Response of
Real Estate Institute of New Zealand Inc

On

Proposals for the Courts and Tribunals Enhanced Services Bill: Modernising the powers and procedures of the Real Estate Agents Authority and Real Estate Agents Disciplinary Tribunal

May 2015

To the Policy Advisor
Ministry of Justice
The Vogel Centre
19 Aitken Street
WELLINGTON
Introduction

The Real Estate Institute of New Zealand (REINZ) welcomes the opportunity to present this response to the Ministry of Justice (the Ministry) on the Proposals for the Courts and Tribunals Enhanced Services Bill (the Bill) in respect of modernising the powers and procedures of the Real Estate Agents Authority Complaints Assessment Committees (the Committee) and the Real Estate Agents Disciplinary Tribunal (the Tribunal).

REINZ is a membership organisation representing an industry of real estate professionals for over one hundred years. REINZ has over 13,000 members specialising in all facets of the real estate arena.

The objectives and purpose of REINZ are to:

(a) Promote and facilitate the quality, expertise and integrity of REINZ members in relation to the principles and practice of real estate;

(b) Support, protect, represent, and promote the general interests of REINZ members in their real estate activities;

(c) Consider, and represent REINZ members on all matters affecting the interests of REINZ members particularly the effects of legislation, regulations, rules of government, government agencies including crown entities, and local authorities;

(d) Enhance the public awareness and reputation of REINZ members;

(e) Undertake such commercial activities of benefit, interest and advantage for REINZ and its members; and

(f) Manage and invest all the monies, property and assets of REINZ in a manner that is of benefit, interest and advantage for REINZ and its members.

There are different categories of membership to REINZ including Agency membership and Associate membership. Five different sector groups of Residential Property Management, Business Brokers, Auctioneers, Commercial and Industrial and Rural are each represented by their Sector Group Chair and appointed members. Members are also represented by their District Forum Leaders and Regional Directors within their region.
In preparing this submission, REINZ has consulted with the representatives of leading real estate agencies throughout New Zealand including Barfoot & Thompson, RayWhite, Bayleys, Harcourts, First National, Remax, LJ Hooker, Professionals, PGG Wrightson, Colliers, Property Brokers, NZ Realtors, Lodge Real Estate, Anne Duncan Real Estate and McDonald Real Estate.

**General Comment**

The purpose of the Bill is to improve services to tribunal users by modernising the tribunals administered by the Ministry with some minor enhancements to court administrative processes.\(^1\) This will be an omnibus Bill containing amendments to a number of statutes to achieve that purpose. The proposal document provided by the Ministry outlines changes to the Real Estate Agents Act 2008 (the Act) which the Ministry considers would help to modernise and standardise processes in the Committee and the Tribunal. This submission is prepared by REINZ and is divided into two sections:

- Responding to the Ministry’s proposal to give the Committee power to order monetary compensation up to $100,000 as a result of ‘unsatisfactory conduct’.
- Responding to the remainder of the Ministry’s proposed changes to the Act.

**A. Proposal to give the Committee power to order compensation**

The Ministry proposes that the relief that the Committee can order in the event of a finding of unsatisfactory conduct, will include monetary compensation up to $100,000. The Ministry seeks this proposal for clarity.\(^2\) As will be explained, an amendment empowering the Committee to order compensation would not be a matter of clarity, but would result in the addition of a significant new power to the Committee.

---

\(^1\) Cabinet Social Policy Committee paper on Courts and Tribunals Enhancements, p 1.
\(^2\) Proposals for the Courts and Tribunals Enhanced Services Bill, Ministry of Justice, p1, para 2.
Where a real estate licensee has been found to have engaged in unsatisfactory conduct under the Act, the Committee currently has power to make one or more of the following orders:

- Reprimanding the real estate agents, branch manager or salesperson;
- Requiring the real estate agent, branch manager or salesperson (for which the generic term in the Act is ‘licensee’) to do any of the following:
  - Make an apology;
  - Undergo further training;
  - Refund fees;
  - Rectify an error at the licensee’s expense;
  - Pay a fine up to $10,000 in the case of an individual or $20,000 in the case of a company;
  - Pay the costs of the inquiry or investigation.

REINZ opposes any amendment to the Act which would have the effect of empowering the Committee to order licensees to pay compensation. This opposition is made on the following grounds:

1. The omission of compensatory powers in s93 is not attributable to a legislative oversight or error but was the result of a conscious decision by Parliament in enacting the Act. No grounds are established to warrant an amendment to s93 in the form enacted.

2. The absence of any genuine protective or disciplinary purpose warranting the proposed amendment to the Act. The Ministry’s proposal does not provide any evidence to show that the current mechanism is inadequate for consumer protection.

3. The disproportionality in granting a compensatory power to the Committee in light of the overall statutory scheme and function of the Committee. Given the structure and composition of the Committee, the prospect of the Committee having power to award compensation in a similar manner to the Tribunal and the District Court is anomalous in a first tier quasi-judicial body.

4. The lack of consistency which would be a consequence of the proposed amendment, by comparison to other vocational or professional disciplinary bodies in New Zealand and Australia. The proposed amendment would be significantly out of step with the approach currently taken to vocational and professional discipline in New Zealand and Australia.

---

\(^3\) s93(1).
5. The tendency of the proposed amendment to shift the focus from the protective purpose mandated in s3 of the Act to monetary compensation, particularly where compensatory remedies are available elsewhere.

**Parliament intended to omit compensatory power from s93**

The omission of any provision in s93 for the Committee to order compensation was not the result of a legislative oversight but was intended by Parliament in the enactment of the Act. The issue was addressed directly in the Ministry discussion paper leading to the reform of the legislation, in August 2003.\(^4\) That paper was described as “*a first step in reviewing the [REAA 1976], which provides the legal framework for regulating real estate agents and salespeople*”.\(^5\) The paper discussed “consumer remedies” in the following terms:

“The [1976] Act doesn’t provide a way for people to get compensation for any loss or harm suffered because of a real estate agent. They must take legal action to get compensation. They can take claims to the Disputes Tribunal if the loss is less than $7,500 (or, with the agent’s agreement, $12,000). Otherwise people have to go to court.

The Lawyers and Conveyancers Bill, on the other hand, allows Standards Committees and the Disciplinary Tribunal to order compensation to be paid. This remedy should perhaps also be available to clients of real estate agents. It would be another way of making the Real Estate Agents Act more consumer friendly, and would give clients an alternative to the Disputes Tribunal or courts.

However, licensing systems don’t usually have this sort of compensation system. In Australia, only two states provide a similar system:

- In the Northern Territory, real estate agents can be made to repay profits if they have made the profit by breaching rules.
- In Queensland, people can claim compensation from a ‘claims fund’ if they suffer financial loss because of certain things. These include the agent’s breach of conflict of interest provisions, trust account rules and misleading conduct. This is an extended form of fidelity fund, because it compensates for things other than theft.”

The passage of the Real Estate Agents Bill during 2007 and 2008 discloses Parliament’s intention to distinguish between lower level disciplinary matters (unsatisfactory conduct), in respect of which compensation would not be available, and more serious matters (misconduct), in which compensation orders would be available. This was to be reflected in the distinction between the limited powers available to the Committee and the more extensive powers to be available to the Tribunal. Reference is made to the following extracts from *New Zealand Parliamentary Debates*:

“The bill also creates a fully independent disciplinary tribunal to deal with serious cases. The tribunal will have the ability to order the cancellation of licenses, award compensation, and impose fines.”\(^6\)

---

\(^4\) Renovating the Real Estate Agents Act: Reasonable Offers Considered, Ministry of Justice, August 2003, p64.

\(^5\) Foreword to discussion paper, Hon Rick Barker, Associate Minister of Justice.

\(^6\) Hon Clayton Cosgrove, (11 December 2007) 644 NZPD 13815-13816, First reading.
“The second tribunal I am not so worried about. This is the Real Estate Agents Disciplinary Tribunal set up under clause 97 and the following clauses. There will need to be a tribunal to deal with the serious complaints. These are complaints about misconduct.”

“I really want to talk about the complaints assessment committee, which is the lower level to where complaints are to be directed; it is the regional level. My colleague Mr Finlayson has already referred to the disciplinary tribunal, which is for the higher level complaints. The complaints assessment committee is for the lower level of complaints ... When we think about the nature of the complaints they are the smaller, minor complaints. It might be complaints about a telephone call that was missed or not returned, which meant that the person missed out on buying the property of his or her choice – it is those sorts of complaints, anything up to misrepresentation, rudeness, or whatever.”

Although there are compensation provisions, it is primarily a disciplinary matter if there is misconduct of any sort, but civil remedies are preserved, and they will include claims against an agent under the Fair Trading Act, or for breach of contract or negligence if we have concurrent liability in this country now, and we probably have.

In circumstances where Parliament puts its mind to the matter of compensation orders, and the distinction between lower and higher level disciplinary bodies, it cannot be said that the omission of a compensatory power in s93 was the result of a legislative oversight requiring clarity.

In 1998, Cabinet agreed to a policy framework to guide the government’s involvement in regulating occupations. The framework identifies the aim of occupational regulation as being to protect the public from the risks (physical, mental and financial) of an occupation being carried out incompetently or recklessly. It follows that there should be a compelling reason, based on clear evidence that the statute is failing in its intended purpose, before making any amendment of this sort.

The Ministry’s proposal document states that the Ministry considers it “unfair” that the ability to recover financial loss depends on the licensee’s behaviour meeting the higher statutory threshold for misconduct.

The Ministry has additionally informed REINZ that it is considering two options:

---

7 Hon Christopher Finlayson (2 September 2008) 649 NZPD 18416, Second reading.
8 Ibid, Kate Wilkinson, at 18419.
9 Ibid, Hon Christopher Finlayson, at 18435.
To allow the Committee to order compensation in the same manner as for other orders available to it under s93; or

To allow or require complaints alleging unsatisfactory conduct and seeking compensation to be referred from a Committee to the Tribunal for consideration.

In REINZ’s opinion neither of these options is consistent with the intent of the Act for the reasons explained in this submission.

The statutory terminology used for compensatory orders is clearly distinct from orders to rectify errors or to provide other relief. With the Ministry’s proposal, that distinction is lost. The proposal is, in a way, a hybrid approach combining both remedial measures.

A distinction between the higher and lower levels of culpable conduct was explained in the Ministry’s Departmental Report on the Real Estate Agents Bill 2008 in the following terms, under the heading ‘Unsatisfactory conduct and misconduct’: 11

“These definitions will be used to differentiate between the lower level and more serious sanctions, and where misconduct is suspected, will determine when a case should be referred to the Disciplinary Tribunal.” [334]

“In addition, the nature of the cases that the CAC will determine are lesser charges of unsatisfactory conduct. Any case involving a significant financial loss to a consumer will, in all likelihood, be regarded as misconduct. The CAC has no jurisdiction on cases of misconduct which must be referred to the Disciplinary Tribunal.” [393]

Both in terms of the range of powers available to the Committee, and the structure and composition of that body, Parliament intended the Committee to exercise a lower level of disciplinary authority. The distinction in the manner of appointment of the two bodies, in which the members of the Tribunal are appointed by the Minister of Justice whereas the members of the Committee are appointed by the Real Estate Agents Authority, is indicative of the higher level of scrutiny and responsibility required of the Tribunal. That is for the obvious reason that the Tribunal exercises greater powers than the Committee, of which the power to order compensation up to $100,000 is an example.

If the proposed amendment is intended to take the Act beyond seeking clarity then REINZ submits that the Act itself should properly be reviewed, which is outside the scope of the Bill.

Absence of consumer concerns warranting amendment

Compensation as a remedy was introduced in the Act to address the perceived inadequacy under the 1976 Act, which did not provide for compensation to be awarded to affected parties. This was a significant change brought in by the reform at the time. Parties who had suffered loss as a result of an act or omission of an agent or salesperson had to seek compensation through negotiation with the agent or take proceedings through the courts. Section 110(2) was enacted to enable the Tribunal to make compensatory orders, providing complainants with a low-cost mechanism for seeking consumer redress. The Ministry’s proposal does not provide any evidence to show that the current mechanism is inadequate to achieve its intended purpose. In fact, the Real Estate Agents Authority’s 2014 annual report shows that 70% of consumers have confidence in the real estate industry which is an improvement from 61% in the 2011/2012 results. The latest statistics by the Authority show that only 46% of complaints over the last 13 months were submitted to the Committee, of which the majority resulted in a decision to take no further action. Only 36% of those referred to the Committee resulted in a decision of unsatisfactory conduct or were referred to the Tribunal.

During the period of consultation leading up to the enactment of the Act, one of the Ministry’s proposals under the public discussion document was to require agents and salespeople to have indemnity insurance for the purpose of providing consumers with greater surety of payment where successful claims for compensation are upheld against an agent. That proposal was not enacted because Parliament saw no clear benefit in compulsory indemnity insurance. This is consistent with the Parliamentary emphasis on discipline for the purpose of consumer protection, not compensation.

Inconsistency with statutory scheme and intended function of the Committee

The initiative for the Ministry’s proposal for an amendment to s93 arose from the judgment of the High Court in Quin v The Real Estate Agents Authority and Others, (the Quin judgment) and the

13 See Note 11, at paragraph 442, p 80.
14 Real Estate Agents Authority Annual Report 2014, p7 compare with the Authority’s Annual Report 2013, p10.
16 See Note 12, p 20.
17 See Note 11, p 98, para 540.
18 [2012] NZHC 3557, [2013] NZAR 38
After discussing the Quin judgment, the Tribunal Chairperson, Judge Barber, suggested the need for legislative amendment to enable the Tribunal (not the Committee) to have:

“...a similar discretionary power to award compensation in situations of unsatisfactory conduct by a licensee as we do for situations of misconduct by a licensee”. Similarly, Judge Barber spoke of the Quin decision as having “…proved somewhat restrictive for us in terms of stating our lack of power to compensate complainants for errors or omissions by licensees found guilty of ‘unsatisfactory conduct’ as distinct from ‘misconduct’.”.

As a starting point, the suggestion by Judge Barber was focused on the powers available to the Tribunal, not the Committee. His Honour did not mention, or seem to turn his mind to, the proposition that the Committee should possess such a power. His Honour also does not point to any deficiency in the legislation but merely notes a preference to be able to award compensation in situations of ‘unsatisfactory conduct’ to “better enable [the Tribunal] to dispense justice”. It should be noted that, at the same time, the Tribunal accepts the following:

- “The primary focus of the Act is not on the provision of a forum in which complainants can seek monetary compensation, but on the regulation of the real estate industry so as to promote and protect the interests of consumers”; 21 and
- “It is always open for complainants to pursue compensatory issues in the civil courts”. 22

The relatively low level of professional culpability encompassed in the statutory concept of unsatisfactory conduct 23 is consistent with the absence of a power by the Committee to order compensation. The prospect of the Committee having power to award compensation at a level routinely occurring in the District Court, for example, is anomalous in a first tier quasi-judicial body, such as the Committee. The absence of any power to order compensation, at present, corresponds with the absence of any powers to curtail or remove the licensee’s ability to continue in business. Those matters are intentionally the sole domain of the Tribunal as an independent judicial body administered by the Ministry, and separate from the Real Estate Agents Authority or the Committee.

---

20 Ibid.
21 See Note 19, p5.
23 As defined in s72 of the Act.
Instead, the Committee has ample remedial powers of a pecuniary nature, including the power to order the reduction, cancellation or refund of fees (commission) and, as was demonstrated in the *Quin* judgment, power to order the licensee to rectify any error or omission at the licensee’s expense or to take steps to provide relief from the consequences of the error or omission. There is currently no monetary limit on that aspect of the Committee’s jurisdiction. There is also the ability to order a fine not exceeding $10,000 in the case of an individual or $20,000 in the case of a company. REINZ submits that the proposed extension of those powers to enable compensation orders is unwarranted when the Committee presently possesses ample remedial powers under s93.

Also, extending the Committee’s power to grant compensation which is currently only exercised by the Tribunal in relation to ‘misconduct’ will no longer justify the retention of the two-tier disciplinary structure.

The question then turns to whether the Tribunal should have the extended power to grant compensation in relation to ‘unsatisfactory conduct’.

The present disciplinary structure enables the Committee to refer matters to the Tribunal, under s91, where the conduct is seen as being sufficiently serious to warrant the exercise of the more extensive powers available to that body, including the power to order compensation. If the effect of the proposed amendment is to empower the Tribunal to determine matters where the licensee’s conduct is not otherwise sufficiently serious to warrant referral, then, in REINZ’s view, the following consequences will follow:

- Increased volume of complaints coming before the Tribunal for low-level of conduct;
- Incentive for complainants to seek compensation when they would not otherwise have done so;
- Increased number of appeals to the High Court by licensees; and
- Disincentive to those considering entering into the industry knowing that even a minor, technical breach can result in a compensation order.

The availability of compensation orders at the first tier of discipline is likely to shift the focus to monetary compensation, even for relatively minor complaints. The complaint system being made available free of cost to complainants without any risk of potential adverse cost consequences will

---

24 s93(1)(e).
25 s93(1)(f)(i) & (ii).
26 s93(1)(g).
exacerbate the effect of the proposed amendment. Extending the Tribunal’s power to order up to $100,000 compensation for low level disciplinary matters would be disproportionate to the separate functions given to the Committee and the Tribunal under the Act. The New Zealand Law Commission has stated in its 2008 Issues Paper that it is important that tribunals not be accorded too much power and their powers must be proportionate to the tasks they perform:

“Just as tribunals must have procedures which ensure the fair and efficient disposal of the cases before them, they also require powers to enable them to operate those procedures and to properly perform their adjudicative function. There are certain core powers which almost all tribunals need, others which are required only by some. On the other hand it is important that tribunals not be accorded too much power. Their powers must be proportionate to the tasks they perform.”

The proposed amendment should not give the Tribunal powers beyond the functions it was enacted to perform, which are to hear and decide cases where the Committee has laid charges of misconduct and to hear appeals against Committee decisions.

**Inconsistency with other vocational and professional disciplinary regimes**

The current regime for complaints and discipline of real estate licensees occurs at two levels. Attached to this submission is a list of disciplinary structures in New Zealand for other occupational groups for comparison. Most occupational regulation is monitored by the Ministry of Business, Innovation and Employment (the MBIE). A summary providing a comparison between the occupational regulatory structures under the MBIE and the Ministry is attached, from which the following observations can be made:

(a) The only other regime with two disciplinary levels, comparable to the regime under the Act, is under Part 7 of the Lawyers and Conveyancers Act 2006. The maximum amount of compensation that can be ordered by the Standards Committee is prescribed by rules made by the New Zealand Law Society or the New Zealand Society of Conveyancers. This is

---

27 Unless the Tribunal exercises the newly proposed power to order costs against vexatious complainants. Compare with regulation of lawyers – under the Lawyers and Conveyancers Act 2006, costs can be awarded in favour of the lawyer complained of by the Standards Committee (s157), Legal Complaints Review Officer (s210) and the Lawyers and Conveyancers Disciplinary Tribunal (s249).
29 not including appeals to the High Court from the Tribunal.
30 See Appendix 1.
31 See Appendix 2.
32 s156(1)(d).
currently prescribed at $25,000. There is no separate compensatory power applicable to the Lawyers and Conveyancers Disciplinary Tribunal. That Tribunal is subject to the same compensatory power of its Committee;

(b) Amongst the other occupations, real estate licensees are the only occupational group with a two-tier disciplinary structure that is subject to a compensation order above $25,000.

(c) The predominant statutory position in single tier disciplinary structures is that those bodies have no power to order compensation. The exceptions are the Immigration Advisers Complaints and Disciplinary Tribunal under the Immigration Advisers Licencing Act 2007, and the Broadcasting Standards Authority under the Broadcasting Act 1989.

The conclusion drawn from the above observations is that the empowerment of the Committee to order compensation up to $100,000 would be significantly out of step with the present approach in this country to vocational and professional discipline.

It is important that tribunals with similar functions and characteristics should have similar powers as inconsistency between tribunals undermines public confidence. The Cabinet policy for occupational regulation is focused on increasing an effective and consistent across-Government approach to occupational regulation.

Appendix 3 to this submission summarises how compensatory claims are dealt with under real estate agents regulatory regimes in Australian states and territories. The conclusions to be drawn from that summary are as follows:

(a) None of the states or territories’ disciplinary bodies possess substantial compensatory powers of the sort contemplated in the proposed amendment;

---

33 The Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32 and The Lawyers and Conveyancers Act (Conveyancing Practitioners: Complaints Service and Standards Committee) Regulations 2008, reg 30. Exceptions may apply where there are multiple complainants or multiple charges – for example, see Auckland Standards Committee v Sorensen [2012] NZLCDT 23.

34 This Tribunal can order reasonable compensation. However, the immigration advisers industry is not comparable to the real estate agents industry. For example, there are currently only 668 licensed immigration advisers (Review of the Regulation of Immigration Advice, July 2014, Martin Jenkins prepared for the MBIE, p10). In contrast, there are currently 17,277 licensees under the Act (Real Estate Agents Authority’s Statistics as at 30 April 2015) http://www.reaa.govt.nz/AboutUs/Reporting/Licensing-statistics/Pages/Monthly-licensing-statistics.aspx). Also, it can be seen from the Martin Jenkins’ report that New Zealand’s international reputation has been taken into account when deciding on consumer redress measures for the immigration advisers.

35 This compensatory power is capped at $5,000 and applies only where a broadcaster has failed to maintain privacy of an individual. See that for insurance and mortgage brokers, compensation is ordered under a Dispute Resolution Scheme rather than a disciplinary body.

36 See Note 28.

37 Policy Framework for Occupational Regulation, Cabinet Office Circular CO (99) 6, 8 June 1999, p15.
(b) Some of the states or territories have a fidelity or indemnity fund which can be available to provide compensation in limited circumstances. In New Zealand, the Real Estate Agents Fidelity Fund was abolished with the repeal of the Real Estate Agents Act 1976 and Parliament may be taken to have intended the removal of that source of compensation in favour of civil remedies.

REINZ submits that the Ministry’s proposed amendment takes the compensatory power much further than other occupational regulatory regimes both within New Zealand and Australia. The amendment would result in disproportionate disciplinary measures being taken against a single occupational group to address unproven consumer risks. In addition, New Zealand has obligations under the Trans-Tasman Mutual Recognition Act 1997 in respect of entry into trades and professions which must be taken into account. It is implicit in the arrangements under the Trans-Tasman Mutual Recognition Act that there will be a reasonably close alignment in common occupational regulation between the two countries.

The shift of emphasis to remedial measures

The absence of any power by the Committee to order compensation must be seen in the context of that body being primarily concerned with discipline, not monetary redress for consumers of real estate licensee services. That underlying statutory purpose was acknowledged in the Quin judgment itself. 38

“The primary focus of the 2008 Act is not, therefore, the provision of a forum in which complainants can seek monetary compensation. Its focus is the regulation of the real estate industry so as to promote and protect the interests of consumers. This includes conferring on regulators powers to grant consumers relief from harm, resulting from licensees acting contrary to the standards required of them.”

The Tribunal has been carefully applying the Quin judgment in its findings to date, which, in turn, has also been followed by the Committee. 39 REINZ is concerned that the proposed amendment will disrupt well settled precedent without good cause. In any case where legislative amendment is contemplated, it is necessary to determine whether the benefits of the proposed amendment will enhance the underlying statutory purposes and that the benefits of the amendment will outweigh

38 The Quin judgment at [44].
39 See Appendix 4.
the disruption to the well settled position. This principle was expressed in the following terms by Treasury:

“Proportionality: the burden of rules and their enforcement should be proportionate to the benefits that are expected to result. Another way to describe this principle is to place the emphasis on a risk-based, cost-benefit regulatory framework and risk-based decision-making by regulators. This would include that a regime is effective and that any change has benefits that outweighs the costs of disruption.”

The introduction of a compensatory power at the lower level of discipline will send a mixed message to complainants, resulting in a shift from consumer protection to monetary compensation. Ample provision is available already in the civil justice system for dis-satisfied consumers to seek financial redress. The intent of the Act was not to replace other remedies available to consumers.

The legislative intent was that a compensation order not exceeding $100,000 would only apply to ‘disreputable agents’ (which falls into the category of misconduct) causing significant financial harm to consumers. Allowing a compensation order in addition to the powers already available to the Committee in circumstances of unsatisfactory conduct would mean that a real estate licensee could be faced with significant monetary liabilities for minor, technical breaches. This would be unduly punitive and would not serve the consumer protection purposes of the Act.

The proposed amendment could also have the effect of encouraging leaky home claims to come before the Committee rather than the Weathertight Homes Tribunal. To date, leaky home related claims involving real estate agents have been adequately dealt with by the Weathertight Homes Tribunal, the Weathertight Homes Resolution Service and the courts. Under the Act, real estate licensees’ involvement in leaky home related complaints are mostly concerned with the disclosure obligations under the Real Estate Agents Act (Professional Conduct and Client Care) Rules. Breaches of those obligations typically come within the category of unsatisfactory conduct rather than misconduct unless the conduct is found to be disgraceful, that it consists of a wilful or reckless contravention of the law or is considered to be seriously incompetent or negligent.

Leaky home claims are complex and require full assessment of evidence prepared by experts in the relevant area. Assessing the damages and apportioning liability amongst the parties is a difficult task.

---

41 See the speech by Hon Christopher Finlayson, Note 9.
42 See the speech by Hon Clayton Cosgrove, (2 September 2008) 649 NZPD 18359, Second reading.
44 See, for example, [2015] NZREADT 9, C04466, CB5778659, CB6562919 & CB 6506723.
45 Or constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee’s fitness to be a licensee (s73).
judicial function requiring expertise and care. The Weathertight Homes Tribunal is the specialist tribunal in that area and its hearings are formal, judicial proceedings. In contrast, the Committee’s function is investigatory in nature and while bound by the principles of natural justice, it is not obliged to adhere to any strict rules of procedure.\footnote{The Committee may regulate its procedure in any manner that it thinks fit as long as it is consistent with the Act and any regulations made under it (s84(3)).}

With the ten year longstop period coming to an end for most leaky home owners, and the recent New Zealand Law Commission’s recommendation to place caps on local government authority liabilities for leak-related claims\footnote{New Zealand Law Commission, “Liability of multiple defendants” 24 June 2014, Chapter 7.} a significant increase in these types of complaints being brought under the Act is a real possibility. Many will find that method to be a quicker and cheaper solution.\footnote{Filing fee to have a case heard by the Weatheright Homes Tribunal is currently $408.89. In comparison, there is no cost to bringing a complaint under the Act.} Consequentially, the expected increase in the number of complaints will result in an increased cost to the industry.

A hearing before the Committee is conducted on the written material presented to the Committee and does not involve the parties appearing in person unless the Committee directs otherwise.\footnote{This discretion is only very rarely exercised.} This further demonstrates the intention of Parliament to reserve compensatory powers to the higher-level adjudicative body, the Tribunal, in circumstances of more formal evidential requirements and procedures. Bearing in mind the composition of the Committee (only one of three members is required to be a lawyer of not less than seven years’ legal experience)\footnote{Compare with the requirement for the Lawyers Standards Committee to have at least 2 lawyers with no less than 5 years’ experience (Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee) Regulations 2008, r13).} and the relative informality of its procedures in which most hearings are conducted on the papers, it is not a suitable body to be making orders of compensation.

B. Other proposed changes to the Act

Proposal to allow the REAA Registrar to reject complaints that are frivolous, vexatious, groundless or made in bad faith, or that would be better dealt with through another agency

REINZ supports this proposed amendment to the extent that it will better enable the Authority to use its existing triage process to dispose of complaints.\footnote{http://www.reaa.govt.nz/Complaints/AboutComplaintProcess/Pages/AbouttheComplaintsProcess.aspx}

\footnote{The Committee may regulate its procedure in any manner that it thinks fit as long as it is consistent with the Act and any regulations made under it (s84(3)).}
\footnote{New Zealand Law Commission, “Liability of multiple defendants” 24 June 2014, Chapter 7.}
\footnote{Filing fee to have a case heard by the Weatheright Homes Tribunal is currently $408.89. In comparison, there is no cost to bringing a complaint under the Act.}
\footnote{This discretion is only very rarely exercised.}
\footnote{Compare with the requirement for the Lawyers Standards Committee to have at least 2 lawyers with no less than 5 years’ experience (Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee) Regulations 2008, r13).}
\footnote{http://www.reaa.govt.nz/Complaints/AboutComplaintProcess/Pages/AbouttheComplaintsProcess.aspx}
Proposal to require the Tribunal members to remain in office after the expiry of their terms to complete decision-making on part-heard case

REINZ supports this proposed amendment.

Proposal to enable an unlimited number of members to be appointed instead of a fixed number of members

The Real Estate Agents Amendment Act 2012 has previously increased the number of Tribunal members from five to six. On 5 December 2012 REINZ wrote to Minister Burrows recommending that a licensee member of the Tribunal be also increased from one to two in s100(2)(b). REINZ does not oppose the current proposal so long as the originally intended ratio (3 non-licensee:1 licensee, except for the Chair) of the number of licensee members in the Tribunal is retained.

Proposal to authorise witnesses to be summoned at the request of the parties

REINZ supports this proposed amendment.

Proposal to authorise the Tribunal to award costs to itself when a person has wasted the Tribunal’s time

REINZ supports this proposed amendment so long as it is additional to empowering the Tribunal to order costs against non-licensee parties under certain conditions discussed in the Cabinet papers provided with the proposal.

Proposal to create a contempt power so tribunals can exclude people who are disruptive from public hearings and ensure compliance with pre-hearing orders

REINZ supports this proposed amendment and believes that it will help the Tribunal process to move more quickly particularly where a party is without legal representation.

Proposal to enable hearings to be held by telephone or audio-visual link where appropriate

REINZ supports this proposed amendment to the extent of the recommendation contained in our 24 April 2013 letter to Minister Burrows on this subject. REINZ opposes any proposal to conduct hearings by telephone, however, as the formality of the Tribunal process can be compromised.

Proposal to authorise the use of forms approved by the Chief Executive of the Ministry of Justice instead of prescribed forms
REINZ supports this proposed amendment to the extent that the Chief Executive of the Ministry must be satisfied that any deviation from the prescribed forms is necessary and is consistent with the Act.

**Proposal to allow the Tribunal to sanction licensee companies by imposing orders to make their business available for inspection or to take management advice**

This power is currently with the Committee under s93. REINZ supports this proposal to the extent that it is consistent with or similar to s93 (1)(h).

**Proposal to include in the Act the timeframe for lodging applications for appeal to the High Court instead of relying on the timeframe in the High Court Rules**

REINZ supports this proposed amendment to the extent that the timeframe is not shorter than what is permitted under the High Court Rules (20 working days after the decision is given, including any decision on penalty).

**Conclusion**

REINZ submits that the proposal to introduce compensatory orders for unsatisfactory conduct under the Real Estate Agents Act is inconsistent with the legislative intent and without sound basis. Had Parliament intended the Committee or the Tribunal to order compensation for unsatisfactory conduct it would have expressly stated so in the Act.

The Tribunal’s present power to award up to $100,000 for compensation for misconduct reflects the significant harm that disreputable agents may inflict on consumers and this provides adequate redress for consumers and there is no evidence to suggest otherwise.

REINZ expects that this proposed change will bring a sweeping change to the liability of real estate licensees and considers that incorporating such substantial change to real estate licensees’ liabilities under the Courts and Tribunals Enhanced Services Bill is arbitrary.