

## Building & Construction The New Dispute Resolution System

### 1. The New 'Dispute Resolution System'

In August 2011, a package of reform legislation came into effect whereby the Western Australian government aimed to reform the building industry processes, registration and complaints system.

The Acts were the *Building Services (Complaint Resolution and Administration) Act 2011 (WA)*, the *Building Services (Registration) Act 2011 (WA)* and the *Building Services Levy Act 2011 (WA)*.

The reform package effectively sets up a new registration framework for people involved in the building industry and provides a streamlined complaints process.

In relation to the complaints process, the *Building Services (Complaint Resolution and Administration) Act 2011 (WA)* is the principal Act. This is the legislation that we will focus upon below. For ease of reference, we refer to it as the '**Act**'.

The major change that most builders and their clients will notice regarding the complaints process is that the Building Disputes Tribunal has been removed. Together, the Building Commission and the State Administrative Tribunal will deal with all future complaints that the Tribunal used to deal with.

A fourth piece of legislation is due to come into effect on 1 January 2012: the *Building Act 2011 (WA)*. We will shortly provide a fact sheet aimed at builders and their compliance with that Act

### 2. Which Board/Tribunal do I go to if I have a dispute?

It depends what the dispute relates to and when the dispute occurred. If it is a workmanship issue it is likely to be either the Building Commission (replacing the former Building Disputes Tribunal) or the State Administrative Tribunal. If it is a payment dispute, it will depend upon the kind of payment dispute.

### 3. What sort of complaints can the Building Commission deal with?

The Building Commission deals with faulty workmanship, certain specific payment disputes and disciplinary proceedings against builders.

These include:

- (a) Workmanship complaints regarding regulated building services: complaints about building services not being carried out in either a proper or proficient manner, or being faulty or unsatisfactory.

Regulated building services include:

- (i) work done by registered building service providers (i.e. builders, painters, building surveyors); and
  - (ii) work done under a contract (or similar arrangement) for home building work.
- (b) Complaints about matters under the *Home Building Contracts Act (1991) WA (HBCA)*. These include limited payment disputes (e.g. excessive or unjustified cost increases).

- (c) Disciplinary complaints relating to the conduct of a registered builder, painter or building surveyor or owner-builder. This can include conduct that is negligent, incompetent, harsh, unconscionable, oppressive, misleading, deceptive or fraudulent. These are dealt with by the new Building Services Board. If the dispute is complex then the Building Commission may refer the matter to the State Administration Tribunal for determination.

#### 4. Who can bring an application to the Building Commission?

Any person who is 'adversely affected' by the building services that were carried out (e.g. the owner, builder, neighbour, sub-contractor etc.) can bring a claim. If it is under a contract for home building work (the HBCA above), either the owner or the builder. If the complaint relates to a disciplinary matter, any person who believes (reasonably) that there has been a disciplinary breach.

#### 5. Can I go straight to the State Administrative Tribunal? What is the difference between a complaint to the Building Commission and the State Administrative Tribunal?

You can't go straight to the State Administrative Tribunal. You must first go to the Building Commission.

The State Administrative Tribunal (**SAT**) reviews the decisions already made by the Building Commissioner, the Building Services Board and certain local government authorities. Basically, if a party appeals the decision of the Building Commission, it will be appealed to the SAT.

However, in some cases the Building Commissioner will refer the complaint made to it to the SAT for them to deal with. This is usually in cases that are complex.

Examples of the decisions the SAT can review include:

- (a) The *Building Act 2011* (WA) gives the SAT the power to conduct a review of certain decisions made by the Building Commissioner or permit authority (local government). For example: a refusal to grant a permit/certificate; certain conditions imposed on a building permit; the refusal to declare that a building standard does not apply; refusal to modify a building standard; or a decision to make a building order.
- (b) The *Construction Contracts Act 2004* (WA) gives the SAT the power to review certain decisions of the adjudicator in payment disputes under that Act. However, the power of review is very limited.

#### 6. I want to make a complaint to the Building Commission. What do I do?

Before lodging a complaint with the Building Commission or the State Administrative Tribunal, talk to the service provider or the client and see if you can resolve it. Tell them your concerns and discuss the problems directly with them. Take notes of the discussions.

If this fails to resolve the issue, you must then provide written notice to them of your complaint (**Notice**). You need to give them 14 days to respond.

The Notice must set out what your complaint is and what remedy you are seeking. A 'Notice of Proposed Complaint' sample form is available from the Building Commission office or their website: [www.buildingcommission.wa.gov.au](http://www.buildingcommission.wa.gov.au) (go to 'Forms').

If after 14 days has passed you have received no response and/or no satisfactory resolution has been reached, you can then make a formal complaint to the Building Commission. A 'Complaint Form' is available from the Building Commission office or website on the same address above.

Upon receipt of your complaint, the Building Commissioner must decide whether to accept or refuse your complaint.

If your complaint is accepted, the Building Commissioner will arrange for an authorised person to investigate the complaint. They will make a report (which may include recommendations for resolving the complaint) and/or refer the matter to the relevant permit authority (e.g. local council)/regulatory body/board for disciplinary action.

The Building Commissioner will consider the investigator's report and can do any of the following:

- (a) dismiss the complaint;
- (b) order the parties to attend conciliation (a meeting where you sit down and discuss the problem with a third party provided by the Commission);
- (c) make orders (e.g. to remedy defective building work or for the builder to pay the cost of someone else remedying the work);
- (d) refer the complaint to the State Administrative Tribunal;
- (e) in the case of a disciplinary matter, refer the matter to the Building Services Board.

Note: The Building Commissioner can only order work or payments up to \$100,000.

If the builder is not a registered builder, the State Administrative Tribunal can only order work or payments up to \$500,000.

If the builder is a registered builder, there is no limit to work or payment that the State Administrative Tribunal can order.

If the remedy you are seeking is above those amounts, you may need to start proceedings in court. Speak to a lawyer about that option.

Typically, in the Building Commission, complaints regarding building service and home building work contract complaints go to conciliation as one of the first few steps. In the State Administrative Tribunal, a similar process is usually followed.

## **7. I have a payment dispute: my client refuses to pay the last progress payment / I believe my builder has overcharged me. What do I do?**

There are, again, several options depending on your circumstances.

### **Summary**

These are, basically:

- (a) private resolution (which can include private mediation or arbitration);
- (b) a claim for adjudication under the Construction Contracts Act (2004) WA;
- (c) in limited circumstances, the Building Commission can hear some payment disputes, as explained above; and
- (d) court proceedings.

### **Private Resolution**

At Cullen Macleod, we generally advise that you attempt to achieve a resolution by private method before you take any other step. This will reduce your legal costs, the time taken, and the stress of being involved in a dispute. We can discuss the various options that are available with you.

### **Adjudication under the Construction Contracts Act (2004)**

The Construction Contracts Act (2004) WA provides an extremely quick process to resolve payment disputes. It is an 'adjudication' process. An adjudicator is a person appointed under the Act who will take your written application and the other party's response, and will make a decision within 28 days of receiving the response. The aim is to ensure that payment disputes are dealt with quickly and projects are not held up due to lack of cash flow. Both builders and owners can make an application.

The crucial issue is that the claimant must lodge the claim within 28 days from when a dispute arose regarding the payment. Usually this is from when the payment was due under the contract, although it can be earlier. This time cannot be extended.

The State Administrative Tribunal does not deal with payment disputes at the first instance. It will deal with appeals from payment disputes dealt with under the *Construction Contracts Act (2004) WA*.

The State Administrative Tribunal can deal with appeals from the adjudicator, but only on a very limited basis. Building Commission The Building Commission basically only deals with payment disputes under the Home Building Contracts Act (1991) WA. Further, it must be a dispute where:

- (a) the contract is terminated and there is a dispute over payments owed; or
- (b) there is a claim that there are excessive or unjustified cost increases in the contract.

### **Court Action**

In most circumstances, this would be your last option. Court action is the most intensive in terms of legal costs, time to resolution and stress. It is also the most procedure driven and the parties have less say in the procedure and outcome than the above options. However, in some cases it will be necessary. We can advise you as to the various options you have, what courts are appropriate and why.

Please note the above information is for general information purposes only. It is not intended as legal advice and should not be taken as legal advice. Your particular facts and circumstances need to be taken into account to provide you with legal advice. If you would like to receive some legal and practical advice on your situation, or just wish to discuss your options in a preliminary no-fee telephone call, please contact Catriona Macleod at [cmacleod@cullenmacleod.com.au](mailto:cmacleod@cullenmacleod.com.au) or call 08 9389 3999.