

**BUILDING SERVICES (COMPLAINT RESOLUTION AND ADMINISTRATION) BILL 2010**

*Consideration in Detail*

Resumed from an earlier stage of the sitting.

**Clause 46: Procedure of Building Commissioner —**

Debate was interrupted after the clause had been partly considered.

**Ms J.M. FREEMAN:** I am interested in the interplay between clause 46(1)(b) and clause 47(1)(b). I will talk about these two clauses together because the minister can probably answer my question all at once. Clause 46(1)(b) specifies that the Building Commissioner is not bound by the rules of evidence, and subsequently clause 47(1)(b) states that the Building Commissioner can direct a person to produce, within a time specified, any records in the custody or under the control of that person. I am interested to know whether that will include not being hamstrung by legal professional privilege or whether clause 47(1)(b) will extinguish legal professional privilege. I asked about those clauses together because I think there is interplay between them and I do not want to waste the minister's time by talking to both clauses individually.

**Mr T.R. BUSWELL:** My understanding is that it does not extinguish legal professional privilege. I make the point in relation to clause 46 and 47 that it is important to note—we would be aware of it, but for the public record—that the Building Commission is not a court. The whole arrangement of the Building Commission is really based on an expectation that it will act quickly and expertly to determine the matters that are brought before it. I think that is an important aspect of its operation and I think that one of the reasons that people generally support change is this timeliness issue. From my recollections of complaints I heard about the Building Disputes Tribunal, the timeliness issue is a significant matter, and my personal view is that the new process is a good outcome.

**Ms J.M. FREEMAN:** I do not disagree about the timeliness of these things and that the Building Commission is not a court. Given that it is not a court and the minister wants timeliness, why was consideration not given to not being hamstrung by legal professional privilege, because that is one of the things that tends to slow processes? Given that whatever is done in this jurisdiction, as I read somewhere else, may not be used in another court necessarily, I would have thought that would give some capacity for legal professional privilege not to be relied upon by parties to try to obstruct and prevent the process from moving onwards. Therefore, given this and that the Building Commissioner is not bound by the rules of evidence—I think that is a very good thing and I am very pleased to see that—I think the problem we face is that people will try to find other defences and other ways to obstruct the process. The commission should be given the capacity to have all the papers and issues on the table so that parties can be brought to a resolution through conciliation. Hopefully it will be as it is in most jurisdictions, whereby many cases are determined by conciliation, and they are often determined by conciliation because all the information is on the table to the review.

**Mr T.R. BUSWELL:** Our intent was, as I explained, to create the Building Commission such that it is not seen to be a court. I think that if the member accepts that as the premise, it would be unwise to give the commission powers, for example, to extinguish or override, or whichever term the member likes to use, legal professional privilege. As I understand, that is a power that a court does not have.

**Ms J.M. Freeman:** It does have; you can argue.

**Mr T.R. BUSWELL:** Suffice to say it is not our view that it is an acceptable set of powers for the Building Commission to have.

**Ms J.M. FREEMAN:** In fact, the minister is probably right in that it can be argued that legal professional privilege does not attach to a document. However, the workers' compensation jurisdiction put in a provision that legal professional privilege could not apply to documents that were being relied upon for determination. Therefore, it is possible to do that. I think that if the government's objective is to have an informal and quick process, when and if the legislation is reviewed, the minister should consider whether legal professional privilege is one of the things that are a real obstruction.

That aside, clause 46(2) states —

Subject to this Act, the Building Commissioner may determine his or her own procedure.

Will that be by way of rules and regulations? How will that be documented?

[Quorum formed.]

**Ms J.M. FREEMAN:** Prior to the quorum being called, I was asking a question about clause 46(2) and whether there will be rules and regulations or how the procedure will be documented.

**Mr T.R. BUSWELL:** My understanding is that the procedures that the commissioner determines will be published as a document of the commission. That is the advice I have.

**Ms J.M. FREEMAN:** If it is a document of the commission, how does that have standing if a person wants to appeal to the State Administrative Tribunal regarding process and procedural justice and those sorts of things? I suppose that is my concern. I would have thought that rules and regulations would be made, and in that way people have to be bound by them. If it is just a document of the commission, how does that interplay in ensuring that we do not have a situation in which people can adopt procedures, following which there is an appeal to SAT, and the process is hamstrung so that there are delays? From my experience, if people want to delay processes, they have all sorts of ways of doing that, including questioning, on a constant basis, the procedural justice that is involved in the jurisdiction.

**Mr T.R. BUSWELL:** The advice I have is that it would be difficult to understand how a person could challenge the Building Commissioner on a procedure when this legislation gives him or her the power to determine that procedure.

**Clause put and passed.**

**Clause 47 put and passed.**

**Clause 48: Joining of parties in HBWC complaint about unconscionable, harsh or oppressive conduct or contract —**

**Ms J.M. FREEMAN:** Clause 48(3) refers to a breach of section 15 of the Home Building Contracts Act 1991. Could the minister read that section into *Hansard* for me?

**Mr T.R. BUSWELL:** Section 15 of the Home Building Contracts Act is made up of a number of provisions and runs across two pages, so I am not going to read that into *Hansard*. I can perhaps provide a description of what the section does. It refers to conduct or terms of contract that are unconscionable et cetera. Basically, subsection (1) outlines things that a builder must not do. Subsection (2) states —

Without limiting the generality of subsection (1) —

They are the things that builders cannot do —

regard may be had to the following for the purposes of that subsection —

So it expands on the aspects that can be given consideration in determining unconscionable action, I suppose. Subsection (3) then goes on to state —

A provision of a contract must not be called in question under subsection (1)(b) by reason only that it entitles the builder —

And it gives a number of other explanations. The section is just too long to read into the record. I am sorry about that.

**Ms J.M. Freeman:** No, that is all right. I probably should have looked it up, but I —

**Mr T.R. BUSWELL:** I have it here with me. The member can look at it afterwards at her leisure.

**Clause put and passed.**

**Clause 49: Costs and expenses —**

**Ms J.M. FREEMAN:** I want to ask some questions about costs and expenses under clause 49(1) and (2), which goes to the circumstances in which costs will not be awarded. I suppose I am just seeking some clarification. Firstly, will there be an application cost? If so, I gather that must be in a fees and charges schedule somewhere. What is the basis for costs and how will this be structured? Will it be structured like the Magistrates Court and the Small Claims Tribunal-type costs? Will it be gazetted? Who will set the costs? Will the commissioner set costs, or will the commissioner establish a costs committee to set costs? I assume that subclause (2) is saying that costs will pretty much not be awarded for legal representation. I want clarification of that. I also have a question about subclause (3), but I will stand again and ask it.

**Mr T.R. BUSWELL:** For a complaint, there is an application fee—that schedule is yet to be determined, as I understand it—but there will not be a fee to apply for costs. There will not be a costs committee. The member is right about clause 49(2). I might just advise that clause 49(2) restricts the power of the Building Commissioner to award costs for representation—that is, lawyers' fees—in circumstances in which the party has been forced to incur the costs because of the inappropriate actions of the other party or as a result of a weak claim. I am pretty sure that that deals with the issue that the member raised. In general, it is expected that parties dealing with the

Building Commissioner will not require representation and that the costs incurred in responding to a complaint and providing information will be minor. That is the expectation.

**Ms J.M. FREEMAN:** Can the minister tell me whether the expectation is that costs will be something that is normal or something that is the exception to the rule and that it would be mostly a non-costs jurisdiction?

**Mr T.R. Buswell:** While you are on your feet, the advice I have is that it will be the exception rather than the rule. That is because of the levy.

**Ms J.M. FREEMAN:** Yes. The minister knows that I had a preference for the non-costs jurisdiction of the previous workers' compensation system and that I believe that part of the problem is that it has now become a costs jurisdiction. But, that aside, clause 49(3) states —

If the Building Commissioner or the State Administrative Tribunal is of the opinion that the costs and expenses were unnecessarily incurred due to the conduct of a party, ...

And it goes on. I am wondering how this will be determined and whether it is the commissioner's view that there will be some warning of this, so that the party will be warned that costs may be ordered if they do not comply with time lines or if they are doing something that hinders the process. I say that because I believe that an applicant is put in a really difficult position if, at the end of the day, they are threatened with costs being awarded when they should not be, to try to stop them proceeding; or, if they are doing something that will lead to costs being awarded, they are not made aware of that. I wonder how the commission intends to deal with that aspect of the bill.

**Mr T.R. BUSWELL:** I think subclause (3) is an exceptional circumstance-type clause, but it clearly says that if, in the opinion of the commissioner, or SAT, a person is not behaving appropriately, that person may well be —

**Ms J.M. Freeman:** If it is the opinion of the commissioner that a person is delaying, will the commissioner make his or her opinion known to the applicant so that they won't be —

**Mr T.R. BUSWELL:** My advice is that generally the answer would be yes. And I do not think it is just the applicant; it may also be the respondent.

**Ms J.M. Freeman:** Either side.

**Mr T.R. BUSWELL:** Yes. The advice I have is that generally the answer would be yes, because in the first instance a change in behaviour would be wanted, so it would be the disincentive of the commissioner —

**Ms J.M. Freeman:** Will that be outlined in the processes established in clause 46(1), so that it will be outlined in that document that comes out?

**Mr T.R. BUSWELL:** Yes.

**Mr M. McGOWAN:** I want to raise an issue relating to cost. I do not want to labour the point. The consumers association, or whatever it was called, indicated that —

**Mr T.R. Buswell:** The united people's front for the protection of the Building Disputes Tribunal.

**Mr M. McGOWAN:** That is the one. They are the minister's words, not mine. That group wrote to me about the costs issue. As I recall, it indicated that the cost structure would be greater for some people than it currently is. As we indicated in the second reading debate, we were interested in whether it would be more expensive for an applicant before the new body than for an applicant before the old body. I am basically seeking the minister's advice or assurance on what the cost structure will be comparing both bodies. If I was applying under the old body today, would it more expensive for me to bring a complaint than it would next year or next month or whenever under the new body?

**Mr T.R. BUSWELL:** I am advised that, by and large, the costs of delivering the process will be covered by the levy. At the moment the Building Disputes Tribunal charges a threshold fee of \$32, I think. The advice is that although that fee has yet to be struck for the new body, it is more likely to be in the vicinity of \$100. Will there be other potential cost savings through the process? If it is quicker, the answer would be yes. If it delivered some outcomes, the answer would be yes. It is our view that, considering cost versus benefits, people who use this complaints handling system will be advantaged. The whole point of this was to provide a better system. One of the reasons the building bills that provide this reform took so long to come to Parliament was my insistence in a previous life that the failings of the Building Disputes Tribunal be dealt with and a better system put in place. The short answer is the advice I have is that the up-front threshold fee will go up from \$32 to \$100. That might sound like a significant percentage increase. It is a threshold fee designed to at least ensure that people have thoroughly considered the application they will lodge.

**Mr M. McGOWAN:** For an applicant, it will be \$68 more under the new arrangement than under the old arrangement.

**Mr T.R. Buswell:** Give or take. That \$100 is yet to be struck. That is an estimation.

**Mr M. McGOWAN:** The advice given to me by the consumers association was that if there was some sort of levy arrangement, people with properties of a certain value would pay more than those with properties of a lesser value or something of that nature, which in principle I do not disagree with. Is it something different from this, or what are they referring to in that matter?

**Mr T.R. BUSWELL:** Only to the extent that the overall levy, part of which will fund this, as it does at the moment, is based on the value of the property. It is a percentage times the value of the property. We will talk about the overall levy when we get on to the levy bill. The overall levy that will be charged will be collected by local governments. A levy is already collected by local governments. There is a disparity between the new levy that will be charged by local governments and the existing local government levy. We will work through that when the levy bill comes in. A component of this funding is generated by that levy. That is currently the case. Aside from that, I cannot comment any further on any link between the value of the property and the fee. There will be a threshold fee.

**Mr M. McGowan:** Where is the levy contained?

**Mr T.R. BUSWELL:** In the levy bill. In his speech on the second reading debate, the member raised the issue, and rightly so, of the impact on cost. I understand that was mainly in relation to the levy bill. He will want to explore the expected rate of the levy and the expected rate that local government can levy. My suggestion is that we would have that discussion at that time as it specifically relates to the complaint resolution process. The advice I have is that there is an up-front fee and there is no charge that specifically relates to the value of the property.

**Ms J.M. FREEMAN:** I have two things to raise out of that discussion. I do not think the minister answered my question about whether the costs would be gazetted. How would we know what the costs were under clause 49?

**Mr T.R. Buswell:** The fees —

**Ms J.M. FREEMAN:** No. When costs are awarded against a person, will they be gazetted? I am talking about a cost schedule for things such as photocopying, lodgement, legal fees and hours. That is what this is about; it is about a cost schedule.

**Dr A.D. Buti:** Is there a taxation on costs?

**Ms J.M. FREEMAN:** No, taxation on costs is not in here. We cannot tax the costs.

**Mr T.R. Buswell:** What was your question?

**Ms J.M. FREEMAN:** Will it be gazetted?

**Mr T.R. Buswell:** No.

**Ms J.M. FREEMAN:** How will people know —

**Mr T.R. Buswell:** There will be an adoption of similar schedules of costs that exist appropriate to SAT or to the Magistrates Court. I do not think that has been worked through.

**Ms J.M. FREEMAN:** How will they be scrutinised? All costs in other jurisdictions are gazetted. Even the workers' compensation cost schedules are gazetted. I do not see how they can be scrutinised. Is the commission giving itself unfettered powers?

**Mr T.R. Buswell:** Give me a break!

**Ms J.M. FREEMAN:** Okay. I understand it will not have unfettered powers, but we need to have some sort of procedure for how costs are established if the commission gives itself the power to award costs.

**Mr T.R. BUSWELL:** The advice I have is that the intention of the commission is to adopt the cost schedules that are applied by SAT.

**Dr A.D. BUTI:** Is that legislated for?

**Mr T.R. Buswell:** No.

**Dr A.D. BUTI:** Are we just going on the minister's good intentions?

**Mr T.R. Buswell:** Yes.

**Dr A.D. BUTI:** Is that what we really want to do? It is not that I dispute the minister's intention, but he will not always be the minister.

**Extract from *Hansard***

[ASSEMBLY — Wednesday, 23 March 2011]

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Ms Janine Freeman; Mr Troy Buswell; Mr Mark McGowan; Dr Tony Buti

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**Mr T.R. BUSWELL:** It is not necessarily my intention. That is the intent of the commissioner. I imagine that if that becomes an issue, it would be subject to appropriate scrutiny. I accept that it will emerge from time to time.

**Ms J.M. Freeman:** Appropriate scrutiny is usually by way of it being gazetted so that parties can see it.

**Mr T.R. BUSWELL:** I am happy to look at what happens in other jurisdictions. It is not an issue for us. I am happy to get some more advice on that as we move through this process. That will be the second thing over and above the other issues that have been raised. There is no intent to use this process to gouge anybody. I have stated that the intent is that the schedules will be the schedules adopted by SAT. If we have to look at doing that by gazettal, I am happy to look at that.

**Dr A.D. BUTI:** I know an order for costs is appealable to SAT; so that is one way of trying to ensure there is some reasonable cost order. However, what guideline will SAT utilise to ensure that the cost order is appropriate? I presume the minister is saying that it will be looking at other jurisdictions.

**Mr T.R. Buswell:** Which component of the cost?

**Dr A.D. BUTI:** An order for costs that is made by the Building Commissioner is appealable under clause 57.

**Mr T.R. Buswell:** Yes.

**Dr A.D. BUTI:** An order for costs is appealable under clause 57, so that is some guarantee. However, SAT of course has to have some criteria to determine whether those costs are appropriate.

Debate adjourned, pursuant to standing orders.