



The Hon Simon O'Brien  
Minister for Commerce  
Parliament House  
PERTH WA 6000

24<sup>th</sup> January 2011

**Re: *The Building Services (Complaint Resolution and Administration) Bill 2010***

I would like to begin our submission by giving you some background into our organisation before proceeding to discuss our concerns about *The Building Services (Complaint Resolution and Administration) Bill 2010*.

The Consumers' Association of Western Australia Inc. (CAWA) was established in 1974 to provide consumer representation to business and government. We are a voluntary, non-profit, non-political organisation. Our main objectives are to:

- represent the views of consumers in Western Australia
- investigate and act on issues of concern to consumers
- provide a forum for the discussion of matters of common interest to consumers
- encourage consumer education.

I am writing on behalf of CAWA to express our deep concern with *The Building Services (Complaint Resolution and Administration) Bill 2010*, currently before the WA Parliament.

CAWA has had a close and constructive working relationship with the Building Disputes Tribunal (BDT) since its establishment in 1992 as the Building Disputes Committee. Many members of CAWA have served as Consumer Members of the Tribunal, and indeed three continue to serve in that capacity.

We are concerned that the dispute resolution model proposed under *The Building Services (Complaint Resolution and Administration) Bill 2010* which will split the BDT's role and functions between the proposed Building Commission (the Commission) and the State Administrative Tribunal (the SAT) will disadvantage consumers in a number of ways.

First, the **new system will be more costly**. In September, members of the BDT attended an information session conducted by Peter Gow, Executive Director of the Building Commission at which information was given regarding the new cost structure to support dispute resolution. Currently there is a flat fee of \$70 on all building licences, including commercial

properties, but under the new Act it will be set at .125% of domestic licence fees. The fee is thus effectively indexed according to the cost of the home – a \$300,000 home equates to paying a \$375 fee towards the dispute resolution process.

While this increased fee will be somewhat offset by a reduction in the Local Government Permit Fee which will be reduced to between a half to two thirds, the levy still effectively becomes a tax on the wealthier home builders who will subsidise consumers who are building at the lower end of the market where most disputes arise. This represents a very significant increase on the current levy. Furthermore, under current legislation more expensive homes, are excluded from the provisions of the Home Building Contracts Act.

Owners will still have to pay an additional fee when lodging a complaint which we understand will be considerably higher than the current fee of \$32.00. We also understand that there will be additional fees if a litigant proceeds to the State Administrative Tribunal (SAT).

We also note that the reduction in the Local Government Permit Fee coincides with reduced inspections. Under the new legislation there will four types of inspection:

1. Mandatory inspections as set by the building regulations. A registered practitioner will need to do these. A registered builder will be able to sign off on his own inspections while an owner builder will need to employ a registered person to complete their sign offs.
2. Local Government may conduct sample inspections to check general compliance with building permits rather than regular inspections to check compliance with the building licence
3. The Building Commission's compliance section will carry out random audits for compliance to the building legislation and the building code.
4. Inspections that take place because of a complaint.

Thus, at the end of the building process, when a Notice of Completion is sent to the Local Government Authority, in many cases the only inspections carried out on a building may well be the builders own site inspections. It seems consumers will not have any way of knowing what inspections are carried out during the construction process. Independent inspections carried out at timely intervals during the building process increase confidence and are welcomed by consumers. Inspections can bring immediate structural concerns to light, thus reducing the possibility of destructive testing or demolition if building issues become apparent later on.

Secondly, the new system **will be less just**. The proposed model is in breach of both the common law right of parties to be heard and the duty of decision makers to provide a fair hearing in accordance with the rules of natural justice and procedural fairness. The Building Commission decisions will simply be administrative decisions. When complaints are made to the Building Commissioner, they will be determined by Building Commission staff on the basis of the written information presented by the parties without the opportunity of a face to face hearing before an experienced and properly constituted panel as has been the practice with the BDT. Parties to disputes are denied natural justice in the proposed model as they will not be given an opportunity to fairly present their case and reply to the other party's submissions

The BDT currently provides an efficient, informal forum for parties to attend in person to outline the circumstances of the dispute. This is a fair and equitable process which often results in the parties reaching a greater understanding and reaching an acceptable compromise. Certainly the members of the BDT benefit from hearing the parties and having the opportunity to clarify the issues in dispute, which are often technical construction matters.

Many people will face disadvantage through their inability to adequately detail all relevant issues in a written format. The experience of the BDT is that parties often don't fully appreciate the significance of aspects of the dispute until they are given the opportunity to hear and respond to the evidence of the other party. The suggestion of Mr Gow that staff of the Building Commission will assist parties to prepare their submissions to the Building Commissioner is fraught with potential conflicts and difficulties.

Parties will be able to appeal the Building Commissioner's decision to the SAT and it is our expectation that a very high proportion of matters will go on to the SAT. This will involve not only an added cost but will add considerably to the length of time it will take to have matters resolved. An inefficient model will inevitably add to the burden of stress endured by the parties in dispute and is likely to result in elderly homeowners (for example) not pursuing valid complaints.

A further concern is that once a case proceeds to a SAT hearing, it will not necessarily be heard by a three person Tribunal, but rather a single legal practitioner or at best a two member Tribunal with an additional sessional member with some building expertise. Currently at the BDT, matters are heard by three person Tribunals comprising a legal chair, and both building and consumer representatives thus ensuring balanced judgements. There is no provision in the SAT for the three person Tribunals to continue. The consumer representation in the resolution process will fall away and there will be no one to ensure that the interests of consumers are considered equitably. The experience of the BDT has demonstrated that technical and complex construction issues are better resolved with a three member Tribunal, with the third member providing balance in discussions and a 'casting vote' in the event of the two other sitting members being unable to reach agreement.

Thirdly, the new system **will be more legalistic**. We understand from Mr Gow that under the new procedures Consumers will be required to fill in a Scott Schedule when lodging a complaint and while Mr Gow believes this can be done with the help of Departmental customer service staff, the experience of the BDT Members and staff is that consumers are frequently required to employ lawyers when this type of documentation is required in hearings. Further, in our experience the SAT hearings and procedures are far more legalistic than the current informal BDT hearings where consumers and builders generally present their cases without legal representation. We believe that consumers will be significantly disadvantaged in having to seek a review of decisions of the Building Commissioner through the SAT and that many Builders will use the cost and complexity of such reviews as a lever to dissuade consumers from lodging complaints.

Finally, **dispute resolution will take inevitably longer** under the new system. The dispute resolution process will effectively involve two separate organisations each with their own built in time frames, backlogs and priorities. It is not unreasonable to assume that a matter may spend many months in the Building Commission have investigations, reports, conciliation and not reach a resolution then to have to move on to the SAT only to have to start at the bottom of a queue to have the matter reheard.

CAWA does not support *The Building Services (Complaint Resolution and Administration)*

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*Bill 2010.* It believes that the new legislation will disadvantage consumers by making the dispute process less equitable, more costly and more drawn out and in the end far more frustrating than the current system which is a low cost, high turnover, no frills, non legalistic, highly democratic process based on equity, good conscience and a lack of legal forms. We have seen no data or other information which suggests otherwise.

CAWA is particularly concerned that there has been no real consultation with stakeholders during the development of this legislative scheme – in particular with consumers – and concerns regarding the cost and effectiveness of the proposed scheme which CAWA expressed to Minister Buswell and to Mr Gow have not been adequately answered. A copy of our previous submission is attached for your information.

CAWA believes that the Bills should be referred to a Parliamentary Committee for a thorough investigation of the legislation before it is passed by Parliament, during which time experienced practitioners currently working in building dispute resolution can be given the opportunity to provide comment and input so that the rationale of the new disputes resolution process can be clearly articulated and its principles of providing a timely, low cost, simple, non-legalistic and just dispute resolution mechanism can be ensured.

The Executive of CAWA would welcome the opportunity to meet with you and discuss any issues set out above. I can be contacted on 0419 943 707. Please note that copies of this letter have also been sent to Master Builders' Association, the Housing Industry Association and WA parliamentarians in order for our concerns to be given widespread attention.

Yours sincerely

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President

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