Canterbury Earthquakes Insurance Tribunal Bill

Submission from Resolution Institute

Submitted by:
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Resolution Institute

About Resolution Institute

Resolution Institute is a professional association and membership organisation of mediators, arbitrators, adjudicators, restorative justice facilitators and other dispute resolution professionals. Resolution Institute was created as a result of the integration of LEADR with LEADR NZ in 2013, and then with the Institute of Arbitrators and Mediators Australia (IAMA) in 2014. Resolution Institute is a not-for-profit organisation with around 4,000 members across Australia, New Zealand and the Asia Pacific region. Resolution Institute members work in a wide range of industry sectors and have diverse backgrounds and experience.

Resolution Institute has been training mediators in Australia and New Zealand for close to 30 years and has a well-recognised accreditation scheme for mediators. Resolution Institute mediation qualifications are also internationally recognised. Resolution Institute is a Recognised Mediator Accreditation Body (RMAB) for accreditation under the National Mediator Accreditation System (NMAS) in Australia, and is also a Qualifying Assessment Programme (QAP) for International Mediation Institute (IMI) accreditation.

In New Zealand, Resolution Institute is an Approved Dispute Resolution Organisation (ADRO) under the Family Dispute Resolution (FDR) Regulations 2013, and as such has responsibility for training and accreditation of FDR Providers. Resolution Institute is also contracted by the Ministry of Justice for training and accreditation of Restorative Justice facilitators.

Resolution Institute offices are in Wellington (New Zealand) and Sydney (Australia).

Resolution Institute promotes the use of a range of alternative dispute resolution approaches. When approaches are of a high quality and fit for purpose, alternative dispute resolution can be quicker, more cost effective, can reduce or repair harm to relationships, and may result in more enduring resolution.

Resolution Institute welcomes this opportunity to make a submission on the Canterbury Earthquakes Insurance Tribunal Bill.

General Position

Resolution Institute supports the key proposition of the Bill, namely to provide efficient resolution of earthquake insurance disputes, including provision for mediation to resolve disputes.

Mediation has proved to be a successful approach for resolution of disaster insurance disputes, both in relation to the Canterbury earthquakes, and internationally.

We note the recent launch of the Greater Christchurch Claims Resolution Service, and hope that the service will see cases resolved through facilitation (mediation) and fewer cases proceed to the Tribunal.

Specific Recommendations

Direction to mediation

The Bill, Clause 24 (1) (g), currently allows that at the first case management conference the tribunal may direct the parties to mediation. Mediation is an efficient process and allows parties to reach

decisions rather than having a decision imposed. Resolution Institute recommends that all cases should be assessed for suitability to mediate, or rather that the presumption should be that most cases will be suitable for mediation and that the task it to determine any cases where there are reasons that the case is not suitable for mediation.

As currently drafted the Bill requires the Tribunal to determine the suitability of mediation for cases. The ability to determine suitability to mediate is the expertise of mediators. Referral to mediation would ensure that all cases that can appropriately be mediated, are mediated.

We note that with the recent launch of the Greater Christchurch Claims Resolution Service, it is likely that some cases will already have been to mediation. We support the provision in Clause 27 (1) (h) that the Tribunal has the ability to decide whether to direct the parties to mediation in the event that they have already attempted mediation.

SUBMISSION 1 – The Bill should require that except where there are specific reasons not to, all cases are referred to a mediator to assess suitability for mediation.

Mediators

Effective mediation is highly skilled work and requires specific training, as well as skill development through experience. At a minimum, all mediators conducting mediations referred by the Canterbury Earthquakes Insurance Tribunal should have a recognised accreditation in mediation. In New Zealand this means being accredited by one of the two mediation professional organisations – Resolution Institute or the Arbitrators' and Mediators' Institute of New Zealand (AMINZ).

We note that experience and expertise in commercial and/or insurance mediation will also be important for this work. It will therefore be important that the scheme is set up with funding and a mediator fee structure that allows for the level of expertise required.

SUBMISSION 2 – Mediators conducting mediations referred by the Canterbury Earthquakes Insurance Tribunal are required to hold mediation accreditation from Resolution Institute or AMINZ

Mediation process

Clause 31 covers independence of mediators and specifies that mediators must act independently "when deciding how to deal with any particular claim or aspect of it". Mediators must act independently at all times in relation to parties to mediation and Clause 31 (1) (a) seems to narrow this.

SUBMISSION 3 - Clause 31 (1) (a) be amended to state: "must act independently at all times"

Clause 32 deals with procedure in relation to mediation. We note the importance of stating expressly that it is the role of the mediator to assist the parties to resolve the dispute. Whilst the clause as drafted goes some way towards achieving this goal, further clarity is possible. We suggest that the procedure in Clause 32 (3) (a) be amended to specify that the mediator's role is to assist the parties to resolve the claim. This differentiates mediation as a process where the mediator facilitates the parties reaching their own decisions, rather than the mediator resolving the claim.

We suggest that Clause 32 (3) (a) be amended to state:
(3) The mediator—

(a) may, having regard to the purpose of this Act and the needs of the parties, follow any procedures, whether structured or unstructured, or do any things that the mediator considers appropriate <u>to assist the parties to</u> resolve the claim promptly and effectively; and
(b) may receive any information, document, or other material, in any way that the mediator thinks fit, whether or not it would be admissible in judicial proceedings.

(4) A mediator may not determine any matter, even if asked to do so by the parties

SUBMISSION 4: - That Clause 32 (3) (a) be amended to state that mediators may "… do any things that the mediator considers appropriate to assist the parties to resolve the claim…"

Confidentiality

Clause 33 refers to confidentiality. Resolution Institute notes that Section 57 of the Evidence Act 2006 covers confidentiality of mediation. Clause 33 (2) (b) and (c) seem to provide broad exception to the usual confidentiality of mediation and we question the need for mediators to provide a copy of the agreed terms of settlement (mediated agreement) to the Chief Executive.

The confidentiality of mediation is often an important factor for parties and reporting of the terms of settlement to a Government department could deter parties from participating, or participating fully, in mediation. We suggest that confidentiality is a matter to be agreed by the parties and, as is usual mediation practice, that it is dealt with in the agreement between the mediator and each party prior to mediation and then discussed and agreed during the mediation and documented in mediated agreement.

SUBMISSION 5: - That mediation be a confidential process (in line with the provisions of the Evidence Act 2006) and that confidentiality be agreed by the parties in an agreement to mediate prior to the mediation and in the mediated agreement reached during the mediation.

Mediation outcomes

The Bill specifies in Clause 34 (1), that the outcome of mediation will be notified to the Tribunal where a claim or part of a claim has been settled and that the copy of the agreed terms of the settlement will be provided to the Chief Executive. As noted above, we question whether providing a copy of the agreed terms of settlement to the Chief Executive is warranted, given its potential disincentive to mediate.

We suggest that there needs to be provision for mediators to refer cases back to the Tribunal. This would include where a case is deemed not suitable for mediation (at any stage of the mediation process) and also where part of the claim is not settled.

We suggest that notification from the mediator to the Tribunal or Chief Executive consist of:

- Determined unsuitable to mediate (and referral of the case back to the tribunal)
- Matters resolved partially (and referral of the case back to the tribunal)
- Matters resolved fully
- No matters resolved (and referral of the case back to the tribunal)

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Thus we suggest that only whether some or all matters are resolved is reported and that the terms of any agreement remain confidential between the parties unless they decide otherwise.

SUMBISSION 6 – That reporting of mediation outcomes to the tribunal be limited to only whether some, all or none of the matters in a case are resolved and that mediators are able to refer cases back to the tribunal when the case is determined not suitable for mediation or some matters are not resolved.

Mediation agreements

Clause 35, provides for 'the parties to a claim (or part of a claim) that has been settled' to apply to the Tribunal for the agreed terms of the settlement to be recorded as a decision of the Tribunal. We note that this seems to require that both parties agree to the application for the agreement to be recorded as a decision of the Tribunal. This has the advantage of preserving the confidentiality that is a fundamental principle of mediation. We note though, that it will require that the mediation process include a decision and agreement on whether to apply to the Tribunal to have the agreement recorded as a decision of the Tribunal.

We note that this is a particularly important point because decisions of the Tribunal are to be published online according to Schedule 2 Clause 25. Given the confidentiality of mediation and the deterrent that publication could be to having the mediation agreement recorded as a decision of the Tribunal, we suggest that 'agreements reached at mediation' could be included in Schedule 2 Clause 25 (3) as a good reason not to publish. That as suggested above, the terms of any mediated agreement are not published and remain confidential, unless the parties decide otherwise.

SUMBISSION 7 – That 'agreements were reached at mediation' be included as grounds for not publishing a Tribunal decision.

Scope of the tribunal

Resolution Institute supports the introduction of a process that aims to deal quickly and effectively with claims arising from natural disasters. We note that the Government's priority is to resolve claims arising from the Canterbury earthquakes. We suggest that there is potential to establish both the Greater Christchurch Claims Resolution Service and the Canterbury Earthquakes Insurance Tribunal in such a way that there is provision to expand their remit to other, or future, disasters.

Given the legislative requirement for establishment of the Tribunal, allowing for a wider scope for the Tribunal now so that it can be used for other or future disasters, could lay the group work for faster response to future disaster claim resolution.

SUBMISSION 8 – The Tribunal be established so as to allow for future roles dealing with claims from other natural disasters such as the Kaikōura earthquake.

Conclusions

Resolution Institute supports the introduction of the Canterbury Earthquakes Insurance Tribunal, in particular supporting the ability of the Tribunal to refer cases to mediation. We believe the provision in the current Bill to refer to mediation, should be strengthened to require parties to

attempt mediation before a determinative approach is taken, unless the case is deemed unsuitable to mediate.

Specific recommendations:

1. The Bill should require that except where there are specific reasons not to, all cases are referred to a mediator to assess suitability for mediation.
2. Mediators conducting mediations referred by the Canterbury Earthquakes Insurance Tribunal are required to hold mediation accreditation from Resolution Institute or AMINZ
3. Clause 31 (1) (a) be amended to state: “must act independently at all times”
4. That Clause 32 (3) (a) be amended to state that mediators may “… do any things that the mediator considers appropriate to assist the parties to resolve the claim…”
5. That mediation be a confidential process (in line with the provisions of the Evidence Act 2006) and that confidentiality be agreed by the parties in an agreement to mediate prior to the mediation and in the mediated agreement reached during the mediation.
6. That reporting of mediation outcomes to the tribunal be limited to only whether some, all or none of the matters in a case are resolved and that mediators are able to refer cases back to the tribunal when the case is determined not suitable for mediation or some matters are not resolved.
7. That ‘agreements were reached at mediation’ be included as grounds for not publishing a Tribunal decision.
8. The Tribunal be established so as to allow for future roles dealing with claims from other natural disasters such as the Kaikōura earthquake.