

**Submission  
No 48**

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

**Organisation:** Housing Industry Association

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SUBMISSION BY THE  
**Housing Industry Association**

Inquiry into opportunities to consolidate Tribunals in  
to the  
Standing Committee on Law and Justice  
on the  
NSW

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.



# 1 Executive Summary

The Housing Industry Association Limited (**HIA**) welcomes the opportunity to comment on the Inquiry into Opportunities to Consolidate Tribunals in NSW.

## 1.1 Terms of reference

HIA notes that in addition to the proposals to consolidate a number of tribunals into one meta-tribunal, the terms of reference to the inquiry specifically considers the jurisdiction and operation of the Consumer, Trader and Tenancy Tribunal (**CTTT**) with particular regard to:

- Its effectiveness in providing fast, informal, flexible process for resolving consumer disputes.
- The appropriateness of matters within its jurisdiction having regard to the quantum and type of claim and the CTTT's procedure.
- The rights of appeal from CTTT decisions.

## 1.2 About HIA

HIA is the peak body for residential builders in Australia with nearly 13,000 members in NSW. HIA members include builders, contractors, manufacturers, suppliers, building professionals and business partners. Members' businesses range from self-employed independent contractors and home based small businesses, to large publicly listed companies. Given this diversity HIA is in a unique position to comment on the status of tribunals in NSW with many members having had personal experience in the home building division of the CTTT.

## 1.3 Issues with the proposal

HIA has significant reservations around the creation of a consolidated tribunal in NSW and in fact submits that strong consideration should be given to a reduction in the jurisdiction of the CTTT.

The CTTT's jurisdiction covers home building claims up to \$500,000 yet HIA members do not have confidence that the CTTT as it is currently constituted effectively resolves these disputes, many of which can often affect a builder's livelihood and the solvency of their business.

Inconsistency in decision making is a particular concern of HIA members who have become frustrated with the lack of technical expertise of CTTT members. Parties are forced to engage expensive experts in cases of claims of alleged defective work. Although the CTTT provides alternative dispute resolution options, members have also noted that the CTTT processes often become lengthy and inefficient.

HIA has serious concerns that the consolidation of tribunals in NSW would further dilute the expertise available for home building matters, further entrenching the issues outlined above.

Additionally HIA member experiences in Queensland and Victoria – both of which have in place consolidated tribunal systems – are far from favourable.

HIA's submissions are expanded upon below.

## **2 The unique nature of Home Building Disputes**

The unique nature of home building matters warrants the need to maintain a specialist building jurisdiction.

There are several reasons why the home building industry (and the disputes that can occur between builders, contractors and home owners) is so unique.

Firstly, the purchase and construction of a new home is usually the largest commercial transaction for an individual during their lifetime and this is reflected in the financial and emotional attachment they place on their home.

There is also a detailed technical process involved in building or renovating a home.

This process combines thousands of components, including a complex web of national, state and local laws, regulations and codes ranging from planning, design, environment, health and safety, to local authority inspection and certification and a multitude of building, electrical, mechanical and plumbing processes.

All of these components are usually done by dozens of different tradespeople engaged by the builder working together to create the finished home.

In addition, the legislative framework in which residential building work operates spans a multitude of issues including licensing, owner-builders, dispute resolution, builders warranty obligations and contractual requirements.

Home building disputes can, in turn, reflect the depth and complexity of issues that can arise during residential building work.

Such disputes can involve purely contractual issues or solely relate to alleged defective work, but more often than not will be a combination of the two.

For these reasons, careful consideration needs to be given to the best way to handle and resolve home building disputes.

Rather than consolidation, the CTTT needs to focus on better achieving its current objectives as outlined in Section 3 of the *Consumer, Trader and Tenancy Act 2001* (**CTTT Act**) and referred to in the Issues Paper<sup>1</sup>.

It is likely that if the CTTT is amalgamated into one all-encompassing Civil and Administrative Tribunal - a 'super-tribunal' – there will be further barriers in the CTTT achieving its objectives. This has been the experience in both Queensland and Victoria after the creation of QCAT and VCAT respectively.

HIA submits that the Standing Committee should priorities the following as a part of any dispute resolution procedure:

- The need for dispute resolution processes that are easy to understand and simple to invoke and operate;
- The need for dispute resolution processes to afford natural and procedural justice and to allow the right of appeal; and
- The need for processes to assist the efficient and effective resolution of disputes.

### 3 The Current Home Building Dispute Resolution Process in NSW

The domestic building market in NSW is highly regulated.

Specific home building legislation, namely the *Home Building Act 1989* (**HBA Act**) requires that home building work is performed to acceptable standards. The HBA Act also mandates certain procedures for the formal resolution of building disputes.

As an initial step the parties can lodge a complaint with NSW Fair Trading to attempt to resolve the dispute. As part of this process the dispute can be informally adjudicated by the Fair Trading inspector. Although a rectification order can be made against the builder there are no powers to compel the owner to hand over a disputed stage claim payment.

The CTTT has been established to deal with consumer matters, including domestic construction disputes. The CTTT is intended to provide a quick, flexible and informal alternative to litigation in the Courts.

All issues of defective work are required to be lodged through NSW Fair Trading prior to applying to the CTTT. In the year 2010-2011, of the complaints made to Fair Trading on home building matters 91% were resolved through mediation. If the matter cannot be resolved by NSW Fair Trading it is referred to the CTTT.

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<sup>1</sup> **Objectives of the Tribunal:** To ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair, to enable proceedings to be determined in an informal, expeditious and inexpensive manner and to ensure the quality and consistency of the Tribunal's decision-making.

During the year 2010 – 1011 NSW Fair Trading referred 6% of its disputes to the CTTT.

It may be that where matters involve only alleged claims of defective work mediation is the most effective dispute resolution mechanism, the question remains; why can't the remaining 6% of matters be resolved this way, and did they involve contractual claims? Were the parties unwilling to negotiate? More detailed analysis of these matters may be required to adequately determine what mechanisms the CTTT should have in place to effectively and efficiently resolve these disputes.

## **4 The CTTT**

The following outlines HIA's concerns in relation to the operation of the CTTT, in specific reference to those matters raised in the terms of reference.

### **4.1 The efficient resolution of disputes**

There is concern over the ability (or inability) of the CTTT to efficiently resolve disputes. Of most concern is that 69% of matters over \$30,000 take up to 18 months to reach finalisation<sup>2</sup>. In addition 20% of matters over \$30,000 are taking longer than 8 weeks to reach the first directions hearing<sup>3</sup>. This delay is in contradiction to the Chairpersons Direction that a directions hearing will be held up to 42 days after lodgment of the application.

Figures indicate that the hearing and resolution of smaller matters are quite lengthy with more than half taking longer than 6 weeks to reach the first hearing while 66% of these matters are taking up to 16 weeks to reach a resolution<sup>4</sup>. For these smaller matters, alternative dispute resolution should be the most efficient way of resolution.

Unfortunately it is the experience of HIA members that the resolution of home building matters in the CTTT is taking even longer than outlined above. These factors would indicate that there may be a systemic problem in the operation of the CTTT that needs to be addressed.

Unlike other jurisdiction there is no comprehensive guidance on how long matters should take to be resolved. The Local Court in NSW publishes time standards that require 90% of civil cases to be finalised within 6 months of the initiation of the proceedings while all cases are to be finalised within 12 months.

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<sup>2</sup> CTTT Annual Management Report 2010-2011

<sup>3</sup> CTTT Annual Management Report 2010-2011

<sup>4</sup> CTTT Annual Management Report 2010-2011



The relevant District Court Practice Note requires that the court aims to have cases completed within 12 months of commencement. In addition the District Court must hold a status conference at which matters must set a hearing date within a period of between 8 and 11 months from commencement.

A lack of clear enforceable standards for the timely resolution of disputes is clearly an impediment to the CTTT reaching its objectives.

In the year 2010-2011, of the 3488 home building matters finalised in the CTTT, 27% of matters were withdrawn, 27% of matters had final orders made by consent and 45% of matters were resolved by determination. Such analysis queries the ability of the CTTT to adequately resolve and manage disputes; why were so many matters withdrawn? If 27% of orders were made by consent, why could this result not have been achieved through some alternative dispute resolution process.

Clearly more investigation is needed before any changes are made to the NSW tribunal structure.

## **4.2 Decision makers**

The lack of technical knowledge of the building industry amongst tribunal members has been a matter of concern for some time.

The discussion paper sets out a number of perceived advantages to operational improvements and efficiencies that could be achieved via consolidation.

However HIA submits that ensuring procedural fairness and consistent decision making should weigh heavier in the minds of the Standing Committee.

There are concerns that consolidating the existing NSW tribunals will further dilute the expertise available for building matters and further compound current problems. This has been the experience in both Queensland and Victoria (discussed in more detail below).

Given the unique nature of building disputes a lack of technical knowledge can be detrimental to a case and dictates the need to appoint experts in any dispute over defective work. Parties often shop around for a number of different opinions and there is no restriction on this practice, inflating the cost of litigation and making it impossible for respondents to defend a claim that has been made against them without doing the same.

Similarly disputes involving home building contracts require a unique understanding of their operation. If it is clear that a tribunal member does not have experience with these types of contracts, parties are compelled to engage legal representation to ensure the adequacy of contractual arguments.

The expectations and qualification of tribunal members need to be clarified. Section 8 of the CTTT Act identifies those factors that should be considered to determine an individual's eligibility to hear matters at the CTTT<sup>5</sup>.

These criteria are broad and provide no requirement for specific knowledge in one area. To conclude that expertise in one jurisdiction of the CTTT enables that individual to decide on matters in a completely different jurisdiction is illogical. This type of multi-disciplinary approach is not generally acceptable in other industries, for example, in a medical context you would not want a dermatologist performing heart surgery. Similarly, parties to home building disputes do not want their matter heard by a CTTT member who has limited expertise in that area.

Consolidation simply increases the risk of individuals hearing and determining matters in which they have no specific expertise.

### **4.3 Alternative dispute resolution**

The CTTT is obligated pursuant to section 54 of the CTTT Act to try and bring the parties to agreement by conciliation. It is noted that in matters under \$30,000 conciliation can often aid in the successful resolution of matters. However, it must still be considered that in order for conciliation to be successful, parties need tribunal members with building expertise to assist with the process.

In matters over \$30,000 involving issues of defective work an expert conclave may be established. Generally expert witnesses meet on site to discuss the issues on which they have prepared reports with a view as far as possible, to clarifying matters in dispute and reach agreement or narrow points of difference.

Generally HIA members support the use of expert conclaves. However a more inquisitorial system may enable those with appropriate qualifications to assist in the resolution of matters.

Consideration should be given to the enforceability of the decisions of the experts as currently they are not binding on the parties (unless the parties agree via consent orders to have the decision binding prior to the determination). Also, currently there are only two experts able to conduct these conclaves leading to lengthy time delays.

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<sup>5</sup> Whether the person has the ability to exercise sound and fair judgment and to make objective and independent decisions based on the merits of the case, whether the person has the ability to command the respect of the parties in proceedings, whether the person has relevant expertise in one or more of the areas of the jurisdiction of the Tribunal, whether the person has ability or experience in alternative dispute resolution procedures.

These alternative dispute resolution functions rely heavily on tribunal members having expertise in residential building. HIA would reiterate that there is a risk of further diluting the expertise of members through the creation of a 'super-tribunal'.

#### **4.4 Jurisdiction**

The CTTT has jurisdiction to handle matters up to \$500,000. It has been the experience of HIA members that such a broad jurisdiction creates a number of issues. It should also be considered that most of the matters heard by the CTTT are less than or equal to \$30,000<sup>6</sup>.

HIA members have found that consumers are inadvertently encouraged to pursue all manner of issues that may otherwise not be pursued if faced with the prospect of going to court. In addition, there are limited disincentives to lodging vexatious or frivolous claims or for withdrawing applications unlike other jurisdictions.

For proceedings brought in a court, a lawyer must certify that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success<sup>7</sup>. In addition if a lawyer appears in proceedings that do not have reasonable prospects of success, the court, or by application of the parties, may order costs against the lawyer<sup>8</sup>. There is no such requirement for matter involving legal representation in the CTTT allowing little disincentive for ambit claims by consumers.

The CTTT was designed to operate as an informal and efficient dispute resolution option, however as the value of claims increases, the CTTT takes on the character of a 'quasi-court'; parties engage legal representation, submissions are drafted and evidence is prepared. The CTTT was not designed for this and as such does not have the formal processes to adequately deal with matters of this nature.

HIA would support the reduction in the jurisdiction of the CTTT to the vicinity of \$50,000 to \$100,000 (an upper threshold being contingent on there being commensurate expertise with the Tribunal decision maker considering such matters).

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<sup>6</sup> Statistics from the CTTT's Annual Management Report 2010-2011 outline 73% of application received were less than or equal to \$30,000.

<sup>7</sup> Section 347 of the *Legal Profession Act 2004 (NSW)*

<sup>8</sup> Section 348 of the *Legal Profession Act 2004 (NSW)*

## 4.5 Right of appeal

The right of appeal is an inherent part of our legal system and allows aggrieved parties the ability to have decisions reconsidered on certain grounds.

HIA believes parties should have a right to appeal.

The right of appeal available to parties in the CTTT is limited to:

- A rehearing in the CTTT.
- Appeals to the District Court on matters of law.
- Appeals to the Supreme Court on matters of procedural fairness or judicial review.

The grounds for a rehearing in the CTTT are limited. A rehearing will only be granted if the Chairperson decides that a party has suffered a substantial injustice and if the matter is less than \$30,000.

In demonstrating a substantial injustice a party must demonstrate that:

- The decision was not fair and equitable.
- The decision was against the weight of evidence.
- Significant evidence is now available that was not reasonably available at the time of the hearing.

HIA would submit that the monetary limit on appeals should be reconsidered in light of a reconsideration of the jurisdiction of the CTTT. If the CTTT is able to hear claims of between \$50,000 to \$100,000 then a limit of \$30,000 on the ability to have a matter reheard loses its utility and should be increased or completely removed.

Parties can appeal decision of the CTTT to the District Court on matters of law only. The District Court can make a decision in substitution of the one made by the CTTT or remit the matter back to the CTTT for a rehearing.

Appeals on a question of law can raise difficulties for applicants when legal representation may not have originally been engaged. In these circumstances the question of law may not have been properly articulated in the first instance and may limit a party's ability to appeal a decision.

## 5 Experience in other states

### 5.1 The Queensland Experience

The Queensland Civil and Administrative Tribunal (**QCAT**) began operations on 1 December 2009 amalgamating 23 of the state's tribunals and bodies. QCAT is advertised as a single gateway through which the community can access justice.

It makes decisions about guardianship, residential and retail tenancy disputes, debt, consumer, trader, building and minor civil disputes, matters affecting children and young people, anti-discrimination matters, and occupational and business regulation matters.

QCAT has a building division which deals with disputes of a domestic, commercial and contractor natures and also reviews statutory authority decisions.

The intention was for QCAT to deal with building disputes up to \$50,000 to allow for matters to be expedited, with the parties being self-represented.

The experience of our Queensland members has been that matters are taking months and in some cases years to reach hearing stage. In addition, matters are often before members who have had little exposure to building contracts and technical knowledge, causing parties to engage building and construction solicitors for all stages of the QCAT process. Further to this, lengthy delays combined with a lack of exposure by tribunal members to building contracts drives up costs for the parties.

## **5.2 The Victorian Experience**

The Victorian Civil and Administrative Tribunal (**VCAT**) was created in 1998 and amalgamated 15 boards and tribunals to offer a one stop shop dealing with a range of disputes including disputes about consumer matters, credit, discrimination, domestic building works, guardianship and administration, residential tenancies and retail tenancies.

Most applications will be sent to mediation before a hearing. The mediator is required to inform VCAT whether the parties have agreed to settle.

If the matter is not settled then, unless it is a small claim under \$10,000 it will proceed to a directions hearing with a view to it being heard and determined. If matter is a small claim it will be heard the same day of the failed mediation.

At a hearing each side can present its case, ask questions of witnesses and make submissions. The Tribunal is not bound by the rules of evidence and governs its own procedures.

Despite commentary that the consolidation of Victorian tribunals has led to significant cost savings and an expansion of the experience of tribunal members, on the whole HIA members have had negative experiences in VCAT.

As has been the case with QCAT, members have experienced lengthy time delays and inconsistent decisions owing to the dilution of specialist knowledge in the area of residential building disputes.

As has been indicated previously in these submissions issues of delay, lack of expertise and cost escalation are already evident in the current operation of the CTTT. Based on the Queensland and Victorian experience not only does consolidation prevent the resolution of these issues, it deepens their impact and effect.

## **6 Conclusion**

The current process of resolving home building disputes through the CTTT requires review and, if necessary, reform.

In any reform process HIA would urge the Standing Committee to consider the need for procedural fairness in the resolution of disputes; these matters far outweigh the objectives of operational efficiencies that might eventuate if a number of existing tribunals are consolidated.