

House of Representatives

Supplementary Order Paper

Tuesday, 8 October 2002

Construction Contracts Bill

Proposed amendments

Hon Lianne Dalziel, in Committee, to move the following amendments:

Clause 2

To omit from line 6 on page 3 the words “(except **sections 43 and 56**)”, and substitute the words “(except **sections 43, 55B, and 56**)”.

To omit from line 8 on page 3 the words “**Sections 43 and 56**”, and substitute the words “**Sections 43, 55B, and 56**”.

Clause 4

To omit from paragraph (f) the words “**sections 23 to 48**” (line 17 on page 4), and substitute the words “**sections 23 to 48A**”.

To omit paragraph (h) (lines 28 to 32 on page 4), and substitute the following paragraph:

- (h) provisions enabling an adjudicator’s determination to be enforced by entry as a judgment on application to a District Court are set out in **sections 50A to 50F**:

To omit from paragraph (i) the words “**sections 52 to 56**” (lines 34 and 35 on page 4), and substitute the words “**sections 51A to 56**”.

Clause 5

To insert, after the definition of **contract price** (after line 22 on page 6), the following definitions:

court means—

- (a) the High Court; or
- (b) a District Court in any proceeding in which the amount claimed or in issue does not exceed the amount to which the jurisdiction of the District Court is limited in civil cases

customised components, in relation to a building or structure, means components that are specifically designed or modified for that particular building or structure

To omit paragraph (b) of the definition of **defendant** (lines 26 and 27 on page 6), and substitute the following paragraph:

- (b) who is liable, or will be liable if certain conditions are met, to pay an amount of money under the determination; and

To omit paragraph (b) of the definition of **plaintiff** (lines 6 and 7 on page 8), and substitute the following paragraph:

- (b) to whom an amount of money is payable, or will be payable if certain conditions are met, under the determination; and

To insert, after the definition of **scheduled amount** (after line 27 on page 8), the following definition:

tribunal means—

- (a) an arbitral tribunal; or
- (b) a Disputes Tribunal established under section 4 of the Disputes Tribunals Act 1988

Clause 6(1)(f)

To insert, after subparagraph (iii) (after line 8 on page 11), the following subparagraph:

- (iv) prefabricating customised components of any building or structure, whether carried out on the construction site or elsewhere; and

Clause 6A

To omit from the definition of **equity rights** in subsection (2) the word “**rights**” (line 36 on page 12), and substitute the word “**returns**”.

To omit from subsection (3)(a) the word “security;” (line 20 on page 13), and substitute the word “security;”.

Clause 8

To omit this clause from line 29 on page 13 to line 19 on page 14, and substitute the following clauses:

8 When Act applies: general

Subject to **sections 8A and 9**, this Act applies to every construction contract (whether or not governed by New Zealand law) that—

- (a) relates to carrying out construction work in New Zealand; and
- (b) is either—
 - (i) entered into on or after the date of commencement of this Act; or

- (ii) entered into before the date of commencement of this Act and that is renewed for a further term on or after that date (except that this Act has effect only in relation to obligations that are incurred or undertaken on or after that date); and
- (c) is written or oral, or partly written and partly oral.

8A When Act applies: residential construction contracts

To avoid doubt, this Act applies to residential construction contracts, except for the following provisions:

- (a) **sections 13 to 16** (which set out default provisions that relate to progress payments); and
- (b) **sections 21(2)(b), 22(2)(b), and 39(2)(b)** (which relate to the serving of a notice to suspend the carrying out of construction work under a construction contract); and
- (c) **sections 26A, 26B, 26D, and 37A to 37G** (which relate to the issue of charging orders in respect of construction sites); and
- (d) **Part 4** (which relates to other measures for securing payment under this Act).

Subpart heading above clause 12

To omit the words “payment provisions of construction contracts” (lines 24 and 25 on page 16), and substitute the word “payments”.

Clause 18(3)

To omit paragraph (b) (lines 24 to 26 on page 20), and substitute the following paragraph:

- (b) an explanation of the consequences of—
 - (i) not responding to a payment claim; and
 - (ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).

Clause 21(2)(a)

To omit from line 6 on page 22 the words “of competent jurisdiction”.

Clause 22(2)(a)

To omit from line 6 on page 23 the words “of competent jurisdiction”.

Clause 23(1)(b)

To omit from line 5 on page 24 the word “arbitral”.

Clause 24

To omit from the heading to this clause the words “**Effect of Part on**” (line 28 on page 24), and substitute the words “**Relationship between Part and**”.

To omit from *subclause (1)* the words “the courts, to arbitration, or to mediation” (lines 6 and 7 on page 25), and substitute the words “a court or tribunal, or to mediation”.

To omit *subclause (1B)* (lines 16 to 19 on page 25), and substitute the following subclause:

- (1B) However, an adjudicator must terminate the adjudication proceedings on a dispute if, before the adjudicator determines the dispute, that dispute is determined under another dispute resolution procedure.

Clause 25

To omit this clause from line 22 on page 25 to line 2 on page 26, and substitute the following clause:

25 Effect of Part on civil proceedings

- (1) Except as provided in this section and **section 40A(2)**, nothing done under, or for the purposes of, this Part affects any civil proceedings arising under a construction contract.
- (2) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—
- (a) must allow for any amount paid to a party to the contract under, or for the purposes of, this Part in any order or award it makes in those proceedings; and
- (b) may make any orders that it considers appropriate, having regard to any steps taken by a party to the contract in good faith and in reliance on an adjudicator's determination (including an order requiring a party to the contract to pay for goods and services supplied by another party to that contract in good faith and in reliance on an adjudicator's determination).

Clause 26(2)

To omit paragraph (f) (lines 4 to 6 on page 27), and substitute the following paragraph:

- (f) whether a determination of an owner's liability under **section 26B(a)** and an approval for the issue of a charging order under **section 26B(b)** are being sought:

Clause 26C

To omit this clause from lines 26 to 30 on page 27, and substitute the following clause:

26C When claimant may not seek approval for issue of charging order

A claimant may not seek any of the matters referred to in **section 26A or section 26B** against an owner who is a residential occupier of the construction site.

Clause 26D(2)

To omit from paragraph (a) the words "**42, and 47**" (line 18 on page 28), and substitute the words "**and 371**".

Clause 28(2)

To omit the word "on" (line 5 on page 30), and substitute the words "in relation to".

Clause 29

To insert, after *subclause (2)* (after line 22 on page 30), the following subclause:

- (2A) However, if the person has a conflict of interest, he or she must not serve a notice of acceptance under **subsection (2)** until the parties have confirmed (whether orally or in writing) that they agree to the person acting as an adjudicator.

Clause 32(1)(a)

To omit from line 2 on page 33 the expression “**sections 37(1)**”, and substitute the expression “**sections 37**”.

Clause 36(4)

To omit the expression “**section 47(6)**” (line 23 on page 37), and substitute the expression “**section 37(6)**”.

Clause 36A(3)

To omit from line 10 on page 38 the words “of the date of the determination”, and substitute the words “after the date on which a copy of the determination is given to the parties to the adjudication under **section 36(3)**”.

Clause 37

To omit this clause from line 14 on page 38 to line 5 on page 39, and substitute the following clause:

37 Adjudicator’s determination: substance

- (1) If an amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine—
- (a) whether or not any of the parties to the adjudication are liable, or will be liable if certain conditions are met, to make a payment under that contract; and
 - (b) any questions in dispute about the rights and obligations of the parties under that contract.
- (2) If no amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine any questions in dispute about the rights and obligations of the parties under that contract.
- (3) If an adjudicator determines under **subsection (1)(a)** that a party to the adjudication is liable, or will be liable if certain conditions are met, to make a payment, the adjudicator—
- (a) must also determine—
 - (i) the amount payable or conditionally payable; and
 - (ii) the date on which that amount became or becomes payable; and
 - (b) may determine that the liability of a party to the adjudication to make a payment depends on certain conditions being met.
- (4) Despite **subsections (1) and (2)**, an adjudicator is not required to determine a dispute that has been withdrawn in accordance with **section 32A**.

- (5) If a dispute is settled by agreement between the parties before the adjudicator's determination is given, the adjudicator—
- (a) must terminate the adjudication proceedings; and
 - (b) if requested by the parties, may record the settlement in the form of a determination on agreed terms.

Clause 37A(1)(a)

To omit the word "the" (line 23 on page 39), and substitute the word "a".

Heading above clause 37D

To add to this heading (line 29 on page 41) the words "*in respect of owner who is not respondent*".

Clause 37E

To insert in *subclause (1)*, after the words "in the prescribed form" (in line 9 on page 42), the words "(if any)".

To omit *subclauses (3) and (4)* (lines 18 to 24 on page 42).

New heading and clause 37I

To insert, after *clause 37H* (after line 6 on page 44), the following heading and clause:

*Adjudicator's fees***37I Adjudicator's fees**

- (1) An adjudicator is entitled to be paid, by way of fees and expenses, an amount—
 - (a) that is agreed between the adjudicator and the parties to the adjudication; or
 - (b) if there is no agreement, that is reasonable, having regard to the work done and expenses incurred by the adjudicator.
- (2) The parties to the adjudication are jointly and severally liable to pay the adjudicator's fees and expenses.
- (3) The parties to the adjudication are each liable to contribute to the adjudicator's fees and expenses in—
 - (a) equal proportions; or
 - (b) the proportions that the adjudicator may determine.
- (4) An adjudicator may make a determination under **subsection (3)(b)** if, in the adjudicator's view,—
 - (a) the claimant's adjudication claim, or the respondent's response, was without substantial merit; or
 - (b) a party to the adjudication acted in a contemptuous or improper manner during the adjudication.
- (5) An adjudicator is not entitled to be paid any fees and expenses in connection with an adjudication if he or she fails to determine the dispute within the time allowed by **section 36(2)**.
- (6) Despite **subsection (5)**, an adjudicator may require payment of his or her fees and expenses before communicating his or her determination on a dispute to the parties to the adjudication.

- (7) If an adjudication claim is withdrawn or terminated, or the dispute between the parties is resolved, an adjudicator is entitled to be paid the fees and expenses incurred in the adjudication up to, and including, as the case may be, the date on which—
- (a) the adjudication claim was withdrawn or terminated; or
 - (b) the adjudicator was notified that the dispute had been resolved.

Clause 38

To omit this clause from lines 11 to 13 on page 44, and substitute the following clause:

38 Enforceability of adjudicator's determination

- (1) An adjudicator's determination under **section 37(1)(a)** is enforceable in accordance with **section 39**.
- (2) An adjudicator's determination under **section 37(1)(b)** or **(2)** about the parties' rights and obligations under the construction contract is not enforceable.
- (3) However, **section 40A** applies if the determination referred to in **subsection (2)** is not complied with.

Clause 39

To add to the heading to this clause (line 15 on page 44) the words "**under section 37(1)(a)**".

To omit from *subclause (2)(a)* the words "of competent jurisdiction" (lines 8 and 9 on page 45).

To omit from *subclause (5)(a)* the expression "**section 37**" (line 31 on page 45), and substitute the expression "**section 36(3)**".

To omit from *subclause (5)(b)* the expression "**section 37(1)(c)**" (lines 32 and 33 on page 45), and substitute the expression "**section 37(3)(a)(ii)**".

Clause 40

To add to the heading to this clause (line 2 on page 46) the words "**under section 37(1)(a)**".

To insert, after the word "determination" (line 3 on page 46), the words "**under section 37(1)(a)**".

New clause 40A

To insert, after *clause 40* (after line 8 on page 46), the following clause:

40A Consequence of not complying with adjudicator's determination under section 37(1)(b) or (2)

- (1) If a party to an adjudication fails to comply fully with the adjudicator's determination under **section 37(1)(b) or (2)** about the parties' rights and obligations under the relevant construction contract, any other party to the adjudication may bring proceedings in any court to enforce that other party's rights under that contract.
- (2) In any proceedings under **subsection (1)**, the court must have regard to, but is not bound by, the adjudicator's determination.

Clause 41A

To omit paragraph (b) (lines 1 to 3 on page 47), and substitute the following paragraph:

- (b) by an adjudicator who has the specific additional qualifications, expertise, and experience that may be prescribed for the purposes of this section (if any).

Clause 42

To omit *subclause (2)* (lines 14 to 17 on page 47), and substitute the following subclause:

- (2) To avoid doubt, **subsection (1)** does not limit **section 41**.

To omit *subclause (3)* (lines 21 to 28 on page 47), and substitute the following subclause:

- (3) If a party to an adjudication wishes to provide another party or the adjudicator with copies of, or extracts from, the construction contract but is for any reason unable to do so (for example, in a case where the contract is oral), it is sufficient if that party gives the missing information in the form of a statutory declaration together with any supporting documents that are available.

Clause 44(1)(b)

To omit the expression "**section 36**" (lines 16 and 17 on page 48), and substitute the expression "**section 36(2)**".

Clause 47

To omit this clause (line 6 on page 50 to line 22 on page 51).

Clause 48(2)

To omit from line 12 on page 52 the words "or without reasonable care".

Clause 49

To insert in *subclause (1)*, after the word "work" (line 29 on page 52), the words "under that contract".

To omit from *subclause (1)(a)(i)* the words "given by the party who ought to have made" (line 1 on page 53), and substitute the words "provided by the party who it is claimed is liable for".

To omit *subclause (2)(ba)* (lines 25 to 27 on page 53), and substitute the following paragraph:

- (ba) is entitled to an extension of time to complete the contract, but is not entitled solely by reason of this Act to recover any costs incurred as a consequence of the extension of time; and

To insert, after *subsection (2)* (after line 32 on page 53), the following subclause:

- (2AA) To avoid doubt, **subsection (2)(ba)** does not affect party A's rights to recover (whether in an adjudication or otherwise) any costs incurred as a consequence of the extension of time that

exist other than solely by reason of this Act, nor does it add anything to those rights.

Clause 50A

To omit *subclause (1)* (lines 9 to 15 on page 55), and substitute the following subclauses:

- (1) This section applies if an adjudicator determines that a party to the adjudication is liable, or will be liable if certain conditions are met, to pay another party either or both of the following:
 - (a) an amount of money under the construction contract:
 - (b) any costs and expenses incurred in the adjudication (including any amount of contribution to the adjudicator's fees and expenses that the adjudicator has determined is payable by one party but that has been paid by another party).
- (1A) If this section applies, a plaintiff may apply for the adjudicator's determination in respect of the matters referred to in **subsection (1)** to be enforced by entry as a judgment in accordance with this subpart.

To omit from *subclause (2)(a)* the words "any court of competent jurisdiction" (line 17 on page 55), and substitute the words "a District Court".

To add to this clause, after line 26 on page 55, the following subclause:

- (4) Despite **subsection (1A)**, a plaintiff (to whom an amount of money will be payable under an adjudicator's determination if certain conditions are met) may only apply for that determination to be enforced by entry as a judgment after those conditions have been met.

Clause 50B

To omit from *subclause (1)* the words "relevant court" (line 31 on page 55), and substitute the words "District Court".

To omit from *subclause (3)* the word "court" in both places where it occurs (lines 10 and 11 on page 56), and substitute in each case the words "District Court".

To omit from *subclause (4)* the word "court" in both places where it occurs (lines 15 and 16 on page 56), and substitute in each case the words "District Court".

Clause 50C

To omit from line 25 on page 56 the word "court", and substitute the words "District Court".

Clause 50D(2)(b)

To omit from line 6 on page 57 the words "relevant court", and substitute the words "District Court".

Clause 50E

To omit from line 12 on page 57 the words "rules of the relevant court", and substitute the words "District Courts Rules 1992".

Clause 50F

To omit from line 14 on page 57 the words “rules of court”, and substitute the words “provisions of the District Courts Rules 1992”.

New clause 55B

To insert, after *clause 55A* (after line 6 on page 60), the following clause:

55B Rules of court

- (1) In addition to all other powers conferred by the District Courts Act 1947, the Governor-General may, by Order in Council, make rules regulating the practice and procedure of District Courts in proceedings under this Act.
- (2) Rules may be made under **subsection (1)** only with the concurrence of—
 - (a) the Chief District Court Judge; and
 - (b) 2 or more members of the Rules Committee established under section 51B of the Judicature Act 1908 of whom at least 1 is a District Court Judge.
- (3) In the absence of any rules under this section, or in any situation not covered by any of those rules, the rules in relation to civil proceedings for the time being in force under the District Courts Act 1947 apply, with all necessary modifications, to proceedings under this Act.

Clause 56

To omit this clause from lines 7 to 11 on page 60, and substitute the following clause:

56 Regulations

The Governor-General may, by Order in Council, make regulations providing for any matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.

Explanatory note

This Supplementary Order Paper makes a number of amendments to the Construction Contracts Bill. The amendments—

- extend the definition of **construction work** to cover prefabricating components that are specifically designed or modified for a particular building or structure:
- clarify the application of the Bill to residential construction contracts:
- enable adjudicators to determine questions in dispute besides those that relate to the liability of a party to make a payment under the relevant construction contract:
- exclude adjudicators and expert advisers from any liability for negligence in the course of the exercise of any of their functions, duties, or powers under the Bill:

- provide that the District Courts have jurisdiction to enforce an adjudicator's determination:
- enable the making of rules to regulate the practice and procedure of the District Courts in relation to proceedings under the Bill:
- make a number of minor or technical changes to the Bill.

The following information explains in more detail the amendments proposed in this Supplementary Order Paper.

Clause 2, which relates to the commencement of the Bill, is amended to allow for the power to authorise persons to nominate adjudicators, the power to make rules to regulate the practice and procedure of the District Courts in relation to proceedings under the Bill, and the power to make regulations to come into force on the day after the date on which the Bill receives the Royal assent. The amendment is intended to ensure that the adjudication process under the Bill is ready to operate as soon as the remainder of the Bill comes into force 3 months after the date on which the Bill receives the Royal assent.

Clause 4, which provides an overview of the Bill, is amended in 2 respects. First, *paragraphs (f) and (i)* are amended to correct some wrong cross-references. Secondly, *paragraph (h)* is amended to better align the description in that clause with the provisions of *clauses 50A to 50F*.

The amendments to *clause 5*—

- insert a definition of **court**, which is defined to mean the High Court or the District Court in any case where the proceedings relate to an amount that does not exceed the amount to which the jurisdiction of the District Court is limited (currently \$200,000). The new definition is needed to clarify that the High Court and the District Courts have jurisdiction to determine debt recovery proceedings that arise under *clauses 21, 22, and 39*. Currently, those clauses use the words “court of competent jurisdiction”, which suggest that the High Court and District Courts already have jurisdiction to deal with those proceedings. However, there is some uncertainty that this is the case and the amendments to *clause 5* and *clauses 21, 22, and 39* are intended to put this jurisdictional point beyond doubt:
- insert a definition of **customised components**, which is defined to mean, in relation to a building or structure, components that are specifically designed or modified for that particular building or structure. The new definition is used in the amendment to *clause 6(1)(f)*, which extends the definition of **construction work** to cover prefabricating customised components of any building or structure:
- insert a definition of **tribunal**, which is defined to mean an arbitral tribunal or a Disputes Tribunal established under the Disputes Tribunals Act 1988. The new definition is used in *clauses 23 to 25*, which relate to the interface between adjudication proceedings under the Bill and other dispute resolution procedures.

Clause 5 is also amended to make drafting amendments to the definitions of **defendant** and **plaintiff** that are consequential on the amendments to *clauses*

37 and 50A, which refer to the conditional liability of a party under an adjudication determination.

Clause 6(1)(f) is amended to include in the definition of **construction work** prefabricating customised components of any building or structure, whether carried out on the construction site or elsewhere. As a result of this amendment, the provisions of the Bill will now apply to a construction contract that involves the prefabrication of customised components.

The amendments to *clause 6A(2) and (3)* correct some drafting errors.

Clause 8 is amended by dividing the provisions contained in that clause into 2 separate clauses. The *new clause 8* sets out the provisions of the current *clause 8(1)* while those in the current *clause 8(2)* are set out in *new clause 8A*. This is a drafting amendment to ensure that those provisions, which relate to the application of the Bill generally and to its application to residential construction contracts, are more accessible.

A more substantive amendment is made in *new clause 8A(b)* to clarify that the provisions of the Bill allowing a party who is owed money under a construction contract to serve a notice of that party's intention to suspend the carrying out of construction work do not apply in the case of a residential construction contract.

The amendment to the *subpart heading above clause 12* ensures that the heading more accurately reflects the provisions that appear under it.

Clause 18(3)(b) is amended to make it clear that the explanation that is required to accompany a payment claim served on a residential occupier must cover the consequences of not paying either the claimed amount or the scheduled amount, whichever is applicable. These are alternative situations and the amendment is intended to clarify that the explanation must relate to one or the other.

Clauses 21 and 22 are amended to provide that a party to a construction contract who is entitled to a progress payment may recover any amount owing, as a debt due, in the High Court or, in certain cases, in the District Court. Currently, those clauses use the words "court of competent jurisdiction". As there is some uncertainty whether the High Court and District Courts have jurisdiction to determine debt recovery proceedings under the Bill, those words have been replaced with the word "court", which is defined in *clause 5* to refer specifically to the High Court and the District Courts. The effect of the amendment to *clauses 21 and 22* is, therefore, to clarify that the High Court and the District Courts have the jurisdiction to determine any proceedings for the recovery of a debt under those provisions. *Clause 39* has also been amended to the same effect.

Clauses 23 to 25 relate to the interface between adjudication proceedings under the Bill and proceedings under other dispute resolution procedures. *Clause 23* gives a party to a construction contract the right to refer a dispute to adjudication even though the dispute is the subject of other legal proceedings between the same parties. *Clause 24* provides that the provisions of the Bill relating to adjudication do not prevent the parties to a construction contract from submitting their dispute to another dispute resolution procedure. However, if the

dispute is determined under that other procedure before the adjudicator determines the dispute under the Bill, the adjudicator is required to terminate the adjudication proceedings relating to the dispute. *Clause 25* provides that, except in certain limited circumstances, the Bill does not affect any civil proceedings arising under a construction contract.

Clause 23 is amended to include within its ambit proceedings in a Disputes Tribunal established under the Disputes Tribunals Act 1988. The effect of the amendment is that the right to refer a dispute to adjudication may also be exercised even though the dispute is the subject of proceedings between the same parties in a Disputes Tribunal.

The heading to *clause 24* is amended to more accurately reflect the provisions of that clause. The amendment to *clause 24(1)* is a minor drafting amendment that is consequential on the amendment to *clause 23*. The amendment to *clause 24(1B)* is more substantive and is intended to remove any potential ambiguity about when the duty of an adjudicator to terminate the adjudication proceedings applies. The adjudicator must terminate the proceedings if, before he or she determines the dispute, the dispute is determined under another dispute resolution procedure.

Clause 25(1) is amended to clarify that it is subject to the other provisions of that clause and *clause 40A(2)*. *Clause 25(2)* is also amended to allow a court or tribunal to make any orders that it considers appropriate having regard to any steps taken by a party to a construction contract in good faith and in reliance on an adjudicator's determination (including an order requiring a party to the contract to pay for goods and services supplied by another party to that contract). This last-mentioned amendment is intended to protect the position of a party who has altered that party's position in good faith and in reliance on an adjudicator's determination.

The amendment to *clause 26(2)(f)* is a minor drafting amendment to ensure consistency in the wording of that clause with *clause 26B*. Currently, *clause 26(2)(f)* refers to "a determination of an owner's liability under **section 26B(a)**, or an approval for the issue of a charging order under **section 26B(a)**" (emphasis added). The word "or" needs to be replaced with the word "and".

Clause 26C, which reinforces the provisions of *new clause 8A* about the application of the Bill to residential construction contracts, currently provides that a charging order may not be sought "in respect of a construction site to which a residential construction contract relates". As it is possible for a situation to arise where a commercial construction contract relates to the same construction site to which a residential construction contract relates (for example, a high-rise office development that includes a penthouse), this clause is amended to specify that no charging order may be sought in respect of the residential occupier rather than the construction site. The amendment to this clause is intended to clarify the limits on when a charging order may be sought under the Bill.

Clause 26D(2) is amended to correct some wrong cross-references.

The amendment to *clause 28(2)* is a minor drafting amendment to ensure consistency of wording within that clause.

Clause 29 is amended to better align the provisions of that clause with *clause 28*. Currently, *clause 29* requires a person who is requested to act as an adjudicator to serve a notice of acceptance on the parties to the adjudication if he or she is willing and able to act in that capacity. The notice must confirm that the person meets the eligibility criteria for adjudicators under *clause 28*. However, *clause 28* requires the person to disclose to the parties to the adjudication any conflict of interest. If there is a conflict of interest, *clause 28* prohibits the person from acting as an adjudicator unless all of the parties to the adjudication agree. The amendment to *clause 29* is intended to ensure that, before serving a notice of acceptance, the person first obtains confirmation from the parties that they agree to the person acting as an adjudicator. In doing so, the person would then be able to confirm in the notice of acceptance that he or she meets the eligibility criteria for adjudicators under *clause 28*.

Clause 32(1)(a) is amended to correct a wrong cross-reference.

The amendment to *clause 36(4)* replaces a cross-reference to *clause 47(6)*, which has been relocated and is now *clause 37I(6)*.

The amendments to *clauses 36A(3) and 39(5)* are related. The amendments are intended to ensure that the parties to an adjudication have the opportunity to make the adjudicator aware of any computational or other errors in the adjudicator's determination before the time period for complying with the determination starts to run.

The amendment to *clause 37* is intended to ensure that an adjudicator is able to determine not only questions about the liability of any of the parties to make a payment under the construction contract but also any questions in dispute about the rights and obligations of the parties under that contract even though, in some cases, no amount of money is sought under the adjudication. The *new clause 37* provides as follows:

- if an amount of money under the relevant construction contract is sought in an adjudication, the adjudicator must determine—
 - whether or not any of the parties to the adjudication are liable, or will be liable if certain conditions are met, to make a payment under the relevant construction contract; and
 - any questions in dispute about the rights and obligations of the parties under that contract; or
- if no amount of money under the relevant construction contract is sought in an adjudication, the adjudicator must determine any questions in dispute about the rights and obligations of the parties under that contract.

The amendment to *clause 37A* is a minor drafting amendment to ensure consistency in the wording of that clause.

The amendment to the heading above *clause 37D* ensures that the heading more accurately reflects the provisions that appear under it.

Clause 37E(1) is amended in 2 respects. First, the clause is amended to cover the possibility that, for any reason, the form of the notice seeking a review of an adjudicator's determination may not be prescribed. Secondly, the clause is amended to omit *subclauses (3) and (4)*, which relate to matters of court procedure that are more appropriately dealt with in the rules of court.

Clause 37I, which relates to adjudicator's fees, was formerly *clause 47*. *Clause 47* has been relocated so that it appears after *clause 37H*, which relates to the costs of adjudication proceedings. The amendment is intended to ensure that the provisions of the Bill dealing with the costs of adjudication appear in the same place.

The amendments to *clauses 38, 39, and 40* are consequential on the amendment to *clause 37*. *Clause 38* sets out when an adjudicator's determination is enforceable. An adjudicator's determination about the liability of a party to make a payment under the relevant construction contract is enforceable under *clause 39*. In comparison, an adjudicator's determination about the rights and obligations of the parties under the contract is not enforceable. However, *clause 40A* applies if that determination is not complied with.

A new *clause 40A* is inserted in the Bill. The new clause provides that a party to an adjudication may bring proceedings in any court if another party to the adjudication fails to comply fully with the adjudicator's determination about the rights and obligations of the parties under the relevant construction contract. In those proceedings, the court is required to have regard to, but is not bound by, the adjudicator's determination.

Clause 41A(b) requires that an adjudication in which the claimant seeks approval for the issue of a charging order in respect of a construction site must be conducted by an adjudicator with the qualifications, expertise, and experience that may be prescribed. The amendment to *clause 41A(b)* clarifies that the qualifications, expertise, and experience that may be prescribed for the purposes of this clause are additional to those that may be prescribed under *clause 28(1)*.

Clause 42 relates to compliance with the requirements of the Bill about the supply of information. *Clause 42(1)* saves from invalidity any notice of adjudication that fails to comply with the requirements of *clause 26(2)(a) to (d) and (g)* (which includes the requirement to state the date of the notice, the nature and a brief description of the dispute, details of where and when the dispute arose, the relief or remedy that is sought, and enough details to identify the construction contract), so long as the notice is in writing, the nature of the dispute and the names of the parties involved are stated clearly in the notice, and any non-compliance does not mislead or unjustly affect the interests of the recipient. *Clause 42(2)*, as currently framed, provides that *clause 42(1)* does not extend to any non-compliance with *clause 41(1)* (which requires certain additional information to be set out in a notice of adjudication to be served on a residential occupier). As *clauses 42(1) and 41(1)* are mutually exclusive, it is not necessary to provide that *clause 42(1)* does not extend to any non-compliance with *clause 41(1)*. The requirements of *clause 41(1)* are not affected even if a notice of adjudication comes within *clause 42(1)*. However, to make it clear that any non-compliance with *clause 41(1)* will result in an invalid notice of adjudication, this clause is amended to provide that, for the avoidance of doubt, *clause 42(1)* does not limit *clause 41*.

Clause 42(3) is amended to provide that, if a party to an adjudication wishes to provide another party or the adjudicator with a copy of the construction contract but is unable to do so because, for example, the contract is oral, it is

sufficient if that party gives the missing information in the form of a statutory declaration. Currently, *clause 42(3)* envisages that the statutory declaration may be provided if a party is unable to meet the requirement under *clause 30(2)* that an adjudication claim must be accompanied by a copy of the contract. *Clause 30(2)* was amended by the select committee to remove that requirement so the amendment to *clause 42(3)* is needed to ensure consistency between these 2 provisions.

The amendment to *clause 44* inserts a more specific cross-reference.

The amendment to *clause 47* has been explained in the note about *clause 37I*.

Clause 48(2) is amended to exclude adjudicators and expert advisers from any liability for negligence arising out of the exercise of any of their functions, powers, and duties under the Bill.

The amendments to *clause 49(1)* are minor drafting amendments. The amendment to *clause 49(2)* is intended to clarify that, if a party exercises the right to suspend work under a construction contract and later makes use of the statutory entitlement to an extension of time to complete the contract, the Bill is not intended to create any additional rights to recover costs incurred as a consequence of the extension of time, nor is it intended to remove any such rights that exist other than solely by reason of the Bill.

Clause 50A is amended in 3 respects. First, the clause is amended to provide that a plaintiff may apply for an adjudicator's determination to be enforced by entry as a court judgment if the adjudicator determines that a party to the adjudication is liable, or will be liable if certain conditions are met, to pay another party either or both of the following:

- an amount under the construction contract:
- any costs and expenses incurred in the adjudication (including any amount of contribution to the adjudicator's fees and expenses that the adjudicator has determined is payable by one party but that has been paid by another party).

Secondly, the clause is amended to provide that applications for an adjudicator's determination to be enforced by entry as a court judgment may be made to a District Court. This amendment is intended to ensure consistency with the purpose of the Bill to provide for the speedy resolution of disputes.

Thirdly, the clause is amended to clarify that a plaintiff to whom an amount of money will be payable if certain conditions are met may apply for that determination to be enforced by entry as a court judgment only after those conditions have been met.

The amendments to *clauses 50B to 50F* are minor drafting amendments. They are consequential on the amendment to *clause 50A* that provides for applications for an adjudicator's determination to be enforced to be made to a District Court.

A new *clause 55B* is inserted in the Bill to enable the making of rules that regulate the practice and procedure of the District Courts in relation to proceedings under the Bill.

The amendment to *clause 56* is a drafting amendment to align the wording of the regulation-making power with the standard wording used in most new legislation. The amendment is intended to ensure that regulations may be made for any matters contemplated by the Bill, necessary for its administration, or necessary for giving it full effect. As currently drafted, there is doubt as to whether regulations may be properly made for all these purposes.

