NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Canterbury Earthquakes Insurance Tribunal Bill

23/10/2018

Submission on the Canterbury Earthquakes Insurance Tribunal Bill

1. Introduction

1.1 The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the Canterbury Earthquakes Insurance Tribunal Bill (Bill).

1.2 The Law Society supports the efforts to establish a speedy, flexible and cost-effective Canterbury Earthquakes Insurance Tribunal (Tribunal) to help resolve ongoing claims arising out of the 2010 and 2011 Canterbury earthquakes. This submission sets out the Law Society's recommendations on a range of practical issues, to ensure the proposals in the Bill are clear and workable in practice and achieve the Bill's stated objectives.

1.3 The Law Society does not seek to be heard.

2. Application of Act – clause 8

2.1 Clause 8 of the Bill sets out who the Canterbury Earthquakes Insurance Tribunal Act 2018 (Act) will apply to. In particular, clause 8(3) provides that:

> Despite subsections (1) and (2), this Act does not apply if the ownership of the building, property, or land has been transferred to the policyholder or insured person under a sale and purchase agreement following the physical loss or damage giving rise to the insurance claim.

2.2 Such transfers are common, sometimes to an associated trust and sometimes following an open market sale. It is unclear why the exclusion of such cases is proposed and how it is consistent with the purpose of the Bill stated in clause 3:

> To provide speedy and cost-effective services in resolving disputes about insurance claims for physical loss or damage to residential buildings, property, and land arising from the Canterbury Earthquakes.

2.3 Excluding properties that have been sold from the scope of the Bill may result in a large number of claims being denied access to the Tribunal that would have otherwise benefited from such a forum.

2.4 Further, the definitions of "residential building" and "residential property", contained in subclause 8(4), have the meanings given to them in a contract of insurance between a policyholder and the insurer. Often contracts of insurance do not have defined terms such as "residential building" or "residential property". For example, the AMI / Southern Response insurance policies refer to 'your home' and contain plain English rather than legally defined terms. The Law Society recommends that these terms should be defined in the Act rather than leaving the definition to insurance policies. Otherwise there is the potential for the meaning of this clause to depend on the identity of the insurer and the insurer's policy wording.

Recommendations

2.5 The Law Society recommends that:

(a) Further consideration be given to including properties that have been sold, within the scope of the Bill.

(b) The terms "residential building" and "residential property" are defined in the Bill, rather than leaving the definition to insurance policies.

3. Bringing claim to Tribunal – clause 10

3.1 Clause 10 sets out how a claim may be brought before the Tribunal. Only a policy holder or insured person may bring a claim against the insurer or Earthquake Commission by making an application or seeking a transfer of proceedings under clause 16.

3.2 If the Tribunal is able to provide speedy and cost-effective dispute resolution, it is unclear why insurers should not be able to take advantage of this. The Law Society notes the Departmental Disclosure Statement (DDS) at [4.9] states:

> Having only policyholders and insured persons be able to apply to the tribunal creates inequality of access to the tribunal. However, the Bill does not affect the ability for any party (including insurers and the Earthquake Commission) to file a claim with the courts. Access to other existing dispute resolution processes also remains available.

3.3 Although the DDS explains that this is a 'homeowner oriented' process, it is not clear why insurers should not be able to initiate proceedings in the Tribunal or seek transfer of existing claims from the Courts to the Tribunal.

Recommendation

3.4 That clauses 10 and 16 be amended to enable any party to a contract of insurance, or insured under the Earthquake Commission Act 1993 Act, to bring a claim before the Tribunal.

4. Ineligible applications – clause 17

4.1 Clause 17 restricts the claims that can be brought before the Tribunal to ones that have not begun in another forum. However, clause 17 does not address the possibility of an alternative dispute resolution agreement. For example, the parties could agree to a standstill agreement with a tiered alternative dispute resolution agreement with expert determination, mediation, and facilitation.

Recommendation

4.2 It would be useful for the Bill to include guidance on how such agreements are to be treated, in particular whether such agreements should result in a stay until the alternative dispute resolution clause has been exhausted.

5. Managing claims and natural justice – clause 20

5.1 Clause 20(4) has the effect of permitting the Tribunal to refuse to permit the involvement of experts unless "in the tribunal's opinion, it is necessary to do so".

5.2 This provision has presumably been included in order to meet the Bill's objectives. However, the Law Society notes that:

a. Many disputes that will be resolved by the Tribunal will raise issues on which expert evidence is likely to be required.

b. In ordinary civil proceedings, a party may call an expert witness as of right as long as the evidence is relevant and admissible. The requirement that evidence is relevant and admissible provides a constraint on parties calling expert evidence unnecessarily. In particular, under the Evidence Act 2006 expert evidence is only admissible if the "fact finder is likely to obtain substantial help" from the expert's opinion.[1]

5.3 The Law Society considers that the existing rules of evidence provide a sufficient constraint on when expert evidence may be called. It may be more efficient to rely on this existing standard rather than introduce a new standard into the Bill.

Recommendation

5.4 That the need for clause 20(4) be reconsidered.

6. Confidentiality – clause 33

6.1 The Law Society has concerns about the interplay between the confidentiality provision in clause 33 and "without prejudice" and settlement privilege in the Evidence Act. It is not clear that a separate regime is necessary for this Tribunal, as this could produce considerable confusion.

6.2 The "confidentiality" provision as currently drafted appears to be broader than settlement privilege. The clause can be distilled as follows:

a. Clause 33(1)(a) and (b) set out the information that is confidential under this section. It includes any information created for the purpose of the mediation and extends to any admission and the agreed terms of settlement.

b. Clause 33(3) places an absolute prohibition on the mediator giving evidence about the mediation.

c. Clause 33(4) then provides that none of the above information is admissible before any court.

6.3 The Law Society considers this to be an overly broad confidentiality clause and broader than settlement privilege in the following ways:

a. There are common law exceptions to the settlement privilege which continue to apply.

b. Section 57 of the Evidence Act contains further exceptions to settlement privilege.

c. Under the framework as currently drafted, it would not be possible to produce a settlement agreement before a court to sue on its terms.

Recommendation

6.4 That clause 33 in its current form is deleted, and that instead the Bill incorporates section 57 of the Evidence Act to apply to mediations under the Bill (once the necessary changes have been made).

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[1] Evidence Act 2006, section 25.

7. Privilege

7.1 Related to the previous point on confidentiality, the Bill is silent on the application of privilege. The Law Society considers this is problematic for the following reasons:

a. Section 4 of the Evidence Act details the kind of proceedings the Evidence Act extends to. It does not extend to tribunals. Section 53(5) of the Evidence Act makes clear that the privilege regime only applies to the District Court, High Court, Court of Appeal and Supreme Court.

b. There is emerging case law as to whether privilege extends to inquisitorial proceedings.[2] Proceedings before the Tribunal are expressly stated to be inquisitorial.

c. Clause 3(2) of schedule 2 of the Bill states that all communications between non-legally trained representatives will be protected in the same way that they would be if between the client and legally qualified representatives.

Recommendation

7.2 That the Bill clarifies that privilege in the context of the Evidence Act will apply to all proceedings before the Tribunal, notwithstanding the inquisitorial nature of such proceedings.

8. Propriety of mediations not to be questioned – clause 36

8.1 Clause 36 provides that mediation services are not to be questioned as being "inappropriate". However, what conduct may be "inappropriate" is not apparent from clause 36 as currently drafted. For example, should there be an ability to question mediations where the mediator has compelled settlement or attempted to determine a matter in contravention of clause 32(4)?

Recommendation

8.2 That the clause is amended to clarify what conduct is deemed to be "inappropriate" for the purposes of clause 36.

9. Substance of decision – clause 44(4)

9.1 Under clause 44, the Tribunal may make any order that a court of competent jurisdiction could make in relation to a claim. Subclause (4) appears to confer on decision makers in a civil context, the power to impose fines of an unspecified amount, entirely within their discretion and for a wide range of behaviour. There is also no provision for circumstances where the order cannot be complied with for genuine reasons.

9.2 Traditionally the mode of ensuring compliance in similar cases is through the use of tools such as unless orders and contempt orders.

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[2] See for example *Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16; *AWB Ltd v Cole* (2006) 152 FCR 382 at [158] – [164].

Recommendation

9.3 That the select committee seek advice from officials about whether clause 44(4) is necessary, in view of the concerns noted at [9.1] – [9.2] above.

10. General comments

Independence of expert advisers

10.1 A key feature of the Tribunal includes the ability to "appoint independent expert advisers to assist it, for example, on construction, geotechnical, engineering, or any other matters necessary to support the resolution of disputes".[3] The Law Society agrees that for the purposes of assisting the Tribunal, it is important that the experts be independent of the parties.

10.2 However, the Law Society queries whether there should also be a requirement for all experts appearing before the Tribunal, whether instructed by the Tribunal or the parties, to agree to comply with something akin to Schedule 4 of the High Court Rules.[4] This would ensure that the experts' role and duty of impartiality are defined.

Case management issues

Case management provisions (cll 20-28, 37-40): structure

10.3 The case management provisions are located in different places in the Bill, and as discussed below it may be clearer and less confusing to group them together in one place.

10.4 The main case management provisions are contained in clauses 20-28 (Part 1, subpart 4). There are 'further' case management provisions for adjudication at clauses 37–40 (Part 2, subpart 2) which are largely similar to the matters covered in clauses 20–28.[5] This may be an unnecessary duplication and the select committee may wish to reconsider the utility of clauses 37-40.

10.5 For simplicity and ease of use, the Law Society recommends that clauses 20–28 become a comprehensive statement on case management that accommodates both mediation and adjudication. These clauses will need to be amended to accommodate this but in the Law Society's view this would provide for a clearer case management framework.

Tribunal's case management powers

10.6 Clause 27, entitled "Powers of tribunal", is contained in Part 1, subpart 4, under the heading "Further case management". The following issues arise:

a. Clause 27(a)(b): How are the documents to be produced and for what purpose? Are the documents produced by the parties to each other, or by the parties to the

3 Explanatory Note to the Bill, p2 (see clause 25).

4 High Court Rules 2016, Schedule 4 - Code of Conduct for Expert Witnesses.

5 Explanatory Note, p9: clause 37 "repeats the requirements contained in the general case management provision in clause 20 but also contains an additional requirement and an additional power which are particularly relevant at the adjudication stage".

Tribunal? It is not clear if this is quasi-discovery or production of documents to the Tribunal.

b. Clause 27(1)(c): This provision seems to permit a type of interlocutory application instigated at the motion of the Tribunal. If this is the intention it should be made clear that the parties can apply to the Tribunal to exercise this jurisdiction as well as the Tribunal initiating the procedure.

10.7 Further, it is assumed that these powers are also exercisable at the first case management conference. To avoid doubt, it would be prudent to move clause 27 so that it follows clause 20 (which deals with managing claims and natural justice).

Questions of law referred to the High Court – clause 51

10.8 Clause 51 states that if a question of law arises during the hearing of a claim the Tribunal may refer the question to the High Court for its opinion. The Law Society notes this is effectively a case stated procedure and considers it would be helpful to incorporate the case stated procedure from the High Court Rules, for consistency and ease of reference.

Pleadings

10.9 The Bill makes no provision for how cases are to be pleaded. As these are potentially high-value and factually complex claims, specifying a claim form and requirements for pleading would be conducive to the prompt and efficient disposal of claims.

Recommendations

10.10 The Law Society makes the following recommendations:

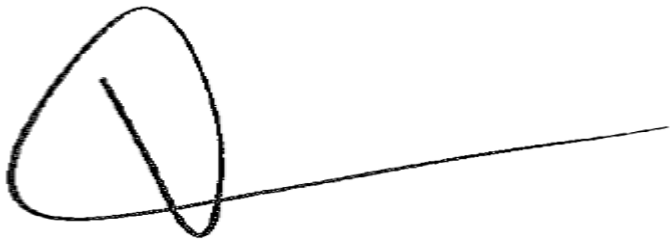
a. Consider the appropriateness of a code of conduct for experts appearing in the Tribunal, similar to Schedule 4 of the High Court Rules.

b. The Bill should provide for a single case management regime, for clarity and ease of reference.

c. In relation to clause 27, the powers of the Tribunal, the issues outlined at [10.6] should be addressed and the clause should be relocated (as discussed at [10.7]).

d. Consider including the case stated procedure from the High Court Rules, for consistency.

e. Include a claim form and requirements for pleading, to facilitate the prompt and efficient disposal of claims.



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