

House of Representatives
Supplementary Order Paper

Tuesday, 19 November 2002

Construction Contracts Bill

Proposed amendments

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

Clause 2

To omit subclauses (1) and (2) (lines 6 to 9 on page 3), and substitute the following subclauses:

- (1) This Act comes into force on 1 April 2003, except for **sections 43, 55B, and 56 and Part 6 and the Schedule**.
- (2) **Sections 43, 55B, and 56 and Part 6 and the Schedule** come into force on the day after the date on which this Act receives the Royal assent.

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, or before an adjudicator under **Part 6**, in relation to any matter arising under a construction contract, the court or tribunal or adjudicator—
 - (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 the court, tribunal, or adjudicator makes in those proceedings; and
 - (b) may make any orders that the court, tribunal, or adjudicator 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 under this

Part (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).

New Part 6 and Schedule

To add, after line 11 on page 60, the following Part and Schedule:

Part 6
Weathertight homes resolution services

Preliminary provisions

57 Purpose

The purpose of this **Part** is to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings.

58 Overview

In general terms, this **Part** provides for the following matters:

(a) *Assessment and evaluation of claims in relation to leaky buildings*

Sections 61 to 66 provide a mechanism for owners of dwellinghouses who consider that their dwellinghouse is a leaky building to—

- (i) submit their claim; and
- (ii) have it, and the nature of the particular problem, assessed and evaluated; and
- (iii) be provided with an assessor's report:

(b) *Mediation of claims*

Sections 67 to 75 make provision for access to a special mediation service that is available to dwellinghouse owners with eligible claims. The claiming owner and any of the other parties against whom the claim is made may agree to refer the claim to mediation, with provision for binding settlements by agreement:

(c) *Compulsory adjudication of claims*

Sections 76 to 109, and the Schedule, set up a mechanism whereby dwellinghouse owners can have their eligible claims referred to adjudicators whose powers and procedures are flexible and whose determinations, subject to appeal, are binding and enforceable:

(d) *Miscellaneous provisions*

Sections 110 to 118 set out various miscellaneous matters that underpin the substantive provisions of this **Part**.

59 Interpretation

In this **Part**, unless the context otherwise requires,—

adjudication means an adjudication initiated by a claimant under **section 80**, or by a transfer of proceedings under **section 113 or section 114**

adjudicator means a person appointed under **section 78** to determine a claim that has been referred to adjudication

approved means approved by the chief executive

arbitral tribunal has the meaning given to it by section 2(1) of the Arbitration Act 1996

arbitration has the meaning given to it by section 2(1) of the Arbitration Act 1996

assessor means an assessor appointed under **section 62**

chief executive means the chief executive of the Department

civil proceedings includes—

- (a) arbitration; and
- (b) for the purposes of **sections 70 and 108**, proceedings before an adjudicator under this **Part** or under **Parts 1 to 5**

claim means a claim by the owner of a dwellinghouse that the owner believes—

- (a) is a leaky building; and
- (b) has suffered damage as a consequence of it being a leaky building

claimant means an owner of a leaky building—

- (a) who makes an application under **section 63(1)**; or
- (b) whose claim is transferred to mediation or adjudication under **section 113 or section 114**

court of competent jurisdiction means—

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

Department means the department of State that, with the authority of the Prime Minister, is for the time being responsible for the administration of this **Part**

Disputes Tribunal means a Disputes Tribunal established under section 4 of the Disputes Tribunals Act 1988

dwellinghouse—

- (a) means any building, or any apartment, flat, or unit within a building, that is intended to have, as its principal use, occupation as a private residence; and
- (b) includes any gate, garage, shed, or other structure that is an integral part of the building; but
- (c) does not include a hospital, hostel, hotel, motel, rest home, or other institution

eligible claim means a claim by the owner of a dwellinghouse that has been evaluated by an evaluation panel as meeting the criteria set out in **section 61(2)**

evaluation panel means a panel convened under **section 65**

external wall cladding systems, in relation to a dwellinghouse, includes—

- (a) the cladding system; and
- (b) all penetrations in the cladding system (for example, doors, windows, and balconies); and
- (c) all materials used in an external wall (for example, external wall materials, jointing compounds, flashings, building wraps, and framing)

leaky building means a dwellinghouse into which water has entered from outside the dwellinghouse through the external wall cladding systems as a result of any aspect of the design, construction, or alteration of the dwellinghouse, or materials used in its construction or alteration

mediation means mediation initiated under this **Part**

mediator means a person appointed to provide mediation services under **section 67**

Minister means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this **Part**

notice of adjudication means the notice referred to in **section 80**

owner, in relation to a dwellinghouse, includes a shareholder of a company, the principal purpose of which is to own the dwellinghouse or the dwellinghouses within the building concerned

parties, in relation to a claim, means the claimant and any 1 or more respondents in relation to that claim

prescribed means prescribed by regulations under this Act

respondent means a person against whom a claim is made

working day means any day other than—

- (a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, Labour Day, and Waitangi Day; and
- (b) the day observed in the appropriate area as the anniversary of the province of which the area forms a part; and
- (c) a day in the period commencing with 25 December in any year and ending with the close of 15 January in the following year.

60 Part binds the Crown

This **Part** binds the Crown.

Assessment and evaluation of claims

61 Criteria for eligibility of claims for mediation and adjudication services

- (1) A claim may be dealt with under this **Part** only if—
 - (a) it is a claim by the owner of the dwellinghouse concerned; and
 - (b) it is an eligible claim in terms of **subsection (2)**.
- (2) To be an eligible claim, a claim must, in the opinion of an evaluation panel, formed on the basis of an assessor's report, meet the following criteria:
 - (a) the dwellinghouse to which the claim relates must—
 - (i) have been built; or
 - (ii) have been subject to alterations that give rise to the claim—
within the period of 10 years immediately preceding the date that an application is made to the chief executive under **section 63(1)**; and
 - (b) the dwellinghouse is a leaky building; and
 - (c) damage to the dwellinghouse has resulted from the dwellinghouse being a leaky building.

62 Assessors

The chief executive must employ or engage persons to prepare reports on claims.

63 Application for assessor's report

- (1) An owner of a dwellinghouse who wishes to make a claim may apply to the chief executive to have an assessor's report prepared in relation to the claim.
- (2) An application must be in the approved form (if any) and must be accompanied by the prescribed fee (if any).
- (3) On receiving an application that complies with this section the chief executive must make an initial assessment as to whether the information in the application indicates that the claim meets or is capable of meeting the criteria set out in **section 61**.
- (4) If the chief executive considers that the information does indicate that the claim meets or is capable of meeting those criteria the chief executive must arrange for an assessor's report to be prepared on the claim.
- (5) If the chief executive does not consider that the information indicates that the claim meets or is capable of meeting those criteria the chief executive must—
 - (a) decline to arrange for an assessor's report to be prepared; and
 - (b) advise the claimant of that decision and the reasons for it.

64 Assessor's report

- (1) An assessor's report is a report setting out—
 - (a) whether or not, in the assessor's opinion, the claim to which the report relates meets the criteria set out in **section 61(2)**; and
 - (b) if the report states that the claim meets those criteria, the assessor's view as to—
 - (i) the cause of water entering the dwellinghouse; and
 - (ii) the nature and extent of any damage caused by the water entering the dwellinghouse; and
 - (iii) the work needed to make the dwellinghouse watertight and repair that damage; and
 - (iv) the estimated cost of that work; and
 - (v) the persons who should be parties to the claim.
- (2) When an assessor's report is completed, the chief executive must refer it to an evaluation panel convened under **section 65**.

65 Evaluation panels

- (1) The chief executive must convene 1 or more evaluation panels.
- (2) An evaluation panel may consist of such number of persons as the chief executive thinks fit.
- (3) A member of an evaluation panel may also be an assessor, but an assessor may not be a member of an evaluation panel when that panel is considering an assessor's report prepared by that assessor.

66 Evaluation of assessor's report

- (1) An evaluation panel must evaluate every assessor's report referred to it under **section 64(2)** and decide whether the claim to which the report relates meets the criteria set out in **section 61(2)**.
- (2) In evaluating an assessor's report under **subsection (1)** an evaluation panel is not required to consider any information other than the assessor's report.
- (3) An evaluation panel must, in relation to each assessor's report referred to it,—
 - (a) advise the claimant of its decision as to whether or not the claimant's claim complies with the criteria set out in **section 61(2)** to be an eligible claim; and
 - (b) if it considers that the claim does not comply with those criteria, advise the claimant of its reasons for that view; and
 - (c) provide a copy of the assessor's report to the claimant.

Mediation of claims

67 Mediation services

- (1) The chief executive must employ or engage persons to provide mediation services to assist persons to resolve, promptly and effectively, eligible claims.
- (2) The chief executive decides how the mediation services are to be provided.
- (3) Any of the mediation services may be provided, for example,—
 - (a) by a telephone, fax, Internet, or email service; or
 - (b) by specialists who—
 - (i) respond to requests or themselves identify how, where, and when their services can best support the object of this **Part**; or
 - (ii) provide their services in the manner, and at the time and place, that are most likely to resolve the eligible claim in question; or
 - (iii) provide their services in all of the ways described in this paragraph.
- (4) **Subsection (3)** does not limit **subsection (2)**.

68 Access to mediation services

- (1) The claimant and any of the other parties to an eligible claim may agree to refer the claim to mediation under this **Part**.
- (2) A referral to mediation must be in the approved form (if any) and must be accompanied by a fee of \$200 (or such other amount as is prescribed).
- (3) The form must be signed by all parties to the mediation.
- (4) The owner of the dwellinghouse to which the claim relates is responsible for the payment of the fee referred to in **subsection (2)**.

69 Procedure in relation to mediation services

- (1) Where mediation services are provided, the mediator who provides the services decides what services are appropriate to the particular case.
- (2) The mediator, in providing those services,—
 - (a) may, having regard to the object of this **Part** and the needs of the parties, follow such procedures, whether structured or unstructured, or do such things as he or she considers appropriate to resolve the claim promptly and effectively; and
 - (b) may receive any information, statement, admission, document, or other material, in any way that he or she thinks fit, whether or not it would be admissible in judicial proceedings.

- (3) A mediator does not have power to determine any matter, even if the mediator is required to do so by the parties.

70 Confidentiality

- (1) Except with the consent of the parties or the relevant party, a person who—
- (a) provides mediation services; or
 - (b) is a party to a mediation; or
 - (c) is a person employed or engaged by the Department; or
 - (d) is a person who assists either a mediator or a person to whom mediation services are provided—
- must keep confidential any statement, admission, or document created or made for the purposes of the mediation (including a settlement under **section 71**) and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.
- (2) No person who provides mediation services may give evidence in any civil proceedings, whether under this Act or any other Act, about—
- (a) the provision of the services; or
 - (b) anything related to the provision of the services that comes to his or her knowledge in the course of the provision of the services.
- (3) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that, by **subsection (1)**, is required to be kept confidential.
- (4) Nothing in the Official Information Act 1982 applies to any statement, admission, document, or information disclosed or made in the course of the provision of mediation services to the person providing those services.
- (5) Nothing in this section—
- (a) prevents the discovery or affects the admissibility of any evidence (being evidence that is otherwise discoverable or admissible and that existed independently of the mediation process) merely because the evidence was presented in the course of the provision of mediation services; or
 - (b) prevents the gathering of information by the Department for research or educational purposes so long as the parties and the specific matters in issue between them are not identifiable; or
 - (c) prevents the disclosure by any person employed or engaged by the chief executive to any other person employed or engaged by the chief executive of matters that need to be disclosed for the purposes of giving effect to this **Part**.

71 Settlements

- (1) Where a claim is resolved, in whole or in part, by agreement, whether through the provision of mediation services or otherwise, any person—
 - (a) who is employed or engaged by the chief executive to provide the services; and
 - (b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—

may, at the request of the parties to the claim, and under that general authority, sign the agreed terms of settlement.
- (2) A person who receives a request under **subsection (1)** must, before signing the agreed terms of settlement,—
 - (a) explain to the parties the effect of **subsection (4)**; and
 - (b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.
- (3) A person who signs the agreed terms of settlement must give a statutory declaration in the approved form (if any) that the requirements of this section have been complied with.
- (4) Where, following the affirmation referred to in **subsection (2)** of a request made under **subsection (1)**, the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—
 - (a) those terms are final and binding on, and enforceable by, the parties; and
 - (b) except for enforcement purposes, no party may seek to bring those terms before a court, whether by action, appeal, application for review, or otherwise.

72 Enforcement of terms of settlement agreed or authorised

- (1) Any agreed terms of settlement that are, under **section 71**, enforceable by the parties, may be enforced by the District Court in the same manner as an order made or judgment given by the District Court.
- (2) The terms of settlement referred to in **subsection (1)** must be filed in the District Court before it can be enforced.
- (3) Where any agreed terms of settlement include a requirement that a party to the claim pay money to the claimant, **sections 102 and 103** apply to that requirement as if it were imposed by an adjudicator's determination.

73 Mediation services not to be questioned as being inappropriate

- (1) No mediation services may be challenged or called in question in any proceedings on the ground—
 - (a) that the nature and content of the services was inappropriate; or

- (b) that the manner in which the services were provided was inappropriate.
- (2) Nothing in **subsection (1)** or in **section 71** prevents any agreed terms of settlement signed under **section 71** from being challenged or called in question on the ground that the provisions of **subsection (2)** of that section (which relate to knowledge about the effect of a settlement) were not complied with.

74 Independence of mediation personnel

- (1) The chief executive must ensure that any person employed or engaged to provide mediation services under **section 67**—
 - (a) is, in deciding how to handle or deal with any particular claim or aspect of it, able to act independently; and
 - (b) is independent of any of the parties to whom mediation services are being provided in a particular case.
- (2) The chief executive, in managing the overall provision of mediation services, is not prevented by **subsection (1)** from giving general instructions about the manner in which, and the times and places at which, mediation services are to be provided.
- (3) Any such general instructions may include general instructions about the manner in which mediation services are to be provided in relation to particular types of matters or particular types of situations or both.

75 Other mediation services

Nothing in this **Part** prevents any person seeking and using mediation services other than those provided by the chief executive under this **Part**.

Adjudication of claims

76 Right to refer claims to adjudication

- (1) The owner of a dwellinghouse that is the subject of an eligible claim has the right to refer the claim to adjudication, except as provided in **subsection (3)**.
- (2) **Subsection (1)** has effect despite any provision of any existing agreement or contract that requires or provides for—
 - (a) the submission to arbitration of any matter; or
 - (b) the making of an arbitral award as a condition precedent to the pursuit of any other proceedings or remedy.
- (3) An owner of a dwellinghouse may not, however, refer an eligible claim to adjudication, or continue adjudication proceedings, if, and to the extent that, the subject matter of the claim is the subject of—
 - (a) an arbitration that has already commenced; or
 - (b) proceedings initiated by the claimant (including by way of counterclaim) by way of—

- (i) proceedings in a court or a Disputes Tribunal; or
 - (ii) proceedings under section 17 of the Building Act 1991.
- (4) **Subsection (3)** does not limit the power of any party to apply for proceedings to be transferred to adjudication under **section 113** or agree that they be transferred under **section 114**.
- (5) In this section, **existing agreement or contract** means an agreement or contract entered into before the commencement of this **Part**.

77 Effect on other dispute resolution procedures

- (1) If a claimant who has referred a claim to adjudication under this **Part** initiates proceedings of a kind referred to in **section 76(3)(a) or (b)** during the course of the adjudication,—
- (a) the claimant must notify the adjudicator; and
 - (b) that notification is to be treated as a notice of withdrawal under **section 84**, and that section applies accordingly.
- (2) Nothing in this **Part** prevents the other parties to an adjudication from submitting any matter in relation to a claim to another dispute resolution procedure (for example, to the courts, to arbitration, or to mediation).

78 Appointment of adjudicators

- (1) Adjudication under this **Part** is performed by adjudicators appointed under this section.
- (2) Each adjudicator is appointed by the Governor-General on the recommendation of the Minister.
- (3) The Minister must recommend for appointment only persons that, in the Minister's opinion, are suitable to be appointed as adjudicators, having regard to their knowledge, skills, and experience.
- (4) One adjudicator is appointed by the Governor-General as the chief adjudicator.
- (5) The provisions of **Part 1 of the Schedule** apply to adjudicators.

79 Manner of provision of adjudication services

- (1) The chief adjudicator decides how the adjudication services under this **Part** are to be provided.
- (2) Adjudication services may be provided, for example,—
- (a) by a telephone, fax, Internet, or email service; or
 - (b) by adjudicators who—
 - (i) respond to requests or themselves identify how, where, and when their services can best support the object of this **Part**; or

- (ii) provide their services in the manner, and at the time and place, that are most likely to resolve the claim in question; or
 - (iii) provide their services in all of the ways described in this paragraph.
- (3) **Subsection (2)** does not limit **subsection (1)**.

Procedure for initiating adjudication

80 How to initiate adjudication

- (1) Adjudication is initiated by a claimant in relation to an eligible claim serving written notice, in the approved form and manner, of the claimant's intention to refer the claim for adjudication (the **notice of adjudication**) on—
- (a) the other party or parties to the adjudication; and
 - (b) the Department.
- (2) The notice of adjudication must state—
- (a) the date of the notice; and
 - (b) the nature and a brief description of the claim and of the parties involved; and
 - (c) the relief or remedy that is sought; and
 - (d) the names and addresses of the parties to the adjudication; and
 - (e) if available, the addresses that the parties have specified for the service of notices.
- (3) Every copy of the notice that is served on another party to the adjudication must be accompanied by a copy of the assessor's report that relates to the claim, and may be accompanied by any other documents.
- (4) The copy of the notice that is served on the Department must be accompanied by a fee of \$400 (or such other amount as is prescribed), less the amount of any fee for mediation services paid by the claimant under **section 68**.

81 Assignment of adjudicator to claim

The chief adjudicator must assign an adjudicator to act in relation to a claim to which a notice under **section 80** relates.

82 Response to adjudication claim

- (1) A respondent may serve on the adjudicator a written response to the adjudication claim—
- (a) within 25 working days after receiving that claim; or
 - (b) within any further time that the parties to the adjudication agree; or
 - (c) within any further time that the adjudicator may allow if the adjudicator considers that, in the circumstances, the additional time is reasonably required to enable the respondent to complete the written response.

- (2) The response may be accompanied by any other documents.
- (3) The respondent must serve a copy of the response and any accompanying documents on the claimant and every other party to the adjudication, either before or immediately after they are served on the adjudicator.

Conduct of adjudication proceedings

83 Jurisdiction of adjudicators

- (1) In relation to any claim that has been referred to adjudication, the adjudicator is to determine—
 - (a) the liability (if any) of any of the parties to the claimant; and
 - (b) remedies in relation to any liability determined under **paragraph (a)**.
- (2) In relation to any liability determined under **subsection (1)(a)**, the adjudicator may also determine—
 - (a) the liability (if any) of any respondent to any other respondent; and
 - (b) remedies in relation to any liability determined under **paragraph (a)**.

84 Withdrawal of adjudication proceedings

- (1) An adjudication claim may be withdrawn if—
 - (a) the claimant serves written notice of withdrawal on the adjudicator, unless a respondent objects to the withdrawal and the adjudicator recognises a legitimate interest on the respondent's part in obtaining a determination in respect of the claim; or
 - (b) the parties agree on the withdrawal.
- (2) An adjudicator is not required to determine a claim withdrawn in accordance with this section.

85 Termination of proceedings by adjudicators

An adjudicator must terminate the adjudication proceedings if the adjudicator considers, on reasonable grounds, that the proceedings should not have commenced, or should not be continued, in terms of **section 76(3)** or **section 77(1)**.

86 Consolidation of adjudication proceedings

If 2 or more adjudication proceedings are pending, the adjudicator may, with the written consent of all of the parties to those adjudication proceedings, determine those adjudication proceedings at the same time.

87 Joinder of parties

- (1) An adjudicator may order that a person be joined as a respondent in an adjudication if the adjudicator considers that—

- (a) the person ought to be bound by, or have the benefit of, an order of the adjudicator; or
 - (b) the person's interests are affected by the adjudication; or
 - (c) for another reason it is desirable the person be joined as a respondent.
- (2) An adjudicator may make an order under **subsection (1)** on the application of any party or on the adjudicator's own initiative.
- (3) Where an adjudicator makes an order under **subsection (1)**—
- (a) the adjudicator must also order the claimant to serve a notice that complies with **section 80** on—
 - (i) the person joined as a respondent; and
 - (ii) the other parties to the adjudication; and
 - (iii) the Department; and
 - (b) **section 82** then applies to the person joined as a respondent.
- (4) Nothing in **subsection (3)(a)** requires a claimant to furnish a copy of the assessor's report to any person other than the newly joined respondent, or to pay a further fee under **section 80(4)**.

88 Removal of party from proceedings

An adjudicator may, on the application of any party or on the adjudicator's own initiative, order that a person be struck out as a party to the adjudication proceedings if the adjudicator considers it fair and appropriate in all the circumstances.

89 Duties of adjudicator

- (1) An adjudicator must—
- (a) act independently, impartially, and in a timely manner; and
 - (b) avoid incurring unnecessary expense; and
 - (c) comply with the principles of natural justice; and
 - (d) disclose any conflict of interest to the parties to an adjudication; and
 - (e) if **paragraph (d)** applies, withdraw from the adjudication unless those parties agree otherwise.
- (2) If a party agrees to an adjudicator continuing to act under **subsection (1)(e)**, the party forfeits any right to object to the adjudicator acting on the basis of any conflict of interest disclosed by the adjudicator under **subsection (1)(d)** prior to that agreement.

90 Powers of adjudicator

- (1) An adjudicator may—
- (a) conduct the adjudication in any manner that he or she thinks fit, including adopting an inquisitorial process; and

- (b) request further written submissions from the parties to the adjudication, but must give the relevant parties an opportunity to comment on those submissions; and
 - (c) request the parties to the adjudication to provide copies of any documents that he or she may reasonably require; and
 - (d) set deadlines for further submissions and comments by the parties; and
 - (e) appoint an expert adviser to report on specific issues (as long as the parties are notified before the appointment is made); and
 - (f) call a conference of the parties; and
 - (g) carry out an inspection of the dwellinghouse to which the claim relates (as long as the consent of the owner or occupier is obtained before entry to any land or premises is made); and
 - (h) request the parties to do any other thing during the course of an adjudication that he or she considers may reasonably be required to enable the effective and complete determination of the questions that have arisen in the adjudication; and
 - (i) issue any other reasonable directions that relate to the conduct of the adjudication.
- (2) The parties to the adjudication must comply with any request or direction of the adjudicator made or given in accordance with this section.
- (3) If the owner or occupier referred to in **subsection (1)(g)** is a party to the adjudication, that party's consent must not be unreasonably withheld.
- (4) An adjudicator also has the powers specified in **Part 2 of the Schedule**.

91 When adjudicator's powers not affected

The adjudicator's power to determine a claim is not affected by—

- (a) the failure of a respondent to serve a response on the claimant under **section 82**; or
- (b) the failure of any of the parties to—
 - (i) make a submission or comment within the time allowed; or
 - (ii) provide specified information within the time allowed; or
 - (iii) comply with the adjudicator's call for a conference of the parties; or
 - (iv) do any other thing that the adjudicator requests or directs.

92 Adjudicator may draw inferences and determine claim based on available information

If any failure of the kind referred to in **section 91** occurs in an adjudication, the adjudicator may—

- (a) draw any inferences from that failure that he or she thinks fit; and
- (b) determine the claim on the basis of the information available to him or her; and
- (c) give any weight that he or she thinks fit to any information provided outside any period that he or she requested or directed.

93 Other provisions relating to adjudication proceedings

The provisions of **Part 2 of the Schedule** have effect in relation to adjudications.

*Adjudicator's determination***94 Adjudicator's determination: timing**

- (1) An adjudicator must determine a claim—
 - (a) within 35 working days after the end of the period referred to in **section 82(1)** during which the respondent may serve on the adjudicator a written response to an adjudication claim (or, if there are 2 or more respondents, within 35 working days after the end of the latest-ending period for response applicable to any of the respondents under **section 82(1)**); or
 - (b) within any further time that the parties to the adjudication agree.
- (2) An adjudicator must give a copy of the determination to every party to the adjudication as soon as practicable after making a determination.

95 Adjudicator's determination: form

- (1) An adjudicator's determination—
 - (a) must be in the approved form (if any); or
 - (b) if there is no approved form,—
 - (i) must be in writing; and
 - (ii) must contain the reasons for the determination; and
 - (iii) in a case where the adjudicator determines that a party to the adjudication is liable to make a payment, must include a statement setting out the consequences for the respondent if the respondent takes no steps in relation to an application from the claimant to enforce the adjudicator's determination by entry as a judgment.

- (2) Within 2 working days after the date on which a copy of the determination is given to the parties to the adjudication under **section 94(2)**, an adjudicator may, on his or her own initiative, correct in the determination any errors in computation or any clerical or typographical errors or any errors of a similar nature.

96 Adjudicator's determination: substance

- (1) An adjudicator may make any order that a court of competent jurisdiction could make in relation to a claim.
- (2) However, if an adjudicator makes an order under **subsection (1)** that requires a person to take any action other than the payment of money, the adjudicator must also determine an amount of money that is payable by the person required to take the action, and a date by which that amount is payable if that person fails or refuses to take the action before that date.
- (3) If an adjudicator determines that a party to the adjudication is liable to make a payment to another party, the adjudicator may make that determination subject to any conditions that the adjudicator thinks fit.
- (4) An adjudicator may determine that the liability of a party to the adjudication depends on another party to that adjudication meeting any conditions that the adjudicator may impose.
- (5) If a claim 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.

97 Costs of adjudication proceedings

- (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by—
 - (a) bad faith on the part of that party; or
 - (b) allegations or objections by that party that are without substantial merit.
- (2) If the adjudicator does not make a determination under **subsection (1)**, the parties to the adjudication must meet their own costs and expenses.

Appeal from adjudicator's determination

98 Right of appeal

- (1) A party to a claim that has been determined by an adjudicator may appeal on a question of law or fact that arises from the determination.

- (2) An appeal must be filed in—
 - (a) the District Court if the amount at issue does not exceed \$200,000; and
 - (b) the High Court if the amount at issue exceeds \$200,000.
- (3) For the purposes of **subsection (2)**, the amount at issue in relation to a determination is—
 - (a) the amount of any money required to be paid under the determination by the person filing the appeal (including any amount determined under **section 96(2)**); or
 - (b) if the appeal relates to a determination in which the adjudicator has declined to require payment of any amount of money (or money's worth in terms of **section 96(2)**) to a claimant, or has required payment of an amount of money (or money's worth in terms of **section 96(2)**) that is less than the amount claimed by the claimant, the amount claimed unsuccessfully by the claimant.
- (4) A claimant may abandon so much of a claim to which an appeal relates as exceeds \$200,000 in order to bring the appeal within the jurisdiction of the District Court.
- (5) Where an appeal is commenced by a person who is required to pay money to a party to a claim, the person may bring the appeal within the jurisdiction of the District Court by paying the other person the difference between the amount required to be paid under the determination and \$200,000.
- (6) Section 17(3) of the Building Act 1991 does not apply to an appeal under this section.

99 Procedure for commencing appeal

- (1) An appeal under **section 98** must be made by filing a notice, in the prescribed form, in the court nearest to the location of the dwellinghouse (or any of the dwellinghouses) to which the appeal relates.
- (2) The notice must be filed—
 - (a) within 20 working days after the date of the determination to which the appeal relates; or
 - (b) within any further time that the relevant court may allow on application made before or after the expiration of the period referred to in **paragraph (a)**.

100 Determination of appeal

- (1) In its determination of any appeal, the court may do any 1 or more of the following things:
 - (a) confirm, modify, or reverse the determination or any part of it;
 - (b) exercise any of the powers that could have been exercised by the adjudicator in relation to the claim to which the appeal relates.

- (2) A determination under **subsection (1)**—
 - (a) has effect as if it were a determination made by an adjudicator for the purposes of this **Part**; and
 - (b) is a final determination of the claim.
- (3) **Subsection (2)(b)** does not prevent any proceedings between the claimant and respondent to the adjudication to which the appeal relates from being heard and determined at the same time as the appeal.

101 Effect of appeal on adjudicator's determination

An appeal under **section 98** does not operate as a stay of the adjudicator's determination unless a District Court Judge, or as the case may be a High Court Judge, on application so determines.

Enforcement of adjudicator's determination

102 Duty to comply with adjudicator's determination

A party to the adjudication must comply with an adjudicator's determination.

103 Enforcement of adjudicator's determination

- (1) Every adjudicator's determination is deemed to be an order of the District Court, and, subject to this section, may be enforced accordingly.
- (2) Where application is made to a District Court for the issue of any process to enforce an adjudicator's determination provided for by **section 96(2)** (determining an amount of money that is payable by a person required to take any action other than the payment of money), the Registrar must give written notice of the application to the party against whom enforcement is sought.
- (3) If that party does not file in the Court, within 10 working days after receiving notice of the application, a notice of objection in the prescribed form, the order may, after the expiry of that period, be enforced under **subsection (1)**.
- (4) The notice referred to in **subsection (3)** may be given only on the ground that it is the belief of the party giving it that the order of the adjudicator has been fully complied with and that the party therefore disputes the entitlement of the applicant to enforce it.
- (5) If the party against whom enforcement is sought files the notice referred to in **subsection (3)** within the prescribed time, the District Court must determine the matter.

*Miscellaneous matters relating to adjudication***104 Parties may be represented at adjudication proceedings**

- (1) A party to a claim that has been referred to adjudication may be represented by the representatives (whether legally qualified or not) that the party considers appropriate.
- (2) **Subsection (1)** is subject to the adjudicator's power to direct that the number of representatives present at a conference of the parties is to be limited to allow for the efficient conduct of proceedings.

105 Adjudication proceedings usually to be in public

- (1) Except as provided in **subsection (2)**, the proceedings of an adjudicator must be conducted in public.
- (2) An adjudicator may, on the application of any party to the proceedings, and after having due regard to the interests of the parties and to the public interest, order that the whole or any part of the proceedings be held in private.
- (3) An adjudicator may, on the application of any party to the proceedings, and after having due regard to the interests of the parties and to the public interest, make an order prohibiting the publication of any report or description of the proceedings or of any part of the proceedings at any hearing before the adjudicator (whether held in public or in private), but no such order may prohibit the publication of any decision of the adjudicator.
- (4) Despite any order made under **subsection (3)**, the adjudicator may permit a report or description of the proceedings or of any part of the proceedings to be included in any publication that is of a bona fide professional or technical nature.

106 Records of adjudication

- (1) The chief executive is responsible for ensuring the safe custody of the records and papers relating to adjudications conducted under this **Part** for the time being in the chief executive's possession or under the chief executive's control.
- (2) Except where an adjudicator otherwise orders under **section 105** or under **clause 13 of the Schedule**, the records and papers must be available for public inspection, on payment of the prescribed fee (if any), at all reasonable times.
- (3) Any person may, on application to the chief executive and on payment of the prescribed fee (if any), require the chief executive to supply to that person a true copy of any record or paper for the time being in the custody or under the control of the chief executive and available for public inspection under **subsection (2)**.
- (4) A certificate, given under the hand of an adjudicator, to the effect that any such copy is a true copy of the paper to which it

relates is, in the absence of proof to the contrary, sufficient evidence that it is a true copy of that record or paper.

107 Adjudication determinations to be made available

- (1) The chief executive must give public notice of every determination of an adjudicator.
- (2) Copies of each determination of an adjudicator, which must include the adjudicator's reasons for each determination, must be available by purchase from the Department at a reasonable price.
- (3) Every notice published under **subsection (1)** is deemed for the purposes of clause 6 of Part I of the First Schedule of the Defamation Act 1992 to be a fair and accurate report of the proceedings of a court in New Zealand.

108 Adjudicators not compellable witnesses

An adjudicator may not be required to give evidence in any civil proceedings on anything connected with an adjudication that has come to his or her knowledge in the course of adjudication proceedings.

109 Application of other enactments to adjudications

- (1) For the purposes of the Limitation Act 1950, and any other provision that imposes a limitation period, the making of an application under **section 63(1)** is deemed to be the filing of proceedings in a court.
- (2) Adjudications must be treated as—
 - (a) proceedings for the purposes of section 24 of the Insolvency Act 1967; and
 - (b) actions or proceedings for the purposes of section 42 of the Corporations (Investigation and Management) Act 1989; and
 - (c) legal proceedings for the purposes of section 248 of the Companies Act 1993.

Miscellaneous provisions

110 Service of notices

Any notice or any other document required to be served on, or given to, any person under this **Part**, or under any regulation made under this **Part**, is sufficiently served if—

- (a) the notice or document is delivered to that person; or
- (b) the notice or document is left at that person's usual or last known place of residence or business in New Zealand; or
- (c) the notice or document is posted in a letter addressed to the person at that person's place of residence or business in New Zealand.

111 Mediator or adjudicator may decline to deal with claim

- (1) A mediator or an adjudicator may decline to deal with a claim if, in the opinion of the mediator or adjudicator,—
 - (a) the subject matter of the claim is trivial; or
 - (b) the claim is frivolous or vexatious; or
 - (c) the claimant is not pursuing the matter in good faith.
- (2) In any case where a mediator or adjudicator decides to decline to deal with a claim, the mediator or adjudicator must inform the parties of that decision and state the reasons for that decision.

112 Transfer of claim to court

An adjudicator may order a claim to be transferred to a District Court or the High Court in its ordinary civil jurisdiction if—

- (a) the claim presents undue complexity; or
- (b) the claim presents a novel claim; or
- (c) the subject matter of the claim is related to the subject matter of proceedings that are already before the court—

so that, in the adjudicator's view, it is more appropriate for a court to determine the claim.

113 Transfer of proceedings from court

- (1) Where proceedings relating to a claim have been commenced in a District Court, a District Court Judge may, on the application of any party, or on the Judge's own motion, order that the proceedings be transferred to mediation or adjudication.
- (2) Where proceedings relating to a claim have been commenced in a High Court, a High Court Judge may, on the application of any party or on the Judge's own motion, order that the proceedings be transferred to mediation or adjudication.
- (3) Where proceedings are transferred under **subsection (1) or subsection (2)**, the adjudicator or mediator may have regard to any notes of evidence transmitted to him or her by the Judge, and it is not necessary for that evidence to be given again in the adjudication or mediation unless the adjudicator or mediator requires it.
- (4) An order to transfer proceedings under **subsection (1) or subsection (2)** may be made only if—
 - (a) the parties to the proceedings agree to the transfer; or
 - (b) the judge making the order believes that the transfer is in the best interests of justice.

114 Transfer of proceedings from arbitration

- (1) Where an arbitration relating to a claim has commenced, the arbitral tribunal may, with the agreement of the parties to the

arbitration, order that any proceedings before it be transferred to mediation or adjudication.

- (2) Where proceedings are transferred under **subsection (1)**, the adjudicator or mediator may have regard to any notes of evidence transmitted to him or her by the arbitral tribunal, and it is not necessary for that evidence to be given again in the adjudication or mediation unless the adjudicator or mediator requires it.

115 Exclusion of liability

- (1) An adjudicator, a mediator, an assessor, or a member of an evaluation panel is not under any civil or criminal liability for anything done, or omitted to be done, in the course of the exercise or intended exercise of any of the adjudicator's or mediator's or assessor's or member of the panel's functions, duties, or powers under this **Part**.
- (2) **Subsection (1)** does not exclude the liability of an adjudicator or mediator or assessor or member of an evaluation panel for anything done or omitted to be done in bad faith.

116 Regulations

The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

- (a) prescribing fees for the purposes of this **Part**;
- (b) prescribing forms for the purposes of this **Part**;
- (c) providing for any other matters contemplated by this **Part**, necessary for its administration, or necessary for giving it full effect.

117 Rules of Court: District Courts

- (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 **Part**.
- (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 **Part**.

118 Legal Services Act 2000 amended

Section 4(1) of the Legal Services Act 2000 is amended by omitting from paragraph (a) of the definition of **civil proceedings** the words “or the Domestic Violence Act 1995”, and substituting the words “the Domestic Violence Act 1995, or **sections 76 to 109** of the Construction Contracts Act **2002**”.

ss 78(5), 90(4), 93

Schedule Adjudicators and adjudications

Part 1 Appointment of adjudicators

1 Appointment

- (1) Every adjudicator takes office from the date stated in the notice of appointment.
- (2) A person is not an employee (as defined in section 2 of the State Sector Act 1988) as a result of being appointed as an adjudicator.
- (3) A person appointed as an adjudicator may hold that office concurrently with any other office.

2 Term of office

- (1) Except as otherwise provided in this schedule, an adjudicator—
 - (a) holds office for a term not exceeding 3 years; and
 - (b) may be reappointed.
- (2) An adjudicator’s term of office referred to in **subclause (1)(a)** must be stated in the notice of appointment.

3 Resignation

An adjudicator may at any time resign from office by written notice given to the Minister.

4 Vacation of office

- (1) An adjudicator may at any time be removed from office by the Governor-General for incapacity affecting performance of duty, neglect of duty, or misconduct, proved to the satisfaction of the Governor-General.
- (2) An adjudicator is deemed to have vacated his or her office if he or she is adjudged bankrupt under the Insolvency Act 1967.

5 Salaries and allowances

- (1) There is to be paid to each adjudicator, out of public money, without further appropriation than this clause,—

Part 1—*continued*

- (a) a salary at such rate or in accordance with such scale of rates as the Higher Salaries Commission from time to time determines; and
 - (b) subject to **subclause (2)**, such allowances as are from time to time determined by the Higher Salaries Commission.
- (2) There is to be paid to each adjudicator, in respect of time spent travelling in the exercise of the adjudicator's functions, travelling allowances and expenses in accordance with the Fees and Travelling Allowances Act 1951; and the provisions of that Act apply accordingly as if the adjudicator were a member of a statutory Board and the travelling were in the service of a statutory Board.
 - (3) In the case of the chief adjudicator, the rate of salary and the allowances determined may be higher than those for the other adjudicators.
 - (4) Nothing in **subclause (1)** prevents in an appropriate case payment to an adjudicator of a salary and allowances on a per diem basis.

Part 2

Provisions having effect in relation to adjudications

6 Privileged communications

- (1) Where any party to an adjudication is represented by a person other than a barrister or solicitor, any communications between that party and that person in relation to the adjudication proceedings and to the matter in issue (if it has been before an adjudicator) are as privileged as they would have been if that person had been a barrister or solicitor.
- (2) In **subclause (1)**, **party**, in relation to an adjudication, includes any person who is allowed to appear or be represented in the adjudication proceedings.

7 Evidence

Any party to an adjudication may give and call evidence.

8 Witness summons

- (1) For the purposes of any adjudication, the adjudicator may, on the application of any party to the adjudication, or of the adjudicator's own volition, issue a summons to any person requiring that person to attend the adjudication and give evidence at the hearing of those proceedings.
- (2) A summons may not be issued under **subclause (1)** to an adjudicator.
- (3) The summons must be in the prescribed form, and may require the person to produce before the adjudicator any

Part 2—*continued*

books, papers, documents, records, or things in that person's possession or under that person's control in any way relating to the adjudication.

9 Witnesses' expenses

- (1) Every person attending before an adjudicator on a summons, and every other person giving evidence before an adjudicator, is entitled, subject to **subclause (2)**, to be paid, by the party calling that person, witnesses' fees, allowances, and travelling expenses according to the scales for the time being prescribed by regulations made under the Summary Proceedings Act 1957, and those regulations apply accordingly.
- (2) The adjudicator may disallow the whole or any part of any sum payable under **subclause (1)**.
- (3) On each occasion on which the adjudicator issues a summons under **clause 8**, the adjudicator must fix an amount that, on the service of the summons, or at some other reasonable time before the date on which the witness is required to attend, is to be paid or tendered to the witness.
- (4) The amount fixed under **subclause (3)** is to be the estimated amount of the allowances and travelling expenses (but not fees) to which, in the opinion of the adjudicator, the witness will be entitled, according to the prescribed scales, if the witness attends at the time and place specified in the summons.

10 Power to take evidence on oath

- (1) The adjudicator may take evidence on oath, and for that purpose any adjudicator, or any other person acting under the express or implied direction of the adjudicator, may administer an oath.
- (2) On any indictment for perjury it is sufficient to prove that the oath was administered in accordance with **subclause (1)**.

11 Party competent as witness

Any party to proceedings before an adjudicator is competent to give evidence in those proceedings and may be compelled to give evidence as a witness.

12 Power to dispense with evidence

In any adjudication the adjudicator may, if he or she thinks fit, dispense with any evidence on any matters on which all parties to the adjudication have agreed.

Part 2—*continued*

13 Power to prohibit publication

- (1) Despite **section 106**, in any adjudication the adjudicator may order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the adjudicator thinks fit.
- (2) Where proceedings are resolved by the adjudicator making a determination on agreed terms under **section 96(5)**, the adjudicator may make an order prohibiting the publication of all or part of that determination, subject to such conditions as the adjudicator thinks fit.

14 Discovery

- (1) The adjudicator may, in relation to discovery, make any order that a District Court may make under section 56A or section 56B of the District Courts Act 1947; and those sections apply accordingly with all necessary modifications.
- (2) Every application for an order under section 56A or section 56B of the District Courts Act 1947 (as applied by **subclause (1)**) is to be dealt with in accordance with regulations made under **Part 6 of this Act**.

15 Power to award interest

- (1) Subject to **subclause (2)**, in any adjudication for the recovery of any money, the adjudicator may, if he or she thinks fit, order the inclusion, in the sum for which a determination is given, of interest, at such rate, not exceeding the 90-day bill rate plus 2%, as the adjudicator thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.
- (2) **Subclause (1)** does not authorise the giving of interest upon interest.

16 Power to proceed if any party fails to attend

If, without good cause shown, any party to a claim before the adjudicator fails to attend or be represented, the adjudicator may act as fully in the matter before him or her as if that party had duly attended or been represented.

17 Proceedings not invalid for want of form

No decision or order of the adjudicator, and no proceedings before the adjudicator, are to be held bad for want of form, or be void or in any way vitiated by reason of any informality or error of form.

Part 2—*continued***18 Proceedings to continue on change of adjudicator**

Where an adjudicator cannot continue to hear a claim and another adjudicator is appointed to continue with the claim, any proceedings then in progress do not abate and are not affected, but are to continue and are to be dealt with by the new adjudicator as if no change had taken place, but the new adjudicator may require evidence to be retaken where necessary.

19 Urgency

Where any party to any proceedings applies to the adjudicator to accord urgency to the hearing of a claim, the adjudicator must consider that application and may, if satisfied that it is necessary and just to do so, order that the proceedings be heard by the adjudicator as soon as practicable.

20 Proceedings not to abate by reason of death

- (1) Proceedings before the adjudicator do not abate by reason of the seat of any adjudicator being vacant for any cause whatever, or of the death of any party to the claim.
- (2) In the latter case, the legal personal representative of the deceased party is to be substituted for the deceased party.

Explanatory note

This Supplementary Order Paper inserts a *new Part 6 and Schedule* into the Construction Contracts Bill that deals specifically with the issue of dwellinghouses that are leaky buildings.

General policy statement

The immediate needs of homeowners of leaky buildings are for independent advice on the nature of their problem, the options available for fixing leaks and consequent damage, and affordable access to fast and effective dispute resolution processes.

In order to address these needs, the Government has decided to establish, in addition to an information advisory service set up independently of the provisions proposed by this Supplementary Order Paper, a specialist dispute resolution service. The advisory service will meet the public need for information in relation to the weathertightness of buildings. The dispute resolution service will provide a less formal, more accessible, and lower cost alternative to taking claims through the courts.

The dispute resolution service will be called the Weathertight Homes Resolution Service. It will provide qualifying owners of

leaky buildings, (being buildings that are intended for use as residential homes) with technical assessments of the scope and nature of their leaky building problems followed by dispute resolution services. Qualifying owners of leaky buildings will then be able to decide whether to apply to have their claim mediated on by the Service's voluntary mediation service or whether to have it adjudicated on by the Service's compulsory adjudication service. Those with claims currently before the courts or subject to arbitration will also be able to apply to have their claims transferred to the Weathertight Homes Resolution Service.

The mediation process will have broad coverage and cover any issues the parties agree to cover. The adjudication process will be limited to establishing legal liability and determining appropriate remedies. Parties to a claim taken to adjudication will be compelled to attend, subject to limited rights to object. The intent is that the adjudication process will have the same scope as a court would but will be a quicker, less formal, and more accessible forum for determining liability.

The process of mediation and its outcomes will remain confidential to the parties involved, whereas adjudication will generally be public. Owners of leaky buildings will pay modest fees to access mediation or adjudication services.

Specific provisions

Clause 2 is amended to provide for the main provisions of the Bill to come into force on 1 April 2003, and for *clauses 43, 55B, and 56 and the new Part 6 and Schedule* to come into force on the day after the date on which the Bill receives the Royal assent.

This amendment overtakes that currently proposed in Supplementary Order Paper No 12.

The *new clause 25* currently proposed in Supplementary Order Paper No 12 (which deals with the effect of adjudications under *Part 3* of the Bill on other civil proceedings) is also overtaken by the proposed *new clause 25*, which, by inserting references to adjudications under the *new Part 6*, ensures that an adjudicator under the new Part will take account of the effects of any adjudication under *Part 3* of the Bill.

The *new Part 6 and Schedule* provide as follows.

Part 6

Weathertight homes resolution services

Preliminary provisions

Clause 57 sets out the purpose of the Part, which is to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings.

Clause 58 provides an overview of the Part.

Clause 59 defines various terms for the purposes of the Part.

Clause 60 provides that the Part binds the Crown.

Assessment and evaluation of claims

Clause 61 sets out the criteria that determine whether a claim by a dwellinghouse owner is eligible for mediation and adjudication under the Part.

The building concerned must have been built (or altered) in the 10 years preceding the application, it must be a leaky building within the definition of that term in *clause 59*, and damage must have resulted from its being a leaky building.

Clause 62 provides for the appointment of assessors.

Clause 63 provides for applications by dwellinghouse owners for the preparation of an assessor's report in relation to their claim.

Clause 64 deals with assessors reports. A report must set out—

- whether or not, in the opinion of the assessor, the claim to which the report relates meets the criteria set out in *clause 61(2)*; and
- if it does, the assessor's view of the cause of the water entering the dwellinghouse, the nature and extent of any damage, the work and repairs needed, the estimated cost of that work, and the persons who should be parties to the claim.

Once completed, the report is referred to an evaluation panel.

Clause 65 provides for the convening of evaluation panels.

Clause 66 requires the panels to evaluate all assessors' reports referred to them, and decide whether the claim meets the criteria required for access to mediation and adjudication services.

An evaluation panel must advise the claimant of its decision as to whether the claim is an eligible claim (giving reasons if it is not), and provide a copy of the assessor's report to the claimant.

Mediation of claims

Clause 67 deals with the setting-up and provision of mediation services.

Clause 68 provides for referral of a claim to mediation by agreement of the parties. A fee of \$200 is payable by the claimant on referral.

Clause 69 gives mediators the discretion to determine what mediation services are appropriate to the particular case, and allows for flexibility and informality in provision of the services.

Clause 70 provides for the general confidentiality of information and matters arising during mediation.

Clause 71 provides for the signing of agreed terms of settlement by the parties to a mediation, in appropriate cases. Agreed terms of settlement are binding on

and enforceable by the parties, provided the necessary formalities as to awareness of the effect of the settlement have been complied with.

Clause 72 provides for the enforcement of agreed terms of settlement under *clauses 102 and 103*, as if they were a determination by an adjudicator.

Clause 73 protects mediation services from being challenged as inappropriate, except on the ground that there was not a proper explanation of the effect of a settlement.

Clause 74 requires the chief executive of the Department to ensure that persons employed or engaged to provide mediation services are able to act independently. This does not prevent the chief executive from giving general instructions about the provision of mediation services.

Clause 75 makes it clear that nothing in *Part 6* prevents a person from seeking and using mediation services other than those provided for under the Part.

Adjudication of claims

Clause 76 sets out the general right of the owner of a dwellinghouse who has an eligible claim to refer the claim to adjudication. This right is limited, however, if and to the extent that the subject-matter of the claim—

- (a) is the subject of already commenced arbitration; or
- (b) is the subject of proceedings or an adjudication initiated by the claimant in a court or a Disputes Tribunal or under section 17 of the Building Act.

A claimant who has started court or arbitration proceedings may however apply for their transfer to adjudication proceedings under *new clause 113*, or seek agreement to their transfer under *clause 114*.

Clause 77 provides that a claimant should not pursue other remedies while the adjudication is proceeding (at pain of the adjudication being treated as withdrawn), but leaves unaffected the position of the other parties to the adjudication.

Clauses 78 and 79 provide for the appointment of adjudicators, including a chief adjudicator, and the manner of provision of adjudication services.

Procedure for initiating adjudication

Clause 80 sets out the procedure for a dwellinghouse owner to refer a claim to adjudication. A fee of \$400 is payable, but will be reduced by any fee previously paid for mediation under the *new clause 68*.

Clause 81 provides for the assignment of an adjudicator to each claim by the chief adjudicator.

Clause 82 provides for the response to a claim by a person against whom the claim is made. Unless further time is allowed by agreement of the parties or by the adjudicator, a response must be made within 25 working days after the respondent has received the claim.

Conduct of adjudication proceedings

Clause 83 sets out the jurisdiction of adjudicators. This is to determine the liability of any of the parties to the claimant, and remedies in relation to that liability.

An adjudicator may also determine liabilities and remedies between respondents, if appropriate.

Clause 84 provides for the withdrawal of adjudication proceedings.

Clause 85 provides for the termination of adjudication proceedings in appropriate cases.

Clause 86 allows the consolidation of adjudication proceedings with the consent of the parties to those proceedings.

Clause 87 allows an adjudicator to order that a person be joined as a respondent in an adjudication in appropriate cases.

Clause 88 provides for parties to be removed from the proceedings in appropriate cases.

Clause 89 sets out the duties of adjudicators. In particular, they must act independently, impartially, and in a timely manner, avoid incurring unnecessary expense, and comply with the principles of natural justice.

Clause 90 sets out the various powers of adjudicators in conducting an adjudication, and generally requires parties to the adjudication to comply with requests or directions of the adjudicators.

Clauses 91 and 92 in effect indicate the possible consequences of a party's failure to respond to a claim or to comply with any request or requirement of an adjudicator during the adjudication proceedings. The adjudicator's power to determine a claim is not affected by any such failure, and the adjudicator may draw from the failure any inferences he or she thinks fit and determine the claim on the basis of the information available to him or her.

Clause 93 applies the provisions of *Part 2 of the new Schedule*, which relate generally to evidential, procedural, and other technical matters, to adjudications.

Adjudicator's determination

Clause 94 requires an adjudicator to determine a claim within 35 working days after the end of the period within which respondents must provide a written response to a claim, or within any further period that the parties agree.

Clause 95 sets out the matters that must be included in an adjudicator's determination as a matter of form.

Clause 96 sets out the matters that must or may be included in an adjudicator's determination by way of substance. If an adjudicator requires a person to take any action other than the payment of money, the adjudicator must also specify a liquidated amount that the person will be liable to pay if they fail to take the action ordered by the date specified in the order.

Clause 97 relates to the costs of adjudication proceedings. These will normally fall on the parties themselves, unless the adjudicator considers that a particular

party has caused costs and expenses to be incurred unnecessarily by reason of bad faith or of advancing allegations or objections that are without substantial merit.

Appeal from adjudicator's determination

Clauses 98 to 101 allow appeals on a question of law or fact to the District Court or the High Court (depending on the amount at issue) from an adjudicator's determination. On an appeal, the court can confirm, modify, or reverse the determination, and may exercise any of the powers that could have been exercised by the adjudicator in relation to the claim. An appeal is a final determination of the claim. The bringing of an appeal will not operate as a stay of the adjudicator's determination unless a Judge otherwise orders.

Enforcement of adjudicator's determination

Clauses 102 and 103 provide for the enforcement of adjudicators' determinations as if they were an order of the District Court.

Miscellaneous matters relating to adjudication

Clause 104 allows parties to an adjudication to be represented by the representatives they consider appropriate (whether legally qualified or not). The adjudicator can however limit numbers to allow for the efficient conduct of proceedings.

Clause 105 provides that adjudication proceedings are generally to be conducted in public, although provision is made for privacy and non-publication of proceedings in appropriate cases.

Clause 106 relates to records of adjudications, and *clause 107* provides for the public notification of adjudication determinations.

Clause 108 provides that adjudicators cannot be required to give evidence in civil proceedings on matters connected with an adjudication.

Clause 109 provides that adjudications are classified as actions for the purposes of the Limitation Act 1950.

Miscellaneous provisions

Clause 110 deals with the service of notices.

Clause 111 allows mediators and adjudicators to decline to deal with trivial, frivolous, or vexatious claims, or claims not pursued in good faith.

Clause 112 allows an adjudicator to transfer a claim to a District Court or the High Court in appropriate cases.

Clause 113 provides that a District Court or High Court Judge may also order court proceedings to be transferred to mediation or adjudication under *Part 6*.

Clause 114 allows arbitration proceedings to be transferred to mediation or adjudication under *Part 6*, by agreement of the parties.

Clause 115 protects adjudicators, mediators, assessors, and members of evaluation panels from liability in the exercise of their functions, duties, or powers, in the absence of bad faith.

Clause 116 empowers the making of regulations contemplated by or necessary for the purposes of *Part 6*.

Clause 117 empowers the making of District Court Rules for the purposes of *Part 6*.

Clause 118 amends the Legal Services Act 2000 to allow access to legal aid for adjudication proceedings, in appropriate cases.

The *Schedule* contains provisions in relation to the appointment of adjudicators, and to various evidential and other procedural and technical matters in relation to adjudications.
