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Civil Law Policy Team
Ministry of Justice

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FAST DISPUTE RESOLUTION: CONSULTATION ON A NEW STATUTORY ADJUDICATION FRAMEWORK

Thank you for the opportunity to provide a submission on the Ministry of Justice's consultation paper 'Fast dispute resolution: consultation on a new statutory adjudication framework'.

Te Kāhui Inihua o Aotearoa | The Insurance Council of New Zealand (ICNZ) represents general insurers. Our members accept the risks of over NZ\$2 trillion of New Zealand's assets and liabilities. ICNZ's members provide a wide range of insurance products including those purchased by businesses such as product and public liability insurance, professional indemnity insurance, cyber insurance, forestry and horticulture insurance, livestock insurance, commercial property insurance, and directors' and officers' insurance.

ICNZ supports the policy intent to provide businesses with a new way to resolve disputes quickly and privately through the development of a voluntary, statutory adjudication framework.

We have the following high-level comments on the proposal.

Our support is based on the premise that the statutory adjudication framework is voluntary. It is essential that both parties must agree to participate in the adjudication process. This is the general tenor of the consultation. However, on page 14 the consultation paper sets out two questions asking "Should both parties have to agree to using statutory adjudication?" and "Should a court be able to order statutory adjudication?". We are opposed to the suggestion that adjudication might not be voluntary for both parties. Voluntary participation is critical given that adjudication will not have the same procedural safeguards as a court process.

Insurers are required to belong to an external disputes resolution scheme approved under the Financial Services (Registration and Dispute Resolution) Act 2008. Our members belong to one of two schemes – the Financial Services Complaints Limited scheme or the Insurance & Financial Services Ombudsman scheme. Both of these schemes decide complaints brought by small business policyholders. (A small business is a business with no more than 19 employees.) It will be important that the legislation makes clear which takes precedence, the financial services disputes resolution scheme or the statutory adjudication scheme.

Adjudicators must be appropriately qualified and experienced to determine disputes (particularly as there is no monetary threshold proposed) and parties must be able to agree between themselves as to who they want to adjudicate their dispute. Given the potential size and complexity of the disputes that may be determined, it is essential that both parties have confidence in the decision-maker. If both parties have confidence in the adjudicator, they will be more likely to accept the decision, meaning disputes can be resolved more efficiently as parties will be less likely to re-litigate the decision through the courts. Generally, the parties should pay the adjudicator's fees in equal proportions to avoid any suggestion of bias.

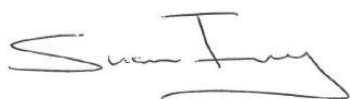
In light of the potential size and complexity of the disputes that may be determined, it is important that the framework allows adjudicators to hold a hearing where appropriate (e.g. where there is competing expert evidence, complex disputed facts and/or issues relating to dishonesty/credibility). It would be inappropriate for an adjudicator to determine such issues on the papers.

It is important that the statutory framework provides clarity about the effect and enforcement of determinations. We agree, that following a determination it would be appropriate to allow a party to file a new claim in court, go to arbitration, or seek judgment review. However, a "pay now, argue later" approach may raise concerns about a party's ability to recover an amount paid pursuant to an adjudicator's determination if the determination is subsequently overturned by a court or arbitrator.

We acknowledge that the "pay now, argue later" approach applies under the Construction Contracts Act 2002, which is focused on maintaining cashflow and business continuity in the construction industry. However, it may be less suited to broader commercial disputes where cashflow issues may be less acute. To address the concerns identified around the ability to recover payments made in accordance with an adjudication, and to encourage the uptake of voluntary adjudication, we suggest that money that becomes payable in accordance with an adjudicator's determination should be enforced by a payment into an escrow account, that may not be released to the successful party within a certain period, say, 28 days. If the losing party commences court proceedings or arbitration within that period, the money should remain in escrow pending the determination of the court action/arbitration. That way the winner has the comfort of the money being secured and the loser has the comfort of easily recovering it if their court action/ arbitration succeeds.

Thank you again for the opportunity to comment on the consultation paper. Please feel free to contact me if you have any questions about our submission or require any further information.

Ngā mihi

A handwritten signature in dark ink, appearing to read 'Susan Ivory', with a stylized flourish at the end.

Susan Ivory
Regulatory Affairs Manager
Insurance Council of New Zealand