BUILDING SERVICES (COMPLAINT RESOLUTION AND ADMINISTRATION) BILL 2010

Consideration in Detail

Clause 1: Short title —

Ms J.M. FREEMAN: During my speech in the second reading debate, I asked the minister why there were no objects.

The SPEAKER: Member, I have given you the opportunity to speak but your comments need to relate to the title of the bill. It is not a general debate. If you are going to ask a direct question about the name of the bill, the short title, I will accept that; otherwise I will rule the question out of order.

Ms J.M. FREEMAN: It is about the short title. The short title is the Building Services (Complaint Resolution and Administration) Bill 2010. What is the object of the short title as it relates to fair, just, economic, informal and quick, and is that the intention?

Mr T.R. BUSWELL: The reason the objects were not included is that it was felt that they were covered in the long title of the bill.

Clause put and passed.

Clause 2 put and passed.

Clause 3: Terms used —

Ms J.M. FREEMAN: I refer to the definition of "home building work contract" set out in section 3(1) of the Home Building Contracts Act 1991. I do not have a copy of that act. Could the minister read that definition into the record?

Mr T.R. BUSWELL: I do not have that particular definition as it appears in the Home Building Contracts Act 1991 with me. Suffice to say, the definition of "builder" in section 3(1) of the HBC Act states —

> a person who carries on, or 2 or more persons who together carry on, a business which consists of or includes the performing of home building work for others;

This includes people who are not registered as builders under the Building Services (Registration) Bill 2010 but who lawfully undertake building contracts in which a registered builder is not required. I move —

> Page 3, after line 10 — To insert —
>
> (g) the *Local Government (Miscellaneous Provisions) Act 1960* Parts VIII, IX and XV;

Mr M. McGOWAN: It is entirely appropriate that the minister explain what the amendment means, not that I am trying to delay the house, but, as it was not part of the original consideration, I would not mind knowing what the minister is asking us to amend.

Mr T.R. BUSWELL: I am advised that this amendment enables us to bring the Building Bill into effect after the bill we are currently considering. This is being done at the request of the building industry to provide it with some time to adapt to the new framework.

Ms J.M. FREEMAN: I seek a point of clarification. The amendment is to insert paragraph (g). I do not see a further amendment to rename the existing paragraph (g) to paragraph (h). Is the existing (g) being removed? This does not appear to be the case. I wonder whether a further amendment needs to be made to make the existing paragraph (g) read paragraph (h)?

The SPEAKER: For the information of the member for Nollamara and other members, these sorts of adjustments are made by the Clerks; that is part of the process.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 4 put and passed.

Clause 5: Making a complaint about a building service or home building work contract matter —

Mr W.J. JOHNSTON: I would appreciate some guidance on the issue I raised in my contribution to the second reading debate; I raise it now because this appears to be an appropriate time. What is the interaction between this clause and the standard building contracts used broadly in the industry? The minister was in this place when I made my comments; therefore, I would appreciate it if he has an opportunity to respond.

Mr T.R. BUSWELL: I am advised that a standard industry contract cannot contradict the Home Building Contracts Act. I am also advised that, irrespective of the nature of the contract signed—I think the member is

referring to the standard Housing Industry Association contract—claims about poor workmanship can still be pursued under this legislation. My recollection of the very concerning issue raised by the member for Cannington about the person in his electorate was that it was more specifically related to potential contractual issues as opposed to workmanship. I am happy to take the member's guidance, but the advice I have is that workmanship-related issues can still be dealt with by way of complaint under this legislation.

Mr M. McGOWAN: My question relates to clause 5(1), which states —

> … a person may make a complaint to the Building Commissioner about a regulated building service not being carried out in a proper and proficient manner or being faulty or unsatisfactory.

The first point I make concerns the term "a person". As I outlined in the second reading debate, I received correspondence from the Housing Industry Association indicating concerns about the broadness of who or what might be able to make complaints to the Building Commissioner. Historically, parties to the contractual arrangement were able to make complaints; that is, a builder or a person acquiring a building service would be able to make complaints. The concern is that if the definition of who may complain is allowed to broaden too far, anyone could make a complaint about a building. Therefore, it is a question of how broad that definition is allowed to go and whether, under this bill, there is an opportunity for people who do not like the shape, size or style of workmanship of the building being constructed next door to make complaints. I think the concerns about the level of the litigiousness being promoted are legitimate. I seek an explanation from the minister about how he is expecting the legislation to work. I also ask what the definition of a "person" is, and whether a corporation, non-profit association, a local authority or any other entity that is not actually a flesh-and-blood human being is also defined as a person. This is a concern of the housing industry and it deserves some clarity about what is intended by this subclause.

Mr T.R. BUSWELL: The member for Rockingham raises an interesting issue. It is a matter of how the balance is set. The member for Scarborough, and other members, outlined instances in which neighbours had difficulty obtaining remedy under the existing legislation. This bill attempts to address that to a degree. The housing industry has expressed concern to the member, and indeed to government, that this subclause may empower too many people to have a bite of the cherry, for want of better term. Subclause (1), as the member has rightly pointed out, is quite broad; it reflects the terminology in the existing legislation. The member is right that this provision in its current form allows not only a consumer of a building service, but also any other person—we would like to think—adversely affected, such as a neighbour, subcontractor or a regulatory agency, to make a complaint. The subclause in question does not define "person" in that way. There has been an agreement made with the HIA, and I am happy to put this on the record, that under clause 5, a regulation will be developed that will bring some clarity to this definition of "person" and effectively provide that a "person" referred to in subclause (1) must have a material interest.

To answer the second part of the member's question, "person" can mean an individual, a body corporate, a not-for-profit organisation or a local government. In other words, the regulation will not prescribe "person" to be one or other of those classes of people, because when thinking about a neighbourly dispute, for example, one or other of those classes could always be a neighbour or the owner of the property next to a property being built. If we think about where the definition could be applied, the subclause is trying to give protection to neighbours, in particular, who may have issue. The ownership of a neighbouring property could rest with any number of different entities, but I am advised that placing in regulation a narrowing of the definition of "person" to a person or entity having a material interest helps address the concerns rightly raised by the HIA.

Mr M. McGOWAN: I appreciate the minister's advice; I have some questions about it. First, where in the legislation is a "person" actually defined to indicate that the definition is broader than a flesh-and-blood human being? Second, I think that the regulation-making power is under subclause (5)(a); could the minister perhaps clarify that? Last, I am still a little unsure about who would have a material interest. Is the minister suggesting that neighbours are able to complain about the workmanship on a property being constructed next door? And, playing devil's advocate, does that mean that people who have lost out in raising their objections to councils over the construction of a two-storey house or a garage next door in a location that they do not agree with then get another bite of the cherry by objecting to that construction through the process outlined in the bill? Does it create a second appeal process for disgruntled neighbours who are upset and who were unsuccessful with an objection at the local council? In a case that came to my attention a family was putting a roof on an unroofed shed on their property and the neighbour objected about the roof to the council. Naturally, it was a fairly vexatious complaint because the roof was not angled. In any event, that held up the construction of the roof. If a neighbour is unsuccessful at the council level in a case like that, can he then take it to the Building Commissioner and have another opportunity to take forward the complaint? Most complaints are not vexatious, but some are. What could be done to prevent a complaint from being misused in that way?

Mr T.R. BUSWELL: That is a good line of inquiry. The member for Rockingham is right. I have been in local government and know that occasionally neighbours do not get on. When that happens, they occasionally use any mechanism available to create a forum in which to express their affection for each other, for want of a better term. In answer to your question, "person" is defined through and in the Interpretation Act, as I understand it. The member is correct; subclause (5)(a) enables the regulations to define by material interest. The extension of the term "material interest" is that a person must be materially affected. In other words, there is absolutely no intent for this framework to enable vexatious complaints to be lodged. Clause 7(3)(d) on page 8 gives the Building Commissioner the clear option to not accept complaints that he deems to be vexatious, misconceived, frivolous or without substance. The clear intent here is to deal with a genuine case when a person is materially affected by the activities of building being done on a site. Does that mean if the neighbour thinks the workmanship is not up to scratch he can complain? If it does not affect him—no. It means that if in the compaction of a block the neighbour next door to the building loses his retaining wall, or a tractor or a delivery vehicle is backed through his fence, he starts to have some grounds for taking action. Does it mean that if a building overlooks the neighbour's property and the neighbour is not happy about that, he can complain? No. That is not an issue related to building; it is really related to the approvals process by which that building is built. I hope that gives the member some comfort. I hope clause 7(3)(d), which I just referred to, gives a clear indication of the intent of that clause.

Mr C.J. TALLENTIRE: I thank the minister for the clarification on that part of clause 5. I put it to him that some bodies may not have a material interest but may have a legitimate interest. I am thinking that perhaps the Heritage Council could have a legitimate interest in the actual construction and style of works.

Mr T.R. BUSWELL: The advice I have is that, if the workmanship did not maintain the heritage character or heritage value of the property, there may be grounds to complain. I imagine that most of those issues would be dealt with through the approvals process that led to the building being constructed. We all know the challenges that everyone faces in preserving and maintaining heritage. I would like to think those issues are dealt with prior to a building licence being issued. It is, nonetheless, a good point. The advice I have is that if in the construction process the quality of workmanship has a detrimental impact on heritage or other values, a complaint can be lodged and may be accepted by the commission. There are no guarantees.

Mr M. McGOWAN: The second question the Housing Industry Association raised was in relation to the definition under section 5(1) of "a regulated building service not being carried out in a proper and proficient manner or being faulty or unsatisfactory." The HIA has indicated that that definition is wider than the current definition in the Builders' Registration Act, yet the explanatory memorandum indicates that it is supposed to capture the same conduct. I seek some advice about whether it is a wider definition, or how the minister expects it will be interpreted when examined by the Building Commission and whether it broadens the matters that can be examined by the commissioner over what is currently the case.

Mr T.R. BUSWELL: Thank you for raising that. The advice I have is that it is broader because, ultimately, this framework will cover all professions covered under the Builders' Registration Act, which, hopefully, we will deal with a little later on today. The broader definition gives the commission the power to investigate complaints against some of those other professions, some of which may provide services through a building contract. Some of the others may provide services on a stand-alone basis. That area covers, as I understand it, painters, plumbers and building surveyors and, in due course, other professions may be brought in under that act. The advice I have is that the broadening of the definition is not so much to do with the activities of builders per se but to give the commission the power to properly regulate and control the outputs—the job of work—of some of the other professions that are either coming into this framework now or that may come into it in the future.

Clause put and passed.

Clause 6: Time limit for complaint —

Mr M. McGOWAN: Clause 6(1) reads —

> A building service complaint is made out of time if the complaint is made more than 6 years after the completion of the regulated building service to which the complaint relates.

That is obviously a statute of limitations. Naturally, such are the limitations that they offer all sorts of exemptions and exceptions in law ordinarily. I am seeking the minister's advice on the exceptions and how any exemptions will work. What will happen if the issue comes to light or the failed building service comes to light at five minutes to six years? What will happen if the failure in the legislation comes to light immediately after the six-year period? What is the definition of the completion of the work? For instance, someone I know had a new house built and they moved in before the work was completed so, at the time they moved in, a range of

issues became apparent that took years to repair. Does the six-year period commence at the conclusion of the initial repair work that became apparent after the party had moved in or does the six-year period commence at the point in time they moved in? A whole range of definitional issues surround this. I think for the purpose of clarity the minister might want to try to answer those questions or is it a matter that he will leave for a court to determine at some point in the future?

Mr T.R. BUSWELL: As the member rightly points out, clause 6(1) places a six-year time limit on making a building service complaint. My advice is this is reflective of common law and existing statutory time lines in the current Builders' Registration Act. Clause 6(1) and (2) in effect define that six-year period, although clause 6(2) provides the process for determining when the six-year limit is reached. My advice is that, notwithstanding that framework, after six years complainants still have access to common law rights in areas such as negligence and access to other contractual rights that may have been afforded to them as a result of the building contract they entered into. However, in my notes—I might get some more advice while the member asks me a follow-up question—it says that under clause 6(2), regulations may prescribe criteria. I might just find out what that means, if the member would like to ask me another question.

Dr A.D. BUTI: I was very interested in the response by the minister, because I think he has just rewritten the law of limitations in Western Australia. As far as I am aware, the law of limitations in Western Australia is quite absolute; the time period runs from the time of the wrong. I think the answer the minister gave is not correct. The time starts to run from the date on which the wrong takes place. What the minister should be looking at is the discoverability rule, which would apply from the time that it was reasonably known that the fault took place. That is from when the time should run. Rather than the time necessarily running from when the wrong took place, the discoverability rule allows for the time to run from when that wrong should have been reasonably discovered. I would be amenable to the minister's interpretation if it was correct; I do not think his interpretation is correct. If the minister's intention is for his advice to be the law, he will need to amend this legislation because it is contrary to the Limitation Act of Western Australia and the normal common law provisions that have survived for a long time in Western Australia.

Mr T.R. BUSWELL: My advice is this legislation does not displace any common-law rights. It simply provides a framework by which complaints can be made on matters dealt with in this legislation.

Dr A.D. BUTI: I understand that, but the common law right is that the time commences from when the wrong takes place. That is backed up by the Limitation Act of Western Australia. Whether we are looking at the six-year time limitation in clause 6 or at the contract provisions under clause 6(3), which is also compatible with contracts provisions of the Limitation Act, the time runs from the time the wrong takes place. It would be better and more just if time ran from the time that the wrong could have been reasonably discovered.

Mr T.R. BUSWELL: The advice I have is that we are not going to entertain the change. This is reflective of the longstanding and current provisions in the existing act that we have worked through with the member for Rockingham's friends in the building industry to attempt to provide a fair and proper framework. My advice is that there are a number of complexities in what the member has put to me. I am not going to discuss those now, but we are not going to alter the point at which or the trigger for which a complaint can be made. The member has raised a couple of fair points, but my advice is that this is the longstanding convention and there are a lot of complications in determining when a fault may have been reasonably discovered. Is that the term used?

Dr A.D. BUTI: The minister is correct. The law is as he basically reflected there. It is just that his previous explanation —

Mr T.R. Buswell: Fair enough.

Ms J.M. FREEMAN: Clause 6(2)(a) states, "if the criteria for determining the date of completion for that building service are prescribed". The minister undertook to explain that particular provision. I need to know whether that is prescribed by regulation or whether it is based on the contract. Where is the head of power to prescribe that by regulation?

Mr T.R. BUSWELL: What we are trying to do here is to acknowledge that a number of standard form contracts exist, and we had a discussion with the member for Cannington about the HIA one. A number of those standard form contracts determine or have definitions for completion date. The regulation's purpose would be to basically collate those for the purpose of the regulation so that they can be applied if required.

On the member for Nollamara's earlier point, we just had another look. It is clause 109. I was not trying to be glib before; I was trying to get some time up my sleeve. Clause 109 is the regulations-determining clause of the bill.

Clause put and passed.

Clause 7: Preliminary decision by Building Commissioner —

Mr C.J. TALLENTIRE: My question relates to a number of clauses and deals with the interplay between the Building Commissioner and the State Administrative Tribunal. I seek the minister's clarification on what processes will be in place to ensure that either one of those bodies deals with a particular complaint when it comes in or there is a coordination between the two bodies. I note in particular at clause 7(4) there is mention of that concurrent situation between SAT and the commissioner.

Mr T.R. BUSWELL: I thank the member. The advice I have is that all complaints in the first instance will go to the Building Commissioner, and the subsequent passage of those complaints to SAT will be determined by the processes outlined in the bill but will effectively be coordinated by the Building Commissioner. Although the progress from the Building Commissioner to SAT is controlled by frameworks established in the bill, it is effectively coordinated by the Building Commissioner. The person making a complaint, as they do now with the Building Disputes Tribunal, will still have a single point of contact, as I understand it, in the first instance.

Ms J.M. FREEMAN: I just would like a point of clarification on clause 7(1), which states that after receiving a complaint the commissioner can decide to accept it or to refuse it and the extent to which they accept or refuse. Is that simply appellable or is it appellable only under a process that is outlined in the act?

Mr T.R. BUSWELL: My understanding is that a decision by the Building Commission to refuse to accept a complaint is appealable to SAT. We are just trying to find the relevant clause, although we have probably stumbled across it as we have moved through. That is certainly the advice I have.

Ms J.M. FREEMAN: I have a question about clause 7(1). I would like to know whether the Building Commissioner's acceptance or refusal of a complaint will be published; or if not published, whether the reasons for the decision will be provided so as to assist in an appeal process?

Mr T.R. BUSWELL: The advice I have is that they will not be published, but they will certainly be made available to the parties.

Ms J.M. Freeman: The reasons for the decision?

Mr T.R. BUSWELL: Yes.

Mr M. McGOWAN: Forgive me if I have missed some of this very important debate, but I am interested in how these processes will be handled. Under clause 7, the Building Commissioner receives a complaint; will that process be in writing or will people have to attend a hearing?

Ms J.M. Freeman interjected.

Mr M. McGOWAN: But if a constituent comes to me with a complaint about a builder, will they be required to fill out a form and make a written complaint on which the Building Commissioner will make a decision; or will it be a process whereby the Building Commissioner will call in the parties and hear arguments from both sides before making a decision?

Mr T.R. BUSWELL: Good question. The advice I have is that the expectation is that in the first instance there will be some informal contact—such as, "I have a problem with doors not opening", or, "The house is falling down"—and there will be a requirement for a formalisation of that complaint. That formalisation, as I have been advised, will be in written form. At that stage the Building Commissioner will make the determination, effectively under clause 7(1). The determination will occur prior to there being any other formal process—that is, calling people in for a hearing. However, I would anticipate that in the process of making those decisions, the commission may have cause to seek further information from the parties.

Ms J.M. FREEMAN: With respect to that notice, I would like some clarification. Will the process of how the information is to be received be outlined in regulations or rules; and, how will the government ensure procedural justice is involved in that? How will the government ensure that the commissioner is not subject to complaints that he is too closely aligned with the building industry and that he takes its position all the time? That is a procedural justice question, and it is important in terms of whether a decision will be appellable. How will ad hoc and informal discussions be recorded? Will there be regulations or rules to that effect?

Mr T.R. BUSWELL: I am just getting some advice. Again, this is an interesting point because it is an issue often raised in relation to the Building Disputes Tribunal. The investigation begins once the complaint has been accepted. I do not think the member's issue is with after a complaint has been accepted; it is at the stage before and as to whether a complaint has been accepted. I just want to get some clarification from the member on that.

Ms J.M. Freeman: That is a very good question, minister. In the first instance, it is before the complaint is accepted. Is the minister saying that acceptance or refusal of a complaint is all based on informal submissions?

Mr T.R. BUSWELL: That is right, yes.

Ms J.M. Freeman: That raises the question of how can informal submissions be appellable. Will there be procedural justice in simply accepting an application?

Mr T.R. BUSWELL: The advice I have had is that the commissioner is compelled to receive the complaint. He then makes inquiries about that complaint and decides whether to accept the complaint. Clause 7(3) outlines a number of matters that the commissioner needs to take into consideration in deciding whether to accept the complaint. My understanding is that the process by which a complaint will be made will be set out in regulation; in other words, it will be made very clear how to go about it. The decision to accept the complaint or not will be appealable to the State Administrative Tribunal. Will there be any other obligation on the commissioner at that point? My advice is that there will not be, but I think it is fair to say that the commissioner is a public officer and I would like to think that his obligation will be to deliver on the legislation. People may make judgements about a decision of the commissioner, but that will always happen—well, not always, but I imagine that in some cases people, including builders, will form a view.

Ms J.M. Freeman: But you don't want SAT to form the view that the commissioner has not followed procedural justice.

Mr T.R. BUSWELL: No. Perhaps a good test will be to look at the judgements that SAT makes after having heard appeals. I would imagine that the minister of the day—whoever that is—will take a very keen interest in the first few appeals against a decision not to accept a complaint if they go to SAT and are overturned. I think the minister of the day will be very interested to hear the commissioner's reasons for that. The reason for the process for the initial acceptance of a complaint, and one of the reasons we tried to go down this path, is that it is meant to be an easy process. This legislation was never designed to obstruct people's right to have a fair hearing; it was designed to improve on the current system.

Clause put and passed.

Clause 8: Further information and verification —

Ms J.M. FREEMAN: I want to clarify and put this on record again. Clause 8(3) states —

> The Building Commissioner may refuse to accept a complaint if the person making the complaint does not comply with a requirement under subsection (1) within the time specified in the requirement or, if no time is so specified, within a reasonable time.

Will there be a capacity to appeal this on the basis of not having had time to comply with the requirements? I do not have a problem with there being a time limitation on applications, but most jurisdictions have the capacity to allow appeals on the basis of "my dog ate my homework" type explanations, or something a bit more serious than that. Can the minister provide that clarification?

Mr T.R. BUSWELL: My understanding is that any administrative decision of the commissioner is appellable. If the reason the commissioner refuses to accept a complaint is that the person, in the commissioner's view, has not provided information within certain time frames, and therefore, by extension, they do not accept the complaint, then that person can appeal that decision to SAT.

Ms J.M. FREEMAN: My question was whether it was appellable to the Building Commissioner, because it states "may refuse".

Mr T.R. Buswell: No.

Ms J.M. FREEMAN: So, basically, although it states "may refuse to accept a complaint", it is a "must refuse" interpretation.

Mr T.R. Buswell: No, no.

Ms J.M. FREEMAN: So can people not appeal to the commissioner on the basis of the time limitation; they must appeal to SAT?

Mr T.R. BUSWELL: Yes. If the commissioner requests information and it is not supplied, and subsequent to that the commissioner decides not to accept the complaint, they have made the decision. People can then appeal that decision to SAT. The commissioner is not compelled to not accept; that is on a case-by-case basis. There will certainly be no reduction in the capacity to appeal to SAT because of clause 8.

Clause put and passed.

Clauses 9 and 10 put and passed.

Clause 11: Action after report —

Mr C.J. TALLENTIRE: Clause 11(5) states —

> The regulations may prescribe circumstances in which the Building Commissioner must deal with the complaint by referring the complaint to the State Administrative Tribunal …

Can the minister outline what those prescribed circumstances may be? I have looked at the explanatory memorandum and cannot see the details there.

Mr T.R. BUSWELL: The advice I have is that as the new system rolls out and is getting used more and more, there may be certain circumstances in which it is the view of the government—the regulation will be set by the government—that certain decisions are better determined in a court rather than by a building commissioner. They would probably be complex contractual-type matters. They may well be matters involving large sums of money. Clause 11(5) gives the government of the day the capacity to make those judgements as we move forward through the process. I think that would be fair and reasonable. I do not think there is any intent for the Building Commissioner to make determinations around complex contractual issues. I cannot give a definition of large sums of money and/or projects that involve large sums of money. It is really a provision to provide flexibility for the matter to move forward whereby the government of the day, whoever it is, may form a view that some things are better off dealt with in a court than by the commissioner.

Clause put and passed.

Clause 12: Building Commissioner not party to proceeding before State Administrative Tribunal —

Mr C.J. TALLENTIRE: In light of what the minister just said in relation to clause 11(5), I wonder why, in clause 12, we would look at a situation in which individuals would become complainants to the State Administrative Tribunal and why in fact we would not allow the Building Commissioner to be the person, with the knowledge and resources of the Building Commission, to have the capacity to take a complaint to SAT.

Mr T.R. BUSWELL: Thank you for the question. It is a good question. This clause quite clearly states that the applicant—that is, the person bringing the complaint—is indeed the applicant for the purposes of going to SAT; not the Building Commission. We do not see it as the role of the Building Commission to take matters to SAT, although it is a role of the Building Commissioner, given their expert knowledge et cetera, to have the capacity to appear at proceedings before SAT as an expert witness. We are trying to clearly say to applicants if there is an issue that they feel needs to be dealt with at SAT, or, if under the regulations we talked about previously, the matter should be dealt with at SAT, it is the applicant's responsibility to take the matter before SAT. The Building Commission will be available to provide expert testimony to SAT, but that would be the extent of its involvement. It is trying to establish a clear framework so that people understand the role of the Building Commission, and the role of the Building Commission in relation to matters before SAT.

Mr C.J. TALLENTIRE: I thank the minister for that response. Given we have established that prescribed circumstances are likely to be matters of a fairly complex nature, it could be quite a costly matter, envisaging circumstances such as a contractor using a form of defective concrete. It would be quite a technical matter; probably spread across a number of complaints as well. It could be one building or one dwelling involved, or it could be multiple dwellings. Why would we look to one aggrieved party to go through the effort of bringing this whole thing to SAT? Why would we not enable the Building Commissioner to be the person who coordinates the case at SAT against the body that has failed to undertake appropriate quality works?

Mr T.R. BUSWELL: I am advised it is not envisaged that the role of the Building Commission is to argue a case at the State Administrative Tribunal. In the case of a complicated complaint, the commission will have the capacity to break a complex complaint down into components, if that is possible. It may well be the case that in some matters of that nature, the commissioner forms the view it will have to be dealt with by the tribunal; other matters the commission can deal with. The overriding objective—even though there are no objects—is to make it a simple process. It is not the role of the Building Commissioner to appear at SAT. That has been our intent from day dot. That is what we are trying to clearly set out here. It is not dissimilar to what happens now if a person goes to the Building Disputes Tribunal and ends up taking further action beyond the BDT. It is the role of the complainant, or the applicant in this case, to take that action.

Mr C.J. TALLENTIRE: Will the minister concede that in fact this could create a situation in which an individual has to carry the burden for a number of complainants, and has to marshal a vast amount of

information to put their case effectively to SAT? That really puts an unfair burden on individuals who do not have the same level of expertise as the commissioner would have.

Mr T.R. BUSWELL: Again, the advice I have is that the Building Commissioner can take out simple matters; that is, deal with components of the complaint. The other thing is if a person had a significant issue that affected consumers, there is also the capacity for the Commissioner for Consumer Protection to take action on behalf of people collectively. My understanding, under this legislation, is that it deals with individual contracts between builders and clients. If there was a group of clients who had an issue with the builder, it would have to advance those issues as individual cases. That is as I understand it.

Ms J.M. FREEMAN: In short, can the minister clarify whether that means there is no capacity to take class actions under this clause, and before the commissioner and therefore to SAT? Is the minister saying that sort of class action would have to be taken by way of consumer affairs action on behalf of a group of consumers in the building industry?

Mr T.R. BUSWELL: Yes. This bill is set up to deal with individual complaints between builders and their clients.

Ms J.M. Freeman: And other people who are substantially —

Mr T.R. BUSWELL: Yes, and others, as we discussed earlier. However, the Commissioner for Consumer Protection has some capacity to take action. We will shortly deal with the Building Services (Registration) Bill 2010. That bill does not deal with any form of compensation between a builder and their client or clients, but I would imagine that if the commission was dealing with a number of complaints against a builder, that matter would also appear before the body that has responsibility for registration, and appropriate action would be taken. That will not deal with the financial matters of individual contracts between the builder and the client, which is what this legislation is set up to do.

Ms J.M. FREEMAN: Can the minister clarify or expand on his last comment—that the Commissioner for Consumer Protection will have some capacity to take action? Can the minister give me some sort of understanding?

Mr T.R. Buswell: No.

Ms J.M. FREEMAN: Okay; I will move to the next issue. Can the minister take that on notice and give me some understanding?

Mr T.R. Buswell: I might be able to. The member might bump into a chap later at the back of the chamber who can probably help.

Ms J.M. FREEMAN: Thank you, minister. Given that the minister has put on the record that the Commissioner for Consumer Protection will have the capacity to take action, it would be useful for members in this place to have an understanding of that situation when they represent their constituents. Any number of people could be affected, yet individuals are being asked to take the financial risk of pursuing it. The issue of individuals taking a financial risk in pursuing it arose when responsibility for complaints to the Equal Opportunity Commission was transferred to the State Administrative Tribunal.

Mr T.R. Buswell: Which clause are you referring to?

Ms J.M. FREEMAN: I am still on clause 12. It relates to the State Administrative Tribunal. If an applicant is successful before the Building Commissioner and the defendant takes action at SAT, what protection will there be for the applicant to not have costs awarded against them by SAT given that the Building Commissioner found in their favour?

Mr T.R. BUSWELL: I am trying to track down some information. It was a good question, and I am seeking some advice on it. The member is right: the State Administrative Tribunal may, as it thinks fit, make orders for costs for proceedings arising from a building services complaint. The answer to the member's question is that I think the statement she has made is correct. I have to admit that a scenario could arise that causes me a little angst. I might get some more advice on that before the bill gets to the other place. It may well be that my advice is that we cannot do anything. I want to explain the scenario so I know that we are on the same page. The scenario that the member has outlined is that consumer A makes a complaint against builder B. The complaint is taken to the Building Commission, which works through the process, and the commission finds in favour of consumer A. Builder B then appeals that decision to SAT, as they have a right to do. SAT reviews it and finds in favour of builder B. In other words, the Building Commission's decision was for some reason flawed; I assume that is the only reason it would do that. The costs for that appearance before SAT would then be determined by SAT. It may be—I will have to get more advice on this—that a scenario emerges whereby SAT determines that consumer A is liable for their costs and the costs of builder B, notwithstanding the fact that the only reason they

are before SAT is, in essence, that the Building Commission made a decision that SAT later on determined to be wrong. That is a very good point. We do not have an answer for the member—other than to point her to clause 49. I have just explained what I think about perhaps an isolated case. With my knowledge of the Building Commission, the probability of failure is very low! However, it is a scenario that may emerge. I cannot give the member an answer, other than to carefully outline the scenario for the purpose of *Hansard* and to provide an undertaking that we will do more work and provide information.

Ms J.M. Freeman: The issue arose with the Equal Opportunity Commission, and the legislation was amended so that that did not occur.

Mr T.R. BUSWELL: I think that is a valid issue. It may well be that we go for a bit longer than we had anticipated. It is probably better if I get some more advice that we can provide in the other place. The member can ensure that the relevant persons in the other place are aware of that. We will certainly make sure that the minister who will have carriage of the bill in the other place is aware of it. I think it is a fair scenario. I just do not have an answer at this stage.

Clause put and passed.

Clause 13: Withdrawal of complaint —

Dr A.D. BUTI: Subclause (2) provides that the complaint cannot be withdrawn if it has been referred to the State Administrative Tribunal. Why is that the case? I would have thought that the complainant should be able to withdraw at any stage. It may relate to cost. As I understand subclause (3), it refers only to parts of a complaint, not the totality of a complaint. I find that rather strange.

Mr T.R. BUSWELL: I thank the member for Armadale. My recollection is that section 46 of the State Administrative Tribunal Act allows a person to withdraw a complaint before SAT with the leave of SAT. Subclause (2) is simply a reflection of that fact. If a person wants to withdraw a complaint before SAT, they have to seek the leave of SAT. It preserves the current system. Subclause (3) is designed to create a framework whereby a person can withdraw part of a complaint without necessarily having to withdraw the entire complaint. I am sure that the member can think of circumstances in which that may arise.

Clause put and passed.

Clauses 14 and 15 put and passed.

Clause 16: Preliminary decision by Building Commissioner —

Mr C.J. TALLENTIRE: Clause 16(3)(f) provides that the Building Commissioner can refuse a matter that has been the subject of a previous complaint. I would like clarification about the appeal opportunities. I think it is possible that someone may have had grounds for an appeal, and the complaint may have been rejected, but over time they may have been able to put together more of a case to justify their complaint. I want to be assured that a person in that set of circumstances could re-present their case. I would have thought that even though the Building Commissioner initially rejected the complaint, thinking that it had been previously dealt with, the person would have some opportunity to appeal and elaborate on the fact that the evidence associated with the latest complaint had not been considered.

Mr T.R. BUSWELL: The advice I have is that this clause is designed to stop serial complainants, if I can put it that way. I acknowledge that the clause says "may"; it does not say "have to". As I have just been advised, it may well be that a person makes a complaint that is not resolved in the person's favour for a whole range of reasons, but then additional information comes to light. I imagine that the Building Commissioner would reconsider either the decision not to proceed with the complaint or the outcome of the process. The point needs to be made that at all times they would have the opportunity to appeal the decision to the State Administrative Tribunal; they could either accept the complaint or appeal against the outcome of the complaint. I cannot imagine there would be a serial objector to SAT. I think SAT might give someone reason to stop doing that; however, that is a matter for those people in SAT.

Clause put and passed.

Clauses 17 to 22 put and passed.

Clause 23: Role of conciliator —

Mr M.P. WHITELY: Subclause (3) states that a conciliation proceeding may be commenced without the consent of both parties. Later the bill states that the only real power of the conciliator is to compel someone's attendance. What is the time frame for the conciliation process? If the conciliation process has no capacity other than to compel people to attend and parties can filibuster, what is the time line for the process?

Mr T.R. BUSWELL: The advice I have is there is no fixed time line, other than the discipline that would be imposed by the Building Commissioner—basically ruling a line in the sand and taking advice from the conciliator that things are not progressing in a way that will lead to an outcome.

Mr M.P. Whitely: That is if a conciliator is of the opinion that one of the parties is prolonging things so as not to reach resolution?

Mr T.R. BUSWELL: The commissioner can then resolve to deal with the matter, and the matter will be dealt with. This bill is not designed to create an open-ended process that stymies people's access to a fair outcome; it is designed to give conciliation an opportunity to succeed, which is always the best first step. However, implicit in that is that if it does not work, the commissioner would become active in making a determination.

Mr M.P. Whitely: Effectively, the conciliator would advise the commissioner?

Mr T.R. BUSWELL: Correct.

Ms J.M. FREEMAN: I seek clarification of that. The Building Commissioner appoints a conciliator. What power does the Building Commissioner have over the conciliator to set reasonable times, and if they do not believe they have conciliated in an appropriate time how do they ask for that matter to be moved to the next stage? I am interested in the power that the Building Commissioner has to ensure that the objective of the act to proceed in a timely manner is able to be met.

Mr T.R. BUSWELL: The member for Nollamara makes a good point, and I refer her to clause 29, which deals with the circumstance in which conciliation fails.

Ms J.M. Freeman: That is not a power that the commissioner has though.

Mr T.R. BUSWELL: It basically says that the conciliation process will fail if both parties deem it to have failed; if the Building Commissioner is satisfied that a party is not cooperating in the proceedings; and if the commissioner is not satisfied with the result of the proceeding. If that is the case, the commissioner must take action. It empowers the commissioner somewhat, but it also sends a clear signal that this is not an open-ended process that people can use to prolong a determination; it is an attempt to create a framework for legitimate and appropriate conciliatory activities. But if in the view of the commissioner that is not happening, the commissioner can say that enough is enough.

Mr M.P. Whitely: Is there any capacity for the parties to say that this process is being dragged out and to instigate this process?

Mr T.R. BUSWELL: My understanding is there is no formal process, because conciliation is designed to be a relatively informal process, if I can use that term. It relates to when both parties fail to agree. I can only imagine if a party is feeling aggrieved that the process is not working, I hope that the conciliator will become aware of that. I have been in a few conciliations and I think it would become obvious to the conciliator. I have been involved in some non-facilitated conciliations; that is, when two people have a row with the umpire! I am sure that the conciliator would pick up on the vibe and the matter would hopefully be dealt with by the commissioner, and knowing the soon-to-be commissioner, he is always about the vibe so I am sure it will be fine.

Ms J.M. FREEMAN: On the basis of the "vibe", as I understand the role of the conciliator, at the end of the process—in which the "vibe" is clear—does the conciliator document not only orders but outcomes of conciliation proceedings that have not been resolved? If one person has not participated in conciliation, is there a capacity for the conciliator to make that known?

Mr T.R. Buswell: No.

Clause put and passed.

Clause 24: Parties to conciliation proceeding —

Ms J.M. FREEMAN: Reference is made to the "complainant" and the "respondent" as parties to a conciliation process. I am seeking clarification of the definition of respondent in clause 3, that is, "a person the subject of a complaint". From my history of and experience with the conciliation process, if one of the parties is an insurer—sometimes the insurer stands in the place of the builder—will that limit the people who can attend a conciliation proceeding to a complainant and an insurer; and how will the commission ensure that it gets the two parties there? I have had quite considerable experience in conciliations and it has been my experience that being able to put together the two primary people in a dispute often leads to an outcome, whereas if we put together two people who are representing the parties—one being an insurer—often there would be no resolution.

Mr T.R. BUSWELL: The advice I have is that the respondent is the person subject of the complaint, which is referred to in clause 5. The advice I have is that that would not be an insurer. I do not mean this negatively, but it is a little different from workers' compensation proceedings, thankfully! Under clause 26(1) a party is not to be represented by another person during conciliation proceedings unless the commissioner determines otherwise. The intent clearly is to make this a simple process. I agree with the member 100 per cent that the best outcome is when people are face to face. This process is designed to achieve an outcome and face-to-face contact provides the best opportunity for that.

Clause put and passed.

Clause 25 put and passed.

Clause 26: Representation at conciliation proceeding —

Ms J.M. FREEMAN: I am interested in clause 26, subclauses (1) and (2) and how the commissioner intends to deal with people from non–English speaking backgrounds with a poor understanding of their right to representation.

Mr T.R. Buswell: By way of interjection, I draw the member's attention to subclause (2)(b), which is designed to assist in those circumstances.

Ms J.M. FREEMAN: Thank you.

Clause put and passed.

Clause 27: Building Commissioner may make orders to give effect to agreement —

Ms J.M. FREEMAN: I refer to clause 27(2) and ask the minister to draw to my attention whether that is a financial order. Is there capacity for financial remedy by way of clause 27(2)(d) or by way of an order?

Mr T.R. BUSWELL: Member, I am advised that we will deal with orders soon. Section 36, division 2 goes some way to defining orders, be they for additional building works, financial settlement or otherwise. I think the member will draw some satisfaction from those components of the bill.

Ms J.M. FREEMAN: Thank you for that, minister. I have looked at the bill before. It is a complex bill and the minister does keep going back and forth. I have one question about clause 27(2)(a) because I am not a lawyer and do not know these things as well as I should know them. Does the reference to "final and binding on those parties" extinguish common law capacity or does common law capacity to pursue a matter remain even in the case of a binding order?

Mr T.R. BUSWELL: If it is the same matter, we cannot be sure; if it is a different matter, then, yes, it can.

Ms J.M. Freeman: So it does extinguish common law.

Mr T.R. BUSWELL: Yes.

Clause put and passed.

Clauses 28 to 33 put and passed.

Clause 34: Jurisdiction of State Administrative Tribunal —

Mr C.J. TALLENTIRE: Clause 34 is about the potential for the State Administrative Tribunal to revoke a pending order. Is that an order imposed by the Building Commissioner? Is that correct?

Mr T.R. Buswell: Correct—yes.

Mr C.J. TALLENTIRE: I am therefore concerned about the conflict between the objectives of the Building Commissioner and those of SAT. It may not necessarily be a conflict, but two bodies will be responsible for an order that emanates from the office of the Building Commissioner. I see that as a potentially fraught situation and one that could lead to people using SAT to remove an order that has been legitimately imposed by the Building Commissioner. I think other circumstances of this arrangement could also be problematic, but that is one example that comes to mind.

Mr T.R. BUSWELL: This clause deals with interim orders. I am advised that SAT has the capacity to review interim orders and that under the act it has the capacity to determine whether the interim order remains in force until the complaint is dealt with. This clause is specifically about interim orders; an interim order being one that is issued prior to the complaint being dealt with.

Clause put and passed.

Clauses 35 to 38 put and passed.

Clause 39: Order for payment before building remedy order —

Mr M.P. WHITELY: I have a very quick question about the moneys collected and applied to the building services account. I want to get my head around the role of the building services account. Clause 39, subclauses (5) and (6) make reference to the building services account. Is part of the function of that account to be a holding account for orders made against particular parties? Can the adjudicator force a party who has an obligation to repair a building to put some moneys in a trust account? Is that or is that not the effect of this clause?

Mr T.R. BUSWELL: In essence, the member is right. The application would be in circumstances in which the commissioner or SAT is of the view that that needs to happen—I am assuming—ultimately to protect —

Mr M.P. Whitely: I am sorry; I missed that.

Mr T.R. BUSWELL: It is up to the commissioner or SAT to determine whether that should happen. I assume that determination would be made if the commissioner or SAT think it will help deliver a just outcome. However, the member is, in essence, right—it acts like a trust fund in practice.

Mr M.P. Whitely: For obligations that they have to meet.

Mr T.R. BUSWELL: Correct—for potential obligations.

Clause put and passed.

Clauses 40 to 45 put and passed.

Clause 46: Procedure of Building Commissioner —

Mr M. McGOWAN: Perhaps it might help to note that the times for both clocks in the chamber are not identical. One says one minute to two o'clock and the other says two minutes to two o'clock. It appears that things are coming apart at the seams in this house.

I have very significant concerns about clause 46 and whether the new arrangements will be speedier and will result in clients of the commission receiving justice more quickly.

Debate interrupted, pursuant to standing orders.

[Continued on page 1950.]