

**INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE  
TRIBUNALS IN NSW**

**Organisation:** Master Builders Association of NSW

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*Master Builders  
Association  
of  
New South Wales*

Submission to:

The Inquiry into Opportunities to  
Consolidate Tribunals in NSW

conducted by:

The legislative Council Standing  
Committee on Law and Justice

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## **Introduction**

This submission is made by the Master Builders Association of New South Wales (Master Builders).

Master Builders is the oldest industry association in Australia, having been founded in Sydney in 1873. Master Builders is the only industry body representing the three key building construction sectors: residential, commercial and engineering.

Master Builders has a robust and active membership which is organised into a divisional structure, encompassing 11 regional areas and a total of 24 divisions. Each active division conducts regular meetings and has an elected President (honorary) to represent the interests of their local members to Master Builders, Council of Management. This structure provides a true democratic structure in terms of representing the views and forming policy of a diverse group of building and construction industry professionals.

Master Builders Head Office is located at Forest Lodge, Sydney, with regional offices in Newcastle, Port Macquarie, Albury, Gosford, Ballina and Ulladulla.

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This submission is made in response to item 2. (c) of the Terms of Reference relating to the jurisdiction and operation of the Consumer Trader and Tenancy Tribunal (CTTT), with comment contained to the Home Building Division.

Master Builders has employed legal officers within our Legal Department which provides a wide range of advocacy, advice, information and training to financial members of Master Builders.

A significant proportion of the work before our legal department relates to residential building matters, which in-turn involves applications to the CTTT. This is a consequence of the CTTT essentially having chief jurisdiction in relation to residential building matters.

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## **Independence**

Master Builders views the inquiry as an opportunity to consider the independence of the CTTT which is fundamental to parties having confidence in the dispute resolution processes provided by the CTTT.

From an industry perspective, there is consistent view that there is an entrenched bias against the building sector in matters of dispute between consumers and builders or trade contractors. Evidence of this can be seen from recent correspondence (Attachment "A") on behalf of the associations Southern Region members.

We submit that by having the CTTT sitting under the hierarchy of NSW Fair Trading, with the Chair of the CTTT reporting to the Minister for Fair Trading implies a bias when considering Fair Trading's principal focus is on consumer protection is considered.

There exist conflicting roles for Fair Trading where on the one hand safe guarding consumer rights, while on the other licensing and undertaking compliance action involving builders and trade contractors. This conflicting role is realised when one considers that builders and trade contractors are also consumers, in the sense that they also purchase services, materials and supplies.

The common expression of "resolving ~~consumer~~ disputes" is used by Fair Trading and the CTTT and can draw conclusions that the process is designed and structured to deliver a consumer outcome, rather than a process to firstly, facilitate a conciliation process; or secondly reach a determination founded upon reasonableness and fairness.

Indeed section (c) of the Terms of Reference refers to "resolving consumer disputes" rather than simply, "resolving disputes".

We submit that the CTTT would be better served by being located under the portfolio of the Attorney General. This relocation would immediately remove the perception of bias as raised above and provide the necessary judicial oversight.

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**Terms of Reference:**

**(c) 1. Effectiveness in providing a fast, informal, flexible process for resolving consumer disputes.**

**Conciliation**

The CTTT promotes the conciliation process as a "primary dispute resolution process".

Master Builders is of the view that the effectiveness and efficiency of the current Home Building Division of the CTTT could be greatly improved by instilling a process that is based upon mediation by trained and experienced mediators.

Residential building disputes are often emotional and can be complex, especially if the officer acting as a conciliator or subsequently determining the matter lacks fundamental building knowledge and experience.

The current process of sending the parties to a room with a roving conciliator attending from time to time to check on any progression to an agreed position is not seen as an effective process, taking into consideration that the parties have most likely participated in the alternative dispute process with the Home Building Service.

Prior to matters or applications proceeding to the Home Building Division of the CTTT, they are referred to NSW Fair Trading's Home Building Service, alternative dispute resolution service (ADR). This process brings the parties together on site in attempt to reach resolution. The Fair Trading inspector can make rectification orders against the licensee; however there is no provision for orders (e.g. direct payment orders) to be made against the client. We submit that this is further evidence of bias incorporated into the legislation.

The majority of industry pro-forma contracts include a dispute resolution process in which the parties are expected to come together and attempt to come to a resolution. Simply transferring this process to a conciliation room of the CTTT, without the guidance and expertise of an experienced mediator, is seen as being neither efficient nor effective as often the position of the parties has hardened.

Where the Home Building Service ADR process does not bring the parties to resolution, the matter can return to the CTTT, where a report from the Home Building service inspector regarding the dispute is forwarded to the CTTT. The *Home Building Act 1989*, Section 48N, provides that the Tribunal member **may** have regard to the report, rather than **must** give regard to the report.

Master Builders submits that this is a further defect in the process, where the Tribunal member can disregard a report of the Home Building Service inspector who has heard the items of dispute, with the privilege of having been on the site and viewed work, in matters where workmanship is the subject of the dispute.

However, in seeking to ensure regard for the inspector's report, we suggest the quality of inspector reports can be greatly improved by establishing guidelines for writing reports to ensure important matters are noted, rather than typical statement that, "the parties failed to reach resolution"

We submit that the effectiveness of the conciliation process would also benefit from a copy of the report being provided to the conciliator, so that the inspector's professional view of the attempt to resolve the dispute and importantly, any particular points of disagreement would be of benefit to the conciliation process.

#### **Appointment of Tribunal Members.**

Master Builders is aware of a long held view amongst industry advocates as to the quality of members appointed to hear and determine building matters. This is especially so when the tribunal has jurisdiction to hear matters up to \$500,000.

It appears that certain Tribunal members see and portray themselves as having the same authoritarian appointment of a judicial officer of the court and conduct matters in this authoritarian manner, rather than applying the expected informalities as established by the objectives of the Tribunal.

We hold the strong view that in order to have an efficient and effective Tribunal processes to deal with residential building matters, it is most important that

members are appointed foremost having building and construction experience, and just not lawyers.

### **"Duelling" Building Consultants.**

We submit that the lack of building knowledge of appointed members and the lack of access of Tribunal members to a panel of independent building experts to assist the Tribunal is encouraging the use and cost to parties of engaging contesting building consultants or experts.

We draw attention to the fact that the CTTT requires an expert witness to comply with the CTTT's Expert Witness Code of Conduct, under the direction of the Chairperson:-

#### ***General Duty to the Tribunal***

**2.** *An expert witness has an overriding duty to assist the Tribunal impartially on matters relevant to the expert's area of expertise.*

*An expert witness's paramount duty is to the Tribunal and not to the parties.*

*An expert witness is not an advocate for any party.*

We question as to whether the Code of Conduct is being enforced. A growing concern is the submission of "duelling" expert reports and the appearance of building experts or consultants acting as advocates for their client rather than their obligation in impartially assisting the Tribunal.

Indeed we question as to whether it is common for the Tribunal member to question a building expert as to whether they have indeed been provided with or are aware of the Expert Witness Code of Conduct.

There is no requirement for the accreditation or registration of building consultants or building experts appearing before the Tribunal. It is effectively left to the parties to establish the witness's credibility and expertise. A proposition we suggest as fundamental from the outset, but not necessarily at the forefront of the minds of traders or consumers not accustomed to appearing before a Tribunal or Court.

The payment factor of parties independently engaging building experts or building consultants immediately creates or implies a bias on the expert to their paying party.

Our concern at the growing practice of building consultants producing ambit defect reports is such that we have a view that building consultants or building experts need to be regulated, which in-turn would provide for a mechanism for

such persons to be held accountable and liable for damages caused by spurious reports or statements or by acting beyond their area of expertise.

We note that the 2002 Joint Select committee on the Quality of Buildings made the recommendation that:

*Recommendation 49*

- *The Tribunal establish a panel of accredited building experts, who will jointly report to parties to a dispute.*
- *The legislation provides that only one report from an accredited expert may be jointly paid by the parties in the Tribunal proceedings without leave.*
- *The legislation provide that the parties shall be jointly responsible for the costs of such a report in the Tribunal, subject to any later costs order.*

Master Builders submits that we view the above recommendations having significant merit; however we are unaware of any of the points above being implemented by the CTTT.

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**Terms of Reference:**

**(c) III The rights of appeal available from CTTT decisions.**

**Rehearing**

Whilst CTTT matters are based upon objectives of informality, accessibility and importantly, a process which seeks to determine disputes in an inexpensive manner, the avenues for appeal or review are limited. Appeals are limited to either the District Court or the Supreme Court on matters of law.

A prospect of pursuing an appeal to either jurisdiction for some parties is daunting and unaffordable in circumstances, especially where a party has already suffered substantial costs prior to even contemplating an appeal.

In our view, the informality objective of the Tribunal warrants an initial independent mechanism of review to consider in particular, ensuring a process of natural justice has occurred.

Other than an appeal process as raised above, a challenge by an aggrieved party can be made by application for a Rehearing.

We are concerned that the current process for determining an application for rehearing is an arbitrary process by the CTTT Chairperson and places the Chairperson in direct conflict with the role of overseeing the operation of the CTTT.

We suggest a conflict could simply arise by balancing the cost rehearings will have on the budgetary position of the CTTT.

In contrast, a process within many government authorities provide an internal review process which is independent of any party involved in the original decision and independent of such conflicts as raised above.

We again emphasise that a rehearing process must be seen to be objective and independent. We suggest that the Chairperson could be insulated from issues of independence and objectivity by applications for rehearing being considered by an appointed panel rather than an individual.

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### **Security of Payment Registrar.**

The NSW *Building and Construction Industry Security of Payment act 1999* is key legislation providing mechanisms for dealing with payment disputes in the building and construction industry.

The Act provides for an adjudication process, undertaken by approved private Adjudication Nominating Authorities (ANA).

The responsibility for the general operations of the legislation and the appointment of ANAs is the responsibility of NSW Government Procurement, a division within NSW Finance and Services.

Master Builders is concerned that the current process facilitates "adjudicator shopping" and is open to conflicting rolls for ANA's of assisting in the preparation of Payment Claims pursuant to the Act and a subsequent role in the appointment an adjudicator.

Master Builders submits that a Security of Payment Registrar be established to administer the general operations and oversight of processes provided by the Act, and in particular the appointment of adjudicators.

Consideration of this proposal we believe is within the scope of the Terms of reference of the Inquiry and its establishment would be consistent with consideration and recommendations of the inquiry for the consolidation of Tribunals.



