

TASMANIA

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**RESIDENTIAL BUILDING WORK QUALITY  
(WARRANTIES AND DISPUTES) BILL 2012**

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# **RESIDENTIAL BUILDING WORK QUALITY (WARRANTIES AND DISPUTES) BILL 2012**

This Public Bill originated in the House of Assembly, and, having this day passed, is now ready for presentation to the Legislative Council for its concurrence.

P. R. ALCOCK, *Clerk of the House*  
21 May 2013

*(Brought in by the Minister for Workplace Relations, the  
Honourable David James O'Byrne)*

## **A BILL FOR**

**An Act to regulate contracts, and impose statutory warranties, relating to residential building work, to provide a resolution process for disputes arising from the building of residences, to provide a process that may require the rectification of defective residential building work, to repeal the *Housing Indemnity Act 1992* and related legislation and for related purposes**

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

## **PART 1 – PRELIMINARY**

### **1. Short title**

This Act may be cited as the *Residential Building Work Quality (Warranties and Disputes) Act 2012*.

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## 2. Commencement

This Act commences on a day to be proclaimed.

## 3. Interpretation

In this Act, unless the contrary intention appears –

*approved mediator* means a person listed as an approved mediator in the register maintained by the Building Dispute Commissioner under section 94;

*Australian Building Codes Board* means the Australian Building Codes Board established by an agreement signed by the Minister of the Commonwealth, and the Minister of each State and Territory, responsible for building regulatory matters on 1 March 1994 and reaffirmed by each such Minister in April 2006;

*Building Code of Australia* means the code produced by the Australian Building Codes Board comprising –

- (a) Volume One of the National Construction Code Series including any variations and additions in the Appendix Tasmania set out in the Appendices to that Volume; and



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- (b) Volume Two of the National Construction Code Series including any Tasmania additions set out in Appendix A to that Volume;

***Building Dispute Commissioner*** means the Building Dispute Commissioner appointed under section 81;

***building site*** means –

- (a) a site, or other place, at which residential building work –
  - (i) has been, is being or is to be, carried out; or
  - (ii) is or may be located; or
- (b) a site, or other place, that is related to a site, or other place, referred to in paragraph (a); or
- (c) a site, or other place, at which an Officer reasonably believes that any document, or other thing, relevant to the subject matter of an investigation is or may be found; or
- (d) a site, or other place, at which an Officer reasonably believes evidence of an offence against this Act is or may be found;

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***carry out***, in relation to building work or residential building work, includes –

- (a) cause building work or residential building work to be carried out; and
- (b) manage or arrange the carrying out of building work or residential building work;

***civil action*** means an action to any court, other tribunal or other person having authority under any law, other than the Building Dispute Commissioner, to make a determination for –

- (a) damages arising from the carrying out of residential building work or relating to a residential building work agreement; or
- (b) enforcement of performance of a residential building work agreement; or
- (c) the payment of a specified sum of money in relation to residential building work or a residential building work agreement; or
- (d) the supply of residential building work; or

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- (e) relief from payment of a specified sum of money in relation to residential building work or a residential building work agreement; or
- (f) the delivery, return or replacement of any specified residential building work or residential building work of a specified description; or
- (g) damages or compensation for loss arising from a breach of a statutory warranty; or
- (h) a combination of two or more of the remedies referred to in paragraphs (a), (b), (c), (d), (e), (f) and (g) –

but does not include an action that the regulations prescribe not to be a civil action;

***clear day*** has the meaning given by section 7;

***client*** means a person for whom residential building work is, or is to be, carried out under a residential building work agreement but does not include, in respect of particular residential building work, an owner builder carrying out that particular residential building work;

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***consumer guide*** means a consumer guide prepared under section 28 or a replacement consumer guide prepared under section 29;

***contractor*** means a person who –

- (a) carries out residential building work; or
- (b) intends to carry out residential building work; or
- (c) has carried out residential building work –

but does not include a subcontractor of the contractor;

***contract price*** has the meaning given by section 6;

***cost-plus contract*** means a major residential building work contract under which the amount the contractor is entitled to receive, excluding prime cost items and provisional sums –

- (a) is not determined at the time the contract is made; and
- (b) includes the actual cost to be incurred in –
  - (i) acquiring materials; and

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(ii) carrying out the residential building work specified in the contract; and

(c) includes any additional amount that comprises a sum calculated as a percentage of the cost referred to in paragraph (b) or a specified sum, or both;

***damages*** means damages recoverable (whether by virtue of an enactment or otherwise) in respect of a civil liability;

***defective***, in relation to residential building work, includes a breach of a statutory warranty and a failure to maintain a standard or quality of building work specified in the relevant residential building work agreement;

***Director of Building Control*** means the Director of Building Control appointed under section 6 of the *Building Act 2000*;

***dispute*** means a dispute referred to the Building Dispute Commissioner under section 33 or 34;

***dispute referrer*** means the client, subsequent owner or contractor who refers a dispute to the Building Dispute Commissioner under section 33 or 34;

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***dispute respondent***, in relation to the referral of a dispute, means a party to the dispute with whom the dispute referrer is in dispute;

***function*** includes duty;

***infringement offence*** means an offence against this Act or the regulations that is prescribed by the regulations to be an infringement offence;

***investigation*** means an investigation conducted under section 75;

***investigation report*** means a report made by an Officer under section 51 at the completion of an investigation;

***major residential building work contract*** means a residential building work agreement –

- (a) where the contract price is, or is reasonably estimated to be, the threshold amount or a higher amount; and
- (b) that complies with the requirements of Part 2;

***material personal interest***, in or in respect of a person or matter, includes –

- (a) a direct or indirect interest; and

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- (b) a pecuniary or non-pecuniary interest; and
- (c) the interest of a relative of the person; and
- (d) the interest of another person who has, or exercises, control over the person; and
- (e) if the person is a corporation under the Corporations Act, a material personal interest in a director or other person concerned in the management of that corporation; and
- (f) any other interest that does, or may, give rise to a conflict of interest;

***materials***, in relation to residential building work, includes –

- (a) materials and components that are to form part of any residential structure or part of any building, structure or work arising from residential building work; and
- (b) plant and materials for use in connection with the carrying out of residential building work if supplied (whether by purchase, hire or otherwise) by the relevant

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contractor or the person carrying  
out the residential building work;

***National Construction Code Series*** means the National Construction Code Series, as amended or remade from time to time, published by the Australian Building Codes Board;

***Officer*** means –

- (a) a State Service officer or State Service employee approved as a Building Dispute Officer under Section 87; or
- (b) the Building Dispute Commissioner;

***owner builder*** has the same meaning as in the *Building Act 2000*;

***person*** includes a body of persons, corporate or unincorporate, and the Crown;

***prime cost*** means the cost of an item (including the delivery for the item) if –

- (a) at the time a residential building work agreement is entered into either the item has not been selected or its cost is not known; and
- (b) the contractor must make a reasonable estimate of the cost of



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the item in the residential building work agreement;

***provisional sum*** means an estimate of the cost of carrying out particular residential building work (including the cost of supplying materials needed for the residential building work) under a major residential building work contract for which a contractor, after making all reasonable inquiries, cannot provide a definite amount at the time the major residential building work contract is entered into;

***Rectification Order*** has the meaning given by section 57 and includes a Rectification Order as varied under this Act;

***regulations*** means regulations made and in force under this Act;

***relevant council***, in respect of residential building work, means the council responsible for the municipal area in which the residential building work has been or is being carried out;

***Residential Building Trust Fund*** means the fund established and maintained under section 109;

***residential building work*** has the meaning given by section 5;

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***residential building work agreement*** means an agreement between a contractor and another person for the carrying out by the contractor of residential building work, whatever the contract price, but does not include a subcontract for the carrying out of residential building work;

***residential structure*** has the meaning given by section 4;

***statutory warranty*** means a warranty arising under Part 3;

***subcontract***, in relation to the carrying out of residential building work, means an agreement for the carrying out of residential building work for a contractor who is obliged to carry out the residential building work under a residential building work agreement or major residential building work contract;

***subcontractor***, in relation to the carrying out of residential building work, means a person who contracts with a contractor who is a party to a residential building work agreement or major residential building work contract to carry out residential building work which the contractor is required to do under that agreement or contract;

***subsequent owner*** means a person who for the time being owns the land or residential

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structure on or in relation to which residential building work has been carried out for another person if that person is entitled to the benefit of a statutory warranty by reason of section 26;

***Tasmanian Plumbing Code*** means the code issued under section 58 of the *Building Act 2000*;

***threshold amount*** means –

- (a) the amount that is one cent more than the maximum amount of a minor civil claim within the meaning of the *Magistrates Court (Civil Division) Act 1992*; or
- (b) if the regulations prescribe another amount, that other amount;

***vary*** means –

- (a) insert matter; or
- (b) omit matter; or
- (c) omit matter and substitute other matter.

#### **4. Residential structure defined**

- (1) A ***residential structure*** is a building, or structure, that is classified under Volume One of

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the National Construction Code Series, as varied or replaced from time to time, as –

- (a) a class 1a building; or
  - (b) a class 2 building; or
  - (c) a class 10 building if that building is associated with a class 1a building or class 2 building.
- (2) Despite subsection (1), the following are not residential structures for the purposes of this Act:
- (a) a caravan or any motor vehicle, trailer, aeroplane or boat used as a residence;
  - (b) a boarding house, guest house, hostel or lodging house;
  - (c) a motel, residential club, residential hotel or residential part of licensed premises, within the meaning of the *Liquor Licensing Act 1990*, or any other building or structure, or part of a building or structure, used or intended to be used as tourist, holiday or overnight accommodation;
  - (d) a residential part of an educational institution;
  - (e) a hospital or care institution;
  - (f) if a building or structure contains only one residence and that residence is used,

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or is intended to be used, by a caretaker for the building or structure, that part of the building comprising the residence;

- (g) a prison within the meaning of the *Corrections Act 1997*, a detention centre within the meaning of the *Youth Justice Act 1997* or premises or part of premises where offenders on remand are held or it is intended that such offenders are to be held;
- (h) Government House;
- (i) a building, structure or other thing that is prescribed by the regulations not to be a residential structure.

(3) In subsection (2) –

*care institution* means an institution where accommodation and personal, nursing or medical care are provided to elderly, sick or rehabilitating persons, but does not include an institution for persons otherwise living independently even though the provision of accommodation may include domestic services such as the preparation of meals, cleaning and laundry services.

(4) If a building or structure, or part of a building or structure, constitutes a residential structure, the following structures, fixtures and fittings are taken to be part of the residential structure:

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- (a) all structures, fixtures and fittings that form part of the residential structure or are used for or partly for the purposes of the residential structure;
  - (b) any thing that is prescribed by the regulations to be such a structure, fixture or fitting.
- (5) For the purposes of subsection (4)(a), the structures, fixtures and fittings that form part of the residential structure or are used for, or partly for, the purposes of the residential structure include, but are not limited to, passageways, retaining structures, driveways, paths, paving, spas and tennis courts.
- (6) Despite subsection (4)(a), a structure, fixture or fitting that forms part of a residential structure or is used for or partly for the purposes of a residential structure is not taken to be part of the residential structure under that subsection if the regulations prescribe that it is not to be so taken.

**5. Residential building work defined**

- (1) In this section –

*fire safety system* includes –

- (a) a booster assembly; and
- (b) fire mains, hydrants and hose reels; and
- (c) sprinklers; and

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- (d) fire and smoke alarms; and
- (e) fire control centres; and
- (f) structures or devices to mitigate the fire hazard in respect of special fire hazard buildings, within the meaning of the *Building Regulations 2004* or any regulations that replace those regulations; and
- (g) stairwell pressurisation; and
- (h) air-handling systems; and
- (i) smoke and heat vents;

***plumbing system*** means –

- (a) a water supply system; or
- (b) a system of sewage or of sullage drainage or removal; or
- (c) a system of storm water drainage or roof drainage; or
- (d) an on-site waste water management system;

(2) The following work is ***residential building work***:

- (a) erecting, re-erecting, constructing,  
altering, repairing, underpinning,

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- demolishing or removing a residential structure;
- (b) adding to, or removing a part of, a residential structure;
  - (c) the restoration, maintenance, renovation, alteration, extension, improvement or repair of a residential structure;
  - (d) work on the land on which building work referred to in paragraph (a), (b) or (c) is, or is to be, carried out in preparation for the use of that land for residential purposes or in preparation for that or other residential building work, including but not limited to –
    - (i) work required to gain access, or to remove impediments to access, to that land, part of that land or other land related to any other residential building work, including the construction of a road to enable access to the residential structure or to that land or part of that land; and
    - (ii) site clearance, earth moving, excavation, tunnelling, boring and filling; and
    - (iii) the preparation of foundations; and



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- (iv) the erection, maintenance or dismantling of plant and equipment; and
  - (v) work required in preparation for the erection of a prefabricated dwelling;
- (e) all associated work carried out in conjunction with work referred to in paragraph (a), (b) or (c) including, but not limited to –
- (i) the provision, installation, alteration, repair or removal of lighting, heating, ventilation, air conditioning, other cooling systems, power supply systems, water supply, sewerage, drainage, communication systems, fire safety systems, security systems and plumbing systems to the residential structure or the land on which the residential structure is, or is to be, situated; and
  - (ii) the erection, re-erection, construction, alteration, repair or removal of buildings, structures and fixtures associated with a residential structure; and
  - (iii) the cleaning, painting and decorating of the inside and

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- outside surfaces of the residential structure; and
- (iv) paving; and
  - (v) landscaping and site restoration;
  - (f) the prefabrication of any component that is to form part of a residential structure, including the manufacture of a prefabricated dwelling, regardless of where that prefabrication is carried out;
  - (g) any work carried out on any part of a prefabricated dwelling, or on any prefabricated component of a dwelling, in preparation for the erection of the prefabricated dwelling or component, regardless of where that work is carried out;
  - (h) any other work that is prescribed by the regulations to be residential building work.
- (3) Although a caravan, motor vehicle, trailer, aeroplane or boat is not a residential structure, if the caravan, motor vehicle, trailer, aeroplane or boat is, or is to be, used as a residence on any land the following work is residential building work:
- (a) all work done in relation to the use of the land for residential purposes including, but not limited to, landscaping, paving and the erection, construction or removal

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- of any building or fixture associated with the caravan, motor vehicle, trailer, aeroplane or boat;
- (b) the provision of water supply, sewerage or drainage to the land on which the caravan, motor vehicle, trailer, aeroplane or boat is, or is to be, situated;
  - (c) loading, unloading or transporting a building or structure that, if fixed to land, could be a residential structure, regardless of whether the loading, unloading or transportation is solely on the land on which the building or structure was or is to be located;
  - (d) loading, unloading or transporting a prefabricated building or structure that, if fixed to land, could be a residential structure, regardless of whether –
    - (i) the building or structure is whole or in parts; and
    - (ii) the loading, unloading or transportation is solely on the land on which the building or structure was or is to be located;
  - (e) any other work that is prescribed by the regulations to be residential building work in relation to the land on which the caravan, motor vehicle, trailer, aeroplane or boat is, or is to be, situated.

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- (4) For the purposes of subsections (2) and (3), buildings and fixtures associated with a residential structure or a caravan, motor vehicle, trailer, aeroplane or boat include, but are not limited to, retaining structures, driveways, fencing, garages, carports, workshops, storage sheds, swimming pools and spas.
- (5) Despite subsections (2) and (3), the following work is not residential building work for the purposes of this Act:
  - (a) work for the purposes of the subdivision of land;
  - (b) work in relation to a building, caravan, motor vehicle, trailer, aeroplane or boat intended to be used only for business purposes;
  - (c) work in relation to a building, caravan, motor vehicle, trailer, aeroplane or boat intended to be used only for the accommodation of animals;
  - (d) other work that is prescribed by the regulations not to be residential building work.

**6. Contract price defined**

- (1) In this section –

*associated third party amount*, in relation to a residential building work agreement,

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means an amount a person, other than the contractor, is entitled to receive directly from the client for any of the following if that amount relates to the carrying out of the residential building work that is the subject of the agreement:

- (a) conveying services to the building site;
- (b) connecting or installing services for use at the building site;
- (c) issuing a permit under the *Land Use Planning and Approvals Act 1993* or any other authorisation necessary for the carrying out of the residential building work;

*Note* Examples of services referred to in the definition of associated third party amount are gas, electricity, water and sewerage.

***residential building work agreement*** does not include a cost-plus contract.

- (2) The ***contract price***, for a residential building work agreement, is the total amount payable under the agreement for the residential building work.
- (3) The contract price includes –
  - (a) the amount the contractor is entitled to receive and keep under the residential building work agreement; and

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- (b) the amount the contractor is entitled to receive under the residential building work agreement for payment to other persons.
- (4) The contract price does not include associated third party amounts.
- (5) If a residential building work agreement is varied, the reference in subsection (2) to the total amount payable under the agreement is a reference to the total amount payable under the agreement as varied.

**7. Clear day defined**

- (1) In this Act –

***clear day*** does not include a Saturday, Sunday or holiday;

***holiday*** means –

- (a) a day specified in section 4 of the *Statutory Holidays Act 2000*; or
- (b) a day specified in Part 1 of Schedule 1 to the *Statutory Holidays Act 2000*; or
- (c) a day specified in Part 1 or 2 of Schedule 2 to the *Statutory Holidays Act 2000*; or

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- (d) the twenty-seventh, twenty-eighth, twenty-ninth, thirtieth or thirty-first of December.
- (2) For the purposes of the definition of *holiday* in subsection (1), a day referred to in that definition is a holiday for all of that day and in the whole of the State.

**8. Act binds Crown**

This Act binds the Crown in right of Tasmania and, in so far as the legislative power of Parliament permits, in all its other capacities.

**9. Determining contract price and costs of residential building work**

- (1) In determining the contract price or costs of residential building work, the following costs and amounts are to be taken into account:
  - (a) cost of materials;
  - (b) cost of labour;
  - (c) cost of insurance;
  - (d) the amount the contractor is entitled to receive under the contract for payment to other persons;
  - (e) reasonable profit for the contractor.

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- (2) In determining the contract price, if the contractor and the client have agreed that the residential building work required to complete a residential building work project is to be carried out in stages under a series of residential building work agreements, all agreements relating to that project are to be treated as one residential building work agreement.
- (3) In determining the contract price, two or more residential building work agreements between the same contractor and client relating to the same residential building work project are to be treated as one residential building work agreement.

**10. When civil action commences**

A civil action commences when any of the following occurs:

- (a) a person provides to another person notice in writing to the effect that a remedy specified in the definition of *civil action* in section 3 is being claimed from, or in relation to, that other person;
- (b) a person commences the civil action in or before any court, other tribunal or other person referred to in the definition of *civil action* in section 3.



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**11. Non-application of Act to certain residential building work agreements**

- (1) This Act does not apply to and in relation to a residential building work agreement that was made before the commencement of this Act.
- (2) Despite the repeal of the *Housing Indemnity Act 1992* under this Act, that Act continues to apply to and in relation to a residential building work agreement that was made before the commencement of this Act.

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**PART 2 – MAJOR RESIDENTIAL BUILDING WORK  
CONTRACTS**

*Division 1 – Offence to carry out certain residential building  
work without major residential building work contract*

**12. Offence to carry out residential building work  
without major residential building work contract**

- (1) A contractor must not carry out, or commence the carrying out of, any residential building work for another person if the contract price is, or is reasonably estimated to be, the threshold amount or a higher amount unless the contractor has entered into a major residential building work contract with that other person for the carrying out of that residential building work.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
- (b) an individual, a fine not exceeding 50 penalty units.
- (2) It is a defence in proceedings for an offence under subsection (1) if the contractor shows that –
- (a) at the time the contractor commenced carrying out the residential building work the contract price was below the threshold; and

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- (b) at that time the contractor could not reasonably foresee that the contract price would increase to such an extent that it would be, or be higher than, the threshold amount; and
- (c) the increase in the contract price was due to a variation in the instructions or requirements of the person for whom the contractor is carrying out the residential building work.

***Division 2 – Requirements relating to major residential building work contracts***

**13. Requirements for major residential building work contract**

(1) In this section –

***specifications*** includes –

- (a) details of the residential building work, including details of fixtures and fittings involved; and
- (b) details of material and products to be used for the residential building work; and
- (c) details of finishes required for the residential building work; and
- (d) other details prescribed by the regulations.

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- (2) A major residential building work contract must be in writing, English and signed by –
  - (a) the contractor or his, her or its legal representative or agent; and
  - (b) the client or his, her or its legal representative or agent.
  
- (3) A major residential building work contract must contain the following information:
  - (a) the full names and addresses of the contractor and client;
  - (b) the location of the residential building work site;
  - (c) if the contractor has a licence, registration or other authority to practise as a contractor, details of the type of licence, registration or authority held and the licence, registration or other authority number;
  - (d) the date the contract is made;
  - (e) a detailed description of the residential building work to be carried out under the contract;
  - (f) except where the regulations provide otherwise, the contract price and payment schedule or, in the case of a cost-plus contract, how the amount to be paid to the contractor is to be determined;

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- (g) if known, the start date for the residential building work or how the start date is to be determined;
  - (h) except for a cost-plus contract, the completion date for the residential building work or, if the starting date is unknown, the number of days or other period required to complete the residential building work once it is started;
  - (i) the statutory warranties;
  - (j) any other information required by the regulations.
- (4) If the start date for residential building work or how the start date is to be determined is not known, the major residential building work contract must contain a statement that the contractor is to ensure that the residential building work is to be started as soon as reasonably practicable unless the regulations provide otherwise.
- (5) A major residential building work contract must include a separate provision defining the key words and phrases used in it and, if a key word or phrase defined in the major residential building work contract is a word or phrase defined in this Act for the purposes of this Act, the definition in the contract must be the same as the definition in this Act or that word or phrase

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must be defined by reference to the definition in this Act.

*Note* Examples of key words and phrases referred to in subsection (5) are “prime cost item” and “provisional sum”.

- (6) A major residential building work contract must have attached to it copies of any relevant plans, specifications and permits and other documents of approval or authorisation available to the contractor at the time the contract is made.
- (7) For the purposes of subsection (6), all plans, specifications, permits and other documents attached to the major residential building work contract must be initialled or signed by –
  - (a) the contractor or, if the contract was signed by the contractor’s legal representative or agent, that legal representative or agent; and
  - (b) the client or, if the contract was signed by the client’s legal representative or agent, that legal representative or agent.
- (8) A major residential building work contract that is a cost-plus contract may contain the information specified in subsection (3)(h).

**14. Requirements for major residential building work contract that is cost-plus contract**

- (1) In this section –

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***independent person***, in relation to a contractor, means a person –

- (a) who does not have a material personal interest in the contractor; and
- (b) in whom the contractor does not have a material personal interest;

***prescribed amount*** means \$20 000 or, if another amount is prescribed in the regulations, that other amount;

***prescribed document*** means a document, or a document of a class of documents, prescribed in the regulations for the purposes of this definition.

- (2) A contractor must not enter into a cost-plus contract that does not contain a fair and reasonable estimate by the contractor of the total amount of money the contractor is likely to receive under the contract.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
- (b) an individual, a fine not exceeding 50 penalty units.

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- (3) In determining what is a fair and reasonable estimate for the purposes of subsection (2), regard is to be had to –
- (a) the information that the contractor had, or reasonably should have had, at the time the cost-plus contract was made; and
  - (b) the nature and location of the building site.
- (4) A contractor must not enter into a cost-plus contract in which the fair and reasonable estimate of the total amount of money the contractor is likely to receive under the contract is the prescribed amount or a higher amount unless the contractor has received from the proposed client a statement that –
- (a) states that the proposed client is aware of the risks and limitations of a cost-plus contract, as set out in the consumer guide; and
  - (b) states that the proposed client has obtained –
    - (i) a valuation of that fair and reasonable estimate by an independent person; or
    - (ii) an estimate by another contractor of the total amount of money that other contractor would be likely to receive were he or she to carry



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out the relevant residential building work under a cost-plus contract; and

- (c) is signed by the proposed client; and
- (d) is in the form set out in the consumer guide.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
  - (b) an individual, a fine not exceeding 50 penalty units.
- (5) On each occasion on which the contractor bills the client under a cost-plus contract for costs and expenses incurred in carrying out the relevant residential building work, the contractor must provide to the client details of those costs and expenses together with copies of any invoices, receipts or prescribed documents that provide evidence of those costs and expenses.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 50 penalty units; or
- (b) an individual, a fine not exceeding 20 penalty units.

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- (6) If a contractor contravenes subsection (2) or (4), the contractor may not enforce the contract against the client.
- (7) Despite subsection (6), a contractor who has contravened subsection (2) or (4) may apply to a court of competent jurisdiction for recovery of an amount consisting of the cost of carrying out the residential building work under the cost-plus contract and a reasonable profit as if the amount were a debt due and owing from the client under the contract to the contractor.
- (8) On receipt of an application under subsection (7), the court of competent jurisdiction may order that the client pay the contractor the amount sought, or an amount consisting only of the cost of carrying out the residential building work under the cost-plus contract, if the court considers that it would not be unfair to the client to make the order.

**15. Requirements for major residential building work contract that includes prime cost item or provisional sum estimate**

- (1) A contractor must not enter into a major residential building work contract that contains an amount, or an estimated amount, for –
  - (a) the prime cost of an item that is less than the reasonable cost of supplying the item (including delivery for the item); or

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- (b) a provisional sum that is less than the reasonable cost of carrying out the residential building work to which the sum relates.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
  - (b) an individual, a fine not exceeding 50 penalty units.
- (2) In determining what is a reasonable cost for the purposes of subsection (1), regard is to be had to –
- (a) the information that the contractor had, or reasonably should have had, at the time the residential building work agreement was made; and
  - (b) the nature and location of the building site.
- (3) A contractor must not enter into a major residential building work contract that contains an amount, or an estimated amount, for the prime cost of an item or for a provisional sum unless the contract contains a separate schedule for each item or sum that sets out –
- (a) a detailed description of the item or of the work to which the sum relates; and

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- (b) a breakdown of the cost estimate for each item or sum that shows at least the estimated quantities of materials that will be involved and the unit cost to the contractor of the item or sum; and
- (c) if the contractor proposes to charge an amount in excess of the estimated cost of each item or sum, how that excess amount is to be determined.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
  - (b) an individual, a fine not exceeding 50 penalty units.
- (4) Subsections (1) and (3) do not apply to items or sums that are, or are to be, supplied or specified by the client.
  - (5) The contractor must provide to the client a copy of any invoice, receipt or other document that shows the cost to the contractor of any item for which a prime cost was included in the major residential building work contract, or that relates to any provisional sum included in the major residential building work contract, and must do so as soon as practicable after receiving the invoice, receipt or other document.

Penalty: In the case of –

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- (a) a body corporate or partnership, a fine not exceeding 50 penalty units; or
  - (b) an individual, a fine not exceeding 20 penalty units.
- (6) If a contractor enters into a major residential building work contract that contravenes subsection (1) –
- (a) that contravention does not make any provision of the contract illegal or void; but
  - (b) the client may apply to a court of competent jurisdiction for a reduction in his or her liability under the contract for the item or the cost of carrying out the residential building work in respect of which the contravention occurred.
- (7) On receipt of an application under subsection (6)(b), the court of competent jurisdiction may make an order reducing the liability of the client under the contract for the item, or cost of carrying out the residential building work, specified in the application to the extent the court considers appropriate.

**16. Provision of major residential building work contract**

- (1) The contractor or client under a major residential building work contract, whichever has

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possession of the contract after it has been signed as required by section 13(2), must provide a copy of the contract to the other party to the contract not later than 10 clear days after the contract is so signed.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 50 penalty units; or
  - (b) an individual, a fine not exceeding 20 penalty units.
- (2) If under section 9(2) or (3) a series of, or two or more, residential building work agreements (*partial agreements*) are to be treated as one residential building work agreement (*joint agreement*) for the purposes of the determination of the contract price and that joint agreement is a major residential building work contract, this section applies to each partial agreement as if it were a major residential building work contract.

**17. Requirement to keep major residential building work contract, &c., for 7 years**

A contractor must keep each of the following documents for 7 years after the day on which a major residential building work contract entered into by the contractor is made:

- (a) the major residential building work contract;

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- (b) the plans, specifications, permits and other documents that are required to be attached to the contract under section 13(6);
- (c) all variations to the contract.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
- (b) an individual, a fine not exceeding 50 penalty units.

***Division 3 – Restrictions relating to major residential building work contracts***

**18. Restrictions on payment under major residential building work contract**

- (1) In this section –

***prescribed amount*** means \$20 000 or such other amount as is prescribed in the regulations.

- (2) A person must not demand or receive under a major residential building work contract, or enter into a major residential building work contract under which the person is entitled to demand or receive, any payment unless the payment –

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- (a) constitutes a genuine progress payment in respect of residential building work already carried out; or
- (b) in the case of a payment made before the commencement of residential building work with a contract price of less than the prescribed amount, is not more than 10% of the contract price; or
- (c) in the case of a payment made before the commencement of residential building work with a contract price of the prescribed amount or more, is not more than 5% of the contract price.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
- (b) an individual, a fine not exceeding 50 penalty units.

***Division 4 – Variations of major residential building work contracts***

**19. Requirement to vary major residential building work contract if residential building work varied**

- (1) If the quality or quantity of residential building work being, or to be, carried out under a major residential building work contract is altered, the contractor must ensure, as soon as practicable



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after that alteration occurs, that the contract is varied to reflect that alteration.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
  - (b) an individual, a fine not exceeding 50 penalty units.
- (2) It is a defence in proceedings for an offence under subsection (1) if the contractor shows that he or she took all reasonable steps to effect the variation of the major residential building work contract as required by that subsection.
- (3) For the avoidance of doubt, this section does not prevent the variation of a major residential building work contract in accordance with this Division for a purpose other than the alteration of the residential building work carried out, or to be carried out, under the contract.

**20. Requirements for variation of major residential building work contract**

- (1) The variation of a major residential building work contract must –
- (a) be in writing and signed by –
    - (i) the contractor or the contractor's legal representative or agent; and

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(ii) the client or the client's legal representative or agent; and

(b) include the date the variation is made.

Penalty: In the case of –

(a) a body corporate or partnership, a fine not exceeding 100 penalty units; or

(b) an individual, a fine not exceeding 50 penalty units.

(2) If a major residential building work contract is to be varied by an addition to the residential building work to be carried out, the contractor must not commence any of that additional residential building work until the variation of the major residential building work contract is made.

Penalty: In the case of –

(a) a body corporate or partnership, a fine not exceeding 50 penalty units; or

(b) an individual, a fine not exceeding 20 penalty units.

(3) Subsection (2) does not apply –

(a) if –

(i) the variation of the major residential building work contract

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is for the addition of residential building work that is to be carried out urgently; and

- (ii) it is not reasonably practicable, in the particular circumstances, to put the variation in writing before carrying out any of the additional residential building work; or
- (b) in circumstances prescribed by the regulations.

**21. Contents of variation**

- (1) In this section –

*fixed-price contract* means a major residential building work contract that is not a cost-plus contract.

- (2) A contractor is to ensure that a variation of a major residential building work contract –
- (a) is in English and readily legible; and
  - (b) describes the variation; and
  - (c) if the variation is sought by the contractor, states the reason for the variation; and
  - (d) if the variation will delay the completion of all residential building work, states the contractor's reasonable estimate of the length of the delay; and

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- (e) in the case of a fixed-price contract, states the change of the contract price because of the variation, or how the change of the contract price is to be determined; and
- (f) if the major residential building work contract provides for progress payments, makes appropriate provision for payments under the contract to reflect any change of the contract price caused by the variation; and
- (g) any other information required by the regulations.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 50 penalty units; or
- (b) an individual, a fine not exceeding 20 penalty units.

**22. Provision of variation**

The contractor or client under a major residential building work contract, whichever has possession of a variation of that contract after the variation has been signed as required by section 20(1)(a), must provide a copy of the variation to the other party to the variation not later than 10 clear days after the variation is so signed.

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Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 50 penalty units; or
- (b) an individual, a fine not exceeding 20 penalty units.

**23. Right of contractor to recover costs under variation**

(1) In this section –

*additional costs* does not include additional prime costs nor additional provisional sums.

(2) This section applies in relation to the variation of a major residential building work contract if the contractor gives effect to the variation and the variation consists of or includes –

- (a) an addition to the residential building work to be carried out under the contract which results in the contractor incurring additional costs; or
- (b) an omission from the residential building work to be carried out which results in the contractor incurring additional costs.

(3) If a contractor fails to comply with any requirement under this Division (other than section 24), the contractor is not entitled to recover from the client any additional costs

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referred to in subsection (2)(a) or (b) except as otherwise provided in this section.

- (4) Despite subsection (3), a contractor who has contravened this Division may apply to a court of competent jurisdiction for recovery of any additional costs referred to in subsection (2)(a) or (b) as if the amount were a debt due and owing from the client under the contract to the contractor.
- (5) On receipt of an application under subsection (4), the court of competent jurisdiction may order that the client pay the contractor the amount sought or a lesser amount if the court is satisfied that –
  - (a) either of the following applies:
    - (i) there are exceptional circumstances to warrant the conferring of an entitlement on the contractor for recovery of an amount for the variation;
    - (ii) the contractor would suffer unreasonable hardship by the operation of subsection (3); and
  - (b) it would not be unfair to the client for the contractor to recover an amount.

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**24. Variations exempt from requirements of this Division**

(1) In this section –

*building surveyor* has the same meaning as in the *Building Act 2000*.

(2) This Division does not apply to a variation of a major residential building work contract that is made necessary by –

(a) the written direction lawfully given by a building surveyor or another person acting lawfully under an Act; or

(b) circumstances that could not reasonably have been foreseen by the contractor when the contract was made –

if the contractor provides to the client, within the period specified in subsection (3), a statement setting out the reasons for, and the cost to be incurred on account of, the variation and, if relevant, a copy of any direction referred to in paragraph (a).

(3) The statement and any copy of a direction required to be provided to the client under subsection (2) must be provided to the client within 10 clear days after the contractor –

(a) received the direction referred to in subsection (2)(a); or

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- (b) became aware, or should reasonably have become aware, of the circumstances referred to in subsection (2)(b).
  
- (4) Subsection (2)(b) does not enable a contractor to vary a major residential building work contract, except in accordance with this Division, by reason only of an increase in the costs of labour (including related overhead expenses) or materials, or both, to be incurred by the contractor.



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**PART 3 – STATUTORY WARRANTIES**

**25. Statutory warranties**

(1) In this section –

*client* means a client under a residential building work agreement, whether that agreement is oral, written or partly oral and partly written;

*contractor* means a contractor under a residential building work agreement, whether that agreement is oral, written or partly oral and partly written;

*relevant criteria* means –

- (a) generally accepted practices and standards applied in the building industry for the materials used; or
- (b) specifications, instructions or recommendations of manufacturers or suppliers of materials.

(2) For the avoidance of doubt, in this section –

- (a) if a person carries out, or agrees to carry out, for another person residential building work with a contract price of the threshold amount or a higher amount but has not entered into a major residential building work contract with that other person –

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- (i) the person is taken to be a contractor under a residential building work agreement in relation to that residential building work; and
  - (ii) that other person is taken to be a client under a residential building work agreement in relation to that residential building work; and
- (b) an owner builder is neither a contractor nor a client.
- (3) A contractor is taken to have given the following warranties to the client:
  - (a) a warranty that the residential building work will be carried out in a proper and skilled manner, with reasonable care and skill and in accordance with the plans and specifications agreed to by the contractor and client;
  - (b) a warranty that all materials to be supplied for use in the residential building work will be good and suitable for the purpose for which they are to be used and that, unless otherwise specified in the residential building work agreement, those materials will be new;
  - (c) a warranty that the residential building work will be carried out in accordance with the requirements of this Act, the *Building Act 2000* or any other Act;

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- (d) if the residential building work agreement does not stipulate the date by which, or a period within which, the residential building work must be completed, a warranty that the residential building work will be carried out with reasonable diligence.
- (4) For the purposes of the warranty specified in subsection (3)(a), in determining whether residential building work has been carried out in a proper and skilled manner, regard may be had to whether or not the residential building work, and workmanship and other service supplied or used, for the purposes of the residential building work –
- (a) is defective; or
  - (b) does not meet the standards required by, or other requirements of, the Building Code of Australia or the Tasmanian Plumbing Code; or
  - (c) does not meet the standard required by, or other requirements of, any law of Tasmania; or
  - (d) does not meet the standard required by, or other requirements of, a residential building work agreement; or
  - (e) does not meet the standard required by any guidelines issued by the Building Dispute Commissioner or standards

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relating to residential building work  
prescribed in the regulations.

- (5) For the purposes of the warranty specified in subsection (3)(b) –
- (a) the warranty does not apply to materials if, under the residential building work agreement, the contractor is subject to the direction of the architect for the supply of those materials and they were supplied under that direction; and
  - (b) the warranty does not apply to materials if –
    - (i) the client nominates those materials; and
    - (ii) either there are no reasonable grounds for not using the materials or, if there are such reasonable grounds, the client insists on the materials being used despite written advice on their unsuitability being provided to the client by the contractor; and
    - (iii) those materials were supplied under that direction or on that insistence; and
  - (c) in determining whether materials supplied are good and suitable for the

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purpose, regard is to be had to the relevant criteria.

- (6) For the purposes of subsection (5)(b), the client nominates materials only if –
- (a) the client nominates them specifically; and
  - (b) the nomination is made without any recommendation, representation, suggestion or other approach being made by the contractor that –
    - (i) supports or approves the use of those materials; or
    - (ii) criticises or disapproves the use of other materials that could be considered to be suitable for use for the purpose for which those materials nominated by the client are to be used.

**26. Succession to statutory warranties**

- (1) In this section –

*associated person* means a person, other than the client, who for the time being owns the land or residential structure on or in relation to which residential building work was carried out under a residential building work agreement;

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*first purchaser*, in relation to land or a residential structure on or in relation to which an owner builder has carried out residential building work that, if carried out under a residential building work agreement, would have had a contract price of the threshold amount or a higher amount, means the person who first acquires the land or residential structure for valuable consideration after that residential building work has been carried out by the owner builder;

- (2) For the avoidance of doubt, in this section –
- (a) if a person has carried out, or agreed to carry out, for another person residential building work with a contract price of the threshold amount or a higher amount but has not entered into a major residential building work contract with that other person –
    - (i) the person is taken to be a contractor under a residential building work agreement; and
    - (ii) that other person is taken to be a client under a residential building work agreement; and
  - (b) an owner-builder is neither a contractor nor a client.
- (3) An associated person has the same rights for a breach of a statutory warranty specified in

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section 25(3)(a), (b) or (c) as if he or she were a client who entered into the residential building work agreement.

- (4) However, subsection (3) –
- (a) applies only to the extent that the rights for the breach of the statutory warranty are rights that were held by the client under the residential building work agreement or the immediately preceding associated person, as the case requires; and
  - (b) if the associated person entered into an agreement for the acquisition of the land or residential structure, applies to the associated person only if, at the time the associated person entered into the agreement, he or she did not know and could not reasonably have known of the existence of the breach of the statutory warranty.
- (5) If an owner builder has carried out residential building work on or in relation to land or a residential structure that, if carried out under a residential building work agreement, would have had a contract price of the threshold amount or a higher amount, the first purchaser, and any other person who for the time being owns the land or residential structure after it was owned by the first purchaser, has the same rights for a breach of a statutory warranty specified in section 25(3)(a), (b) or (c) as if the owner builder

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were a contractor who had carried out the residential building work for the first purchaser under a residential building work agreement and the first purchaser were the client.

- (6) However, subsection (5) –
- (a) applies only to the extent that the rights for a breach of a statutory warranty for a defect –
    - (i) in the case of the first purchaser, are rights that would have been held by a client under a residential building work agreement; or
    - (ii) in the case of another person who for the time being owns the land or residential structure after it has been owned by the first purchaser, are rights that were held by the immediately preceding owner of land or residential structure by reason of this section; and
  - (b) applies –
    - (i) to the first purchaser; or
    - (ii) another person who entered into an agreement for the acquisition of the land or residential structure and who for the time being owns the land or residential structure



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after it has been owned by the purchaser –

only if, at the time the purchaser or other person entered into the agreement by which he or she became the owner of the land or residential structure, he or she did not know and could not reasonably have known of the existence of the defect that would constitute the breach of the statutory warranty had the builder owner been a contractor under a residential building work agreement.

**27. Civil proceedings for breach of statutory warranty**

- (1) Civil proceedings for a breach of a statutory warranty relating to residential building work are to be commenced within 6 years and 6 months after –
  - (a) the completion of the residential building work if the residential building work is completed; or
  - (b) the day specified in the relevant residential building work agreement for completion of the residential building work, or the day on which that work is to be completed as determined in accordance with the relevant residential building work agreement, if the residential building work is not completed; or

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- (c) the day on which the contract is made if the residential building work is not completed and there is no day as referred to in paragraph (b).
- (2) In civil proceedings for breach of a statutory warranty relating to residential building work, it is a defence for the defendant to show that –
- (a) the deficiencies of which the plaintiff complains arise from instructions given by the client contrary to the written advice of the defendant; and
  - (b) the defendant did not contravene any law or relevant code or standard in complying with those instructions.

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## **PART 4 – CONSUMER GUIDE**

### **28. Consumer guide**

- (1) The Building Disputes Commissioner must prepare a consumer guide.
- (2) The consumer guide is to contain –
  - (a) information about the operation of this Act; and
  - (b) information on the risks and limitations of a cost-plus contract; and
  - (c) the form of the statement a contractor is required to receive from a potential client under section 14(4) before entering into a cost-plus contract; and
  - (d) the information required by the regulations; and
  - (e) any other information relevant to the operation of this Act that the Building Dispute Commissioner considers appropriate.
- (3) After preparing the consumer guide, the Building Dispute Commissioner must cause a notice to be published in the *Gazette* and in 3 newspapers circulating generally in Tasmania specifying –
  - (a) that the consumer guide has been prepared; and

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- (b) the purpose of the consumer guide; and
- (c) the effect of section 31; and
- (d) how and where copies of the consumer guide may be obtained; and
- (e) the date on which the consumer guide is to take effect; and
- (f) any other information relating to the consumer guide that the Building Dispute Commissioner considers appropriate.

**29. Replacement consumer guide**

- (1) The Building Dispute Commissioner may rescind a consumer guide and prepare a new consumer guide.
- (2) After preparing a new consumer guide, the Building Dispute Commissioner must cause notice of it to be published in the manner specified in section 28(3).

**30. Availability of consumer guide**

The Building Dispute Commissioner is to take, by electronic or other means as the Building Dispute Commissioner considers appropriate, all reasonable steps to ensure that copies of a consumer guide are publicly available.

**31. Contractor to provide consumer guide to client**

- (1) Before carrying out or commencing the carrying out of any residential building work under a major residential building work contract, the contractor must provide a copy of the consumer guide to the client.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
  - (b) an individual, a fine not exceeding 50 penalty units.
- (2) If under section 9(2) or (3) a series of, or two or more, residential building work agreements (*partial agreements*) are to be treated as one residential building work agreement (*joint agreement*) for the purposes of the determination of the contract price and that joint agreement is a major residential building work contract, the contractor must provide a copy of the consumer guide to the client as soon as practicable after becoming aware that the joint agreement is a major residential building work contract.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or

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- (b) an individual, a fine not exceeding 50 penalty units.
- (3) For the purposes of subsections (1) and (2), the contractor may provide the copy of the consumer guide –
  - (a) in the case of a client who is an individual, by –
    - (i) giving it to the client; or
    - (ii) leaving it at, or sending by post to, the client’s postal or residential address, or place or address of business or employment, last known to the contractor; or
    - (iii) faxing it to the client’s fax number; or
    - (iv) emailing it to the client’s email address; and
  - (b) in the case of a client who is a body corporate or partnership, by –
    - (i) leaving it at, or sending it to, the client’s principal or registered office or principal place of business; or
    - (ii) faxing it to the client’s fax number; or

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- (iii) emailing it to the client’s email address.
- (4) A document signed by a client containing a statement that a contractor has provided the client with a copy of the consumer guide is evidence of that matter.

**32. Status of consumer guide**

A consumer guide is not –

- (a) a statutory rule for the purposes of the *Rules Publication Act 1953*; or
- (b) subordinate legislation for the purposes of the *Subordinate Legislation Act 1992*.

**PART 5 – DISPUTE RESOLUTION**

*Division 1 – Disputes*

**33. Referral of dispute by client or subsequent owner**

- (1) A client under a residential building work agreement, or a subsequent owner, is entitled to refer a dispute in relation to residential building work to the Building Dispute Commissioner if he or she considers that one or more of the following applies:
  - (a) the client, or subsequent owner, is entitled to the benefit of a statutory warranty and there has been a breach of that statutory warranty;
  - (b) the contractor has provided to the client under section 24 –
    - (i) a statement without having the legal authority to do so; or
    - (ii) a statement that does not specify sufficient reason for the variation of the major residential building work contract or the costs incurred, or to be incurred, on account of the variation; or
    - (iii) a statement that specifies costs incurred, or to be incurred, on account of such a variation that are not reasonable;



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- (c) the contractor has failed to complete the residential building work required by the residential building work agreement;
  - (d) any other matter prescribed by the regulations.
- (2) A dispute may be referred under subsection (1) by a client, or subsequent owner, only within –
- (a) 3 years after the day on which the residential building work is completed; or
  - (b) if the Building Dispute Commissioner is satisfied that the client, or subsequent owner, had good reason for not making the referral within that 3-year period, within such longer period as the Building Dispute Commissioner determines.
- (3) For the purposes of subsection (2), residential building work in respect of a residential structure is completed –
- (a) if the residential building work agreement provides for a day by which, or a period during which, any defect in the residential building work may be identified and corrected, on that day or the last day of that period; or
  - (b) if the residential building work agreement does not provide for a day or period referred to in paragraph (a) but otherwise specifies that the residential

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building work is completed on a day or on the occurrence of an event specified in the agreement, on that day or on the day on which that event occurs; or

- (c) if the day on which residential building work under a residential building work agreement cannot be determined in accordance with paragraph (a) or (b) or there is no residential building work agreement, on the day on which the residential building work is completed except for minor defects which do not prevent the residential structure from reasonably being used for the purpose specified in the residential building work agreement or for its intended use; or
- (d) if the day on which residential building work is completed cannot be determined in accordance with paragraph (a), (b) or (c), on a day prescribed by the regulations or a day on which an event prescribed by the regulations occurs.

**34. Referral of dispute by contractor**

- (1) Subject to subsection (2), a contractor under a residential building work agreement is entitled to refer a dispute with the client to the Building Dispute Commissioner if he or she considers that the dispute is affecting his or her ability to carry out the residential building work so as to meet the requirements of a statutory warranty.

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- (2) The regulations may limit, or impose restrictions on, the disputes that may be referred under subsection (1).
- (3) A contractor is entitled to refer a dispute under subsection (1) only in relation to a residential building work agreement made after the commencement of this Act.
- (4) A dispute may be referred under subsection (1) by a contractor only before the day on which the residential building work is completed.
- (5) For the purposes of subsection (4), residential building work in respect of a residential structure is completed –
  - (a) if the major residential building work contract provides for a day by which, or a period during which, any defect in the residential building work may be identified and corrected, on that day or the last day of that period; or
  - (b) if the residential building work agreement does not provide for a day or period referred to in paragraph (a) but otherwise specifies that the residential building work is completed on a day or on the occurrence of an event specified in the agreement, on that day or on the day on which that event occurs; or
  - (c) if the day on which residential building work under a major residential building work contract cannot be determined in

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accordance with paragraph (a) or (b), on the day on which the residential building work is completed except for minor defects which do not prevent the residential structure from reasonably being used for the purpose specified in the major residential building work contract or for its intended use; or

- (d) if the day on which residential building work is completed cannot be determined in accordance with paragraph (a), (b) or (c), on a day prescribed by the regulations or a day on which an event prescribed by the regulations occurs.

**35. Form of referral of dispute**

- (1) A referral of a dispute is to –
  - (a) be in a form approved by the Building Dispute Commissioner; and
  - (b) be signed by the dispute referrer or his or her legal representative or agent; and
  - (c) specify the details of the dispute; and
  - (d) be accompanied by any prescribed fee.
- (2) The Building Dispute Commissioner may accept a referral of a dispute that does not comply with subsection (1).
- (3) The Building Dispute Commissioner may waive the whole or part of the fee referred to in

subsection (1)(d) if he or she considers that it would be unreasonable or unfair, or would cause hardship, to impose the fee or the full fee in the circumstances.

- (4) If a dispute referrer changes his or her name or address, the client, or subsequent owner, is to notify the Building Dispute Commissioner in writing of that change.

### **36. Notifying of receipt of referral of dispute**

Within 10 clear days after the lodgement with the Building Dispute Commissioner of a referral of a dispute, the Building Dispute Commissioner is to –

- (a) notify, in writing, each person who would be a dispute respondent were the Building Dispute Commissioner to determine to investigate the dispute of the lodgement of the referral and either –
- (i) provide a copy of the referral to each such person; or
  - (ii) include in the notice the details of the matter in dispute; and
- (b) notify, in writing, the dispute referrer and each person referred to in paragraph (a) that under section 72 no civil action in relation to any matter that is the subject of the referral may be commenced during

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the relevant period specified in that section.

**37. Initial assessment of referral of dispute**

- (1) As soon as practicable after the lodgement with the Building Dispute Commissioner of a referral of a dispute, the Building Dispute Commissioner is to assess the referral to determine whether or not an investigation into the dispute is to be conducted.
- (2) Before making a determination referred to in subsection (1), the Building Dispute Commissioner –
  - (a) may make enquiries and obtain information that he or she considers necessary or appropriate; and
  - (b) request the dispute referrer, by written notice, to do one or more of the following within the reasonable time specified in the notice:
    - (i) provide further information or documents;
    - (ii) verify all or any part of the referral by statutory declaration;
    - (iii) provide evidence that the dispute referrer has taken reasonable steps to resolve with the contractor, client or subsequent

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owner, as the case requires, the matter which is the subject of the dispute, or a particular matter which is one subject in dispute in the referral.

- (3) Subsection (2) does not authorise the exercise of a power under section 75.

**38. Determination to investigate or dismiss referral of dispute**

- (1) On assessing under section 37 a referral of a dispute by a client or subsequent owner, the Building Dispute Commissioner –
- (a) if of the opinion that the referral relates only to a matter referred to in section 33(1), is to determine that the dispute be investigated; or
  - (b) if of the opinion that the referral relates to a matter referred to in section 33(1) and other matters, is to determine that the dispute, so far as it relates to the matter referred to in section 33(1), be investigated and dismiss the referral in so far as it relates to those other matters; or
  - (c) if of the opinion that –
    - (i) the dispute referrer is not a person entitled to make a referral under section 33(1); or

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- (ii) the referral does not relate to a matter referred to in section 33(1) –

is to dismiss the referral.

- (2) On assessing under section 37 a referral of a dispute by a contractor, the Building Dispute Commissioner –

- (a) if of the opinion that –

- (i) the referral relates only to a matter which he or she considers affects the ability of the contractor to carry out the residential building work so as to meet the requirements of a statutory warranty; and

- (ii) the contractor is entitled to refer the dispute –

is to determine that the dispute be investigated; or

- (b) if of the opinion that –

- (i) the referral relates to a matter which he or she considers affects the ability of the contractor to carry out the residential building work so as to meet the requirements of a statutory warranty and other matters; and



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- (ii) the contractor is entitled to make the referral in respect of the matter that so affects the contractor's ability –

is to determine that the dispute in so far as it relates to the matter that so affects the contractor's ability be investigated and dismiss the referral in so far as it relates to those other matters; or

- (c) if of the opinion that –

- (i) the referral does not relate to a matter which he or she considers affects the ability of the contractor to carry out the residential building work so as to meet the requirements of a statutory warranty; or

- (ii) the contractor is not entitled to make the referral –

is to dismiss the referral.

- (3) On assessing a referral of a dispute under section 37 and despite subsections (1) and (2), the Building Dispute Commissioner may dismiss the referral, or the referral of a dispute so far as it relates to a particular matter, if of the opinion that –

- (a) the referral was not made within the relevant period specified in section 33(2) or section 34(4); or

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- (b) the dispute referrer has not paid the prescribed fee referred to in section 35(1)(d); or
- (c) the Building Dispute Commissioner under section 69 or section 37(2) has requested the dispute referrer to provide further information, or verify information by statutory declaration, and the dispute referrer has not complied with that request within the time allowed; or
- (d) the dispute referrer has failed, without good reason, to take reasonable steps to resolve with the contractor, client or subsequent owner, as the case requires, the matter which is the subject of the dispute, or a particular matter which is one subject in dispute in the referral; or
- (e) all the issues arising out of the subject matter of the referral, or the referral in so far as it relates to a particular matter, have been adjudicated upon by a court, tribunal, board or another person established by or under a law of Tasmania, the Commonwealth, another State or a Territory; or
- (f) the dispute referrer has been provided with reasonable explanations and information and there would be no benefit in further entertaining the referral, or the referral in so far as it relates to a particular matter; or

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- (g) the referral, or the referral in so far as it relates to a particular matter, lacks substance; or
  - (h) the referral, or the referral in so far as it relates to a particular matter, is frivolous, vexatious or was not made in good faith; or
  - (i) the dispute, or the dispute in so far as it relates to a particular matter, has been resolved.
- (4) Subsection (3)(a) does not apply if the Building Dispute Commissioner is satisfied that the dispute referrer had good reason for not making the referral of the dispute within the period specified in section 33(2).
- (5) On dismissing a referral of a dispute, or a referral of a dispute in so far as it relates to a particular matter, the Building Dispute Commissioner is to advise the dispute referrer of the dismissal and the reason for it.
- (6) If the Building Dispute Commissioner is of the opinion –
- (a) that it is inappropriate for the sole matter, or a particular matter, to which a referral of a dispute relates to be the subject of an investigation and dispute resolution under this Act; and
  - (b) also that, but for the opinion referred to in paragraph (a), he or she would

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determine that the referral of the dispute relating to that sole matter or the referral of the dispute in so far as it relates to that particular matter be investigated –

he or she is to issue a Certificate of Exemption in relation to the matter and advise the dispute referrer and the person who would, had the determination to investigate been made, be the dispute respondent of the issue of the Certificate of Exemption and the reasons for holding the opinion referred to in paragraph (a).

**39. Parties to dispute**

- (1) If the Building Dispute Commissioner determines under section 37(1) that a dispute referred to him or her is to be investigated, the following persons are parties to the dispute:
  - (a) in the case of a dispute referred by a client under a residential building work agreement –
    - (i) the client; and
    - (ii) the contractor;
  - (b) in the case of a dispute referred by a subsequent owner who, under section 26(3), has succeeded to the rights of his or her predecessor in title in respect of statutory warranties relating to residential building work carried out

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under a residential building work agreement –

- (i) the subsequent owner; and
  - (ii) the contractor;
- (c) in the case of a dispute referred by a subsequent owner in relation to a residential structure on which residential building work was carried out by an owner builder and who, under section 26(5), is entitled to the benefit of the statutory warranties in respect of residential building work carried out by the owner builder –
- (i) the subsequent owner; and
  - (ii) the owner builder.
- (2) The Building Dispute Commissioner may declare that another person is a party to a dispute if the original parties to the dispute and that other person agree, in writing provided to the Building Dispute Commissioner.
- (3) A declaration under subsection (2) is to be in writing provided to the original parties to the dispute and the other person.

**40. Early resolution of dispute**

- (1) As soon as practicable after a referral of a dispute is lodged with the Building Dispute Commissioner, he or she, if of the opinion that it

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is reasonable to do so and if the dispute referrer consents, may attempt to facilitate the early resolution of the dispute to the satisfaction of the parties without the need for the Building Dispute Commissioner to proceed to assessment under section 37.

- (2) Without limiting the powers of resolution of the Building Dispute Commissioner, he or she may provide or recommend, but not require any person to attend, conciliation or mediation.

**41. Notice of assessment**

Within 14 days after making a determination under section 38, the Building Dispute Commissioner is to provide written notice of the determination to each party to the dispute.

**42. Splitting of matters in dispute**

- (1) This section applies to a referral of a dispute that –
  - (a) deals with more than one matter in dispute; or
  - (b) deals with more than one set of circumstances; or
  - (c) for any other reason is susceptible to being dealt with in 2 or more such referrals.

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- (2) At any time before an investigation in relation to a referral of a dispute has been completed and if it is administratively or otherwise convenient to do so, the Building Dispute Commissioner may determine that a referral of a dispute to which this section applies be treated as 2 or more such referrals.
  - (3) If at any time before an investigation in relation to a referral of a dispute to which this section applies has been completed the Building Dispute Commissioner considers that it is in the public interest to do so, the Building Dispute Commissioner is to determine that the referral be treated as 2 or more such referrals.
  - (4) The Building Dispute Commissioner is not to determine under subsection (2) or (3) that a referral of a dispute be treated as 2 or more such referrals unless satisfied that any attempt at resolution, including by conciliation or mediation, is not likely to be prejudiced by the making of the determination.
  - (5) On determining under subsection (2) or (3) that a referral of a dispute be treated as 2 or more such referrals, the Building Dispute Commissioner is to notify, in writing, each party to the dispute of the splitting of the referral.

**43. Combining referrals of a dispute**

- (1) If –

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- (a) the Building Dispute Commissioner has received a referral of a dispute (***original referral***) in relation to residential building work; and
- (b) at any time before an investigation in relation to the original referral has been completed the Building Dispute Commissioner receives another referral of a dispute (***second referral***), whether by the dispute referrer who made the original referral or by another dispute referrer, in relation to that or other connected residential building work; and
- (c) the Building Dispute Commissioner considers it administratively or otherwise convenient to do so –

the Building Dispute Commissioner may determine that the original referral and the second referral be treated as one referral of dispute.

- (2) The Building Dispute Commissioner is not to determine under subsection (1) that 2 or more referrals of a dispute be treated as one such referral unless satisfied that any attempt at resolution, including by conciliation or mediation, is not likely to be prejudiced by the making of the determination.
- (3) On determining under subsection (1) that 2 or more referrals of a dispute be treated as one referral, the Building Dispute Commissioner is



to notify, in writing, each party to all the disputes of the combining of the referrals.

**44. Amendment of referral of a dispute**

- (1) At any time before an investigation in relation to a referral of a dispute has been completed –
  - (a) the dispute referrer, in writing provided to the Building Dispute Commissioner, may amend the referral by removing a matter from it; and
  - (b) the Building Dispute Commissioner, in writing, may amend the complaint by adding or removing a matter, or both.
- (2) As soon as practicable after a referral of a dispute is amended, the Building Dispute Commissioner, within 14 days, is to –
  - (a) notify, in writing, each party to the dispute of the amendment; and
  - (b) provide him or her with a copy of that amendment or the referral as amended.

**45. Withdrawal of referral of a dispute**

- (1) At any time before an investigation in relation to a referral of a dispute has been completed, a dispute referrer may notify the Building Dispute Commissioner, in writing, that he or she wishes to withdraw a referral of a dispute, or a referral of a dispute in so far as it relates to a particular

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matter, by notifying the Building Dispute Commissioner in writing of the withdrawal.

- (2) Within 14 days after receiving a notice under subsection (1), the Building Dispute Commissioner is to –
  - (a) determine whether or not to continue the investigation of the dispute, or the dispute in relation to a particular matter; and
  - (b) notify, in writing, each other party to the dispute of the withdrawal and of his or her determination.
- (3) The Building Dispute Commissioner may only determine to continue the investigation of the dispute, or the dispute in relation to a particular matter, if the dispute referrer consents to that determination.
- (4) If the Building Dispute Commissioner determines to continue the investigation of the dispute, or the dispute in so far as it relates to a particular matter –
  - (a) the referral of the dispute or the dispute so far as it relates to a particular matter is not withdrawn; and
  - (b) the dispute referrer, without his or her consent, cannot be required to –
    - (i) pay the costs of obtaining expert advice or procuring tests; or

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- (ii) do or refrain from doing any thing; and
  - (c) the Building Dispute Commissioner, after the completion of the investigation, may not under section 52 make a Rectification Order or refer the dispute, or the particular matter in dispute that has been withdrawn, to an approved mediator appointed by the Building Dispute Commissioner but must dismiss the referral of the dispute, or the referral of the dispute in so far as it relates to the particular matter that is the subject of the withdrawal.
- (5) If the Building Dispute Commissioner determines not to continue the investigation of the dispute, or the dispute in so far as it relates to a particular matter, the referral of the dispute or the dispute so far as it relates to a particular matter is withdrawn on the making of that determination.

***Division 2 – Investigation of disputes***

**46. Investigation fee**

- (1) On the making of a determination under section 38 that a dispute is to be investigated, the Building Dispute Commissioner, in writing, is to require the dispute referrer to pay to the Building Dispute Commissioner any prescribed investigation fee.

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- (2) The Building Dispute Commissioner may waive the whole or part of the investigation fee if he or she considers that it would be unreasonable or unfair, or would cause hardship, to impose the fee or the full fee in the circumstances.

**47. Commencing investigation**

- (1) On the making of a determination under section 38 that a referral of a dispute is to be investigated, the Building Dispute Commissioner is to ensure that an investigation is conducted by an Officer unless the referral is withdrawn.
- (2) Despite subsection (1), the Building Dispute Commissioner may wait until the investigation fee has been paid before ensuring that the investigation is commenced.

**48. Building Dispute Commissioner to report further matter for investigation**

- (1) In this section –

*new matter* means a matter –

- (a) in respect of which a referral of a dispute could be made in relation to the residential building work to which an original referral relates or to other, connected residential building work; but

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- (b) was not the subject matter of that original referral;

*original referral* means a referral of a dispute in relation to which an investigation is being conducted;

*parties* means the parties to the dispute to which an original referral relates.

- (2) If as a result of conducting an investigation in relation to an original referral an Officer becomes aware of a new matter that could be the subject of a referral of a dispute, the Officer may report the new matter to the Building Dispute Commissioner.
- (3) On receipt of a report of a new matter, the Building Dispute Commissioner may advise the parties –
- (a) of that new matter; and
  - (b) that the Building Dispute Commissioner may amend the original referral to include that new matter.

**49. Power to dismiss referral during investigation**

- (1) If, during the investigation of a dispute, the Officer forms the opinion that –
- (a) the referral of the dispute was not made within the period specified in section 33(2) or section 34(4); or

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- (b) the dispute referrer has not paid the investigation fee or part of the investigation fee; or
- (c) the dispute referrer has not complied with a requirement made under this Act to provide further information, or verify information by statutory declaration, within the time allowed; or
- (d) the dispute referrer has failed, without good reason, to take reasonable steps to resolve the dispute, or a particular matter which is in dispute, with the dispute respondent; or
- (e) the dispute referrer has failed, without good reason, to provide the Officer with access to the building site or any information or document that the Officer has requested; or
- (f) the dispute referrer has not agreed to the obtaining of expert advice or the procuring of tests when notified under section 50 of the need for such advice or tests; or
- (g) all the issues arising out of the subject matter of the referral, or the referral in so far as it relates to a particular matter, have been adjudicated upon by a court, tribunal, board or another person established by or under a law of

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Tasmania, the Commonwealth, a Territory or another State; or

- (h) the dispute referrer has been provided with reasonable explanations and information and there would be no benefit in further investigating the dispute; or
- (i) the referral, or the referral in so far as it relates to a particular matter, lacks substance; or
- (j) the referral is frivolous, vexatious or was not made in good faith; or
- (k) the dispute has been resolved –

the Officer may continue the investigation or, in writing, may report that opinion and the reasons for it to the Building Dispute Commissioner and recommend that the Building Dispute Commissioner dismiss the referral or the referral in so far as it relates to a particular matter.

- (2) On receipt of a report and recommendation under subsection (1), the Building Dispute Commissioner may do one or more of the following:
  - (a) require the Officer to continue the investigation of the referral of the dispute or the referral of the dispute in so far as it relates to a particular matter;

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- (b) dismiss the referral of the dispute or the referral of the dispute in so far as it relates to a particular matter.
- (3) On dismissing a referral of a dispute, or the referral of a dispute in so far as it relates to a particular matter, the Building Dispute Commissioner is to advise each party to the dispute of the dismissal and the reason for it.

**50. Expert advice, &c.**

- (1) If during an investigation of a dispute an Officer forms the opinion that the investigation cannot be completed without obtaining the advice of an expert in relation to the matter in dispute or without procuring the undertaking of tests by other persons, the Officer is to report that opinion and the reasons for it, in writing, to the Building Dispute Commissioner.
- (2) On receipt of the report, the Building Dispute Commissioner may do one or more of the following:
  - (a) obtain the advice of an expert or procure the undertaking of tests;
  - (b) may notify the dispute referrer of the need for the expert advice or tests;
  - (c) may require the Officer to continue with the investigation whether or not the advice of an expert is obtained or the undertaking of tests is procured.



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- (3) If the Building Dispute Commissioner notifies the dispute referrer of the need for the expert advice or tests, the Building Dispute Commissioner is to –
- (a) ask the dispute referrer whether or not he or she agrees to the continuation of the investigation and so obtain the expert advice or procure the undertaking of the tests; and
  - (b) inform the dispute referrer and the dispute respondent –
    - (i) that, if the dispute referrer agrees, any Rectification Order may require the dispute referrer or the dispute respondent, or both, to pay the costs of obtaining the expert advice or procuring the tests; and
    - (ii) that, if the dispute referrer does not agree, the Building Dispute Commissioner may dismiss the referral of the dispute, or the dispute in so far as it relates to a particular matter.
- (4) If the Building Dispute Commissioner determines that the investigation be continued despite the dispute referrer not agreeing to its continuation and the obtaining of the expert advice or procurement of the undertaking of the tests, the Building Dispute Commissioner may,

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on the terms and conditions he or she considers appropriate –

- (a) obtain the advice of such experts; and
- (b) procure the undertaking of such tests –

as he or she considers necessary for the purposes of the investigation.

- (5) If the Building Dispute Commissioner obtains expert advice or procures the undertaking of tests despite the dispute referrer not agreeing to the continuation of the investigation and the obtaining of the expert advice or procurement of the tests, the Building Dispute Commissioner is to bear the costs of so obtaining that expert advice or procuring the undertaking of those tests.

**51. Investigation report following investigation**

- (1) When an Officer has completed his or her investigation of a referral of a dispute, he or she is to provide to the Building Dispute Commissioner a written report containing –
  - (a) a summary of the investigation; and
  - (b) his or her findings; and
  - (c) his or her recommendations as to the taking of action by the Building Dispute Commissioner under section 52 and the reasons for those recommendations.

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- (2) On receipt of the investigation report, the Building Dispute Commissioner is to provide to each party to the dispute –
- (a) a copy of the report; and
  - (b) notice that the party, within 14 days after the copy of the report is provided to him or her, may make written submissions to the Building Dispute Commissioner in relation to the report.

*Division 3 – Rectification Orders and dismissing referrals of disputes*

*Subdivision 1 – Determination following investigation*

**52. Power to require mediation, make Rectification Order or dismiss referral of a dispute**

- (1) After the completion of an investigation of a referral of a dispute, the Building Dispute Commissioner must do one or more of the following:
- (a) require the parties to the dispute, or a particular matter in dispute, to attend mediation with an approved mediator appointed by the Building Dispute Commissioner;
  - (b) make a Rectification Order in relation to the referral, or the referral in so far as it relates to a particular matter;

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- (c) dismiss the referral, or the referral in so far as it relates to a particular matter.
- (2) In making a determination under subsection (1), the Building Dispute Commissioner –
  - (a) is to consider the report of the Officer, and any submission in relation to it, provided under section 51; and
  - (b) may consider any other information in his or her possession.

**53. Time limit for final determination**

- (1) In this section –

*resolution period* has the same meaning as in section 66;

*unresolved matter* means a matter which is a subject of the referral of a dispute and in respect of which –

- (a) the referral has not been withdrawn; or
- (b) the referral has not been dismissed by the Building Dispute Commissioner; or
- (c) a Rectification Order has not been made by the Building Dispute Commissioner; or

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- (d) a Dispute Record of Agreement has not been prepared and signed by all the parties under section 63.
- (2) The Building Dispute Commissioner must make a determination under section 52 in relation to every matter that is a subject of a referral of a dispute within 180 days after he or she received the referral.
- (3) If, at any time after the Building Dispute Commissioner receives the referral of a dispute but before the end of an investigation into that dispute, a Dispute Record of Agreement is made in relation to the matter or a particular matter that is the subject of the dispute, the resolution period is not be taken into account for the purposes of determining the period referred to in subsection (2).
- (4) If the determination under section 52 consists of, or includes, a requirement that the parties attend mediation with an approved mediator appointed by the Building Dispute Commissioner in relation to the referral or the referral in so far as it relates to a particular matter (***original determination***) –
  - (a) that mediation must be concluded; and
  - (b) if the mediation results in a resolution of the dispute or a particular matter in dispute, a Dispute Record of Agreement must be prepared and signed by the

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parties in accordance with section 63;  
and

- (c) if at the conclusion of the mediation there is an unresolved matter, the Building Dispute Commissioner must make a determination under section 52(1)(b) or (c) in relation to that matter –

within a period of 90 days after the original determination was made.

- (5) If all parties to the referral agree, in writing, the Building Dispute Commissioner may extend the period referred to in subsection (2) or (4).
- (6) The Minister, by notice in writing to the Building Dispute Commissioner, may extend the period referred to in subsection (2) or (4) in a particular case if the Minister is of the opinion that the interests of justice require the extension.
- (7) On receipt of a notice provided by the Minister under subsection (6), the Building Dispute Commissioner must notify the parties, in writing, of the extension of the period referred to in subsection (2) or (4).

**54. Notifying of requirement to attend mediation, Rectification Order or dismissal of referral of a dispute**

On making any determination under section 52, the Building Dispute Commissioner is to notify, in writing, each party to the dispute of that

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determination and provide him or her with a copy of the determination.

**55. Parties to dispute bound by determination of Building Dispute Commissioner**

Each party to a dispute is bound by the determination of the Building Dispute Commissioner under section 52 relating to that dispute.

*Subdivision 2 – Procedure if parties to attend mediation*

**56. Application of Act if parties to attend mediation**

If the Building Dispute Commissioner under section 52(1)(a) requires the parties to the dispute, or a particular matter in dispute, to attend mediation with an approved mediator –

- (a) the investigation is taken to be extended for the purposes of that mediation; and
- (b) Division 2 and this Division apply in relation to that investigation and the mediation although no further report by the Officer who investigated the referral is required unless the Building Dispute Commissioner determines otherwise.

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***Subdivision 3 – Rectification Order***

**57. Rectification Order**

- (1) A Rectification Order is an order that requires –
- (a) a dispute respondent in relation to residential building work to take any necessary action, or the action specified in the order, to do one or more of the following:
    - (i) rectify any defective residential building work;
    - (ii) correct any damage caused in the carrying out of residential building work or by defective residential building work;
    - (iii) complete residential building work under a residential building work agreement; or
  - (b) a dispute respondent to do or refrain from doing any thing so as to satisfy a term of the residential building work agreement; or
  - (c) a dispute respondent to do or refrain from doing any thing so that the dispute referrer may carry out residential building work so as to meet the requirements of a statutory warranty; or



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- (d) a party to a dispute to pay a sum of money to another party.
- (2) A Rectification Order may –
- (a) specify conditions, including conditions relating to the payment of money or access to a building site, to be complied with by a party to the dispute before another party must comply with the requirements of the Rectification Order; and
  - (b) include one or more of the following orders:
    - (i) an order requiring the contractor or another party to the dispute to pay the costs of rectifying any defective residential building work or damage;
    - (ii) an order requiring a sum of money, the payment of which is in dispute, to be paid into the Residential Building Trust Fund;
    - (iii) an order requiring a sum of money for costs relating to either the dispute resolution process or the rectifying of any defective residential building work or damage, or both, to be paid into the Residential Building Trust Fund;

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- (iv) an order requiring a sum of money to be paid out of the Residential Building Trust Fund on compliance with the Rectification Order or part of the Rectification Order;
- (v) if the dispute referrer under section 50 has agreed to the obtaining of expert advice or the procuring of tests, an order requiring the dispute referrer to reimburse the Building Dispute Commissioner for the cost of obtaining that expert advice or procuring those tests;
- (vi) if the Building Dispute Commissioner considers that a party to the dispute has behaved frivolously or vexatiously or made unfounded submissions, an order requiring that party to pay some or all of the costs of another party;
- (vii) any other order the Building Dispute Commissioner considers appropriate in relation to the resolution of the dispute to which the Rectification Order relates.

(3) A Rectification Order is to –

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- (a) specify a date by which the requirements of the Rectification Order must be complied with, subject to another person's compliance with any condition referred to in subsection (2)(a); and
  - (b) indicate that the Rectification Order, or the Rectification Order in so far as it relates to a particular matter, ceases to have effect if the matter giving rise to the Rectification Order, or that particular matter, becomes the subject of a civil action before the date specified in accordance with paragraph (a).

**58. Reasons for making Rectification Order**

- (1) The Building Dispute Commissioner may make a Rectification Order in respect of a dispute relating to residential building work only if satisfied, on the basis of any information the Building Dispute Commissioner considers relevant, of one or more of the following matters:
  - (a) there has been a breach of a statutory warranty and a party to the dispute is entitled to the benefit of the warranty;
  - (b) the contractor has failed to complete the residential building work required by the residential building work agreement;
  - (c) the contractor has provided to the client under section 24 –

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- (i) a statement without having the legal authority to do so; or
    - (ii) a statement that does not specify sufficient reason for the variation of the major residential building work contract or the costs incurred or to be incurred on account of the variation; or
    - (iii) a statement that specifies costs incurred or to be incurred on account of such a variation that are not reasonable;
  - (d) the dispute has affected or is affecting the ability of the contractor to carry out the residential building work so as to meet the requirements of a statutory warranty and the contractor is entitled to make the referral of the dispute;
  - (e) any other matter prescribed by the regulations for the purposes of section 33(1)(d).
- (2) For the purposes of being satisfied of any matter referred to in subsection (1), the Building Dispute Commissioner may rely on one or more of the following:
- (a) information obtained by an Officer;
  - (b) a report provided to the Building Dispute Commissioner by an Officer;

- (c) expert advice obtained, and the results of tests procured, by the Building Dispute Commissioner under section 50;
- (d) other information and advice the Building Dispute Commissioner obtains in any manner, and from any person, he or she considers appropriate.

**59. Publication of Rectification Order**

- (1) If the Building Dispute Commissioner makes a Rectification Order, he or she may publish the Rectification Order or details of the Rectification Order without the consent of the parties to the dispute and in such manner as he or she considers appropriate.
- (2) If the Building Dispute Commissioner publishes the Rectification Order or the details of the Rectification Order on the internet, the Building Dispute Commissioner is to remove the Order or details from the internet within 3 years after the Order was made.

**60. Effect of Rectification Order**

- (1) A person who is required to do, or refrain from doing, any thing by a Rectification Order must comply with the Rectification Order.

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- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
  - (b) an individual, a fine not exceeding 50 penalty units.
- (2) The Building Dispute Commissioner may notify –
  - (a) the Director of Building Control of a failure by a building practitioner, within the meaning of the *Building Act 2000*, to comply with a Rectification Order if the Building Dispute Commissioner becomes aware of such a failure; and
  - (b) the Administrator of Occupational Licensing appointed under section 10 of the *Occupational Licensing Act 2005* of a failure by a contractor, or practitioner, within the meaning of that Act, to comply with a Rectification Order if the Building Dispute Commissioner becomes aware of such a failure.
- (3) The failure of a building practitioner, within the meaning of the *Building Act 2000*, to comply with a Rectification Order made by the Building Dispute Commissioner is professional misconduct for the purposes of the *Building Act 2000* and the Building Dispute Commissioner may provide a report of that failure to the Director of Building Control and the relevant council.

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- (4) For the purposes of the *Building Act 2000* –
  - (a) a report provided to the Director of Building Control under subsection (3) is taken to be a complaint made by the Building Dispute Commissioner under section 32 of that Act; and
  - (b) the Director of Building Control is not required, under section 32(2)(c) of that Act, to provide a statutory declaration in support of the report.
- (5) The failure of a contractor, or practitioner, within the meaning of the *Occupational Licensing Act 2005*, to comply with a Rectification Order is improper conduct for the purposes of section 90 of that Act and the Building Dispute Commissioner may provide a report of that failure to the Administrator, within the meaning of that Act.
- (6) If a Rectification Order requires a person to pay a sum of money to another person, whether or not conditional on the taking or completion of some other action required by the Rectification Order, and the person fails to comply with the Rectification Order, that sum of money is a debt due and owing to the other person from the date of that failure to comply.

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**61. Notifying of failure to comply with Rectification Order**

If a person who has the benefit of a Rectification Order considers that another person has failed to comply with the Rectification Order, that person may notify the Building Dispute Commissioner, in writing, of that failure.

*Subdivision 4 – Dismissal of referral of dispute*

**62. Requirement to dismiss certain referrals of disputes after completion of investigation**

In making a determination under section 52 as to whether to refer a dispute to an approved mediator, make a Rectification Order or dismiss a referral of a dispute, the Building Dispute Commissioner –

- (a) is to dismiss the referral if not satisfied that the referral relates to one or more of the matters specified in section 58(1); and
- (b) may dismiss the referral if satisfied that the dispute referrer has failed to take reasonable steps to resolve the dispute.

*Division 4 – Dispute Records of Agreement*

**63. Dispute Record of Agreement**

- (1) In this section –



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*parties* to a dispute includes, in the case of a referral in relation to which the Building Dispute Commissioner has not made a determination under section 38, persons who would be parties to the dispute if the Building Dispute Commissioner had determined under that section that the referral of the dispute is to be investigated.

- (2) If the parties to a dispute agree to a resolution of a matter in dispute –
- (a) as a result of the facilitation by the Building Dispute Commissioner of an early resolution under section 40; or
  - (b) through conciliation or mediation or any other process before the completion of the investigation of that dispute –

the Building Dispute Commissioner, Officer or approved mediator present at the time the parties agree to the resolution is to prepare a Dispute Record of Agreement.

- (3) A Dispute Record of Agreement –
- (a) is to set out –
    - (i) the terms of the agreement of the parties to the dispute for the resolution of the matter in dispute, including any action to be taken, and any payment to be made, by a party; and

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- (ii) the time within which that action or payment is to be taken or made; and
- (b) is to be signed by –
  - (i) each party to the dispute who has agreed to the resolution of the matter in dispute; and
  - (ii) the Building Dispute Commissioner, Officer or approved mediator who was present at the time the parties agreed to the resolution of the matter in dispute.
- (4) A Dispute Record of Agreement may include –
  - (a) action to be taken by a party to the dispute in relation to a matter that is not the subject of the referral of the dispute but could be the subject matter of a referral of a dispute; and
  - (b) an agreement that the dispute respondent pay to the dispute referrer an amount equal to the whole or part of the inspection fee paid by the dispute referrer to the Building Dispute Commissioner; and
  - (c) any matter the Building Dispute Commissioner, Officer or approved mediator preparing the Dispute Record of

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Agreement considers appropriate to be included.

- (5) If the Dispute Record of Agreement is prepared by an Officer or an approved mediator, the Officer or approved mediator is to provide it, once it has been signed by the parties to the dispute, to the Building Dispute Commissioner.
- (6) The Building Dispute Commissioner –
  - (a) is to keep the original signed Dispute Record of Agreement; and
  - (b) is to provide each party to the dispute with a copy of the Dispute Record of Agreement as soon as practicable after it has been signed by the parties to the dispute unless the Building Dispute Commissioner is satisfied that the Officer or approved mediator who prepared the Dispute Record of Agreement has provided that party with a copy of it already.

**64. Compliance with Dispute Record of Agreement**

- (1) A person who is required to do or refrain from doing any thing by a Dispute Record of Agreement must comply with the Dispute Record of Agreement.

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- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
  - (b) an individual, a fine not exceeding 50 penalty units.
- (2) It is a defence in proceeding for an offence under subsection (1) if the person establishes –
- (a) that the person was unable to comply with the Dispute Record of Agreement; or
  - (b) that the action, or failure to do any thing, of another party to the Dispute Record of Agreement prevented or made it unreasonably difficult for the person to comply with that Agreement; or
  - (c) that the person and all other parties to the Dispute Record of Agreement who may be affected by the failure to comply with that Agreement had made a later agreement (whether or not a Dispute Record of Agreement) conflicting with the Dispute Record of Agreement in relation to the action, or refraining from action, that is the subject of that failure to comply; or
  - (d) any other ground for a defence prescribed by the regulations.

**65. Notifying of failure to comply with Dispute Record of Agreement**

(1) In this section –

*resolution period* has the same meaning as in section 66.

(2) If a person who has the benefit of a Dispute Record of Agreement considers that another person has failed to comply with the Dispute Record of Agreement, that person may notify the Building Dispute Commissioner, in writing, of that failure within the resolution period.

(3) On receiving notice that a person has failed to comply with a Dispute Record of Agreement, the Building Dispute Commissioner is to notify, in writing, all other parties to that Agreement –

(a) of the receipt of that notice; and

(b) that the Dispute Record of Agreement has ceased to have effect.

**66. Effect of Dispute Record of Agreement for this Act**

(1) In this section –

*parties* to a dispute includes, in the case of a referral in relation to which the Building Dispute Commissioner has not made a determination under section 38, a person who would be a party to the dispute if the Building Dispute Commissioner had

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determined under that section that the referral of the dispute be investigated;

***resolution period*** means the period commencing when a Dispute Record of Agreement is prepared and signed in accordance with section 63 and ending when whichever of the following first occurs:

- (a) a party to the dispute named in that Dispute Record of Agreement notifies the Building Dispute Commissioner, in writing, that another party named in that Agreement has failed to comply with it;
- (b) the expiration of –
  - (i) the period of 10 clear days; or
  - (ii) the extended period allowed by the Building Dispute Commissioner under subsection (2) –

commencing on the end of the day by which, under that Dispute Record of Agreement, all actions and payments are to be taken and made.

- (2) On his or her own motion or the application of a party to the dispute specified in the Dispute

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Record of Agreement, the Building Dispute Commissioner may extend the period of 10 clear days specified in paragraph (b)(i) of the definition of *resolution period* in subsection (1) by notifying each party to the dispute named in that Dispute Record of Agreement.

- (3) If a Dispute Record of Agreement is prepared in relation to a matter in dispute and –
- (a) if the referral of the dispute in relation to that matter has not been assessed under section 37, the Building Dispute Commissioner is not to proceed to so assess the referral of that matter; or
  - (b) if the referral of the dispute in relation to that matter is the subject of an investigation that has not been completed –
    - (i) the investigation is not, during the resolution period, to continue; and
    - (ii) the Building Dispute Commissioner is not, during the resolution period, to proceed to make a Rectification Order in relation to the matter or dismiss the referral in so far as it relates to the matter.
- (4) If before the end of the resolution period a party to the dispute named in the Dispute Record of Agreement notifies the Building Dispute

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Commissioner, in writing, that another named party has failed to comply with the Dispute Record of Agreement, the Dispute Record of Agreement ceases to have effect and the Building Dispute Commissioner may do one or more of the following:

- (a) if the Building Dispute Commissioner has not made a determination in relation to the matter that is the subject of the Dispute Record of Agreement, proceed to assess, under section 37, the referral of the matter;
- (b) if the matter that is the subject of the Dispute Record of Agreement is the subject of an investigation that has not been completed, ensure that the investigation of the matter is continued;
- (c) if the Dispute Record of Agreement is the result of mediation that the parties to the dispute were required to attend by the determination of the Building Dispute Commissioner under section 52(1)(a), must proceed under section 52(1)(b) or (c) –
  - (i) to make a Rectification Order in relation to the matter that is the subject of that Dispute Record of Agreement; or



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- (ii) dismiss the referral or the referral in so far as it relates to that matter.
- (5) If, at the end of the resolution period the Building Dispute Commissioner has not been notified, in writing, by a party named in the Dispute Record of Agreement that another named party has failed to comply with that Dispute Record of Agreement –
- (a) the Building Dispute Commissioner, if satisfied that all parties have complied with that Dispute Record of Agreement –
    - (i) is to notify each party to the dispute, in writing, that the matter has been resolved and that he or she will take no further action on the referral of the dispute, or the referral of dispute in relation to that matter; and
    - (ii) is to take no further action under this Act, and to ensure that an investigation is not conducted or continued, on the referral of the dispute, or the referral of dispute in relation to that matter, as the case requires; or
  - (b) the Building Dispute Commissioner, if not so satisfied, may proceed under subsection (4) as if he or she had been notified, in writing, by a party named in

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the Dispute Record of Agreement that another named party had failed to comply with that Dispute Record of Agreement.

- (6) For the purposes of subsection (5), the Building Dispute Commissioner may be satisfied that all parties have complied with a Dispute Record of Agreement solely on the basis that he or she has not been notified, as referred to in that subsection, that a party has failed to comply with it.

**67. Effect of Dispute Record of Agreement for certain other Acts**

- (1) The Building Dispute Commissioner may notify –
- (a) the Director of Building Control of a failure by a building practitioner, within the meaning of the *Building Act 2000*, to comply with a Dispute Record of Agreement if the Building Dispute Commissioner becomes aware of such a failure; and
  - (b) the Administrator of Occupational Licensing appointed under section 10 of the *Occupational Licensing Act 2005* of a failure by a contractor, or practitioner, within the meaning of that Act, to comply with a Dispute Record of Agreement if the Building Dispute

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Commissioner becomes aware of such a failure.

- (2) The failure of a building practitioner, within the meaning of the *Building Act 2000*, to comply with a Dispute Record of Agreement made by the Building Dispute Commissioner is professional misconduct for the purposes of the *Building Act 2000*.
- (3) The failure of a contractor, or practitioner, within the meaning of the *Occupational Licensing Act 2005*, to comply with a Dispute Record of Agreement is improper conduct for the purposes of section 90 of that Act.
- (4) If a Dispute Record of Agreement requires a person to pay a sum of money to another person, whether or not conditional on the taking or completion of some other action required by the Dispute Record of Agreement, and the person fails to comply with the Dispute Record of Agreement, that sum of money is a debt due and owing to the other person from the date of that failure to comply.

*Division 5 – Appeals from determinations, &c.*

**68. Appeal from determination, &c., by Building Dispute Commissioner or Officer**

- (1) In this section –

*Appeal Tribunal* means the Resource Management and Planning Appeal

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Tribunal established under section 5 of the *Resource Management and Planning Appeal Tribunal Act 1993*.

- (2) A person aggrieved by any of the following determinations, requirements or recommendations of the Building Dispute Commissioner or an Officer may appeal to the Appeal Tribunal:
- (a) the making of a Rectification Order under section 52;
  - (b) the dismissal, under section 38, 49 or 52, of a referral of a dispute, or of a referral of a dispute in so far as it relates to a particular matter;
  - (c) the recommendation or requirement by an Officer or the Building Dispute Commissioner, under section 47 or 52, that the parties to a dispute or a particular matter in dispute attend mediation with an approved mediator appointed by the Building Dispute Commissioner.
- (3) The Appeal Tribunal is to hear and determine an appeal under this section in accordance with the *Resource Management and Planning Appeal Tribunal Act 1993*.
- (4) For the purposes of section 14(1) of the *Resource Management and Planning Appeal Tribunal Act 1993*, the following persons are parties to an appeal under this section:

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- (a) the Building Dispute Commissioner or Officer who made the determination, requirement or recommendation appealed against;
  - (b) the dispute referrer;
  - (c) all dispute respondents.
- (5) Section 14(2) of the *Resource Management and Planning Appeal Tribunal Act 1993* does not apply to an appeal under this section.
- (6) If a person under this section appeals against a determination, requirement or recommendation of the Building Dispute Commissioner or an Officer, the operation of that determination, requirement or recommendation is suspended until the appeal is determined.

***Division 6 – Miscellaneous***

**69. Building Dispute Commissioner may require information or statutory declaration**

- (1) At any time after a dispute is referred to the Building Dispute Commissioner, he or she may require a party to the dispute, by written notice provided to the party, to do one or both of the following within the reasonable time specified in the notice:
- (a) provide information or documents;

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- (b) verify by statutory declaration all or any part of the referral or information provided.
- (2) The Building Dispute Commissioner may extend the period specified under subsection (1), whether before or after its expiry.
- (3) A person must comply with a requirement made under subsection (1).  

Penalty: Fine not exceeding 50 penalty units.
- (4) Despite subsection (3), a person is not required to provide information or a document if the information or document to be provided is subject to legal professional privilege.
- (5) A person is not excused from complying with a requirement to provide information or a document made under subsection (1) on the ground that the information or document may tend to incriminate the person.
- (6) In proceedings for an offence against this Act, other than for an offence against section 114(1) or (2), information or a document provided, in compliance with a requirement made under subsection (1) is not admissible in evidence against the person if –
  - (a) the person claims before providing the information or document that the answer, information or document may tend to incriminate the person; or

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- (b) the person's entitlement to make a claim of the kind referred to in paragraph (a) was not drawn to the person's attention before the document or information was provided.
- (7) Despite subsections (3) and (5), a person is excused from complying with a requirement to provide information or a document, and made under subsection (1) during an investigation, that does not relate to a matter included in a referral of a dispute on the ground that the information or document may tend to incriminate the person if –
- (a) the person claims to the Building Dispute Commissioner that the information or document may tend to incriminate the person; or
- (b) the person's entitlement to make a claim of the kind referred to in paragraph (a) was not drawn to the person's attention.

**70. Building Dispute Commissioner may order residential building work to stop**

- (1) At any time after a dispute is referred to the Building Dispute Commissioner, he or she may require, by written notice provided to the contractor, that the contractor cease carrying out all residential building work or the residential building work specified in the order, until the requirement is rescinded if the Building Dispute Commissioner considers that there is a

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reasonable possibility that evidence relevant to a matter in dispute may be lost if the work were to continue or for any other reason the Building Dispute Commissioner considers appropriate in the circumstances.

- (2) A requirement under subsection (1) has effect for the period of not more than 30 clear days specified in it.
- (3) The Minister, by notice in writing to the Building Dispute Commissioner, may extend the period referred to in subsection (2) in a particular case if the Minister is of the opinion that the interests of justice require the extension.
- (4) At any time after making a requirement under subsection (1), the Building Dispute Commissioner, by written notice provided to the contractor, may vary or rescind the requirement as he or she considers appropriate.
- (5) The contractor must comply with a requirement made under subsection (1) or such a requirement as varied under subsection (4).

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
- (b) an individual, a fine not exceeding 50 penalty units.



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- (6) A requirement made under subsection (1), or the variation or rescission of such a requirement, takes effect when it is provided to the contractor.
  - (7) On making a requirement under subsection (1) in respect of a contractor, or varying or rescinding such a requirement, the Building Dispute Commissioner is to notify, in writing, each other party to the dispute of the making, varying or rescission of the requirement.

**71. Contractor to comply with residential building work agreement in addition to Dispute Record of Agreement or Rectification Order**

- (1) Compliance by a contractor with a Dispute Record of Agreement or a Rectification Order relating to a residential building work agreement does not absolve the contractor from his or her obligation to complete the residential building work in accordance with the plans and specifications that form part of the residential building work agreement.
- (2) If a contractor cannot complete the residential building work in accordance with the plans and specifications that form part of the residential building work agreement if he or she complies with a Dispute Record of Agreement or Rectification Order –
  - (a) the contractor is to firstly comply with the Dispute Record of Agreement or Rectification Order and then complete the residential building work in

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accordance with the plans and specifications to such extent as remains possible; and

- (b) for all purposes, compliance with the Dispute Record of Agreement or Rectification Order and those plans and specifications as specified in paragraph (a) is sufficient to satisfy the obligation of the contractor to complete the residential building work in accordance with the plans and specifications that form part of the residential building work agreement.

**72. Limitation on commencing court action**

- (1) If a dispute in relation to, or that includes, a particular matter referred to in section 33(1) or section 34(1) has been referred to the Building Dispute Commissioner under that section or the Building Dispute Commissioner has added, under section 44, such a particular matter to the referral of a dispute, a civil action in relation to that matter may not be commenced in any court of competent jurisdiction until any of the following occurs:
  - (a) the referral, or the referral in so far as it relates to that particular matter, has been dismissed under section 38, 49 or 52;
  - (b) the referral, or the referral in so far as it relates to that particular matter, has been withdrawn;

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- (c) the Building Dispute Commissioner under section 66(5) notifies each party to the dispute, or the dispute in so far as it relates to that particular matter, in writing, that the dispute, or the dispute in relation to that particular matter, has been resolved;
  - (d) a Rectification Order is made under section 52 in relation to the referral or the particular matter;
  - (e) the subject matter of the referral, or that particular matter, becomes the subject of a Certificate of Exemption provided under section 73.
- (2) A person who commences a civil action in relation to a matter that is the subject of a Dispute Record of Agreement or a Rectification Order must notify the Building Dispute Commissioner, in writing, of the commencement of the civil action.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 50 penalty units; or
  - (b) an individual, a fine not exceeding 20 penalty units.
- (3) If under any law a person may only commence a civil action within a period specified in that or another law (*limitation period*), the period –

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- (a) commencing when the dispute is referred to the Building Dispute Commissioner or when the Building Dispute Commissioner adds the relevant matter to the referral of a dispute; and
- (b) ending when any of the events specified in subsection (1) occurs –

is not to be taken into account in determining the limitation period.

**73. Certificate of Exemption**

- (1) The Building Dispute Commissioner may determine that it is not appropriate, in a particular case, for a matter referred to in section 33(1) or section 34(1) to be the subject of a referral of a dispute.
- (2) The Building Dispute Commissioner may make a determination under subsection (1) –
  - (a) in the circumstances, or for the reasons, prescribed in the regulations; or
  - (b) in any other circumstances, or for any other reasons, which the Building Dispute Commissioner considers render it inappropriate for the matter to be the subject of a referral of a dispute.
- (3) The Building Dispute Commissioner may make a determination under subsection (1) –
  - (a) at his or her discretion; or

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- (b) on the written application of –
  - (i) the dispute referrer; or
  - (ii) another party to the dispute or, if the Building Dispute Commissioner has not yet made a determination under section 38 as to whether the dispute be investigated or the referral dismissed, a person who may become a party to the dispute should the Building Dispute Commissioner so determine to investigate the dispute.
- (4) The Building Dispute Commissioner may make a determination under subsection (1) at any time after a dispute has been referred to him or her but before any of the following occurs:
  - (a) a Rectification Order is made in relation to the relevant matter;
  - (b) the referral of the dispute, or the referral of the dispute in so far as it relates to the relevant matter, is dismissed;
  - (c) the referral of the dispute is amended by removing the relevant matter;
  - (d) the referral of the dispute, or the referral of the dispute in so far as it relates to the relevant matter, is withdrawn;

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- (e) the referral of the dispute, or the referral of the dispute in so far as it relates to the relevant matter, is the subject of a Dispute Record of Agreement.
- (5) If the Building Dispute Commissioner makes a determination under subsection (1) –
- (a) he or she is to provide a Certificate of Exemption to –
    - (i) the dispute referrer; and
    - (ii) every other party to the dispute or, if the Building Dispute Commissioner has not yet made a determination under section 38 as to whether the dispute be investigated or the referral dismissed, a person who would be a party to the dispute if the Building Dispute Commissioner had so determined to investigate the dispute; and
    - (iii) any other person the Building Dispute Commissioner considers may be interested in the Certificate of Exemption; and
  - (b) any referral of a dispute made only in relation to the matter to which the determination relates is taken to have been withdrawn; and

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- (c) any referral of a dispute made in relation to that matter and to other matters is taken to have been withdrawn in so far as it relates to that matter.

**74. Document may be evidence**

- (1) In any proceedings before a court, each of the following documents signed, or purportedly signed, by the Building Dispute Commissioner is evidence of the matters specified in it:
  - (a) a Dispute Record of Agreement;
  - (b) a written recommendation, report or other document;
  - (c) a recommendation or requirement by the Building Dispute Commissioner that the parties to a dispute attend mediation with an approved mediator appointed by the Building Dispute Commissioner;
  - (d) a Rectification Order;
  - (e) a dismissal of a referral of a dispute, or a referral of a dispute in so far as it relates to a particular matter;
  - (f) a certificate certifying that the Building Dispute Commissioner on a day specified in the certificate received –
    - (i) a withdrawal of a referral of a dispute or a referral of a dispute

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in so far as it relates to a particular matter; or

- (ii) a notice under section 65 by a person stating that another person has failed to comply with a Dispute Record of Agreement.

(2) In any proceedings before a court –

- (a) a Dispute Record of Agreement signed, or purportedly signed, by an Officer is evidence of the matters specified in it; and

- (b) a recommendation that the parties to a dispute attend mediation with an approved mediator appointed by the Building Dispute Commissioner which is signed, or purportedly signed, by an Officer is evidence of the matters specified in it; and

- (c) an investigation report signed, or purportedly signed, by an Officer is evidence of the recommendations contained in the report and the belief of the Officer in the reasons, as set out in the report, for those recommendations.

(3) In any proceedings before a court, a Dispute Record of Agreement signed, or purportedly signed, by an approved mediator is evidence of the matters specified in it.



## **PART 6 – INVESTIGATIONS**

### **75. Investigation conducted by Officer**

An Officer may conduct an investigation –

- (a) for the purposes of investigating a referral of a dispute; or
- (b) to determine whether this Act has been, or is being, contravened.

### **76. Responsibilities of Officer during investigation**

In conducting an investigation, the Officer is to –

- (a) ensure that each party to the dispute is given a reasonable opportunity to provide to the Officer in relation to the matter that is the subject of the dispute written or oral submissions, or both, as the Officer considers appropriate in the circumstances; and
- (b) take reasonable steps, including attempting conciliation and recommending to the parties that they attend mediation with an approved mediator appointed by the Building Dispute Commissioner, to assist the parties to the dispute to resolve it.

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**77. Powers of Officer in investigation**

- (1) During an investigation, an Officer may exercise any one or more of the powers specified in this section for the purposes of the investigation.
- (2) An Officer may require any person –
  - (a) to answer a question; or
  - (b) to provide any information or document in the person's possession or control –that the Officer considers relevant to the investigation.
- (3) In the case of an investigation for the purposes of investigating the referral of a dispute, a requirement made under subsection (2) –
  - (a) must be in writing; and
  - (b) must clearly specify the question, or clearly specify the information, document or class of information or documents, required to be provided; and
  - (c) may only require the person to answer the question or provide the information in writing; and
  - (d) may require the person to provide that written answer or information as a statutory declaration; and

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- (e) must specify a reasonable period within which the person must provide the answer, information or document.
- (4) If in a requirement made under subsection (2) the Officer did not require an answer or information to be provided as a statutory declaration by a person but later considers that it is appropriate to do so, the Officer, in writing, may require the person to verify by statutory declaration the truth of the answer or information provided.
- (5) An Officer, by notice in writing, may require a party to a dispute to attend at the building site or another place, and at the time and on the day, specified in the notice for any of the following purposes:
  - (a) to allow an Officer access to the building site or place;
  - (b) in the case of an investigation to determine whether this Act has been or is being contravened, to answer questions and provide information and documents;
  - (c) to attempt conciliation of a matter in dispute;
  - (d) any other purpose that the Officer considers relevant to the investigation or the resolution of the dispute.
- (6) An Officer may enter, remain in or on and inspect a building site at any reasonable time.

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- (7) Despite subsection (6), an Officer may enter, remain in or on and inspect that part of a building site that is occupied as a residence only –
- (a) with the consent of the owner or an adult person who appears to the Officer to be living in the residence; or
  - (b) in accordance with a warrant issued under section 78.
- (8) While lawfully in or on a building site, an Officer may –
- (a) require a person in or at the building site to provide reasonable assistance in relation to the exercise of the Officer's powers; and
  - (b) examine, seize, make copies of or take extracts from any document in or on the building site; and
  - (c) inspect any thing in or on the building site; and
  - (d) open, or require a person at that building site to open, any shed, cupboard, box or other container in which the Officer considers that something relevant to the investigation may be kept; and
  - (e) move or remove a building or structure, a part of a building or structure or any building materials if the Officer

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- reasonably believes that the investigation cannot be completed without doing so; and
- (f) conduct tests, including the taking of measurements and samples for analysis, as the Officer considers may be relevant to the investigation; and
  - (g) take photographs and film, video, audio, digital and other recordings; and
  - (h) operate at the building site mechanical, electric, electronic and other equipment provided by the Officer; and
  - (i) seize and retain any thing that appears to indicate that an offence against this Act has been, or is being, committed.
- (9) At the request of a person apparently in charge of carrying out residential building work at a building site from which any thing has been seized under subsection (8)(b) or (i) or a person who in the opinion of the Officer would be entitled to possession of such a thing if it had not been so seized, the Officer is to provide a receipt for that thing.
- (10) In exercising powers under this section, an Officer may be accompanied and assisted by –
- (a) persons authorised by the Building Dispute Commissioner for the purpose; and

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- (b) such interpreters as the Officer considers appropriate.
- (11) If an Officer is accompanied and assisted by an interpreter –
- (a) a question asked or a requirement made by the interpreter on behalf of the Officer is taken to have been asked or made by the Officer; and
  - (b) an answer given, or information or a document provided, to the interpreter is taken to have been given or provided to the Officer.
- (12) An Officer is not to exercise his or her powers under this section so as to –
- (a) unnecessarily impede any residential building work being carried out at the building site; or
  - (b) if the building site is a residence, unnecessarily interfere with the quiet enjoyment of the residence by the residents.

**78. Warrant to enter residence**

- (1) An Officer may apply to a justice for a warrant for entry to –
- (a) a place that the Officer believes is a building site if a person who appears to the Officer to be in charge of the place

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has refused to allow the Officer to enter, remain in or inspect the place; or

- (b) that part of a place that is occupied as a residence if the Officer believes the place or occupied part to be a building site and the owner of the residence or an adult person who appears to the Officer to be living in the residence has refused to allow the Officer to enter, remain in or inspect the residence.
- (2) A justice may issue a warrant if satisfied on reasonable grounds that the place, or the whole place or the part of a place occupied as a residence, specified in the application is a building site.
  - (3) A warrant authorises the Officer or any Officer, as specified in the warrant, to exercise the powers specified in section 77 in the place, or the part of a place occupied as a residence, specified in the warrant –
    - (a) at the times specified in the warrant or, if no times are specified, at any reasonable time; and
    - (b) subject to any conditions specified in the warrant.
  - (4) In exercising powers under a warrant in a place or a part of a place that is a residence, an Officer may be accompanied by a police officer in addition to any other persons who may accompany an Officer under section 77(10).

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**79. Person must answer questions and comply with requirements**

- (1) A person must comply with a requirement made by an Officer under section 77.

Penalty: Fine not exceeding 50 penalty units.

- (2) Despite subsection (1), a person is not required to answer a question or provide information or a document if the answer would divulge information that is subject to legal professional privilege or the information or document to be provided is subject to legal professional privilege.
- (3) A person is not excused from answering a question asked by, or complying with a requirement to provide information or a document made by, an Officer under section 77 on the ground that the answer, information or document may tend to incriminate the person.
- (4) In proceedings for an offence against this Act, other than for an offence against section 114(1) or (2), an answer given, or information or a document provided, in compliance with a requirement made by an Officer under section 77 is not admissible in evidence against the person if –
- (a) the person claims before giving the answer or providing the information or document that the answer, information or document may tend to incriminate the person; or



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- (b) the person's entitlement to make a claim of the kind referred to in paragraph (a) was not drawn to the person's attention before the answer was given or the document or information provided.
- (5) Despite subsections (1) and (3), a person is excused from answering a question asked by, or complying with a requirement to provide information or a document made by, an Officer under section 77 during an investigation that does not relate to a matter included in a referral of a dispute on the ground that the answer, information or document may tend to incriminate the person if –
  - (a) the person claims to the Officer that the answer, information or document may tend to incriminate the person; or
  - (b) the person's entitlement to make a claim of the kind referred to in paragraph (a) was not drawn to the person's attention.

**80. Building Dispute Commissioner may report contravention of *Building Act 2000*, &c.**

- (1) If as a result of an investigation the Building Dispute Commissioner is of the opinion that a person –
  - (a) may have contravened the *Building Act 2000* in respect of residential building work; or

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- (b) has, in respect of residential building work, otherwise engaged in conduct that may be professional misconduct, or unsatisfactory professional conduct, under that Act –

the Building Dispute Commissioner may provide a report of that opinion and the reasons for the opinion to the Director of Building Control and the relevant council.

- (2) For the purposes of the *Building Act 2000* –
  - (a) a report provided to the Director of Building Control under subsection (1) is taken to be a complaint made by the Building Dispute Commissioner under section 32 of that Act; and
  - (b) the Director of Building Control is not required, under section 32(2)(c) of that Act, to provide a statutory declaration in support of the report.

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**PART 7 – ADMINISTRATION AND FINANCIAL  
MATTERS**

*Division 1 – Building Dispute Commissioner*

**81. Building Dispute Commissioner**

- (1) Subject to subsection (3), the Building Dispute Commissioner is to be –
  - (a) a State Service officer or State Service employee appointed by the Minister as the Building Dispute Commissioner; or
  - (b) if the Minister so determines in writing, a person appointed under subsection (2).
- (2) Subject to and in accordance with the *State Service Act 2000*, a person may be appointed to be the Building Dispute Commissioner for the purposes of this Act.
- (3) The person holding the office of Director of Building Control is not entitled to be appointed as the Building Dispute Commissioner.

**82. Functions and powers of Building Dispute Commissioner**

- (1) The Building Dispute Commissioner has –
  - (a) the functions imposed by this and any other Act; and

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- (b) such other functions as may be prescribed by the regulations.
- (2) The Building Dispute Commissioner has –
  - (a) the power to do all things necessary or convenient to perform his or her functions; and
  - (b) the powers given by this and any other Act; and
  - (c) such other powers as may be prescribed by the regulations.

**83. Assistance to Building Dispute Commissioner**

- (1) The Building Dispute Commissioner may make arrangements with the Head of an Agency, within the meaning of the *State Service Act 2000*, for State Service officers and State Service employees employed in, or for the purposes of, that Agency to be made available to the Building Dispute Commissioner to enable the Building Dispute Commissioner to perform his or her functions and exercise his or her powers under this Act.
- (2) A State Service officer or a State Service employee may be made available to the Building Dispute Commissioner in conjunction with a position in the State Service.

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**84. Guidelines of Building Dispute Commissioner**

- (1) The Building Dispute Commissioner may issue guidelines for the purposes of this Act.
- (2) The Building Dispute Commissioner may publish the guidelines in such manner, and at such times, as he or she considers appropriate.

**85. Delegation**

The Building Dispute Commissioner may delegate to a State Service officer or State Service employee made available to the Building Dispute Commissioner under section 83 any of his or her functions or powers under this Act, other than this power of delegation.

**86. Grounds for determination or formation of opinion**

For the purposes of making a determination or forming an opinion or belief under this Act, the Building Dispute Commissioner may rely on one or more of the following:

- (a) information obtained by an Officer;
- (b) a report provided to the Building Dispute Commissioner by an Officer;
- (c) expert advice obtained, and the results of tests procured, by the Building Dispute Commissioner under section 50;

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- (d) a report provided to the Building Dispute Commissioner by a mediator under section 102;
- (e) other information and advice the Building Dispute Commissioner obtains in any manner, and from any person, he or she considers appropriate.

***Division 2 – Building Dispute Officers***

**87. Appointment of Building Dispute Officers**

- (1) The Building Dispute Commissioner may appoint as a Building Dispute Officer –
  - (a) a State Service officer or State Service employee made available to the Building Dispute Commissioner under section 83 as a Building Dispute Officer; or
  - (b) with the consent of the Secretary of the Department, a person employed in the public service of the Commonwealth, a Territory or another State and made available to the Building Dispute Commissioner.
- (2) A Building Dispute Officer is appointed on the terms and conditions specified in his or her instrument of appointment.

**88. Qualifications of Officer**

The Building Dispute Commissioner may require Officers to hold or obtain the qualifications he or she considers necessary or appropriate for the performance of the functions of an Officer.

**89. Functions and powers of Officers**

(1) An Officer has the following functions:

- (a) to conduct investigations under this Act, including undertaking conciliation between the parties to a dispute;
- (b) the functions imposed by this and any other Act;
- (c) such other functions as may be prescribed by the regulations.

(2) An Officer has –

- (a) the powers given by this and any other Act; and
- (b) such other powers as may be prescribed by the regulations.

**90. Offences in relation to Officer, &c.**

A person must not, without lawful excuse –

- (a) obstruct, delay, threaten or attempt to intimidate –

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(i) an Officer; or

(ii) an interpreter, or other person, who is assisting an Officer under section 77(10) –

in the performance and exercise of his or her functions and powers under this Act; or

(b) directly or indirectly prevent, or attempt to prevent, another person from appearing before or being questioned by an Officer.

Penalty: In the case of –

(a) a body corporate or partnership, a fine not exceeding 100 penalty units; or

(b) an individual, a fine not exceeding 50 penalty units.

***Division 3 – Approved mediators***

**91. Maximum number of mediators**

The Building Dispute Commissioner may determine the maximum number of persons who may be approved mediators.



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**92. Approval of mediators**

- (1) The Building Dispute Commissioner, in such manner and at such times as he or she considers appropriate, may call for applications by persons to be approved as mediators.
- (2) A person, in response to a call by the Building Dispute Commissioner under subsection (1) or at any other time, may apply in writing to the Building Dispute Commissioner to be approved as a mediator.
- (3) On receipt of the application of a person –
  - (a) the Building Dispute Commissioner, if satisfied that the person has appropriate qualifications, must approve that person as a mediator unless subsection (4) applies; or
  - (b) the Building Dispute Commissioner, if not so satisfied, must not approve that person as a mediator.
- (4) The Building Dispute Commissioner must not approve a person as a mediator in relation to a matter specified in section 33(1) or section 34(1) if to do so would cause any maximum number of approved mediators determined under section 91 to be exceeded.
- (5) The Building Dispute Commissioner may approve an applicant as a mediator –

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- (a) in relation to such matters specified in section 33(1) or section 34(1) as the Building Dispute Commissioner considers appropriate; and
  - (b) subject to such conditions as the Building Dispute Commissioner considers appropriate.
- (6) In determining whether an applicant has appropriate qualifications and experience to be approved as a mediator or whether such approval is to relate only to certain matters specified in section 33(1) or section 34(1) or to be subject to conditions, the Building Dispute Commissioner is to comply with any guidelines issued by the Minister.
- (7) The Building Dispute Commissioner is to notify an applicant, in writing, as to whether or not he or she is approved as a mediator and –
  - (a) if so approved, of the matters referred to in section 33(1) or section 34(1) to which the approval relates and of any conditions to which the approval is subject; or
  - (b) if not so approved, the reasons for the refusal to approve the person as a mediator.
- (8) A person aggrieved by any of the following decisions of the Building Dispute Commissioner may apply to the Magistrates Court (Administrative Appeals Division) for a review

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of that decision and that decision is a reviewable decision for the purposes of the *Magistrates Court (Administrative Appeals Division) Act 2001*:

- (a) the decision not to approve the person as a mediator;
- (b) the decision not to approve the person as a mediator in relation to a particular matter specified in section 33(1) or section 34(1);
- (c) the decision to make the approval of a person as a mediator subject to a condition.

**93. Variation of matters to which approval relates or conditions of approval as mediator**

- (1) The Building Dispute Commissioner, at any time by notice provided to an approved mediator, may –
  - (a) vary the matters to which the approval as a mediator relates by doing one or more of the following:
    - (i) adding a matter under section 33(1) or section 34(1) to which the approval relates;
    - (ii) removing a matter from the matters under section 33(1) or

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section 34(1) to which the approval relates; or

- (b) vary the conditions to which the approval as a mediator is subject by doing one or more of the following:
  - (i) adding a condition;
  - (ii) amending a condition;
  - (iii) omitting a condition.
- (2) An approved mediator aggrieved by the decision of the Building Dispute Commissioner to vary the matters to which the approval relates or the conditions to which the approval is subject may apply to the Magistrates Court (Administrative Appeals Division) for a review of that decision and that decision is a reviewable decision for the purposes of the *Magistrates Court (Administrative Appeals Division) Act 2001*.

**94. Register of approved mediators**

- (1) The Building Dispute Commissioner is to maintain an up-to-date register of persons approved as mediators.
- (2) The Building Dispute Commissioner may publish the register in such manner, and at such times, as he or she considers appropriate.

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**95. Revocation of approval as mediator**

- (1) The Building Dispute Commissioner, by notice provided to an approved mediator, may revoke his or her approval of that person as a mediator if –
  - (a) the approved mediator has notified the Building Dispute Commissioner in writing that he or she no longer agrees to be an approved mediator; or
  - (b) the Building Dispute Commissioner is satisfied that the approved mediator no longer has the qualifications or experience appropriate to be an approved mediator; or
  - (c) the Building Dispute Commissioner is satisfied that the approved mediator has contravened this Act or the conditions to which the approval is subject; or
  - (d) for any other reason specified in guidelines issued by the Minister or prescribed by the regulations.
- (2) A person aggrieved by the decision of the Building Dispute Commissioner to revoke the person's approval as a mediator may apply to the Magistrates Court (Administrative Appeals Division) for a review of that decision and that decision is a reviewable decision for the purposes of the *Magistrates Court (Administrative Appeals Division) Act 2001*.

**96. Appointment of approved mediator**

In appointing an approved mediator in respect of a referral of a dispute relating to a matter referred to in section 33(1) or section 34(1), the Building Dispute Commissioner is to appoint an approved mediator who is entitled to mediate such a matter.

**97. Conducting mediation**

In conducting mediation sessions, an approved mediator is to comply with the regulations and any guidelines issued by the Building Dispute Commissioner.

**98. Withdrawal of party from mediation**

If parties to a dispute have been recommended or required to attend mediation under this Act, any of those parties may withdraw from mediation at any time.

**99. Approved mediator may recommend cessation of mediation**

If, at any time during the conduct of mediation sessions between the parties to a dispute, the approved mediator considers that –

- (a) the mediation is unlikely to result in the resolution of the matter which is the subject of the mediation; or

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- (b) it would be unfair to a party to the dispute to allow the mediation to continue; or
- (c) it is appropriate for any other reason to do so –

the approved mediator may recommend to the Building Dispute Commissioner that no further mediation in relation to the matter should be conducted.

**100. Building Dispute Commissioner may conclude mediation**

If at any time after the parties to a dispute have been recommended or required to attend mediation under this Act, the Building Dispute Commissioner considers that –

- (a) the mediation is unlikely to result in the resolution of the matter which is the subject of the mediation; or
- (b) although the mediation is ongoing, the period set out in guidelines issued by the Building Dispute Commissioner for the completion of mediation has ended and the circumstances do not justify the extension of that period; or
- (c) it would be unfair to a party to the dispute to allow the mediation to continue; or

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- (d) it is appropriate for any other reason to do so –

the Building Dispute Commissioner may provide notice, in writing, to each party recommended or required to attend mediation and to the approved mediator that no further mediation in relation to the matter is to be conducted.

**101. When mediation is concluded**

Mediation in relation to a matter is concluded when any of the following occurs:

- (a) the parties to the dispute who are recommended or required to attend mediation agree to a resolution of the matter;
- (b) such a party withdraws from mediation or refuses to attend mediation in relation to the matter;
- (c) those parties agree to conclude the mediation in relation to the matter;
- (d) the Building Dispute Commissioner provides notice under section 100 that no further mediation in relation to the matter is to be conducted.



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**102. Report by approved mediator**

- (1) When mediation between parties to a dispute are concluded, the approved mediator is to provide a report to the Building Dispute Commissioner.
- (2) The report is to contain only the following information:
  - (a) if the parties to the dispute agree to a resolution of a matter, a statement that an agreement has been reached and a Dispute Record of Agreement prepared and signed in accordance with section 63;
  - (b) a statement that mediation has been concluded;
  - (c) a statement as to whether a party to the dispute –
    - (i) has withdrawn from mediation, or refused to attend mediation when it has been recommended or required under this Act; or
    - (ii) in the opinion of the mediator, has acted or not acted in good faith in the mediation sessions towards finding a resolution to the matter in relation to which mediation was conducted.
- (3) Any offer or admission made during mediation, other than an offer that is or forms part of the

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resolution of a matter as referred to in subsection (2)(a), may not be mentioned in the report.

- (4) The Building Dispute Commissioner may only use a report for the purposes of –
  - (a) ensuring that a Dispute Record of Agreement referred to in the report has been provided to him or her; or
  - (b) determining under any provision of this Act whether to dismiss a referral of a dispute, or a referral of a dispute in so far as it relates to a particular matter, on the basis that the dispute referrer has failed to take reasonable steps to resolve the dispute or matter.
- (5) The report may not be used as evidence of any offer, admission or other matter in proceedings in any court or other tribunal other than in proceedings on an appeal under section 68 as evidence supporting or contradicting the grounds on which the determination of the Building Dispute Commissioner to dismiss the referral of a dispute, or the referral of a dispute in so far as it relates to a particular matter, being grounds that the dispute referrer has failed to take reasonable steps to resolve the dispute or the dispute in relation to the particular matter.
- (6) If a report makes a statement in respect of any of the matters referred to in subsection (2)(c), the Building Dispute Commissioner is entitled to

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rely on that statement in making any determination, or taking any action, under this Act.

**103. Action following conclusion of mediation**

On the conclusion of mediation in relation to a matter, the Building Dispute Commissioner, as appropriate, may –

- (a) proceed under section 37 to assess the referral of the dispute; or
- (b) continue with the investigation of the dispute; or
- (c) proceed under section 52 to make a Rectification Order, dismiss the referral of the dispute or make a Rectification Order but also dismiss the referral of the dispute in so far as it relates to a particular matter.

**104. Disqualification of approved mediator**

- (1) An approved mediator is disqualified from conducting mediation sessions in relation to a dispute relating to a matter referred to in section 33(1) or section 34(1) if he or she has a material personal interest in the relevant residential building work agreement, the relevant residential building work or a party to the dispute.

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- (2) As soon as practicable after becoming aware that he or she is disqualified from conducting mediation sessions in relation to a dispute relating to a matter referred to in section 33(1) or section 34(1), the approved mediator must –
  - (a) cease conducting mediation sessions; and
  - (b) notify, in writing, each party to the dispute referred to mediation and the Building Dispute Commissioner of that disqualification.
- (3) Any agreement reached by the parties to a dispute while attending mediation sessions with a disqualified approved mediator is void.
- (4) A disqualified approved mediator is entitled to charge fees for mediation sessions conducted, and costs incurred, before he or she became aware, or ought to have become aware, that he or she was disqualified.
- (5) On receiving notice from an approved mediator that he or she is disqualified, the Building Dispute Commissioner must appoint another approved mediator for the purposes of the referral of the parties to mediation.

**105. Costs of mediation**

- (1) An approved mediator may charge reasonable fees for, and recover the reasonable costs incurred in, conducting mediation sessions and

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providing a report to the Building Dispute Commissioner.

- (2) The parties to a dispute who are referred to an approved mediator appointed by the Building Dispute Commissioner –
- (a) are jointly and severally liable to pay the reasonable fees and costs of the approved mediator; and
  - (b) are each liable to contribute to the payment of those fees and costs in equal proportions or, if the approved mediator determines different proportions, in the proportions so determined.

**106. Confidentiality**

An approved mediator must not disclose any information obtained in conducting mediation sessions to any person except –

- (a) to the Building Dispute Commissioner or another person involved in the administration of this Act in the course of the approved mediator's obligations under this Act; or
- (b) with the consent of all parties to the dispute who were referred to the mediation; or
- (c) as required by, or with the consent of, a court.

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Penalty: Fine not exceeding 100 penalty units.

***Division 4 – Residential Building Administration Fund***

**107. Residential Building Administration Fund**

- (1) The Building Dispute Commissioner is to establish and maintain a fund to be called the “Residential Building Administration Fund”.
- (2) The following monies are to be paid into the Residential Building Administration Fund:
  - (a) all fees paid to the Building Dispute Commissioner in relation to an application or referral of a dispute under this Act;
  - (b) all investigation fees paid to the Building Dispute Commissioner under section 46;
  - (c) all money paid in response to the issue of an infringement notice in respect of an infringement offence;
  - (d) all other money received by the Building Dispute Commissioner in the course of the performance of functions and the exercise of powers under this Act by the Building Dispute Commissioner or an Officer;
  - (e) money appropriated by Parliament for the purposes of the Building Dispute Commissioner or the administration of this Act;

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- (f) all other money paid to the Building Dispute Commissioner for the purpose of providing a process for the resolution of disputes or for the administration of this Act;
  - (g) income from the investment of the Fund.
- (3) The Residential Building Administration Fund may be applied as follows:
- (a) in the payment or discharge of the costs, expenses, charges and obligations incurred or undertaken in the administration and enforcement of this Act, including but not limited to the costs of providing education programs for contractors and clients in relation to the carrying out of residential building work and the operation of this Act;
  - (b) in any other manner authorised or required under this or any other Act.

**108. Investment of Residential Building Administration Fund**

The Building Dispute Commissioner may invest the Residential Building Administration Fund or any part of that Fund in a manner approved, and in accordance with any conditions determined, by the Treasurer.

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***Division 5 – Residential Building Trust Fund***

**109. Residential Building Trust Fund**

- (1) The Building Dispute Commissioner is to establish and maintain a fund to be called the “Residential Building Trust Fund”.
- (2) The following monies are to be paid into the Residential Building Trust Fund:
  - (a) all money ordered to be paid into the Fund under a Rectification Order;
  - (b) all money paid by a person to the Building Dispute Commissioner in trust for payment to another person in relation to the resolution of a dispute;
  - (c) income from the investment of the Fund.
- (3) The Residential Building Trust Fund may be applied as follows:
  - (a) in the payment of money to a party to a dispute or another person in accordance with a Rectification Order;
  - (b) in the payment of money to a party to a dispute or another person entitled to the money under an agreement made during the resolution of the dispute;
  - (c) as prescribed by the regulations.



## **110. Investment of Residential Building Trust Fund**

The Building Dispute Commissioner may invest the Residential Building Trust Fund or any part of that Fund in a manner in which trustees are authorised to invest trust funds under the *Trustee Act 1898*.

### *Division 6 – Infringement notices*

## **111. Infringement notice**

- (1) The Building Dispute Commissioner may issue and serve an infringement notice on a person if the Building Dispute Commissioner reasonably believes that an infringement offence has been committed.
- (2) An infringement notice may not be served on an individual who has not attained the age of 16 years.
- (3) An infringement notice –
  - (a) is to be in accordance with section 14 of the *Monetary Penalties Enforcement Act 2005*; and
  - (b) is not to relate to more than 3 infringement offences.
- (4) The regulations –
  - (a) may prescribe the penalty applicable to each infringement offence that is payable under an infringement notice; and

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- (b) may prescribe different penalties for bodies corporate, partnerships and individuals.
- (5) The penalty prescribed in the regulations for an infringement offence is not to exceed 20% of the maximum penalty that could be imposed on, as the case requires, the body corporate, partnership or individual by a court in respect of the offence.

***Division 7 – Ministerial guidelines***

**112. Ministerial guidelines**

- (1) The Minister may issue guidelines for the purposes of this Act.
- (2) The guidelines may make provision in relation to –
  - (a) the making by the Building Dispute Commissioner of a determination as to whether –
    - (i) a person has appropriate qualifications and experience to be approved as a mediator; or
    - (ii) the approval of a person as a mediator is to relate only to certain matters specified in section 33(1) or be subject to conditions; and
  - (b) the reasons for revoking the approval of a person as a mediator; and

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- (c) the making by the Building Dispute Commissioner of a Rectification Order; and
  - (d) such other matters as the Minister considers appropriate.
- (3) The Minister may publish the guidelines in such manner, and at such times, as he or she considers appropriate.

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**113. Avoidance of contracting out**

- (1) Any exclusion, limitation, modification or waiver of a right conferred, or a statutory warranty implied, by this Act is void.
- (2) A contract, agreement or arrangement made or entered into, orally or in writing, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly, defeating, evading or avoiding the requirements of this Act is void.
- (3) A person must not –
  - (a) attempt to exclude, limit, modify or waive a right conferred, or a statutory warranty implied, by this Act; or
  - (b) enter into, orally or in writing, a contract, agreement or arrangement that purports to have the purpose or effect of in any way, directly or indirectly, defeating, evading or avoiding the requirements of this Act.

Penalty: In the case of –

- (a) a body corporate or partnership, a fine not exceeding 100 penalty units; or
- (b) an individual, a fine not exceeding 50 penalty units.

**114. False or misleading statements**

- (1) A person must not, in answering a question or providing information under this Act –
- (a) make a statement knowing it to be false or misleading; or
  - (b) omit any matter from a statement knowing that without that matter the statement is false or misleading.

Penalty: Fine not exceeding 100 penalty units.

- (2) A person must not provide under this Act a document that the person knows to be false or misleading without informing the person to whom the document is provided of that knowledge.

Penalty: Fine not exceeding 100 penalty units.

**115. Proceedings for offence**

Proceedings for an offence against this Act –

- (a) may be instituted by the Building Dispute Commissioner; and
- (b) must be commenced within 3 years after the alleged offence occurred.

**116. Liability of director, &c., if offence by body corporate**

- (1) In this section –

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*officer* has the same meaning as in the Corporations Act;

(2) If –

- (a) a body corporate commits an offence against this Act; and
- (b) it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, an officer of the body corporate or a person who was purporting to act as an officer of the body corporate –

that officer or person, as well as the body corporate, commits the offence.

(3) An officer or other person referred to in subsection (2)(b) may be convicted of the offence referred to in subsection (2) whether or not the body corporate is charged with or convicted of the offence.

**117. Liability of partner if offence by partnership**

(1) If –

- (a) a partnership commits an offence against this Act; and
- (b) it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of –

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- (i) a partner of the partnership; or
- (ii) another person concerned in the management of the partnership; or
- (iii) a person who was purporting to act as such a partner or person concerned in the management of the partnership –

that partner or person, as well as the partnership, commits the offence.

- (2) A partner or person referred to in subsection (1)(b) may be convicted of the offence referred to in subsection (1) whether or not the partnership is charged with or convicted of the offence.

**118. Protection from liability**

- (1) A person engaged in the administration of this Act, including but not limited to an approved mediator, interpreter and person assisting the Building Dispute Commissioner, does not incur any personal liability in respect of any act done, or omitted, in good faith in the performance or exercise, or purported performance or exercise, of a function or power under this Act.
- (2) A liability that would, but for subsection (1), attach to a person attaches to the Crown.

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**119. Regulations**

- (1) The Governor may make regulations for the purposes of this Act.
- (2) Without limiting the generality of subsection (1), the regulations may –
  - (a) provide for fees and charges payable in respect of any matter under this Act; and
  - (b) provide a model major residential building work contract; and
  - (c) provide that a major residential building work contract or a major residential building work contract of a class of such contracts must include, or must not include, a clause or matter; and
  - (d) provide what is appropriate provision in a variation of a major residential building work contract for payments under the contract to reflect any change of the contract price caused by the variation; and
  - (e) provide for all matters and procedures relating to a referral of a dispute and its resolution, including the making of Rectification Orders by the Building Dispute Commissioner.
- (3) If –



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- (a) the regulations require a major residential building work contract, or a major residential building work contract of a class of such contracts, to contain a clause in prescribed terms; and
- (b) such a contract does not contain that clause –

that contract is taken to include the clause in the prescribed terms, and any other term of the contract that is inconsistent with the clause is unenforceable to the extent of the inconsistency.

- (4) If the regulations provide that any matter must not be included in a major residential building work contract or a major residential building work contract of a class of such contracts, a major residential building work contract that contains that matter is unenforceable to the extent that it includes or applies to that matter.
- (5) A regulation made under subsection (2)(c) does not apply to a major residential building work contract in force at the time that the regulation commences.
- (6) The regulations may be made so as to apply differently according to such factors as are specified in the regulations.
- (7) The regulations may –
  - (a) provide that a contravention of any of the regulations is an offence; and

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- (b) in respect of such an offence, provide for the imposition of a fine not exceeding 50 penalty units and, in the case of a continuing offence, a further fine not exceeding 10 penalty units for each day during which the offence continues.
- (8) The regulations may authorise any matter to be from time to time determined, applied or regulated by the Building Dispute Commissioner.
- (9) The regulations may adopt, either wholly or in part and with or without modification, and either specifically or by reference, any of the standards, rules, codes or specifications of any prescribed authority, whether the standards, rules, codes or specifications are published or issued before or after the commencement of this Act.
- (10) A reference in subsection (9) to standards, rules, codes or specifications includes a reference to an amendment of those standards, rules, codes or specifications, whether the amendment is published or issued before or after the commencement of this Act.
- (11) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act.
- (12) Regulations made under subsection (11) may take effect on the day on which this Act commences or a later day as specified in the regulations, whether the day so specified is

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before, on or after the day on which the regulations are made.

**120. Administration of Act**

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

- (a) the administration of this Act is assigned to the Minister for Workplace Relations; and
- (b) the department responsible to that Minister in relation to the administration of this Act is the Department of Justice.

**121. Repeal of certain Acts, &c.**

- (1) The following Acts are repealed on a day to be proclaimed, being a day not later than 3 years after the commencement of this Act:
  - (a) *Housing Indemnity Act 1992*;
  - (b) *Housing Indemnity Amendment Act 2008*.
- (2) The following statutory rules are rescinded or revoked on the day proclaimed under subsection (1):
  - (a) *Proclamation under the Housing Indemnity Act 1992* (S.R. 1993, No. 95);

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- (b) *Housing Indemnity Regulations 2004* (S.R. 2004, No. 134);
- (c) *Housing Indemnity Amendment Regulations 2005* (S.R. 2005, No. 23);
- (d) *Proclamation under the Housing Indemnity Amendment Act 2008* (S.R. 2008, No. 67).

**122. Consequential amendments**

The legislation specified in Schedule 1 is amended as specified in that Schedule.

**SCHEDULE 1 – CONSEQUENTIAL AMENDMENTS**

Section 122

***Building Act 2000***

1. Section 271(3) is amended by inserting after paragraph (a) the following paragraph:
  - (ab) for the administration of the *Residential Building Work Quality (Warranties and Disputes) Act 2012*; and

***Housing Indemnity Act 1992***

1. After section 5, the following section is inserted in Part 1:
  - 5A. Exclusion of certain building work contracts, &c.**

This Act does not apply to, or in relation to –

- (a) a building work contract that is entered into on or after the day on which the *Residential Building Work Quality (Warranties and Disputes) Act 2012* commences; or
- (b) any building work performed under such a contract.

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***Judicial Review Act 2000***

- 1.** Schedule 1 is amended by inserting after item 7 the following item:
  - 8.** A decision by the Building Dispute Commissioner or a Building Dispute Officer under the *Residential Building Work Quality (Warranties and Disputes) Act 2012*.