

## HOME BUILDER AND HOUSE RENOVATION DISPUTE RESOLUTION

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Home building and renovation is treated simply as one sector of the construction industry in the United Kingdom. It has not been marked out for any special treatment by the legislature. The construction industry is subject to a complex web of regulations ranging from planning, design, environment, health and safety to local authority inspection and certification. The home building and renovation sector has come under much criticism. The problems associated with so called Cowboy Builders are legion. All this is despite the fact that the property market is a key sector in the economy and home building and particularly the home renovation industry plays a central role in the ever rising value of domestic property. Domestic home owner / contractor disputes feature strongly in all District Court listings.

From the perspective of alternative dispute resolution the home building and renovation sector is virtually a pariah within the ADR industry, since contracts made with residential occupiers are excluded from the scope of adjudication under the Housing Grants, Construction and Regeneration Act 1996, though as illustrated by the JCT Home Owner Contract, the parties may contract in to adjudication. How different then from the UK experience is that of Australia, where a plethora of legislation provides for a highly regulated home building industry, with compulsory inbuilt dispute resolution procedures. Whilst New South Wales seized the initiative and hence it is the New South Wales legislation analysed below, it should be noted that most of the other jurisdictions of Australia have since copied New South Wales' example. Is there anything that we in the UK can learn from their experience? After all, they were not slow to pick up on our adjudication revolution. Perhaps the UK could beneficially repay the compliment?

The primary home building legislation is the Home Building Act 1989 as amended by the Home Building Legislation Amendment Act 2001 and the Home Building Amendment Act 2004, complemented now by the Home Building Regulation 2004 The principal section headings to the Home Building Act 1989 give a flavour of the regulatory regime aimed at ensuring a responsible, accountable home building industry :

### **PART 2 - REGULATION OF RESIDENTIAL BUILDING WORK AND SPECIALIST WORK**

*Division 1 - Contracting for work*

*Division 2 - Restrictions on who may do certain work*

### **PART 2A - REGULATION OF SUPPLY OF KIT HOMES**

### **PART 2B - REPRESENTATIONS CONCERNING CONTRACTOR LICENCES OR CERTIFICATES**

### **PART 2C - STATUTORY WARRANTIES**

### **PART 2D - REGULATION OF BUILDING CONSULTANTS**

*Division 1 - Contracting for work*

*Division 2 - Restrictions on who may do certain work*

*Division 3 - Representations concerning building consultancy licences*

### **PART 3 - LICENCES, BUILDING CONSULTANCY LICENCES AND CERTIFICATES**

*Division 1 - Contractor licences*

*Division 2 - Supervision and tradesperson certificates*

*Division 3 - Owner-builder permits*

*Division 3A - Building consultancy licences*

*Division 4- Provisions relating to contractor licences, certificates, building consultancy licences and owner-builder permits*

### **PART 3A - RESOLVING BUILDING DISPUTES AND BUILDING CLAIMS**

*Division 1 - Definitions*

*Division 2 - Dealing with a building dispute*

*Division 3 - Making an application for determination of a building claim*

*Division 4 - Jurisdiction in relation to building claims*

*Division 5 - Powers of Tribunal*

### **PART 4 - DISCIPLINARY PROCEEDINGS**

*Division 1 - Interpretation*

*Division 2 - Disciplinary action*

**PART 4A - REVIEWS BY ADMINISTRATIVE DECISIONS TRIBUNAL****PART 5 - JURISDICTION OF TRIBUNAL REGARDING APPEALS AND UNJUST CONTRACTS***Division 3 - Unjust contracts***PART 6 - HOME WARRANTY INSURANCE***Division 2 - Insurance***PART 6A - INSOLVENT INSURERS***Division 1 - Preliminary**Division 2 - Insurance claims indemnified by State**Division 3 - Miscellaneous***PART 7 - FAIR TRADING ADMINISTRATION CORPORATION AND ADDITIONAL POWERS OF DIRECTOR-GENERAL****PART 8 - GENERAL***Division 1 - Inspections and reports*

It can be seen that the Act provides a comprehensive licensing program for home building, coupled with warranties and compulsory insurance. Dispute Resolution plays a key role in this regulatory regime. The provisions of Part 3A warrant closer inspection and are set out in full below.

**PART 3A - RESOLVING BUILDING DISPUTES AND BUILDING CLAIMS****Division 1 - Definitions****48A Definitions***(1) In this Part:**"building claim" means a claim for:**(a) the payment of a specified sum of money, or**(b) the supply of specified services, or**(c) relief from payment of a specified sum of money, or**(d) the delivery, return or replacement of specified goods or goods of a specified description, or**(e) a combination of two or more of the remedies referred to in paragraphs (a)–(d),**that arises from a supply of building goods or services whether under a contract or not, or that arises under a contract that is collateral to a contract for the supply of building goods or services, but does not include a claim that the regulations declare not to be a building claim.**"building dispute" means a dispute that has been notified as referred to in section 48C.**"building goods or services" means goods or services supplied for or in connection with the carrying out of residential building work, specialist work or building consultancy work, being goods or services:**(a) supplied by the person who contracts to do, or otherwise does, that work, or**(b) supplied in any circumstances prescribed by the regulations to the person who contracts to do that work.**(2) Without limiting the definition of "building claim", a building claim includes the following:**(a) an appeal against a decision of an insurer under a contract of insurance required to be entered into under this Act,**(b) a claim for compensation for loss arising from a breach of a statutory warranty implied under Part 2C.**(3) A word or expression:**(a) that is used in a definition in subsection (1), and**(b) that is defined in the Consumer Claims Act 1998 ,  
has the same meaning as in that Act.**(4) For the purposes of subsection (3), a reference in section 3 of the Consumer Claims Act 1998 to a consumer is to be read as a reference to any person.***Division 2 - Dealing with a building dispute****48B Definitions** *In this Division:**"complainant" means a person who has notified the Director-General of a building dispute under section 48C.**"contractor" means the holder of a contractor licence to whom a building dispute relates.*

*"inspector"* means a person appointed to carry out an investigation into a building dispute, as referred to in section 48D.

*"rectification order"* means an order referred to in section 48E (1) or (2).

#### **48C Notification of building dispute**

Any person may notify the Director-General, in such manner as the Director-General may approve, that the person has a dispute with the holder of a contractor licence with respect to residential building work or specialist work done by the contractor or the supply of a kit home by the contractor.

#### **48D Investigation of dispute**

- (1) The Director-General may appoint a member of staff of the Department of Fair Trading to investigate any matter that has given rise to a building dispute.
- (2) After completing an investigation, an inspector must cause a written report to be prepared on the results of the investigation and cause copies of the report to be given to the complainant and the contractor.

#### **48E Inspector may make rectification order**

- (1) If, after completing an investigation under section 48D, an inspector is satisfied:
  - (a) that any residential building work or specialist work contracted to be done by the contractor is incomplete, or
  - (b) that any residential building work or specialist work done by the contractor is defective, or
  - (c) that the contractor, in the course of doing any residential building work or specialist work, has caused damage to any structure or work, or
  - (d) that, as a consequence of any defective residential building work or specialist work done by the contractor, a structure or work has been damaged,
 the inspector may serve a written order on the contractor requiring the contractor to take such steps as are specified in the order to ensure that the work is completed or the defect or damage rectified, as the case requires.
- (2) If, after completing an investigation under section 48D, an inspector is satisfied:
  - (a) that any kit home supplied by the contractor is incomplete, or
  - (b) that any kit home supplied by the contractor is defective, or
  - (c) that the contractor has failed to supply a kit home,
 the inspector may serve a written order on the contractor requiring the contractor to take such steps as are specified in the order to ensure that the kit home is supplied or completed or the defect rectified, as the case requires.
- (3) A rectification order:
  - (a) may specify conditions (including conditions with respect to the payment of money) to be complied with by the complainant before the requirements of the order must be complied with, and
  - (b) must specify a date by which the requirements of the order must be complied with, subject to the complainant's compliance with any condition referred to in paragraph (a), and
  - (c) must indicate that the order will cease to have effect if the matter giving rise to the order becomes the subject of a building claim before the date specified in accordance with paragraph (b).

#### **48F Effect of rectification order**

- (1) Except as provided by section 51, a rectification order does not give rise to any rights or obligations.
- (2) Subject to section 48I, a rectification order ceases to have effect for the purposes of section 51 if the matter giving rise to the order becomes the subject of a building claim before the date specified in accordance with section 48E (3) (b).

### **Division 3 - Making an application for determination of a building claim**

#### **48I Application for determination of building claim**

- (1) Any person may apply to the Tribunal for the determination of a building claim.
- (2) A building claim may be withdrawn by the claimant at any time.
- (3) If, immediately before a building claim was made, the claimant was subject to the requirements of a rectification order under Division 2, the building claim may not be withdrawn except with the leave of the Tribunal.

- (4) When granting leave to the withdrawal of a building claim referred to in subsection (3), the Tribunal may restore the rectification order referred to in that subsection.

**48J Certain applications to be rejected**

The Registrar of the Tribunal must reject any application to the Tribunal for the determination of a building claim unless:

- (a) the Registrar is satisfied that the subject-matter of the building claim has been investigated under Division 2, or  
 (b) the Chairperson of the Tribunal directs that the building claim be accepted without such an investigation having been made.

**Division 4 - Jurisdiction in relation to building claims**

**48K Jurisdiction of Tribunal in relation to building claims**

- (1) The Tribunal has jurisdiction to hear and determine any building claim brought before it in accordance with this Part in which the amount claimed does not exceed \$500,000 (or any other higher or lower figure prescribed by the regulations).
- (2) The Tribunal has jurisdiction to hear and determine any building claim whether or not the matter to which the claim relates arose before or after the commencement of this Division, except as provided by this section.
- (3) The Tribunal does not have jurisdiction in respect of a building claim relating to building goods or services that have been supplied to or for the claimant if the date on which the claim was lodged is more than 3 years after the date on which the supply was made (or, if made in instalments, the date on which the supply was last made).
- (4) The Tribunal does not have jurisdiction in respect of a building claim relating to building goods or services that are required under a contract to be supplied to or for the claimant on or by a specified date or within a specified period but which have not been so supplied if the date on which the claim was lodged is more than 3 years after the date on or by which the supply was required under the contract to be made or, if required to be made in instalments, the last date on which the supply was required to be made.
- (5) The fact that a building claim arises out of a contract that also involves the sale of land does not prevent the Tribunal from hearing that building claim.
- (6) The Tribunal does not have jurisdiction in respect of a building claim arising out of a contract of insurance required to be entered into under this Act if the date on which the claim was lodged is more than 10 years after the date on which the residential building work the subject of the claim was completed.
- (7) The Tribunal does not have jurisdiction in respect of a building claim arising from a breach of a statutory warranty implied under Part 2C if the date on which the claim was lodged is more than 7 years after:
- (a) the date on which the residential building work the subject of the claim was completed, or  
 (b) if the work is not completed:
- (i) the date for completion of the work specified or determined in accordance with the contract, or  
 (ii) if there is no such date, the date of the contract.
- (8) The Tribunal does not have jurisdiction in respect of a building claim relating to:
- (a) a contract for the supply of goods or services to which none of subsections (3), (4), (6) and (7) applies, or  
 (b) a collateral contract,  
 if the date on which the claim was lodged is more than 3 years after the date on which the contract was entered into.
- (9) This section has effect despite section 22 of the Consumer, Trader and Tenancy Tribunal Act 2001 .

**48L Tribunal to be chiefly responsible for resolving building claims**

- (1) This section applies if a person starts any proceedings in or before any court in respect of a building claim and the building claim is one that could be heard by the Tribunal under this Division.
- (2) If a defendant in proceedings to which this section applies makes an application for the proceedings to be transferred, the proceedings must be transferred to the Tribunal in accordance with the regulations and are to continue before the Tribunal as if they had been instituted there.
- (3) This section does not apply to matters arising under sections 15, 16 or 25 of the Building and Construction Industry Security of Payment Act 1999 .
- (4) This section has effect despite section 23 of the Consumer, Trader and Tenancy Tribunal Act 2001 .

**48M Jurisdiction in relation to actions against refusal of insurance claims**

Despite section 48K, a building claim that relates to the refusal of an insurance claim that exceeds \$500,000 (or any other higher or lower figure prescribed by the regulations) is to be heard by a court of competent jurisdiction.

**Division 5 - Powers of Tribunal****48N Tribunal may have regard to certain building reports**

- (1) In determining a building claim, the Tribunal may have regard to, but is not bound by, any report prepared by an inspector by whom any matter giving rise to a building dispute has been investigated under Division 2 (before an application was made for determination of the building claim).
- (2) The inspector may be called to give evidence in proceedings before the Tribunal only by the Tribunal (and not by either party to the building claim).
- (2A) The Tribunal may appoint an independent expert, from a panel of experts approved by the Chairperson of the Tribunal, to advise the Tribunal as to any matter that the Tribunal refers to the expert for advice.
- (2B) In any proceedings for which an independent expert has been appointed under subsection (2A), no party may call any other expert to give evidence in the proceedings, or tender any report prepared by any other expert, except by leave of the Tribunal.
- (2C) Subject to any order of the Tribunal, the costs of an independent expert appointed under subsection (2A) are to be borne by the parties in equal proportions.
- (2D) Anything done or omitted to be done by an independent expert under this Division does not, if the thing was done or omitted to be done in good faith for the purposes of this Division, subject the expert personally to any action, liability, claim or demand.
- (3) Nothing in this section prevents a party from cross-examining an inspector or expert called under this section.

**48O Powers of Tribunal**

- (1) In determining a building claim, the Tribunal is empowered to make one or more of the following orders as it considers appropriate:
  - (a) an order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,
  - (b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings,
  - (c) an order that a party to the proceedings:
    - (i) do any specified work or perform any specified service or any obligation arising under this Act or the terms of any agreement, or
    - (ii) do or perform, or refrain from doing or performing, any specified act, matter or thing.
- (2) The Tribunal may make an order of a kind referred to in subsection (1) (a) or (b) even if the applicant asked for an order of a kind referred to in subsection (1) (c).
- (3) The provisions of sections 9–13 of the Consumer Claims Act 1998 apply, with any necessary modifications, to and in respect of the determination of a building claim.

**48P Power to adjourn proceedings where insurable event arises**

- (1) This section applies to proceedings in relation to a building claim that does not arise under a contract of insurance entered into under this Act.
- (2) If, during the course of any proceedings before the Tribunal in relation to a building claim, it appears to the Tribunal that a party to the dispute has the right to make a claim under a contract of insurance entered into under this Act, the Tribunal may adjourn the proceedings to allow the claim to be made and determined.
- (3) If proceedings are adjourned under this section and the claim in relation to the contract of insurance is settled, the proceedings are taken to have been finalised, unless the Tribunal otherwise orders.

**48Q Power to join persons as parties to proceedings**

If, at any time before or during proceedings before it in relation to a building claim, the Tribunal is of the opinion that a person should be joined as a party to the proceedings, the Tribunal may, by notice in writing given to the person or by oral direction given during proceedings, join the person as a party to the proceedings.

**48R Order must include warning regarding non-compliance**

*An order made under this Part (other than an interim order or a direction) must include a warning, in the form prescribed by the regulations, that if the person against whom the order is made fails to comply with the order the failure to comply will be recorded with the other information kept about the person in the register kept under section 120.*

**48S Tribunal must inform Director-General of any order made**

*The Tribunal must inform the Director-General of any order made under this Part, and of the time limit for compliance with the order, as soon as practicable after making the order.*

**48T Director-General to be informed of compliance with order**

- (1) *A person against whom an order has been made by the Tribunal under this Part may inform the Director-General when that order has been complied with.*
- (2) *A person against whom an order has been made must not inform the Director-General that an order has been complied with if the person knows or ought reasonably to know that it has not been complied with. Maximum penalty: 200 penalty units.*
- (3) *If the Director-General is satisfied that an order has been complied with, the Director-General must ensure that the register kept under section 120 does not record non-compliance with the order.*
- (4) *Nothing in this section prevents the Director-General from recording non-compliance with an order if he or she had previously removed a reference to an order from the register.*

**48U Failure to inform of compliance**

*If the Director-General has not been informed that an order has been complied with by the end of the time limit for compliance with the order, the order is taken to have not been complied with and may be recorded as such on the register kept under section 120.*

The **Homebuilding Act** is supplemented by the **Home Building Regulation 2004** which in outline provides further detailed provisions in respect of the following matters with specific reference to Part 6:-

**PART 2 - PRESCRIPTIONS FOR THE PURPOSES OF DEFINITIONS IN THE ACT****PART 3 - REGULATION OF RESIDENTIAL BUILDING WORK, SPECIALIST WORK, BUILDING CONSULTANCY WORK AND THE SUPPLY OF KIT HOMES**

*Division 1 - Contracting for work*

*Division 2 - Restrictions on who may do certain work*

*Division 3 - Supply of kit homes*

**PART 4 - CONTRACTOR LICENCES, BUILDING CONSULTANCY LICENCES, CERTIFICATES AND OWNER-BUILDER PERMITS**

*Division 1 - Requirements to obtain contractor licences, building consultancy licences and certificates*

*Division 2 - Conditions of contractor licences, building consultancy licences and certificates*

*Division 3 - Cancellation*

*Division 5 - Fees*

*Division 6 - Miscellaneous*

**PART 5 - INSURANCE REQUIREMENTS**

*Division 1 - Preliminary*

*Division 2 - Insurance contracts generally*

*Division 3 - Miscellaneous*

**PART 6 - RESOLUTION OF BUILDING DISPUTES AND BUILDING CLAIMS****8 Transfer of proceedings from other courts**

(1) *For the purposes of section 48L of the Act:*

- (a) *proceedings are to be transferred by order of the court hearing the proceedings, and*
- (b) *notice of the transfer is to be given to the Registrar of the Tribunal by the registrar of the court hearing the proceedings, and*
- (c) *all documents relating to the proceedings in the custody of the court hearing the building claim are to be transferred by the registrar of the court to the Registrar of the Tribunal.*

(2) On receipt of such a notice of transfer and accompanying documents, the Registrar must serve on all of the parties a notice fixing a date and time for the holding of the hearing or a directions hearing in relation to the proceedings.

**9 Warning notice for Tribunal orders**

For the purposes of section 48R of the Act, the following warning must be included in an order made under Part 3A of the Act:

*You must notify the Office of Fair Trading’s Home Building Service in writing when you have complied with this order (for example, when you have done the work or paid the money).*

*If you do not notify the Home Building Service, your public record will show that you have failed to comply with the order and you may be unable to renew your licence when it expires.*

*You can be fined up to \$22,000 if you falsely claim you have complied with this order.*

From the above it will be noted that dispute resolution takes two separate tracks, one for the resolution of claims before a Tribunal and the other for an investigation of complaints, which if upheld following inspection, which is an integral part of the service, will lead to orders for rectification. This is a client orientated service, ensuring both cash flow for the builder and not only quality assurance but also rectification for the home owner. The builder is held accountable both to the client and the State.

Allied to the above is the role of the **Consumer, Trader & Tenancy Tribunal Act 2001** which has a section that specialises in home building construction disputes and is the relevant tribunal within the Home Building Act. Note that the residential theme is continued in that the tribunal also has jurisdiction over Residential Tenancies. **The Consumer, Trader and Tenancy Tribunal Act 2001** provides in outline as follows, with specific reference to Part 5 on ADR :-

**PART 2 - ESTABLISHMENT OF TRIBUNAL**

**Division 1 - Establishment and membership**

**5 Establishment of Consumer, Trader and Tenancy Tribunal**

(1) A Consumer, Trader and Tenancy Tribunal of New South Wales is established by this Act.

(2) The Tribunal has and may exercise such functions as are conferred or imposed on it by or under any Act.

The following Acts confer jurisdiction on the Tribunal: ..... (only selected acts set out below)

Consumer Claims Act 1998 .....

Fair Trading Act 1987 .....

Home Building Act 1989 .....

Residential Tenancies Act 1987 ..... etc

**Division 2 - Organisation and functions**

**Division 3 - Assessors**

**Division 4 - Registrar and staff**

**PART 3 - JURISDICTION OF TRIBUNAL**

(This refers parties back to the jurisdiction in each of the Acts it services)

**PART 4 - PROCEDURE OF TRIBUNAL**

**PART 5 - ALTERNATIVE DISPUTE RESOLUTION**

**Division 1 - Conciliation and preliminary measures**

**54 Tribunal to promote conciliation**

(1) Before making an order to determine any matter that is the subject of proceedings, it is the duty of the Tribunal to use its best endeavours to bring the parties in the proceedings to a settlement that is acceptable to all the parties.

(2) If such a settlement is reached, the Tribunal must make orders that give effect to the settlement to the extent permitted by this Act.

(3) Any statement or admission made before the Tribunal or any person at a meeting or other proceeding held for the purposes of subsection (1) is not admissible at a hearing of the matter concerned or in any other legal proceedings.

**55 Preliminary conferences**

(1) In addition to or in the course of any action taken under section 54, the Tribunal may, before commencing to hear and determine an application, confer with, or arrange for a member or the Registrar to confer with, the

parties in the proceedings and make any determination with respect to the proceedings that is agreed to by the parties.

- (2) If proceedings are referred under this section to a member or the Registrar and the parties agree to the determination of the member or the Registrar, the determination has effect as a decision of the Tribunal.
- (3) If the proceedings are not determined under this section and the matter proceeds to a hearing:
  - (a) evidence is not to be given, and statements are not to be made, concerning any words spoken or acts done at a conference held in accordance with this section unless the parties otherwise agree, and
  - (b) any member who presided over a preliminary conference in respect of the proceedings is not entitled to be a member of the Tribunal determining the proceedings if any party in the preliminary conference objects, in the manner and form prescribed by the regulations, to the member's participation in the proceedings.
- (4) The Chairperson may direct that a preliminary conference is to be held under this section in the case of any applications made to the Tribunal of a kind specified in the direction.

### **Division 2 - Mediation and neutral evaluation**

#### **56 Definitions : In this Division:**

"mediation session" means a meeting arranged for the mediation of a matter under this Division.

"mediator" means a person to whom the Tribunal refers a matter for mediation under this Division.

"neutral evaluation session" means a meeting arranged for the neutral evaluation of a matter under this Division.

"neutral evaluator" means a person to whom the Tribunal refers a matter for neutral evaluation under this Division.

#### **57 Meaning of "mediation" and "neutral evaluation"**

- (1) In this Act, "mediation" means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.
- (2) In this Act, "neutral evaluation" means a process of evaluation of a dispute in which the neutral evaluator seeks to identify and reduce the issues of fact and law that are in dispute. The neutral evaluator's role includes assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings.

#### **58 Appointment of mediators and neutral evaluators**

- (1) The Chairperson may appoint any person whose name is on the list compiled under Schedule 5 as a mediator or neutral evaluator for the purpose of particular proceedings in the Tribunal.
- (2) Mediators and neutral evaluators have the functions conferred or imposed on them by or under this or any other Act.
- (3) Schedule 5 has effect in respect of a mediator or neutral evaluator appointed under this section.

#### **59 Referral by Tribunal**

- (1) The Tribunal may, by order, refer a matter arising in any proceedings for mediation or neutral evaluation if the Tribunal considers the circumstances appropriate.
- (2) The mediator or neutral evaluator may, but need not be, a person whose name is on a list compiled under Schedule 5.

#### **60 Costs of mediation and neutral evaluation**

- (1) The costs of mediation or neutral evaluation, including the costs payable to the mediator or neutral evaluator, are payable by the Tribunal, except to the extent that the regulations provide that the parties in the proceedings are to pay such costs.
- (2) Regulations made for the purposes of this section may provide that the parties are to pay such costs:
  - (a) in such proportions as they may agree among themselves or, failing agreement, in such manner as may be ordered by the Tribunal, or
  - (b) in any other prescribed manner.

#### **61 Agreements and arrangements arising from mediation or neutral evaluation sessions**

- (1) The Tribunal may make orders to give effect to any agreement or arrangement arising out of a mediation session or neutral evaluation session if the Tribunal is satisfied that it would have the power to make a decision in terms of the agreement or arrangement or in terms that are consistent with the agreement or arrangement.



- (2) Nothing in this Division affects the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session or neutral evaluation session, in relation to the matters the subject of any such session.

#### **62 Privilege**

- (1) In this section, "mediation session" or "neutral evaluation session" includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.
- (2) Subject to subsection (3), the same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to:
- a mediation session or neutral evaluation session, or
  - a document or other material sent to or produced to a mediator or neutral evaluator, or sent to or produced at the Tribunal or the office of the Registrar, for the purpose of enabling a mediation session or neutral evaluation session to be arranged.
- (3) The privilege conferred by subsection (2) only extends to a publication made:
- at a mediation session or neutral evaluation session, or
  - as provided by subsection (2) (b), or
  - as provided by section 63.
- (4) Evidence of any thing said or of any admission made in a mediation session or neutral evaluation session is not admissible in any proceedings before any court, tribunal or body.
- (5) A document prepared for the purposes of, or in the course of, or as a result of, a mediation session or neutral evaluation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court, tribunal or body.
- (6) Subsections (4) and (5) do not apply with respect to any evidence or document:
- if the persons in attendance at, or identified during, the mediation session or neutral evaluation session and, in the case of a document, all persons identified in the document, consent to the admission of the evidence or document, or
  - in proceedings instituted with respect to any act or omission in connection with which a disclosure has been made under section 63 (c).

#### **63 Secrecy**

A mediator or neutral evaluator may disclose information obtained in connection with the administration or execution of this Division only in any one or more of the following circumstances:

- with the consent of the person to whom the information relates,
- in connection with the administration or execution of this Division,
- if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,
- if the disclosure is reasonably required for the purpose of referring any party or parties in a mediation session or neutral evaluation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties in the mediation session or neutral evaluation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,
- in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

#### **64 Other measures not precluded**

Nothing in this Division prevents:

- the parties in any proceedings from agreeing to and arranging for mediation or neutral evaluation of any matter otherwise than as referred to in this Division, or
- a matter arising in any proceedings from being dealt with under the provisions of the Community Justice Centres Act 1983 .

### **PART 6 - APPEALS AND REHEARINGS**

#### **65 Review by prerogative writ etc generally excluded**

- (1) Except as provided by this section, a court has no jurisdiction to grant relief or a remedy by way of:
- a judgment or order in the nature of prohibition, mandamus, certiorari or other relief, or

- (b) a declaratory judgment or order, or  
 (c) an injunction,  
 in respect of any matter that has been heard and determined (or is to be heard or determined) by the Tribunal in accordance with this Act or in respect of any ruling, order or other proceeding relating to such a matter.
- (2) A court is not prevented from granting relief or a remedy of a kind referred to in subsection (1) in relation to a matter in respect of which the jurisdiction of the Tribunal to determine the matter was disputed if the ground on which the relief or remedy is sought is that:
- (a) the Tribunal gave an erroneous ruling as to its jurisdiction, or  
 (b) the Tribunal erred in refusing or failing to give a ruling as to its jurisdiction when its jurisdiction was disputed.
- (3) A court is not prevented from granting relief or a remedy of a kind referred to in subsection (1) in relation to a matter in respect of which the Tribunal has made an order if the ground on which the relief or remedy is sought is that:
- (a) the Tribunal had no jurisdiction to make the order, or  
 (b) in relation to the hearing or determination of the matter, a party had been denied procedural fairness.

#### **66 Referral of questions of law to Supreme Court**

- (1) A referral under this section is to be made in accordance with rules of the Supreme Court.
- (2) If, in any proceedings, a question arises with respect to a matter of law, the Tribunal may decide the question or may refer it to the Supreme Court for decision.
- (3) If a question with respect to a matter of law is referred to the Supreme Court by the Tribunal:
- (a) the Tribunal is not to make an order or a decision to which the question is relevant until the Supreme Court has decided the question, and  
 (b) on deciding the question, the Supreme Court is to remit its decision to the Tribunal, and  
 (c) the Tribunal is not to proceed in a manner, or make an order or a decision, that is inconsistent with the decision of the Supreme Court.
- (4) Any costs to the parties in proceedings arising out of the referral of a question with respect to a matter of law to the Supreme Court are not payable by the parties but are to be paid as a cost of the administration of this Act.
- (5) For the purposes of this section, a reference to a matter of law includes a reference to a matter relating to the jurisdiction of the Tribunal.

#### **67 Appeal against decision of Tribunal with respect to matter of law**

- (1) If, in respect of any proceedings, the Tribunal decides a question with respect to a matter of law, a party in the proceedings who is dissatisfied with the decision may, subject to this section, appeal to the Supreme Court against the decision.
- (2) An appeal is to be made in accordance with the rules of the Supreme Court. The rules of the Supreme Court may provide that an appeal (or such classes of appeal as may be specified in the rules) may be made only with the leave of the Court.
- (3) After deciding the question the subject of such an appeal, the Supreme Court may, unless it affirms the decision of the Tribunal on the question:
- (a) make such order in relation to the proceedings in which the question arose as, in its opinion, should have been made by the Tribunal, or  
 (b) remit its decision on the question to the Tribunal and order a rehearing of the proceedings by the Tribunal.
- (4) If such a rehearing is held, the Tribunal is not to proceed in a manner, or make an order or a decision, that is inconsistent with the decision of the Supreme Court remitted to the Tribunal.
- (5) If a party has appealed to the Supreme Court against a decision of the Tribunal on a question with respect to a matter of law, either the Tribunal or the Supreme Court may suspend, until the appeal is determined, the operation of any order or decision made in respect of the proceedings.
- (6) If the Tribunal suspends the operation of an order or a decision, the Tribunal or the Supreme Court may terminate the suspension or, where the Supreme Court has suspended the operation of an order or a decision, the Supreme Court may terminate the suspension.

- (7) *If a rehearing is held, fresh evidence, or evidence in addition to or in substitution for the evidence on which the original decision was made, may be given on the rehearing.*
- (8) *A reference in this section to a matter of law includes a reference to a matter relating to the jurisdiction of the Tribunal.*
- (9) *The regulations may exclude the making of an appeal under this section in such classes or description of cases as may be prescribed.*

Note that the Tribunal fulfils a case management role somewhat like that within the Civil Procedure Rules 1999 in that there is a duty to encourage the parties to pursue settlement, complete with detailed provisions for conciliation and mediation, which are distinguished from each other. Furthermore a fast track preliminary decision making process is also available from the registrar – somewhat like a mini-trial. Decisions of the tribunal are fully binding, subject to an appeal process. Decisions of the tribunal are published. The following have been reported :-

**Precision Flooring P/L v Tricon Projects P/L (Home Building) [2005] NSWCTTT 250** : This claim was related to the **Ziade v Tricon**<sup>1</sup> adjudication. The question arose as to whether this was the same issue and thus amounted to double jeopardy. The Tribunal held that it was a distinct and separate dispute and hence the Tribunal had jurisdiction. W J Tearle. Member. Consumer Trader and Tenancy Tribunal. 2nd April 2005

**Hogan v Allan (Home Building) [2005] NSWCTTT 255** : Tribunal had to determine whether the contractor held himself out as a building contractor; whether the contract was for a “fixed price” or on a “costs plus” basis; whether works completed to specifications; standard of workmanship; whether homeowner and/or contractor terminated or repudiated the contract; whether payment for work completed lawfully withheld; whether claim founded in contract or restitution & quantum meruit?

M. Noone : Member Consumer, Trader and Tenancy Tribunal. 6th April 2005

**Meyer v Brian Burston Building Design Consultant (General) [2005] NSWCTTT 235** : Tribunal considered the application of the BCISPA in Tribunal proceedings, holding that the procedure to assert a claim / defence had not been followed and accordingly the payment claim failed.

W J Tearle. Member Consumer, Trader & Tenancy Tribunal. 20th April 2005

**Bell v Pearce (Home Building) [2005] NSWCTTT 433** : An adjudication found that the contract had been determined, following which claims for oral variations and cross claims for non-completion were submitted to the tribunal which found the variations payable on a quantum meruit basis.

G J Durie. Senior Member. Consumer Trader & Tenancy Tribunal. 23rd June 2005

**Williams v Star Structures P/L (Home Building) [2006] NSWCTTT 347** : Where the claim for damages by owner and the counterclaim for unpaid progress payment were both successful the tribunal determined that each party should bear its own costs.

G J Durie. 28th June 2006.

There is a further potential cross over between the role played by the CT&TA 2001 and that of the construction adjudication regime established by the **Building and Construction Industry Security of Payment Act 1999**. The inspiration for this Act was the HGCRA 1996, so it should be more familiar territory for readers. However, the jurisdiction of the adjudicator under the BCISPA is more restrictive than under the HGCRA in that it targets progress payments rather than “*any dispute arising under a relevant construction contract*”. For the benefit of readers unfamiliar with the BCISPA, its provisions in outline are as follows:-

#### **PART 1 - PRELIMINARY**

### **3. Object of Act**

- (1) *The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*

<sup>1</sup> **Ziade v Tricon** [2004] NSWSC 1070. Hearing of originating process seeking to set aside statutory demand, contested adjudication application, property developer, construction management agreement. Off-setting claim, whether this was an appropriate supplementation of the initial affidavit rectification - property sold. Is the offsetting claim genuine. Proceedings dismissed. Equity Division. Supreme Court New South Wales. Master Macready. 22nd November 2004

- (2) *The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.*
- (3) *The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:*
- (a) the making of a payment claim by the person claiming payment, and*
  - (b) the provision of a payment schedule by the person by whom the payment is payable, and*
  - (c) the referral of any disputed claim to an adjudicator for determination, and*
  - (d) the payment of the progress payment so determined.*
- (4) *It is intended that this Act does not limit:*
- (a) any other entitlement that a claimant may have under a construction contract, or*
  - (b) any other remedy that a claimant may have for recovering any such other entitlement.*
4. *Definitions*
5. *Definition of "construction work"*
6. *Definition of "related goods and services"*
7. *Application of Act*

## **PART 2 - RIGHTS TO PROGRESS PAYMENTS**

8. *Rights to progress payments*
9. *Amount of progress payment*
10. *Valuation of construction work and related goods and services*
11. *Due date for payment*
12. *Effect of "pay when paid" provisions*
- (1) *A pay when paid provision of a construction contract has no effect in relation to any payment for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract. .... etc*

## **PART 3 - PROCEDURE FOR RECOVERING PROGRESS PAYMENTS**

### **Division 1 - Payment claims and payment schedules**

- 13 **Payment claims**
- (1) *A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the "claimant") may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.*
- (2) *A payment claim:*
- (a) must identify the construction work (or related goods and services) to which the progress payment relates, and*
  - (b) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"), and*
  - (c) must state that it is made under this Act.*
- (3) *The claimed amount may include any amount:*
- (a) that the respondent is liable to pay the claimant under section 27 (2A), or*
  - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.*
- (4) *A payment claim may be served only within:*
- (a) the period determined by or in accordance with the terms of the construction contract, or*
  - (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied), whichever is the later.*
- (5) *A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.*
- (6) *However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.*

14. *Payment schedules*
- (1) *A person on whom a payment claim is served (the **respondent** ) may reply to the claim by providing a payment schedule to the claimant.*
  - (2) *A payment schedule:*
    - (a) *must identify the payment claim to which it relates, and*
    - (b) *must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**).*
  - (3) *If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.*
  - (4) *If:*
    - (a) *a claimant serves a payment claim on a respondent, and*
    - (b) *the respondent does not provide a payment schedule to the claimant:*
      - (i) *within the time required by the relevant construction contract, or*
      - (ii) *within 10 business days after the payment claim is served,*

*whichever time expires earlier,*

*the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.*
15. *Consequences of not paying claimant where no payment schedule<sup>2</sup>*
16. *Consequences of not paying claimant in accordance with payment schedule*

#### **Division 2 - Adjudication of disputes**

17. *Adjudication applications*
18. *Eligibility criteria for adjudicators*
19. *Appointment of adjudicator*
20. *Adjudication responses*
21. *Adjudication procedures*
22. *Adjudicator's determination*
23. *Respondent required to pay adjudicated amount*
24. *Consequences of not paying claimant adjudicated amount*
25. *Filing of adjudication certificate as judgment debt*
26. *Claimant may make new application in certain circumstances*

#### **Division 3 - Claimant's right to suspend construction work**

27. *Claimant may suspend work*

#### **Division 4 - General**

28. *Nominating authorities*
29. *Adjudicator's fees*
30. *Protection from liability for adjudicators and authorised nominating authorities*
31. *Service of notices*
32. *Effect of Part on civil proceedings*

#### **PART 4 - MISCELLANEOUS**

33. *Act binds Crown*
34. *No contracting out*
  - (1) *The provisions of this Act have effect despite any provision to the contrary in any contract.*
  - (2) *A provision of any agreement (whether in writing or not):*
    - (a) *under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or*
    - (b) *that may reasonably be construed as an attempt to deter a person from taking action under this Act,*

*is void.*

The interrelationship between litigation, construction adjudication and the tribunal is relevant to the following reported cases outlined below :-

<sup>2</sup> **Bitannia P/L v Parkline Construction P/L [2006] NSWCA 238** : Contrary to s15, s52 Trade Practices Act 1974 (Federal Law) provides a remedy where the failure to provide a payment schedule arose out of the misleading and deceptive conduct of the contractor. Thus by virtue of the TPA a s52 cross-claim can be pleaded as a defence to an enforcement action.

**Cooper v Home Productions P/L (General) [2004] NSWCTTT 597** : Tribunal had to determined whether an adjudication under the BCISPA 1999 ousts the jurisdiction of the Tribunal under the Consumer Claims Act 1998. D.Sheehan. Member. CT&TT. New South Wales. 20th October 2004

**Cooper v Anthony Veghelvi (1) Home Productions P/L (2) CT&TT (5) [2005] NSWSC 227** : The issue here was whether in the light of a pending appeal sum ordered by adjudication by virtue of s 25(4) BCISP Act should be paid into court. Master Harrison : New South Wales Supreme Court : 23rd March 2005.

**Cooper v Veghelyi, Home Productions P/L, Consumer Trader & Tenancy Tribunal [2005] NSWSC 602** : The claimant applied for a declaration that the adjudication determination made by the First Defendant in favour of the Second Defendant under the BCISPA 1999 (NSW) (BCISP Act) was null and void and of no effect. Having considered the jurisdiction of the Trader and Tenancy Tribunal the declaration was granted. Patten AJ : New South Wales Supreme Court : 28th June 2005

**Presser v Ocean View Properties Pty Ltd [2006] VSC 143** : This concerned a dispute over defective floors in an advance purchased apartment in a development program. Application for stay of action to the Home Building Tribunal approved. Habsersberger J. Melbourne. 10th March 2006

**Plus 55 Village Management P/L v Parisi Homes P/L [2005] NSWSC 559** : A dispute as to the basis for payment under an oral construction arose. Was the work in respect of a "dwelling" under H.B.Reggs - HBA ss10, 91(1)(a), 92, 94 - BCISPA ss 32(2), (3) - CA s459G, s459H(1)(b) ? The Consumer Claims Tribunal declined to hear application due to lack of jurisdiction. An adjudicator found in favour of the defendant and the decision was filed as a District Court judgment. Here an application was made under s459G Corporations Act to set aside a statutory demand. The court held that there was a genuine dispute as to liability and the statutory demand was accordingly set aside. White J : New South Wales Supreme Court : 2nd June 2005

## CONCLUSIONS

The Australians have devised a complex web of inter-related mechanisms for the regulation of home building work and for the resolution of disputes that works in a just yet speedy and cost effective manner. Decisions as to alleged regulatory defects feed seamlessly into the dispute resolution matrix, providing both for reparation works and compensation. The matrix does much to protect consumer rights and promotes responsible building. In return the home building and renovation industry has a robust mechanism that helps to ensure prompt payment and protection against spurious allegations by over-demanding and unreasonable clients. It is a model that the UK could learn much from. Granted the Consumer Tribunal is designed to deal with much more than building and would involve a major commitment for any government. However, elements of the program could be grafted on to current UK systems.

Stage One could take the form of a Scheme for Homebuilding / Remedial Construction Works establishing minimum standards within the industry, which would have to be incorporated into all contracts. Should a contract be non compliant the scheme would apply. To the extent that local authorities already certify such works, either local councils or Industry Organisations such as the National Home Builders could take on the task of policing the Scheme and delivering expert opinions. Registration and membership with the organization would be compulsory. If a home builder was not registered, then the regulation would state that he cannot enter into or enforce a home building construction contract. However, he would be entitled to recover a "quantum meruit" for work done. However, this would shift the burden to the home builder to prove value of work - rather than placing it on the consumer to prove defective work.

Stage Two might remodel the HGCRRA to provide adjudication for the domestic construction sector, with prescribed systems for domestic billing. It would be very important for such adjudicators to be qualified evaluators of work done - and would put a large amount of the responsibility upon the professionals in the industry. It would drive cowboy builders to either upgrade - or ship out.