

# Briefing Note



## Commentary on the *Building Services Corporation (Amendment) Bill 1994*

by

Sharon Rose

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## **Introduction**

The purpose of this briefing note is to provide some context for consideration of the proposed **Building Services Corporation (Amendment) Bill 1994**.

## **Background**

The bill seeks to respond to a number of criticisms made concerning the building industry in New South Wales, particularly the Inquiry into the New South Wales Building Services Corporation, February, 1992, by Commissioner Peter Dodd, the terms of reference and summary of findings and recommendations of which are noted below.

### **Inquiry into the New South Wales Building Services Corporation By Commissioner Peter Dodd - 28 February 1993**

The Royal Commission into Productivity in the Building Industry in NSW received numerous complaints about the operations of the Building Services Corporation (B.S.C) from several sources, including the Building Action Review Group (BARG). This, along with evidence of the maladministration of the Master Builders' Association Group Apprenticeship Scheme, led the Commissioner, Mr Roger Gyles, QC, to find that an external review of the structure and functions of the BSC was warranted.

### **Terms of Reference**

The Inquiry was established:

To investigate and provide recommendations to the Government on consumer protection in the home building and related services industry, with particular reference to:

1. the appropriate purpose and scope of government regulation;
2. the efficiency and effectiveness of the NSW Building Services Corporation (BSC) including its financial management and the administration of the licensing and insurance functions;
3. the role and operations of any special funds or trusts under the control of the BSC;
4. the appropriate structure, functions and operations of the BSC;
5. the best method of minimising disputes, including alternative dispute

resolution mechanisms in the home building sector, and

6. such other incidental matters which may arise in the course of the inquiry.

## **Summary of Findings and Recommendations**

### *Corporate Purpose: Consumer Protection*

- A Registry of Residential Building Disputes be established to receive and seek resolution in all disputes related to residential building work;
- The Registry of Residential Building Disputes should be an independent agency located within the portfolio of the Minister for Consumer Affairs but separate from the Department of Consumer Affairs;
- Insurance for residential building work should be privatised;
- The remaining BSC functions to be consolidated into a restructured organisation to be known as the Office of Building Services within the portfolio of the Minister for Housing;
- The Office of Building Services should be an independent inner budget agency located within the portfolio of the Minister for Housing but separate from the Department of Housing;
- The membership of the Corporation should be reviewed and reconstituted as an Advisory Council to the Minister for Housing.

### *Licensing/Registration*

- The current licensing of residential building contractors in NSW should be replaced by a new registration scheme supported by a compulsory private indemnity insurance;
- The Office of Building Services to be responsible for registering and disciplining building contractors;
- The current show cause process to discipline builders should be replaced by a new system utilising administrative procedures and a special disciplinary tribunal staffed by a small permanent panel of experts;
- Limited appeal rights to the Commercial Tribunal for matters relating

to discipline and registration.

### *Dispute Resolution*

- The Registry of Residential Building Disputes should be the initial referral point for any dispute;
- The Registry of Residential Building Disputes should be responsible for determining the most appropriate and efficient mechanism for resolving individual residential building disputes;
- The existing Building Disputes Tribunal and the Commercial Tribunal should be utilised as the final arbiters in any residential building dispute;
- Monetary jurisdiction of the Building Disputes Tribunal to be increased to \$50,000;
- Matters in excess of \$50,000 should be heard by the Commercial Tribunal;
- De novo appeals against Registry determinations should be directed to the appropriate Tribunal;
- The Tribunals should be given jurisdiction regarding costs in appeals against Registry determinations, or should award costs according to a formula.

### *Insurance*

- The Government should discontinue its involvement in the provision of insurance in the residential building industry;
- There should be compulsory private insurance for all residential building work over \$5,000 in value;
- The responsibility for the existing insurance funds in the interim should be transferred to the Treasurer;
- The Treasurer should appoint an interim Board to manage the operations of the insurance schemes during the transitional period;
- The Treasury should investigate and determine an appropriate privatisation model and the best option for dealing with the remaining BSC policies.

### *Education and Training*

- An appropriate advisory body should be established to assess training and education needs, advise on funding proposals and review performance;
- If the Government is to continue the industry development and education role undertaken by the BSC, the percentage of registration fees to be used for this purpose should be clearly identifiable as should any capital funds endowed for this purpose.

### *Contracts*

- All contracts for residential building work over \$5,000 should be in writing;
- The plain English standard form contract currently being developed by the BSC to be introduced as soon as possible, but not made mandatory;
- A standard dispute clause for all residential building contracts should be legislated, nominating the Registry of Residential Building Disputes as the initial referral for point for any dispute.

### *Local Government*

- Local Councils should be legislatively accountable for ensuring that specified critical phase inspections are undertaken to certify structural soundness in relation to all residential building work.

### *Strata Title Buildings*

- Commissioner Dodd noted that Mr John Mant was undertaking the 'Inquiry into customer Service Bodies Under the Responsibility of the Minister for Housing'<sup>1</sup> which reviewed the strata title area, and recommended that it address the issue of warranties by developers and the contractual relationship between developers and consumers including the role of the body corporate.

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<sup>1</sup> *Inquiry into certain customer service bodies under the responsibility of the Minister for Housing*, Report of Inquiry by Commissioner John Mant, 12 May 1993.

### *Owner Builders*

- Details of any building work over \$5000 undertaken on a property by an owner builder during the preceding seven years must be available during the conveyancing process.

### *Outstanding Grievances*

- All outstanding insurance appeals should be directed to the Commercial Tribunal regardless of the appeal provisions of the original insurance policy.
- Any person who has an outstanding grievance with the BSC should be encouraged to approach the Registry of Residential Building Disputes for advice about any available appeal options that remain for their particular situation.

### *Implementation*

- A small Task Force, reporting to the Minister for Housing should be established to implement these recommendations;

The Task Force should include a representative from the Office of Public Management, Treasury, and a nominee of the Minister for Housing and the Minister for Consumer Affairs;

- Registration fees should be used, in addition to any fees for service, to fully support the operations of the Office of Building Services, the Registry of Residential Building Disputes, the Building Disputes Tribunal and those aspects of the Commercial Tribunal activities that relate to the residential building industry;
- Adequate staff and resources should be provided to implement the recommendations.

## **Major Issues Raised in the Dodd Report**

Commissioner Dodd identified a number of key issues in his report:

### **The role of the BSC as a "one-stop shop":**

- \* "I believe that the key functions of the BSC are mutually exclusive and that the adoption of the 'one-stop shop' approach to the residential building industry is fundamentally flawed. Consequently, the system



is becoming more and more unworkable....I have no doubt that unless the conflicting roles are separated and their respective processes made more transparent and objective, the pressures under which the BSC is currently operating can only become more immobilising."

In her second reading speech, the Minister states that proposed reforms to the BSC seek to address the problems of the 'one-stop shop' issue raised by Dodd and that the transfer of BSC insurance to the private sector is a key element in unravelling the conflicts generated by such a system and that proposals in relation to this will be ready for consideration next year.

**The effectiveness of compulsory licensing as a means of promoting fair trading in the residential building industry:**

- \* "Licensing per se is not a guarantee of quality. Most complaints against builders are against licensed builders: builders who presumably possess at least minimum skills, but who for their own reasons do poor work....Nevertheless, given the magnitude of the investment and the uneven bargaining positions of consumers and builders, there is a role for some limited regulation in the residential building industry, through a registration system and compulsory indemnity insurance.

In her second reading speech, the Minister states that few people have agreed with Dodd's proposals for the abolition of licensing and its replacement with a scheme of registration, supported by compulsory insurance and that it is not possible to quickly abandon licensing as it now exists. Ms Machin further states that a licensing review task force will be established which will consult extensively with industry and consumer groups, with its immediate task to identify ways of improving the current system in the short term, and to examine the options for more fundamental reform of licensing under a privately managed home building insurance scheme.

**Insurance provision via the BSC:**

- \* "I do not believe that government involvement should extend to the management of a monopoly insurance business. The provision of insurance lies most appropriately with the private sector...The insurance schemes currently offered by the BSC cover general and structural defects but the BSC does not demand an inspection of the work during construction. From a risk management point of view I

find this irrational."<sup>2</sup>

As previously mentioned, proposals in relation to the transfer of BSC insurance to the private sector will be ready for consideration next year.

## **Actions Taken since the Dodd Report**

According to the Minister's second reading speech, action has been taken in relation to a number of the issues raised by Dodd:

- After receiving the Dodd report, the Minister for Housing (who had previous ministerial responsibility for the Building Services Corporation (BSC) until its transfer to the Minister for Consumer Affairs in December, 1993) established a task force to consider public reaction to it. The task force reported that while there was widespread agreement about the problems described by Dodd, there were divergent views concerning some of the solutions he proposed and the task force recommended to the Minister that further research and consultation be undertaken into the feasibility and implications of the Dodd report recommendations. Ms Machin advises that this has been under way since late 1993 and will continue into two areas, namely licensing and insurance.
- The BSC has been separated from the Department of Housing and established as a 'stand-alone' organisation.
- The Plain English home building contract was launched on 15 December, 1993, and the BSC is to provide the Minister with a comprehensive report on its first six months of operation.
- The BSC has developed a consumer strategy to guide the enhancement of this area over the next two to three years.
- Production and distribution of "A Fair Deal" - The BSC's plan for advising and educating consumers in the home building industry.

## **Building Services Corporation (Amendment) Bill 1994**

The bill was introduced by the Minister for Consumer Affairs, on 4 May,

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<sup>2</sup> *Inquiry into the New South Wales Building Services Corporation*, Commissioner Peter Dodd, 28 February, 1993. p1.

1994 in the Legislative Assembly. According to the Minister's second reading speech:

There are too many operators still licensed by the BSC who fail to build to an acceptable standard of workmanship or who fail to properly manage their businesses, with the result that consumers are left high and dry when their contractor goes broke. These matters are the targets of the Government's concerns.

The bill seeks to make reforms in relation to:

### **Dispute Resolution**

According to the Minister's second reading speech, the current system for resolving disputes is unsatisfactory from the point of view of the consumer, the building industry and the BSC. The proposed changes seek to facilitate early intervention<sup>3</sup> by the BSC in disputes and to encourage mediation as the first and preferred option of resolution. In addition, authority for issuing rectification orders<sup>4</sup>, will be transferred from the BSC to the Building Disputes Tribunal, thereby eliminating conflict between the roles of dispute resolution and disciplinary action.

The Minister further advises that the new dispute resolution system will offer incentives to disputing parties to resolve their disputes through mediation and that the mediation service will be provided at no charge to the parties and there will be no penalty for not completing mediation successfully.

### **Disciplinary Hearings**

According to the Minister's second reading speech, the bill seeks to transfer disciplinary hearings against license holders from the BSC to the Commercial Tribunal so that they are conducted on neutral ground. The decision of the Commercial Tribunal will be final and appeals may be lodged with the Supreme Court on points of law only. However, the BSC will remain to have responsibility for initiating disciplinary action.

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<sup>3</sup> The bill seeks to abolish the requirement for consumers to wait a period of 30 days to allow the builder to rectify the problem, until which time the BSC is unable to act.

<sup>4</sup> Currently, the BSC has the authority to issue rectification orders to the builder or contractor who fails to act on a complaint of a consumer. The builder must comply with the rectification order or face disciplinary action by the BSC.

## **The Corporation Structure**

The Minister states in her second reading speech, that the current BSC board structure represents various sectional interests and the relationship between the board and the general manager is a confused one. The bill provides for the establishment of a Home Building Advisory Council to replace the Board and to serve as a peak body to advise the Minister on a range of issues in the residential building industry. The Council will operate independently of the BSC and will have its own administrative structure to support its operations.

## **Longstanding Claims**

According to the second reading speech, the bill proposes to give consumers with longstanding disputed insurance claims the right to take the matter on appeal to the Commercial Tribunal and this is consistent with the recommendations made by Dodd in this regard.

## **Building Disputes Tribunal Referees**

Ms Machin states in her second reading speech that it is essential that consumers and builders alike have confidence in the new dispute resolution procedures and, to that end, the bill proposes to amend the *Consumer Claims Tribunals Act* by removing the requirement for Building Disputes Tribunal referees to have extensive experience in the building industry, as this has been interpreted too widely in the past. The amendments will also eliminate the statutory requirement of the Minister for Consumer Affairs to consult with any person or organisation prior to recommending appointments to the Building Disputes Tribunal to the Governor. The Minister further states that these changes will bring selection and appointment procedures into line with those used for Consumer Claims Tribunal referees.