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Annual Report of the

# WEATHERTIGHT HOMES TRIBUNAL

For the 12 months ended 30 June 2020

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*Presented to the Minister of Justice and the Minister of Housing*

# WEATHERTIGHT HOMES TRIBUNAL

## OVERVIEW

It is my pleasure to present the annual report of the Tribunal for the period commencing 1 July 2019 and ending on 30 June 2020.

The Tribunal is a well performing judicial body producing high quality and timely decisions and orders. The financial year saw a continuation of the decline in the number of new claims commenced compared with the previous financial year. We are now well past the peak of 'leaky home' building in this country. As has been the case for a few years now, more claims were finalised than were filed, so the number of outstanding active claims (11) is now small. Notwithstanding this trend, it is expected that the Tribunal will continue to receive new claims at a modest level for some years to come.

In order to improve access to civil justice in this country, Ministers are respectfully urged to consider reform of the tribunal sector, as briefly discussed later.

## JURISDICTION AND GENERAL INFORMATION

### Establishment and Function of the Tribunal

The Tribunal is based in Auckland. It was established in 2007 by section 101 of the Weathertight Homes Resolution Services Act 2006 (the Act). It is part of Government's response to the 'leaky homes crisis' enabling claims by the owners of dwellinghouses (stand-alone homes, townhouses and apartments) to be heard faster and more economically than in the general courts. Claimant owners have the option of suing responsible parties in the Tribunal or the courts.

The claims are typically against one or more of the local territorial authority, builder, sub-contractors, developer, project manager, engineer, architect and occasionally the previous owner. The causes of action are grounded in tort, contract and statutory liability.

The primary function of the Tribunal is to hear and determine under the Act claims for adjudication.<sup>1</sup> It has other secondary functions, as set out in the Act, including reconsidering decisions of the chief executive of the Ministry of Business, Innovation and Employment (MBIE) dismissing claims as ineligible for processing by the Weathertight Homes Resolution Service of MBIE.<sup>2</sup>

The Tribunal is required to manage adjudication proceedings in a manner that best ensures they are speedy, flexible and cost-effective.<sup>3</sup> There are special procedures in relation to lower value claims, being those under \$20,000, in order to ensure they are quickly and efficiently heard and determined. Such claims are rare and there are none currently before the Tribunal.

The Tribunal operates in an inquisitorial or investigative manner, as permitted by the Act.<sup>4</sup> It may grant any remedy that can be claimed in a court of law, though has only limited power to award costs.<sup>5</sup>

The Chair can issue practice directions.<sup>6</sup> There are comprehensive Directions and Guidelines in place.

Decisions of the Tribunal are enforced as orders of the District Court.<sup>7</sup>

The claims brought before the Tribunal range in value from about \$50,000 to the low tens of millions. They concern stand-alone houses, townhouses and apartments. The Tribunal resolves cases throughout New Zealand.

## **Appeals**

A party to a claim determined by the Tribunal may appeal on a question of law or fact arising out of the decision.<sup>8</sup> The appeal will be heard by the District Court if the amount does not exceed \$350,000, otherwise it will be heard by the High Court.<sup>9</sup> An appeal must be filed within 20 working days after the date of the Tribunal's decision, or within such further time as the court may allow.<sup>10</sup>

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<sup>1</sup> Weathertight Homes Resolution Services Act 2006, s 62.

<sup>2</sup> Section 49.

<sup>3</sup> Section 57(1).

<sup>4</sup> Section 73(1)(a).

<sup>5</sup> Sections 50(1), 91.

<sup>6</sup> Section 114.

<sup>7</sup> Section 98(1).

<sup>8</sup> Section 93(1).

<sup>9</sup> Section 93(2).

<sup>10</sup> Section 94(2).

Parties may also seek judicial review of the Tribunal's decisions and orders in the High Court, particularly where an appeal is not available.

### **Publication of Tribunal Decisions**

The Tribunal must give public notice of every determination.<sup>11</sup> However, it can order any part of the evidence or proceedings or the name of any party or other person not to be published.<sup>12</sup> In the interests of open justice, it is rare for the Tribunal to make such orders.

The Tribunal has a website page, accessible as part of the Ministry's website. It is at [www.justice.govt.nz/tribunals/weathertight-homes/](http://www.justice.govt.nz/tribunals/weathertight-homes/). All of the Tribunal's determinations are published on the website.

### **Membership**

Members of the Tribunal are appointed by the Governor-General on the recommendation of the Minister of Justice, after consultation with the Minister of Housing.<sup>13</sup> The Minister of Justice recommends those who, in the opinion of the Minister, are suitable to be appointed having regard to their knowledge, skills and experience.<sup>14</sup>

One of the members is appointed by the Governor-General as Chair of the Tribunal.<sup>15</sup>

There is a code of conduct for members. A comprehensive bench book is available to the members concerning the jurisdiction, procedures and law governing the Tribunal.

### **Registry**

The administrative and financial support of the Tribunal is provided by the Courts and Tribunals division of the Ministry of Justice.

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<sup>11</sup> Section 100(1)(a).

<sup>12</sup> Section 69, clause 14 of Schedule 3.

<sup>13</sup> Section 103(1) & (2).

<sup>14</sup> Section 103(3).

<sup>15</sup> Section 103(4).

The Ministry provides such staff as are necessary for the Tribunal to perform its functions effectively.<sup>16</sup> No Registrar has been appointed, as provided for under the Act.<sup>17</sup>

The day-to-day administration of the Tribunal is headed by Ms Jan Pilkington, service manager. She reports to Ms Jessie Henderson, justice services manager, who is responsible for all tribunals based in Auckland. The Tribunal's long-standing case manager is Ms Kate Bishop, who was assisted by Ms Leena Kumaran until February 2020. Ms Angelberta Wilson joined the team in March 2020. Ms Dianne Turner, judicial personal assistant, provided secretarial services to myself and the members.

The members have access to a legal research team. This team also provides proof reading services, produces abstracts of our decisions for the website and issues a regular newsletter updating members on the relevant law and media articles of interest. Ms Sarah Jenkison provides these services to the members. The team is managed by Ms Susan O'Connor.

I thank these officers for their excellent support of myself and the members. The day-to-day operational support and research services of the Tribunal are in the hands of a high performing and professional team.

## 2019/2020 FISCAL YEAR ACTIVITIES

### Membership

The Tribunal had the following members during the financial year, all of whom are legally qualified:

	<i>Date of first appointment</i>	<i>Date of expiry of warrant</i>
David Plunkett (Chair)	23 September 2015	23 September 2021
Kevin Kilgour	14 May 2008	17 April 2024
Paul Cogswell	14 December 2010	17 April 2024

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<sup>16</sup> Section 108.

<sup>17</sup> Section 108(1).

I am indebted to all the members for their excellent work and particularly thank Mr Kilgour who continues to undertake much of the Tribunal's judicial work.

### **Claims and Applications Filed and Finalised**

The relevant information is set out in Appendix 1.

A total of 5 new claims were filed during the financial year. This compares with 8 claims in the last financial year.

It can be seen that 7 claims were finalised during the year, compared with 15 in the previous year. Of those 7, 5 (71%) of them settled, largely at or shortly after mediation. This rate of settlement is lower than that of the past few financial years (92-94%), but is a consequence of the low number of claims now skewing our statistics. The Tribunal's processes promoting settlement remain very effective.

### **Appeals and Judicial Reviews of Tribunal Decisions**

The relevant information is set out in Appendix 2.

There continues to be a low rate of challenge to the Tribunal's decisions and procedural orders, this being a testament to the quality of the Tribunal's work.

## **THE YEAR AHEAD**

There are no significant issues facing the Weathertight Homes Tribunal, if its work is considered in isolation from larger justice issues in society.

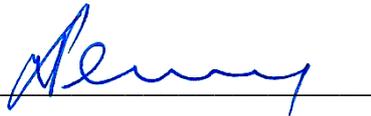
As I mentioned in my last annual report, the former Minister of Justice, the Hon Andrew Little, identified a concern about access to civil justice for those with building disputes of \$100,000, a large sum for ordinary New Zealanders.<sup>18</sup> Access to justice is not just a criminal or family proceedings issue. Ordinary New Zealanders cannot afford to use the general courts to resolve disputes concerning even large sums of money.

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<sup>18</sup> Speech to Law Foundation Awards (8 December 2017). The Minister's concern presumably excludes building cases within the specialist jurisdictions of the Tribunal or the newly established Canterbury Earthquakes Insurance Tribunal.

It is suggested that an important part of the solution is to expand the jurisdiction of tribunals to cover much of the civil jurisdiction (excluding family) of the District Court. This would, however, require considerable work to make tribunals 'fit-for-purpose' today and positioned to accept a broader jurisdiction. This includes reviewing the Ministry's senior management support for tribunals, member issues (such as the conditions of appointment and remuneration) and the use of technology.

This could be followed by reviewing the model for tribunals in New Zealand. Ministers are respectfully urged to give consideration to amalgamating tribunals into larger bodies to achieve greater coherence and efficiency, as has occurred overseas.<sup>19</sup> Even if one large super-tribunal is not favoured, as recommended by the Law Commission, tribunals with like functions could be amalgamated, as occurred with the creation of the Immigration and Protection Tribunal and the Health Practitioners Disciplinary Tribunal.



David Plunkett  
Chair  
11 December 2020

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<sup>19</sup> See the work of the New Zealand Law Commission in its various reports from 2004 to 2008, including *Tribunal Reform* (NZLC SP20, 2008) at [12], [34], [3.27], [6.3], [6.35].

## Appendix 1 – Claims and Applications Filed and Finalised

<b>Claims and applications outstanding at 1 July 2019</b>	<b>17</b>
Active claims	10
Inactive claims*	7
Eligibility reviews	0
Pre-commencement discovery	0
<b>Total claims and applications filed</b>	<b>5</b>
Claims for adjudication filed	5
Eligibility reviews sought	0
Pre-commencement discovery	0
<b>Total claims and applications finalised</b>	<b>7</b>
Claims determined	1
Eligibility reviews determined	0
Pre-commencement discovery	0
Claims terminated	1
Claims settled and closed	5
<b>Procedural orders issued</b>	<b>66</b>
<b>Claims and applications outstanding at 30 June 2020</b>	<b>15</b>
Active claims	11
Inactive claims*	4
Eligibility reviews	0
Pre-commencement discovery	0

\* On hold, or subject to settlement agreement but not yet closed

## Appendix 2 – Appeals and Judicial Reviews of Tribunal Decisions

Appeals pending at 1/7/19	Appeals filed 19/20 FY	OUTCOMES			Appeals pending at 30/6/20
		Allowed	Dismissed	Discontinued /Abandoned	
1*	0	1	0	0	0

Judicial Reviews pending at 1/7/19	Judicial Reviews Filed 19/20 FY	OUTCOMES			Judicial Reviews Pending at 30/6/20
		Allowed	Dismissed	Discontinued /Abandoned	
0	0	0	0	0	0

\* Appeal filed in High Court in May 2019 mistakenly omitted from statistics at Appendix 2 of 2019 annual report