, CO57-97, 30 April 1999) Member Burnett noted that such recovery is permitted under the principles of restitution for unjust enrichment. The claim must be in the nature of an unenforceable agreement.

that is urgent and it is not reasonably practicable to document the variation before the work is done.

Clause 81 details how a variation is acquitted in a contract that provides for progress payments. There are four types of variations listed:

- Type 1: Additions that may be carried out in one progress payment period
- Type 2: Additions that take effect over all or a number of progress payments
- Type 3: Omissions that may be made in a single progress payment
- Type 4: Omissions that affect all or a number of progress payments

For major variations - namely those over \$10,000 or a proportion of the contract price set by regulation (whichever is the greater) - other terms of payment are allowed in the variation document. It is suggested in the Explanatory Notes that such terms might include a deposit, or special progress payment arrangements.²²

Clause 84 prescribes the right of the contractor to recover an amount for a variation sought either by the owner or a person other than the owner.

3.8 TERMINATION FOR INCREASE IN CONTRACT PRICE OR NON-COMPLETION OF WORK

Clause 90 allows the building owner to terminate a building contract if:

- The **contract price rises by 15% or over** because of a **cost escalation clause**, or
- The **contract work is not finished within 1 ½ times the originally estimated time**.

In these instances, however, the contract can only be terminated where the price rise or delay was reasonably foreseeable by the building contractor. In addition, for a price rise, the rise is not caused by a delay caused by the building owner. Upon termination, the building contractor is entitled to recover a reasonable amount for the work done up to termination, as long as that amount is no more than the contractor would have been entitled to under the contract: **clause 91**.

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²² *Explanatory Notes*, Domestic Building Contracts Bill 1999, p 25.

4. DOMESTIC CONTRACTS ACT 1995 - VICTORIA

The Domestic Building Contracts Bill 1999 (Qld) is modelled on the *Domestic Contracts Act 1995* (Vic). The Queensland Bill contains some provisions that are similar to those contained in the Victorian model. The Victorian Act regulates the matters that must be included in a domestic building contract and provides a series of statutory warranties to persons who contract under domestic building contracts. A domestic building contract includes a contract for the erection, construction, extension, improvement or repair of a home. The Act extends to high-rise residential developments.²³

The statutory warranties provided for in the Queensland Bill are similar to those found in the Victorian Act, except for the inclusion in the Victorian Act of a warranty that work will be completed by the due date or period specified by the contract.²⁴ As in Queensland, the warranties run with the building and are enforceable by the owner for the time being of the building or land.²⁵

The Act also includes provisions about how prime cost items or provisional sums are to be detailed in contracts.²⁶

A number of prohibitions relating to the nature and content of domestic building contracts are also prescribed under the Act, including a limit on the amount of deposit which may be demanded or paid; restrictions on cost plus contracts and cost escalation clauses; and the prohibition of arbitration clauses.²⁷

Although, under the Victorian Act, a builder is required to give the building owner copies of the contract and any relevant reports, there is no requirement for a builder to give a building owner the equivalent of a consumer information statement (provided for in the Queensland Bill).

The Victorian Act imposes additional requirements in the case of domestic building contracts in which the contract price exceeds \$5,000.²⁸ These include; contract formalities such as sufficient description of work or price; a prohibition on any builder entering such a contract unless he or she is registered; provisions for the

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²³ *Domestic Building Contracts Act 1995* (Vic), ss 3 (definition of “home”), 5,6.

²⁴ *Domestic Building Contracts Act 1995* (Vic), s 8.

²⁵ *Domestic Building Contracts Act 1995* (Vic), s 9.

²⁶ *Domestic Building Contracts Act 1995* (Vic), s 22.

²⁷ *Domestic Building Contracts Act 1995* (Vic), Part 2, Division 2.

²⁸ *Domestic Building Contracts Act 1995* (Vic), Part 3.

variation of the contract price, plans or specifications; a five day cooling-off period; prescribed limits for progress payments and provisions governing the end of the contract. Similar provisions apply to domestic building contracts under the Queensland Act.

The Victorian Act also confers jurisdiction on the Victorian Civil and Administrative Tribunal to resolve domestic building disputes.²⁹

5. QUEENSLAND BUILDING TRIBUNAL BILL

The Queensland Building Tribunal (QBT) was established in July 1992 as a result of recommendations emanating from the Home Building Review Report.³⁰ This report recommended the establishment of a Domestic Building Tribunal, with the objectives of resolving domestic building disputes “*quickly, cheaply and justly*”.³¹

The QBT is presently constituted under the *Queensland Building Services Authority Act 1991* (Qld). It is the main forum for:

- Resolution of domestic building disputes between home owners and builders
- Review of decisions by the QBSA in relation to construction industry regulation
- Conduct of disciplinary matters involving licenses issued by the QBSA.³²

The Bill is the result of a process of review of existing building industry regulatory arrangements that has been ongoing for some years.³³ Notably, the Scurr Inquiry and the Implementation Steering Committee each made recommendations to abolish the Tribunal. While advocating a similar result, the proposals differed in content. The Scurr Report had recommended that the QBSA should not be put in charge of the Dispute Resolution Unit because of the conflicts of interest it would involve. The ISC reversed that proposal.

In the *Queensland Building Tribunal Annual Report 1997-1998*, Chairperson Cotterrel expressed some general concern about the ISC processes, and noted that

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²⁹ *Domestic Building Contracts Act 1995* (Vic), ss 3 (definition of “tribunal”), 53.

³⁰ Queensland. Department of Housing and Local Government, *Home Building Review Report*, November 1990, pp 51-73.

³¹ *Home Building Review Report*, p 63.

³² *Explanatory Notes*, Queensland Building Tribunal Bill, p 3.

³³ *Explanatory Notes*, Queensland Building Tribunal Bill 1999, p 2.

the suggested reforms had produced uncertainty concerning the future of the Tribunal. The Chairperson advocated instead a number of minor alterations to the Tribunal and its processes, rather than its abolition. It should be noted that the Bill has generally incorporated the proposals put forward on behalf of the Tribunal in its *Annual Report 1997-1998*.³⁴

5.1 ESTABLISHMENT AND OBJECTIVES

The Queensland Building Tribunal Bill 1999 replaces Parts 7 and 8 of the *Queensland Building Services Authority Act 1991* (Qld), which currently establishes the QBT and provides for its jurisdiction and powers.

The QBT is re-established under **clause 9** of the Bill. The establishment of the Tribunal under its own Act thereby augments the independence of the Tribunal. It is the primary venue for hearing building disputes and other matters within its jurisdiction in “*an expeditious way that is just, fair and cost efficient*”.³⁵

5.2 CONSTITUTION OF THE TRIBUNAL

The QBT consists of the chairperson and other members appointed under the proposed Act: **clause 11(1)**. Members must be lawyers of not less than 5 years standing or a retired judge of an Australian Court: **clause 11(3)**.

For a proceeding, the Tribunal is constituted by a single member: **clause 27**.

5.3 REGISTRAR OF TRIBUNAL

Clause 20 establishes the position of registrar of the Tribunal. The registrar must have a particular knowledge and experience of:

- Public administration; and
- Something else with substantial relevance to the functions of the registrar.

In addition to other matters, the registrar is empowered to:

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³⁴ Queensland Building Tribunal, *Annual Report 1997-1998*, pp 20, 21.

³⁵ Queensland Building Tribunal Bill 1999, cl 4.

- Appoint mediators and decide whether or not a proceeding should be subject to a timed mediation and expedited hearing under Part 6: **clause 21(3)**.
- Make default decisions for debts for liquidated amounts where an application has been made and the respondent has not filed a defence or counterclaim as provided for under clause 121: **clause 21(3)**.
- Engage experts as consultants on behalf of the Tribunal: **clause 23**.

5.4 LEGAL REPRESENTATION

The Bill has retained the philosophy from the current legislation that the right to have legal representation before the Tribunal is not automatic.

Clause 66 specifies that parties are generally required to represent themselves at proceedings other than mediations, case appraisals and pre-hearing conferences. A party is entitled to be represented by a lawyer where:

- all the parties agree, or
- the proceedings are disciplinary proceedings, public examinations and debt recovery applications brought by the QBSA, or
- the Tribunal directs that representation be allowed. A non-exhaustive list of four discretionary factors is provided for the Tribunal to consider in deciding whether to allow representation.

This statutory list of discretionary factors is a new inclusion in the Bill. The *Queensland Building Services Authority Act 1991* (Qld) does not provide specific guidance as to how the Tribunal should exercise its discretion to direct the allowance of legal representation. The QBT, however, in practice, has adopted a list of eight discretionary factors devised by the courts to be taken into account when deciding the question of legal representation.³⁶ The new statutory list

included in the Bill includes four of these factors, namely:

- the amount involved
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³⁶ In *Jeffries v Tschannen & Denham* (unreported QBT, 9 December 1994), Chairperson Cotterell set out eight matters to be considered in granting legal representation for a hearing: the amount of the claim and of any counter-claim; the nature and complexity of the issues and volume of evidence to be adduced; the questions of law which are likely to arise; the nature and extent of the cross-examination likely to be required; the capacity and willingness of the party to represent himself or herself and his or her experience in doing so; the effect of legal representation on the length of the hearing; the cost of legal representation; and the need to avoid allowing tactical ploys to unfairly disadvantage the other party. See also Ernst, B. Legal representation in the QBT, *Australian Construction Law Newsletter*, February 1999, Issue 42, p 16.

- the complexity of the legal and factual issues involved
- the ability of the lawyer or other person to help the Tribunal and the party represented
- the ability of the party to represent himself or herself: **clause 66(2)(b)(iv)**.

Clause 64 requires that parties represent themselves at mediations or case appraisals unless the mediator or case appraiser allows representation by a lawyer or another person in the interests of justice. **Clause 65**, however, allows representation by a lawyer or another person at a pre-hearing conference unless the Tribunal directs otherwise. The reason given in the Explanatory Notes for the relaxation of the general restriction on representation in this instance is because it may be oppressive to refuse representation rights for an interlocutory step in a proceeding. For example, a party working in a more remote location may incur costs for a step that may only take a few minutes and may be able to arrange for another to appear on his/her behalf.³⁷

5.5 JURISDICTION OF THE TRIBUNAL

The Tribunal may hear and decide all matters it is required or permitted to hear and decide under legislation: **clause 28**.³⁸

In particular, **Part 5** of the Bill gives the Tribunal jurisdiction over building disputes.

A person involved in a building dispute can apply to have the Tribunal decide the dispute. In resolving a dispute, the Tribunal can make orders including: the payment of money or relief of payment; restitution; the variation of a contract to avoid injustice; rectification or completion of work; and an award of costs: **clause 93**.

In the case of a major commercial building dispute - a commercial building dispute where either the claim or the counterclaim exceeds \$50,000 - the Tribunal is limited to where all the parties to the dispute consent to the Tribunal's jurisdiction: **clause 94**.

Certain mandatory procedures are prescribed for hearing major commercial building disputes. If the Tribunal becomes aware that another party should be

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³⁷ *Explanatory Notes*, Queensland Building Tribunal Bill 1999, p 22.

³⁸ For example: Queensland Building Services Authority Act 1991; Domestic Building Contracts Bill 1999 (as proposed).

joined in a major commercial dispute, the Tribunal must order the proceeding to be removed to a court: **clause 96**.

5.6 POWERS OF THE TRIBUNAL

The Bill confers on the Tribunal a broad range of powers in the exercise of its jurisdiction, including the general powers to:

- Order **disclosure** of a document in a party's possession or control or other evidence: **clause 42(3)(b), (4)**. The duty of disclosure, however, does not apply to privileged documents, credit documents and additional copies of documents already disclosed: **clause 43(1)**. It should be noted that an expert's report is not a privileged document: **clause 43(2)**.
- **Summons** a person to appear as a witness and produce documents or things: **clause 68**.
- **Join** a person as a **party** to a proceeding: **clause 45**. In the case of a major commercial building dispute, a person can only be joined as a party if that person consents: **clause 95**.
- **Consolidate two or more proceedings** into the one proceeding where they involve the same question or will affect each other: **clause 46**.
- **Summarily dismiss vexatious proceedings** and order costs against the vexatious litigant to compensate the respondent party for any resulting loss, inconvenience and embarrassment: **clause 50**.
- Order **security for costs** on the application of a party against whom a claim is made: **clause 57**.
- Order **costs** (generally): **clause 61**. **Clause 62** enables the Tribunal to order a stay of proceedings against a party until the costs of an earlier proceeding awarded against that party is paid.
- Refer a technical matter to an appropriate **expert** for **investigation** and **report**: **clause 76**.
- Punish a person for **contempt** of the Tribunal: **clauses 79** and **80**.
- **Enter and inspect a building or land** relevant to a proceeding: **clause 77**. Before entering a building or land, a Tribunal member or his/her delegate must follow the procedures set out in clause 78. These steps include giving reasonable notice of entry, if possible, to the occupier or owner in order to minimise coercion to effect the entry.³⁹ **Clause 173** saves any person authorised by the Tribunal to enter and inspect property from liability for any act done honestly and without negligence under the proposed Act. Liability instead attaches to the State.

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³⁹ *Explanatory Notes, Queensland Building Tribunal Bill 1999*, p 25.

- Make a **stop order** to prohibit a person from starting or continuing building work if satisfied that the work is being carried out or about to be carried out in contravention of the *Queensland Building Services Authority Act 1991* (Qld): **clause 114**.
- Make a **suspension order** to suspend a person's licence: **clause 115**.

The Tribunal can make stop orders and suspension orders without notice to the person affected. An opportunity for subsequent representations on the continuation of the orders is, however, provided. The Explanatory Notes explain that the resultant reversal of the onus of proof in these provisions is warranted, given that these orders are made in circumstances where urgent action is required.⁴⁰ The Scrutiny of Legislation Committee, however, has queried whether it is reasonable, in the circumstances, for the Tribunal to be able to issue stop orders and suspend licenses without giving the person affected a reasonable opportunity to show cause.⁴¹ In response to the community's concern the Minister has noted:

*...The power is limited by the requirement that such orders may be made only on application by the Authority and only where the Authority can demonstrate that a licence should be suspended or that work will be or is being carried out in contravention of the Act. The impact on potentially affected persons is further balanced by the fact that they have a right to make representations in relation to such orders of the Tribunal.*⁴²

5.7 PUBLIC EXAMINATIONS

The Bill confers a new jurisdiction on the QBT to conduct public examinations, on application of the QBSA, in which witnesses may be compelled to answer questions.

On application of the QBSA, the Tribunal can conduct a public examination that investigates:

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⁴⁰ *Explanatory Notes, Queensland Building Tribunal Bill 1999, p 9.*

⁴¹ Queensland. Parliament, Scrutiny of Legislation Committee, *Alert Digest*, (13) November 1999, pp 29-30.

⁴² Hon JC Spence MLA, Minister for Aboriginal and Torres Strait Islander Policy and Minister for Women's Policy and Minister for Fair Trading, in *Alert Digest*, Issue No 15, Scrutiny of Legislation Committee, Queensland Parliament, December 1999, p 48.

- the conduct or competence of a person who has carried out or undertaken to carry out building work, or
- whether a licensee (or, in the case of licensed corporation, a nominee or person exercising control over the corporation) fulfils certain conditions or breached a condition imposed on his/her licence: **clause 112**.

In the case of a corporation, the Tribunal may summons a director or an executive officer to appear on behalf of the corporation: **clause 113(3)**.

5.8 PRIVILEGE AGAINST SELF-INCRIMINATION.

A person appearing as a witness before the Tribunal must not fail to answer a question or produce a document or thing unless he/she has a reasonable excuse: **clause 72(3)**. If the answer or production of the document or thing would tend to incriminate the person, that is a reasonable excuse: **clause 72(4)**. The Explanatory Notes further indicate a reasonable excuse would also arise where legal professional privilege applied.⁴³

Clause 73 removes the right of a person appearing at a public examination to claim the privilege against self-incrimination in response to a question about his/her **financial affairs**. The rationale for this approach is comprehensively detailed in the Explanatory Notes.⁴⁴

Clause 73(2) requires the Tribunal to advise the person of the following:

- that if the answer might incriminate him/her, the person may make a claim **before** giving the answer that it might incriminate him/her; and
- the effect of making the claim will have on the admissibility of the answer.

Refusal to answer a question is an offence unless the person has a reasonable excuse: the maximum penalty is 500 penalty units: **clause 73(3)**. Legal professional privilege is an example of a reasonable excuse in these circumstances.⁴⁵

If the claim of self-incrimination is made before giving the answer, and the answer might incriminate the person, the answer is not admissible in any proceeding against the person except if the falsity or misleading nature of the answer is relevant to the proceeding: **clause 73(5), (6)**. However, **clause 75(7)** notes that

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⁴³ *Explanatory Notes*, Queensland Building Tribunal Bill 1999, p 23.

⁴⁴ *Explanatory Notes*, Queensland Building Tribunal Bill 1999, pp 3-8, 24.

⁴⁵ *Explanatory Notes*, Queensland Building Tribunal Bill 1999, p 24.

public examinations and review proceedings against the QBSA are not proceedings against the person. The answer may therefore be admitted in evidence in such proceedings.

5.9 CASES STATED AND APPEALS

On the application of a party to a proceeding or on its own initiative, the Tribunal may state a case on a question of law arising in a proceeding for the opinion of the District Court: **clause 91**.

A party to a proceeding may appeal the final decision of the Tribunal in a proceeding to the District Court. The restriction of appeals to final determinations would avoid parties having available to them a means of delaying the final resolution of a dispute

The appeal is by way of re-hearing and based on the material that was before the Tribunal and any other evidence allowed by the District Court. The District Court may confirm, annul, vary or reverse the Tribunal's original decision; remit the case to the Tribunal for further hearing or a re-hearing; or make consequential or ancillary orders or directions: **clause 92**.

5.10 DISPUTE RESOLUTION PROCEDURES

Part 6 of the Bill sets out the general power of the Tribunal to conduct hearings and introduces a more comprehensive set of dispute resolution procedures to enhance and improve the current procedures employed to resolve disputes. These current procedures include mediation and case management conferences.⁴⁶

The QBT, in its *Annual Report 1998-1999*, has stated that these changes:

*...will enable it to resolve each dispute as expeditiously and cheaply as possible to achieve a just outcome by applying to the dispute, at each stage during the process, the most appropriate dispute resolution procedure likely to resolve it by a fair process.*⁴⁷

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⁴⁶ Queensland Building Tribunal, *Annual Report 1998-1999*, pp 7, 8.

⁴⁷ Queensland Building Tribunal, *Annual Report 1998-1999*, p 23.

5.10.1 Decision by Default

The registrar is empowered, on behalf of the Tribunal, to give a decision by default for a debt of a liquidated amount. This decision can be set aside or amended subsequently by the Tribunal: **clauses 121, 122.**

5.10.2 Mediation

At present, the *Queensland Building Services Authority Act 1991* (Qld) provides for the mediation of domestic building disputes. Persons appointed as inspectors under the Act are also eligible for appointment as mediators.

The Tribunal or the registrar can appoint a mediator, with suitable qualifications and experience, for building dispute and review proceedings. The cost of the mediator is borne by the Tribunal unless all the parties to a proceeding nominate the mediator for appointment whereby the parties are responsible for any additional costs incurred in appointing that mediator: **clause 123.** The admission of anything said or done in the course of mediation in any other proceeding of the Tribunal is prohibited: **clause 125.**

Where a proceeding is listed for an expedited hearing on the same day, the maximum time allowed for a mediation is two and a half hours: **clause 127.** This allows for the same day hearing of minor domestic and relevant minor commercial building disputes.⁴⁸

5.10.3 Expedited Hearings

The Bill proposes an expedited process for matters of less than \$10,000. The Tribunal must decide a minor domestic building dispute at an expedited hearing if the dispute has been to mediation but has not been settled. The exception is where the Tribunal considers the dispute is too complex to be dealt with at an expedited hearing: **clause 128.**

Furthermore, the Tribunal can decide a domestic building dispute other than a minor domestic building dispute at an expedited hearing if all parties so apply and the Tribunal considers it appropriate: **clause 128(3).**

In certain circumstances, the Tribunal can conduct an expedited hearing of a minor commercial building dispute for payment of a subcontractor up to a maximum amount of \$10,000: **clause 129.**

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⁴⁸ *Explanatory Notes, Queensland Building Tribunal Bill 1999*, p 36.

5.10.4 Summary Decision

The Tribunal may give a summary decision for the applicant for all or part of the relief claimed in a proceeding, if the respondent has raised no defence other than the amount of the claim and the Tribunal decides there is no need for a hearing about that part of the proceeding: **clause 131**. Alternatively, in a proceeding where the application has no merit, or the respondent has raised an adequate defence, the Tribunal can give a summary decision for the respondent: **clause 132**.

5.10.5 Case Appraisal

Case appraisal is a process that may be used to resolve proceedings in a timely and cost-effective manner. The Bill provides costs incentives for parties to accept the decision of a case appraiser.

The Tribunal may refer a proceeding to case appraisal where all parties apply for a referral. The case appraiser must have suitable qualifications and experience to be appointed as a case appraiser by the Tribunal. The cost of the case appraiser is borne by the Tribunal unless all the parties to a proceeding nominate the case appraiser for appointment whereby the parties are responsible for any additional costs incurred in appointing that case appraiser: **clause 141**.

The case appraiser has the same powers as the Tribunal to decide a proceeding and award costs: **clauses 142,147**. The decision of the case appraisal must be in writing. Reasons for the decision are not required: **clause 146**. The case appraiser's decision is final unless a party who is dissatisfied with it elects to have the dispute heard by the Tribunal. In that circumstance, the case appraiser's decision ceases to have effect and the dispute is decided afresh: **clauses 148, 150**.

5.10.6 Pre-Hearing Conferences

The Tribunal can conduct various interlocutory conferences to enable it to make procedural directions in a proceeding: **clause 152**. Evidence of anything said or done at a pre-hearing conference is inadmissible as evidence in other proceedings except where; the parties consent; the evidence is a direction at a pre-hearing conference; or, the evidence relates to an offence or contempt: **clause 154**.

5.10.7 Settlement Offers

Settlement offers are included in the Bill to encourage parties to make and accept reasonable settlement offers early in proceedings. An offer to settle is made without prejudice; the Tribunal is not to be told of the offer until after its final

decision: **clause 158**. An offer must remain open for acceptance until immediately before the Tribunal delivers its final decision, or for a shorter period if stated in the offer: **clause 159**.

The Tribunal may make adverse orders against a party whose offer is accepted but does not comply with its terms: **clause 160**. Where a party has rejected a reasonable offer, and the decision of the Tribunal is not more favourable to that party than the offer, the Tribunal must award the reasonable costs incurred by the other party after the offer was made: **clause 161**.

6. TRIBUNALS IN OTHER STATES

In its 1993 Report entitled *Home Building – Consumer Problems and Solutions*, the Trade Practices Commission praised the QBT as the model for similar tribunals.⁴⁹

It is noted that the Domestic Building Tribunal, which operated in Victoria from 1993 to June 1998, was modelled on the QBT.

The Victorian Civil and Administrative Review Tribunal (which replaced the Domestic Building Tribunal) in Victoria and the Fair Trading Tribunal in New South Wales provide two recent examples of Tribunals set up in other jurisdictions to hear and determine domestic building disputes and other related matters.⁵⁰

6.1 VICTORIA

The **Victorian Civil and Administrative Tribunal** (VCAT) is chiefly responsible for resolving domestic building disputes in Victoria.⁵¹ The Domestic Building Tribunal of Victoria previously heard such disputes; however, it was abolished and incorporated into the VCAT when the VCAT came into operation on 1 July 1998.⁵²

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⁴⁹ Trade Practices Commission, p 5.

⁵⁰ See: Strecker, E and Megens, P, 'The Role of the Domestic Building Tribunal Pursuant to the New Domestic Building Tribunal Act (Victoria)', *Building and Construction Law*, Vol 12(4), August 1996, pp 267- 290; Davenport, P, 'Goodbye to the NSW Building Disputes Tribunal and Commercial Tribunal - Welcome to the NSW Fair Trading Tribunal', *Australian Construction Law Newsletter*, April/May 1999, Issue 65, pp 4-5.

⁵¹ *Domestic Building Contracts Act 1995* (Vic), ss 53, 57.

⁵² VCAT replaces the Victorian Administrative Appeals Tribunal and a number of other Tribunals, including the Domestic Building Tribunal. The transfers of jurisdiction are effected by the *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic).

VCAT is a tribunal of general administrative review and has original and review jurisdiction. Its review jurisdiction is conferred on it by any enabling Act. The *Domestic Building Contracts Act 1995* (Vic), which relates to domestic building contracts, is one such Act.

Ordinary members of the Tribunal must be either lawyers or have special knowledge or experience about a class of matter within the Tribunal's jurisdiction.⁵³ The president must be a Supreme Court judge while a vice president must be a County Court judge.⁵⁴ At an intermediate level, provision is also made for the appointment of senior members and deputy presidents.⁵⁵

VCAT can make any order it considers fair to resolve a domestic building dispute.⁵⁶ Such orders may include the referral of a dispute to mediation, payment of money from one party to another, voiding or varying a term in a domestic building contract and orders to rectify or complete building work.⁵⁷ The Tribunal also has the general power to grant an injunction where just and convenient to do so.⁵⁸

The entitlement to be represented in proceedings of VCAT is restricted. Certain parties including a minister, or representatives of the state, public authorities, statutory office-holders and insurers have the right to be represented by a professional advocate. If another party to the proceeding is a professional advocate, or is allowed to be represented by a professional advocate, or all the parties to the proceeding agree, the party may be represented by a professional advocate.⁵⁹ A professional advocate is a legal practitioner, a law clerk, a person holding a qualification in law or with substantial experience as an advocate in proceedings of a similar nature to the proceedings before VCAT.⁶⁰ There is also provision for representation by other persons, including authorised representatives of a body corporate, or by the party personally.⁶¹

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⁵³ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 14.

⁵⁴ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss 10, 11.

⁵⁵ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss 12,13.

⁵⁶ *Domestic Building Contracts Act 1995* (Vic), s 53(1).

⁵⁷ *Domestic Building Contracts Act 1995* (Vic), s 53(2).

⁵⁸ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 123.

⁵⁹ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 62(1)(b).

⁶⁰ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 62(8).

⁶¹ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss 62(1)(a), (c), 62(7).

The pre-hearing procedure of VCAT includes compulsory informal pre-hearing conferences, and mediation with or without consent. With the agreement of the parties, proceedings may be conducted entirely on the basis of documents with no appearance by the parties.⁶²

Normally each party bears their own costs in the Tribunal although VCAT has power to make a costs order where it is fair to do so.⁶³ It is a criminal offence to fail to comply with a non-monetary order of VCAT, and the president can punish for contempt of VCAT.⁶⁴

An order of the VCAT constituted by the president or a vice president, whether with or without others, is not subject to an appeal, except with the leave of the Court of Appeal or judge making the order. Where the Tribunal is constituted without the president or a vice president, a party to a proceeding may appeal, on a question of law, from an order of the Tribunal to the Trial Division of the Supreme Court, with the leave of the Trial Division.⁶⁵

6.2 NEW SOUTH WALES

In New South Wales any person can apply to the **Home Building Division** of the **Fair Trading Tribunal** for the determination of a building claim for residential building work or specialist work as defined in the *Home Building Act 1989* (NSW).⁶⁶

The Tribunal came into existence on 1 March 1999 under the auspices of the *Fair Trading Tribunal Act 1998* (NSW). The Tribunal replaces the NSW Building Disputes Tribunal and the NSW Commercial Tribunal.

The Fair Trading Tribunal does not have exclusive jurisdiction with respect to any building claims. If an action is commenced in a court before it is commenced in the Tribunal, the Tribunal does not have jurisdiction.⁶⁷ An action can be transferred

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⁶² *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 100(2).

⁶³ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 109.

⁶⁴ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss 133, 137.

⁶⁵ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 148.

⁶⁶ *Home Building Act 1989* (NSW), s 89A; *Consumer Claims Act 1998* (NSW), Sched 2.4.

⁶⁷ *Fair Trading Tribunal Act 1998* (NSW), s 22.

from the Tribunal to a court or from a court to the Tribunal.⁶⁸ There is no compulsion for any claimant to use the Fair Trading Tribunal rather than any court.

The Tribunal is not bound by the rules of evidence and may act with as little formality as circumstances permit and according to equity, good conscience and the substantial merits of the case. Evidence can be taken by telephone or closed circuit television or by any other means of communication. If requested by a party, the Tribunal must provide written reasons for a decision.

The Tribunal can join a person who has a sufficient interest in resolving the dispute as a party to the proceedings.⁶⁹

Legal representation is allowed as of right if the claim or dispute is over \$25,000, otherwise leave for legal representation to be granted is required.⁷⁰ Only lawyers and strata managing agents are entitled to charge a fee for representing a party.⁷¹ Legally qualified and other members and assessors can assist and advise members on technical issues.

The Tribunal has an obligation to endeavour to bring about an acceptable settlement between the parties. Accordingly, it can refer matters to mediation or neutral evaluation.⁷²

The Tribunal is not limited in the amount of a claim or an award that may be made. Costs can be awarded if the amount claimed is over \$10,000 and the parties are granted the right to legal representation. If the amount awarded by the Tribunal is over \$25,000, expenses of professional or expert services can also be obtained.⁷³

Orders requiring the payment of money can be enforced through a court having jurisdiction.⁷⁴

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⁶⁸ *Fair Trading Tribunal Act 1998 (NSW)*, s 23.

⁶⁹ *Fair Trading Tribunal Regulation 1999 (NSW)*, s 27.

⁷⁰ *Fair Trading Tribunal Regulation 1999 (NSW)*, s 15.

⁷¹ *Fair Trading Tribunal Act 1998 (NSW)*, s 33(5); *Fair Trading Tribunal Regulation 1999 (NSW)*, s 17(2).

⁷² *Fair Trading Tribunal Act 1998 (NSW)*, s 54.

⁷³ *Fair Trading Tribunal Act 1998 (NSW)*, s 48; *Fair Trading Tribunal Regulation 1999 (NSW)*, s 32(1).

⁷⁴ *Fair Trading Tribunal Act 1998 (NSW)*, s 47.

There is a right of re-hearing if the applicant can demonstrate a substantial injustice as defined in the Act.⁷⁵ There is also a right of appeal to the Supreme Court on the bases of an error of jurisdiction or denial of natural justice. If the amount claimed is over \$25,000, an appeal also lies on a question of law.⁷⁶

7. CONCLUSION

The *Queensland Building Services Authority Act 1991* (Qld) currently regulates domestic building contracts and establishes the Queensland Building Tribunal.

The Domestic Building Contracts Bill 1999 proposes to remove the regulation of domestic building contracts to a discrete legislative environment. Similarly, the Queensland Building Tribunal Bill 1999 proposes to re-establish the Tribunal under its own legislation.

The remaining provisions in the *Queensland Building Services Authority Act 1991* (Qld) are more closely associated with the industry regulator, the QBSA, which is also established under the existing Act, and its functions. These functions range from the regulation of matters such as building contracts other than domestic building contracts, licensing, and rectification of building work to the administration of the statutory insurance scheme.

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⁷⁵ *Fair Trading Tribunal Act 1998* (NSW), s 63.

⁷⁶ *Fair Trading Tribunal Act 1998* (NSW), s 61; *Fair Trading Tribunal Regulation 1999* (NSW), s 18(b).

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APPENDIX A – ISC: SUMMARY OF REFORMS, COSTS AND RECOMMENDATIONS

Source: Queensland. Implementation Steering Committee. *Securing our Industry's Future: Report of the Implementation Steering Committee on Security of Payment in the Building and Construction Industry*, October 1997, pp 2-8.

1. SUMMARY OF REFORMS, COSTS AND RECOMMENDATIONS

The ISC has developed a package of reforms to improve both security of payment and industry performance. In proposing the package, due consideration has been given to the principles encapsulated in the recommendations in the Government Discussion Paper on 'Security of Payment in the Building and Construction Industry' released in November 1996, the responses and comments in response to that Discussion Paper and the need for the reforms to be cost-effective and practical.

The rationale which underpins the reform package is that the desired outcomes will be most effectively achieved through an approach which recognises the importance of an integrated set of responses covering contractor licensing, dispute resolution, contract provisions, Government contract administration and consumer protection.

The ISC believes implementation of the reform package summarised below will facilitate continuing improvement in industry performance and improved outcomes for all parties in the industry.

1.1 SUMMARY OF REFORMS

1.1.1 LICENSING REFORMS (See Section 3.2)

LICENCE CLASSES

All existing licensees with the exception of demolition contractors will continue to be licensed by BSA under the proposed licensing system. Transitional arrangements will allow automatic transfer to classes incorporating existing scopes of work.

Builders

The number of building licence classes will be expanded to reflect categories of work in the Building Code of Australia and nationally agreed competencies to promote national consistency in licensing of builders. Appropriate licence classes for the transition of existing licensees will be determined by their individual contracting experience generally over the past three years.

Trade Contractors

Licences for sub-classes of work for trade contractors will be discontinued resulting in a reduction in the number of licence classes. The requirements of

contractors carrying out limited scopes of work will continue to be met by conditional licences and classes established under the category of Specialised Contracting.

Contractor licensing will be extended to include building work undertaken by fire protection contractors and soil testers.

Technical Competence Licence

A silver card category of licence will be established for persons requiring or choosing to maintain technical accreditation (occupational licensees and technical nominees). Financial requirements for this class will not be applicable in recognition of the absence of financial exposure.

Consistent with proposals by the Department of Local Government and Planning to rationalise existing regulatory duplication of plumbers and drainers (occupational licensing by the Plumbers and Drainers Licensing Board / BSA contractor licensing), the role of the Plumbers and Drainers Licensing Board in regulating service delivery be subject to further BSA / industry discussions with a view to at least having BSA undertake the operational licensing elements of the Board's current role. It is also suggested that the Board's advisory role on industry matters be reviewed by representatives of the Department of Local Government and Planning, BSA and the plumbing industry to establish whether it should be integrated with the operating framework of the Queensland Building Services Board.

LICENCE REQUIREMENTS

(Obtaining a Licence)

Revised assessment procedures for corporate applicants will allow examination of all persons in a position of influence in the business entity by reference to established criteria including fitness and propriety.

Technical Requirements

Apprenticeships and approved training courses will continue to form the basic qualifications for licence classes. Competency based assessments against national competency standards will be available as an alternative qualification for licence classes.

Technical qualifications for licensed building designers will be revised in the interim, pending development of national competency standards, to incorporate current national design curriculum requirements.

Financial Requirements

Financial requirements for all licences will be strengthened to allow more accurate assessments of the financial viability of licensees. Applicants will be required to demonstrate both capital adequacy and satisfactory liquidity as well as regular monitoring of their financial position.

Financial requirements will include “validation” by appropriately accredited external consultants to minimise misleading statements of an applicant’s financial viability.

The recommended benchmarks for net tangible assets will be further evaluated over the next two years to determine their appropriateness. Any upward shift in net tangible asset requirements will need to be progressively introduced with adequate notice to enable a smooth industry transition.

Managerial Requirements

All individual applicants will continue to have to satisfy managerial requirements as a prerequisite to licensing. Corporate applicants will be required to identify managerial nominees to obtain a licence to ensure appropriate management skills are held by an officer or employee of the corporation.

Experience Requirements

Existing experience requirements (two years) for trade contractors will be retained for applicants who have completed trade apprenticeships or approved courses. Requirements for builders will be increased to four years, including the current requirement for two years relevant supervision for those applicants who have completed approved courses other than formal trade apprenticeships or professional qualifications.

LICENCE REQUIREMENTS

(Retaining a Licence)

At annual renewal, licensees will have to attest to their on-going technical and managerial competence to retain their licence. Compliance with competence requirements will be by self-certification and supported by random audits of licensees.

BSA will routinely undertake comprehensive assessments of a contractor’s past performance and confirm continuing financial viability at regular intervals following cross-checks of credit bureaux data and investigation of complaints. Where appropriate, performance audits of licensees will be conducted. Licensees failing to meet licensing criteria may have their licences cancelled, suspended, downgraded to a lesser class of licence or conditions imposed.

COMPLIANCE

(Ensuring Compliance with Legislative Requirements)

Substantial increases in the stringency of licensing requirements will require commensurate increases in the powers of the BSA to ensure ongoing compliance. This will include the authority to require the production of documents, hold an Inquiry for the purpose of investigating any matter arising under the QBSA Act, conduct examinations of company officers and

immediately suspend / cancel licences where retention poses a serious financial risk.

To more effectively prevent the re-emergence of improper / unethical persons associated with failed businesses, it is proposed there be a 5 year bar on licensing applied to bankrupts or officers of failed companies subject to a limited discretion of the Authority to waive the bar.

BSA should also be empowered to administratively impose fines for unlicensed contracting, failure to comply with a Direction and failure to notify relevant changes to licence status.

BUILDING WORK

(Definition)

The value of exempt building work will be increased to \$1000 (from \$500) to set a more realistic benchmark of work for which a licence should be required.

The definition of building work will be further revised to provide that a licence is required to provide inspection services in all classes of work.

1.1.2 DISPUTE RESOLUTION REFORMS (See Section 4.2)

DISPUTE RESOLUTION

(Overview)

A two-stage dispute resolution process will be established providing for non-judicial and judicial dispute resolution in the commercial and residential building sectors. Parties to disputes may agree to skip processes such as non-judicial dispute resolution or alternatively, submit to alternative dispute resolution (such as arbitration) but where no such agreement exists, the proposed two stage dispute resolution process will constitute the default option for all disputes except those in the commercial sector involving more than \$50,000. The processes will be available to parties for resolution of contractual as well as technical issues and in concert with the reforms to contract provisions set out in 1.1.3, will significantly enhance security of payment.

Compulsory arbitration clauses in domestic building contracts will continue to be void. However, where arbitration is permitted and agreed, the arbitration will be governed by the terms of the Commercial Arbitration Act. All arbitration of commercial disputes will also be governed by the terms of the Commercial Arbitration Act.

DISPUTE RESOLUTION

(Non-judicial)

A Dispute Resolution Unit (DRU) will be established within the BSA. The DRU will provide case management for all disputes referred to it. Where no resolution is possible through conciliatory processes such as mediation, it will be empowered to provide binding expert determinations of disputes or where

the complexities of the dispute warrant, the matter may be directed to the Courts.

A fee of \$200 will apply for the lodgement of disputes with the DRU to partially offset the costs of this service and to deter trivial or vexatious disputes. Successful applicants will have the fee refunded as a part of the dispute settlement. For commercial disputes, the costs of any mediation and / or adjudication services will also be recovered, consistent with a user pays approach.

Appropriate industry experts will be used to determine these matters including outsourced service providers selected from a panel of accredited experts. Where there are significant contractual issues, adjudicators will be provided who are legally trained practitioners with competencies no less than current QBT Members.

DISPUTE RESOLUTION

(Judicial)

The Queensland Court system will be responsible for appeals against the DRU's decisions, as well as disciplinary and review matters.

DISPUTES UNDER \$10,000

(Summary Process)

All disputes involving claims under \$10,000 will be resolved by a DRU determination unless both parties agree to resolve it through other suitably agreed processes. Procedures governing the summary dispute resolution process will be simplified to ensure that the cost of dispute resolution is consistent with the quantum of the dispute. The right of appeal against a summary determination will be limited to a denial of natural justice and manifest error of law.

DISPUTES OVER \$10,000

Unless otherwise agreed by the parties either in the contract or subsequent to the dispute arising, disputes over \$10,000 will be resolved in the first instance by a non-judicial determination of the DRU. Such determinations will be binding and enforceable unless appealed to the Courts. The appeal to the Courts will provide an opportunity for parties to have their dispute fully considered as though no determination had been made by the DRU. Commercial disputes over \$50,000 in value are to be determined in the Court unless both parties agreed to have the matter otherwise resolved.

1.1.3 CONTRACT PROVISIONS REFORMS (See Sections 5.2)

APPLICABILITY

Contract reforms will apply to all parties, for both commercial and residential sectors. Contract requirements will not extend to supply contracts at this time.

All building contracts for work to be performed in Queensland are to be governed by and subject to the laws of Queensland.

CONTRACT REQUIREMENTS

All contracts in the building sector (including variations to contracts) will be required to be in writing and set out the scope of work to be done, time for completion and amount to be paid.

Contracts will contain prescribed payment periods and provide for progressive payment of variations to ensure prompt payment.

“Pay-if-paid” and “paid when paid” clauses will be void if contained in any building contract.

In order to minimise the future emergence of unfair contract conditions, the Queensland Building Services Board will monitor contractual provisions in building contracts generally while the Department of Public Works and Housing will undertake this role for Government building projects. Any unfair conditions identified will be reported to Government with a recommendation that they be made void.

Retentions and performance securities will be deemed to be held in trust to assist in securing the timely payment of moneys owing to all contractors.

Contracts shall have as the standard clause / default option that dispute resolution will be through the DRU / Court processes unless such an approach is deliberately substituted by an alternative dispute resolution approach specifically nominated and agreed in writing by both parties to the contract. Where the parties opt for arbitration as the method of dispute resolution, the contract must provide for nomination of an arbitrator by an independent third party such as the Institute of Arbitrators where the parties cannot or have not agreed on the appointment of the arbitrator.

Private sector owners and head contractors may agree to securities and retentions greater than the prescribed cap, however, such variation shall not be passed further down the contractual chain so as to require subcontractors and others to exceed a 5% cap. In addition, that component of any retentions held in respect of a defects liability period is not to exceed 2.5% of the accepted contract sum.

SUBCONTRACTORS' CHARGES ACT

The Subcontractors' Charges Act will continue to apply to building work with the exception of home building for individual consumers but will be amended to improve its effectiveness through the clarification of the Act's application and operation, together with an increased scope of cover and measures to reduce the potential for possible vexatious charges.

1.1.4 GOVERNMENT CONTRACT ADMINISTRATION REFORMS (See Section 6.2)

GOVERNMENT PREQUALIFICATION SYSTEM

The Department of Public Works and Housing will implement a four level pre-qualification system to streamline the selection of service providers (specifically contractors, specialist contractors and consultants) for all Government building projects with a value estimated to exceed \$100,000. All service providers will have to be prequalified and registered to be eligible to tender for such Government building projects.

For contractors, the register will be underpinned by and linked to BSA's licensing system to ensure only licensed contractors are included and feedback on contractor performance is reflected in BSA licensing.

All Government building projects will be rated according to their complexity and risk with project ratings equated to the prequalification levels to assist in determining the eligibility of prequalified service providers to tender for particular projects. To be eligible to tender, a service provider will need to have a rating that matches or exceeds the project rating.

PREQUALIFICATION CRITERIA

To determine their rating, service providers will assess themselves against four key criteria - technical capacity, management approach, people involvement and business relationships. The financial requirements of the POC system will be based on the licensing financial requirements. Service providers will also need to be committed to continuous improvement to meet the biennial prequalification renewal requirements.

WHOLE-OF-GOVERNMENT APPROACH

The Government contract administration reforms are to be applied on all Queensland Government building projects.

TENDERING

Notwithstanding the need to ensure reasonable competition, the proposed Government prequalification system will provide greater scope to reduce the costs of tendering through the use of the select tender process.

Government tendering processes for building works will be consistently applied by Government Departments and agencies with new provisions to be incorporated in the State Purchasing Policy.

Through the publication of guidelines, the procedures used for Government tendering including preparation of select tender lists and assessment of tenders will be made more transparent to demonstrate probity and accountability.

FINANCIAL VIABILITY CHECKING

Financial viability checks on initially preferred tenderers for all Government building projects with a value estimated to exceed \$100,000 will be carried out by the BSA until the prequalification system and proposed licensing requirements have been fully implemented. Following the full implementation of all reforms and subject to the results of an evaluation in two years, the requirement for viability checks may be phased out, considerably reduced in scope, or more selectively applied.

1.1.5 CONSUMER PROTECTION REFORMS (See Section 7.2)

STANDARD RESIDENTIAL BUILDING CONTRACT

A standard industry plain language domestic building contract will be introduced to replace the existing Queensland Master Builders Association (QMBA), Housing Industry Association (HIA) and Building Services Authority (BSA) contracts.

HOME WARRANTY INSURANCE ARRANGEMENTS

Consistent with the underlying principles of the National Competition Policy, BSA's current monopoly arrangement for home warranty insurance will be opened up to private sector competition. Insurers will be required to provide licensed contractors with access to insurance or notify the BSA of their rejection of the contractor. Contractors refused access to insurance will have a right of appeal to the Courts.

A mandatory minimum policy coverage will be required, cognisant of the existing BSA scheme as a benchmark and the need for greater national consistency in regulatory requirements for consumer protection. Consumers will continue to be afforded protection against fraud and losses not attributable to the contractor. In addition, the appropriateness of extending the policy coverage to high-rise residential construction, swimming pools and building work undertaken by trade contractors will be considered as a part of the implementation of the new insurance arrangements. Stringent penalties will be imposed for fraudulent behaviour.

Minimum reporting requirements for insurers will be legislated to ensure transparency and comparability in provider performance.