
**PROPOSALS OF THE
WEATHERTIGHTNESS EXPERT PANEL
FOR ESTABLISHING A
WEATHERTIGHTNESS ADVISORY, ASSESSMENT AND DISPUTE
RESOLUTION SERVICE.**

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TABLE OF CONTENTS

1. INTRODUCTION TO THE PROPOSALS.....3
2. PROPOSED ADVISORY SERVICE.....5
3. PROPOSED ENTRY CRITERIA FOR THE DISPUTE RESOLUTION SERVICE7
4. PROPOSED DISPUTE RESOLUTION SERVICE.....8
5. AN INFORMATION GATHERING MECHANISM.....21
6. CONFIDENTIALITY AND RELATED FACTORS22

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1. Introduction to the proposals

In this document we set out proposals for the following:

- a) an advisory service
- b) possible additional dispute resolution options
- c) an information gathering mechanism.

In doing so, we are responding to the Government's expressed intention to establish a stand-alone service directed at the needs of homeowners affected by matters discussed in the Report of the Overview Group on the Weathertightness of Buildings, September 2002. We have therefore concentrated on the design of such a service and have not included in our proposals, except in a brief section of our report¹, a consideration of options that might be adopted within the court system, or be annexed to the court system.

The additional dispute resolution options which we have considered, all of which could be linked to a preliminary assessment process, are as follows:

- a) voluntary mediation with a mediator provided by the stand-alone dispute resolution service;
- b) compulsory mediation with such a mediator;
- c) compulsory adjudication before an adjudicator provided by the service.

We have considered two possible models for adjudication.

- a) a process modeled on the investigations meeting process used in the Employment Relations Authority;
- b) a modified adversarial system.

¹ Section 13, Establishing a Weathertightness Advisory, Assessment and Dispute Resolution Service.

Our proposals are based on applicants entering the system at the outset of the process. There is no reason why provision should not be made for parties already in the court system to transfer, or be transferred, to any dispute resolution system that may be established.

We provide for information gathering within the dispute resolution process.

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2. Proposed advisory service

Any advisory service designed to meet the public need for information in relation to the weathertightness of buildings could have a general and a specific role.

Its general role would be one of public education. The public knows already that there is a problem of leakage through the external wall cladding systems of buildings. However, homeowners need greater detail about:

- a) the way in which this can occur;
- b) what happens when it does occur;
- c) the steps that can be taken to remedy the problem;
- d) the likely costs of such steps;
- e) the parties who may be responsible for causing the leakage and the resultant damage; and
- f) the ways in which recovery may be sought from those parties.

This information could be provided in a number of different ways:

- a) publicity in the media;
- b) the publication of pamphlets or booklets containing the information;
- c) the production of videos containing the information.

The work done by the Homeowner Protection Office in British Columbia is a useful guide to the type of information and publications that could be provided by the service.

The service's specific role could be two-fold:

- a) To help individual homeowners understand the general information contained in the service's publications and, in particular, to make an informed choice between the various methods of dispute resolution available to obtain compensation for damage caused by leakage through the external wall cladding systems of their homes;

- b) To advise individual homeowners who choose to use any stand-alone dispute resolution service that the Government might create at this stage about their options under that service and what they need to do to take advantage of it

Because the work of the service may, particularly if it is given the second of the two specific roles identified above, involve the expression of opinions about the causes, consequences and ways of remedying problems of weathertightness, it is imperative that the service be separate from any dispute resolution service.

3. Proposed entry criteria for the dispute resolution service

We recommend that the application meet the following criteria for entry to the service.

- a) The affected building must be a dwelling that has suffered damage as a consequence of leakage through the external wall cladding systems, not caused only by any action or inaction of the owner.²
- b) Claims may only be made by the owner of the affected dwelling.
- c) The estimated cost of rectification must be greater than \$7,500 (ie the Disputes Tribunal limit)
- d) The claim must comply with current statutory limitation requirements – either the Limitations Act 1950 six- year limitation or the Building Act 1991 10- year long-stop provision as applicable.
- e) The applicant must have made a genuine but unsuccessful attempt to resolve the dispute with involved parties.

² For the purpose of this report leaky buildings syndrome is defined as leakage through the external wall cladding systems causing damage to interior amenities and compromising structural integrity. A more complete definition would refer to the complete wall system, including the cladding system and all penetrations, eg doors, windows and balconies, and all materials from the exterior to the interior, eg exterior wall materials, jointing compounds, flashings, building wraps and framing.

4. Proposed dispute resolution service

The key elements of the proposed dispute resolution service are outlined in Figure 1. The details are as follows:

4.1 0800 help line and website

The 0800 help line and website are a point of first contact, where homeowners can obtain information about how to access the service, undertake an initial screening and request or download registration forms.

a) Screening

Screening is an “on the spot”, “face value” assessment that the claim meets the service criteria. If the claim appears to meet the criteria, the name and address of the claimant will be recorded and a registration form sent to them. If the claim does not meet the criteria, advice will be given about other avenues for addressing the claim. People whose cases are marginal will be sent registration forms

b) Registration form sent

No time frame is set for applicants to return the form.

c) Preliminary assessment

The receipt and screening of registration forms, with provision for:

- i) registration of the application, if the claim complies at “face value” with the criteria for entry into the service and the registration form contains all the required information. If this is the case the applicant will be advised of the fact and given a unique registration number and a more detailed application form to complete and return;
- ii) liaison with the applicant if the registration form does not contain all the required information, with a view to obtaining that information if it is available;

- iii) rejection of the registration in those cases where information provided does not comply with the criteria for entry into the service, in which case the applicant will be referred to the advisory service. The applicant will also be sent a copy of the more detailed application form for their information, or for completion if they want to persist with their application.

d) Case manager appointed

A case manager will be appointed to every application once it is registered. The case manager will be responsible for the progress of the application through the service and will be the point of contact for all parties throughout the process.

4.2 Application form sent

The application form acknowledges the registration of the application and seeks detailed information about the issue, including a statement of the nature and extent of the leaky building problem, names of the suggested parties involved, what has been done so far to fix the problem and cost estimates.

4.3 Assessment

The case manager acknowledges the application and arranges an interview and inspection by the assessor with the applicant.

An independent assessor is appointed. The assessor is a recognised expert in the field of building construction with particular expertise in the area of the weathertightness of buildings. Specific training of assessors is recommended as a pre-requisite of their appointment.

The application form completed by the claimant, is passed to the assessor for interview and inspection. The assessor then makes an assessment.

The objective of the interview, site inspection and assessment is to determine if the applicant has a bona fide case in terms of the criteria of the dispute resolution service. This involves meeting with the applicant and visiting the building involved. The outcome is an Interview/Inspection Record

4.4 Evaluation

Evaluation by a regional unit of all registered applications where the assessment has been completed, with a view to:

- a) reviewing the application form and the assessment report, to ensure the application complies with the criteria for entry into the service and all the required information has been provided.
- b) ensuring there is consistency of treatment of all applications by the case managers.

In the event of the application being rejected at this stage, the applicant will be referred to the advisory service.

The evaluation report, prepared in the service's regional office, records the decision on the application. Before the application proceeds further, the regional office will need to confirm the remedial work proposal is reasonable and falls within the criteria set for the service.

4.5 Advise applicant and other parties

If the application complies with the criteria for entry into the dispute resolution service and the service is set up with more than one dispute resolution option offered, the applicant is required to choose which option he or she wishes to follow. (Provision could be made for subsequent transfer between options if appropriate.)

If the application does not comply with the criteria for entry into the dispute resolution service, the applicant is advised to seek redress at the Disputes Tribunal (if the estimate of the remedial work and/or reparation is less than \$7,500) or referred to the advisory service.

4.6 Voluntary mediation

If the applicant elects the voluntary mediation option the subsequent steps will be as follows:

- a) Notification of the application to all parties identified by the applicant as responsible or potentially responsible, in the applicant's view, for the damage which has occurred and an invitation to those parties to participate in a mediation. The notification and invitation will be issued by the case manager and will be accompanied by the application form, assessment report and evaluation report.
- b) Provision for the case manager to take all practicable steps to persuade the parties who do not respond to the invitation, or who initially indicate they do not wish to mediate, to change their mind and participate.
- c) In the event that all the invited parties agree to mediate or that the parties who have responded positively agree to mediate, notwithstanding the absence of other parties, the matter will proceed to mediation as described in f)-m) below.
- d) In the event that none or insufficient of the invited parties agree to mediate, the application will be transferred to the compulsory adjudication option or, if it is not included in the dispute resolution service, the applicant will be referred to the advisory service.
- e) In the event that one of the invited parties wishes to involve other parties not already named by the applicant, the process described in a) to c) should be repeated.

- f) A preliminary meeting of the participants in the mediation with an independent mediator, so the mediator can:
- i) explain the mediation process to the parties and answer any questions they may have about it;
 - ii) identify any further information that may be required by any of the parties and any further steps that should be taken to enable the parties to mediate successfully;
 - iii) fix the timetable, up to and including the mediation;
 - iv) help the parties to complete and sign an Agreement to Mediate. The case manager will attend the preliminary meeting.
- g) The independent assessor who carried out the assessment will attend the preliminary meeting and be available to advise the mediator about further information that may be required.
- h) The provision of a period for gathering and sharing the further information identified as needed at the preliminary meeting.
- i) As determined at the preliminary meeting, the assessor will provide a further report on the remedial work required.
- j) Before the mediation itself proceeds, the regional office will need to confirm that the remedial work proposal is reasonable and falls within the criteria set for the service.
- k) The mediation itself. Consideration could be given to a provision that, if the applicant does not have legal advice or if the mediator so directs, the independent assessor who carried out the assessment will attend the mediation and be available to answer questions or assist.
- l) If the matter settles as a result of the mediation, the parties to the mediation will complete and sign a Settlement Agreement.
- m) If the matter does not settle, the application will be referred to the compulsory adjudication option or, if it is not included in the dispute resolution service, the applicant will be referred to the advisory service.

4.7 Compulsory mediation

If the applicant chooses the compulsory mediation option the subsequent steps will be as follows:

- a) Notification to all parties identified by the applicant as responsible, or potentially responsible in the applicant's view, for the damage which has occurred, of:
 - i) the registration of the application;
 - ii) the date, time and place of the preliminary meeting in terms of b) below.
- b) A preliminary meeting of the participants in the mediation with an independent mediator, so the mediator can:
 - i) explain the mediation process to the parties and answer any questions they may have about it;
 - ii) identify any further information that may be required by any of the parties and any further steps that should be taken to enable the parties to mediate successfully;
 - iii) fix the timetable, up to and including the mediation;
 - iv) help the parties to complete and sign an Agreement to Mediate.The case manager will attend the preliminary meeting.
- c) The independent assessor who carried out the assessment will attend the preliminary meeting and be available to advise the mediator about any further information that may be needed.
- d) The provision of a period for gathering and sharing the further information identified as needed at the preliminary meeting.
- e) As determined at the preliminary meeting the assessor will provide a further report on the remedial work required.
- f) Before the mediation itself proceeds the regional office will need to confirm that the remedial work proposal is reasonable and falls within the criteria set for the service.

- g) The mediation itself.
- h) If the matter settles as a result of the mediation, the parties to the mediation will complete and sign a Settlement Agreement.
- i) If the matter does not settle, the application will be referred to the compulsory adjudication option or, if it is not included in the dispute resolution service, the applicant will be referred to the advisory service.

4.8 Compulsory adjudication

If the applicant chooses the compulsory adjudication option the initial steps could be the same, whichever model the Government introduces. But the steps after the preliminary meeting would differ.

4.9 Preliminary steps to be taken in compulsory adjudication

The steps up to and including the preliminary meeting could be as follows:

- a) The application form and the assessment report would constitute the claim by the applicant, if the applicant did not lodge his or her own claim document.
- b) All possible parties in respect of whom, on the basis of the application form and the assessment report (or the alternative claim documents), there is an arguable case for liability, would be served (and so joined) straight-off.
- c) All those parties would be required:
 - (i) to respond within a specified period of service, say 35 days, by filing and serving on the applicant, and all parties served by the applicant, and also on any additional parties sought to be joined, a simplified response form which:
 - responds to the applicant's claim

- makes any cross-claims against other parties named by the claimant – and any claims against additional parties not named by the applicant
 - has attached to it all documents on which that party relies.
- (ii) to attend the preliminary meeting referred to in e) below.
- d) All parties served with cross-claims or additional party claims should be required to respond to them within a specified period, say 28 days, of being served with the response form.
- e) There should be a preliminary meeting of all parties with the adjudicator within a specified period, say 84 days, of the issue to the applicant for service of copies of his or her application form and the assessment report, and a form advising parties of the procedure to be followed.
- f) At the preliminary meeting the adjudicator would:
- (i) deal with all requests for:
 - more information about any party's claim or cross-claim
 - discovery (in terms of g) below).
 - (ii) schedule the adjudication session;
 - (iii) appoint a single expert, who may be the assessor, to report to him or her and to the parties or give directions as to the number of experts that may be called by the parties;
 - (iv) direct early meetings between the parties' experts to resolve technical issues.
- g) The following rules would apply to discovery:
- (i) every party should serve any documents on which it relies on the other parties at the same time as its claim or response;
 - (ii) every party should be required to:

- serve copies of any document in its possession, power or control which is helpful to a party against whom it has a claim or who has a claim against it at the same time as it serves the documents it intends to rely on
 - make an affidavit that it has examined the documents in its possession, power or control and there are no other documents in its possession, power or control which are helpful to any other such party.
- (iii) parties would not be entitled to further discovery from another party unless they could satisfy the adjudicator that those documents exist and are helpful to them.

4.10 Modified Employment Relations Authority process for compulsory adjudication

If the adopted compulsory adjudication model is a modification of the Employment Relations Authority process, the procedure after the preliminary meeting could mirror that set out in paragraphs 4-6 of the authority's "Steps to be taken in proceedings" document. That is:

- a) The adjudication session would commence with a general outline given by the adjudicator of the procedure to be followed in the particular case, including the order in which witnesses are to provide information. A formal opening would not be required from parties. Information would usually be provided to or obtained by the adjudicator in the form of sworn or affirmed evidence. Depending on any directions previously given, a witness could read a prepared statement or give oral evidence. This evidence could be added to at the request of the party or party's representative. Following this, or at any time, the adjudicator could question the witness. Questioning of witnesses by the parties could also be permitted. The parties or their representatives could propose further inquiries for the adjudicator

to make in relation to the evidence, or anything else of relevance to the investigation. The adjudicator would consider any such proposals and make such inquiries as thought necessary.

- b) At the close of an adjudication session parties or their representatives could sum-up by making points about the information gathered by the adjudicator and, in doing so, might refer to any applicable legal principles. A citation of any case law should be given where a copy of the decision is not being provided.
- c) The determination of the adjudicator would be in writing, to be issued either in a reserved decision or as a transcript of an oral decision given at the end of the investigation meeting. The adjudicator would aim to issue reserved decisions as soon as possible after the meeting but in any case within six weeks of completion of the investigation.

4.11 Modified adversarial process for compulsory adjudication

If the adopted compulsory adjudication model is a modified adversarial process, the procedure after the preliminary meeting would be as follows:

- a) Evidence in chief at the adjudication session would be in writing exchanged before the session and confirmed as true and correct at the hearing.
- b) Supplementary oral evidence in chief would be permitted, together with oral cross-examination and re-examination.
- c) Each party would be allocated a fixed time for the presentation of all aspects of its case – supplementary evidence in chief, cross-examination and re-examination – to be allocated between the different aspects at that party's election.
- d) Submissions would be in writing, with limited time for oral argument, limited to a summary of the key points in the

submissions and to answering questions from the adjudicator or, possibly, even just to answering questions.

- e) The adjudicator's decision should be capable of being challenged only on grounds similar to those on which arbitrator's awards may be challenged.
- f) The adjudicator's decision should be able to be enforced in the same way as an arbitrator's award can be enforced.

4.12 Ability of parties to compulsory adjudication process to agree to mediate

Provision could be made, in whichever compulsory adjudication model is adopted, for the parties to agree to mediate, either using the voluntary mediation option provided by the service or a private mediator. We suggest, however, that this only be done in the context of a date having been fixed for the final hearing by the adjudicator.

4.13 Right of appeal from adjudicator's determination

Whichever compulsory adjudication model is adopted, consideration will need to be given to appeal rights. The principal options are:

- a) appeal on a question of law only;
- b) appeal on questions of fact and law in which the appellant is required to persuade the appellate court that the lower court or the tribunal was in error;
- c) appeal by way of a fresh hearing of the whole matter.

Given that an equivalent case conducted in the District Court would be appealable on the second basis, we suggest that that form of appeal be adopted for appeals from the determinations of adjudication and that the right of appeal should be to the High Court.

4.14 Protocols and forms

Once the form of the dispute resolution service is finalised, protocols and forms will need to be drawn up for those using the service. Some work has been done on this already and is attached in the appendices to this document.

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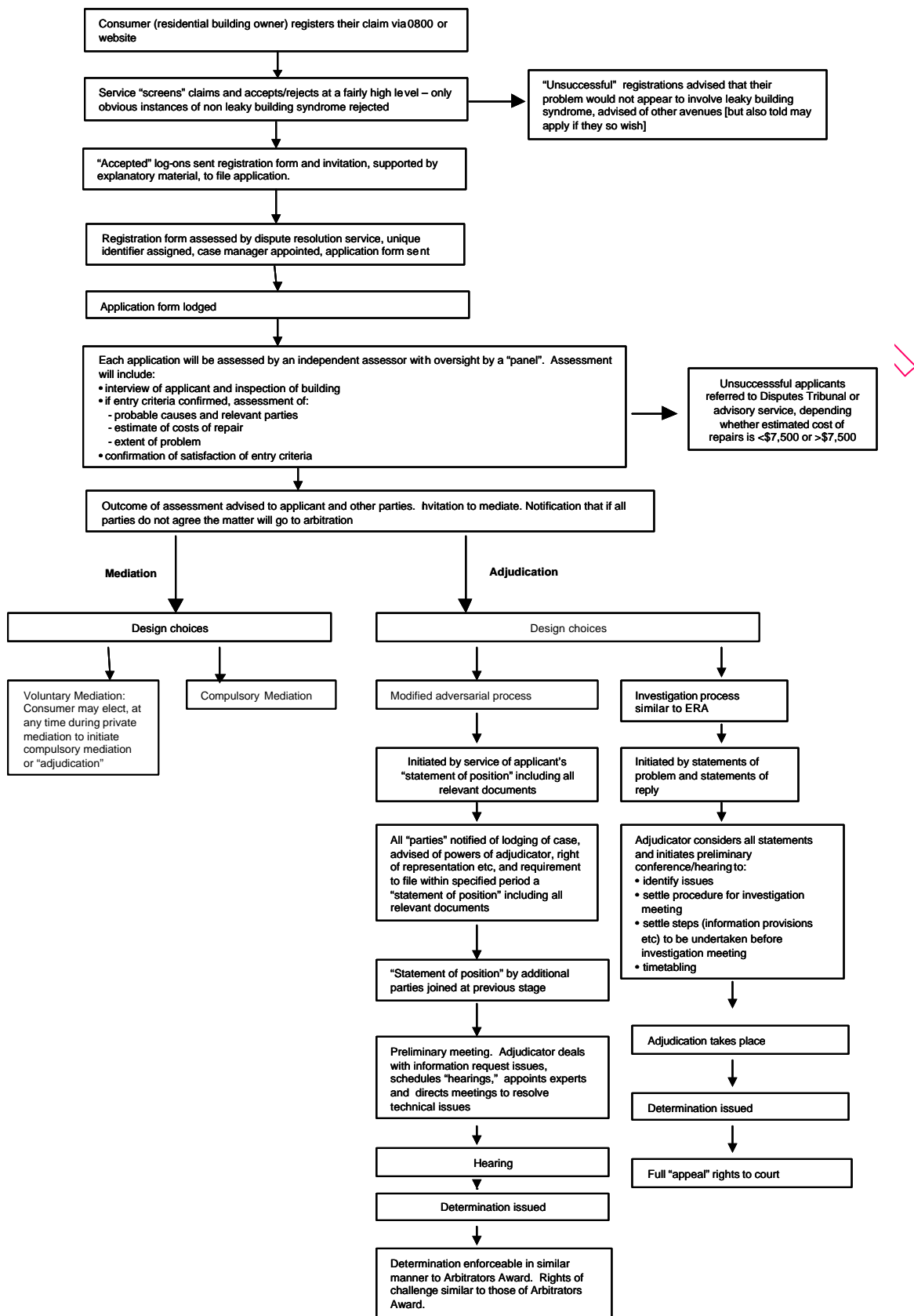


Figure 4.1: Proposed dispute resolution service options

5. An information gathering mechanism

The information contained in the application form and in the preliminary assessment report, recording the details of the building in question, could be used as the source of the information sought by the Government.

It would be necessary to assure the public, and to ensure in fact, that information in these documents identifying the property and the parties remains confidential.

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6. Confidentiality and related factors

Confidentiality is an essential feature of mediation and must be maintained in the design of any stand-alone dispute resolution service. We believe the proposal for an information gathering mechanism contained in the previous section is consistent with the maintenance of confidentiality.

In the time available to us we have not had an opportunity to consider fully what the position should be regarding the adjudication option. Our provisional view is that, because the adjudication option would, for those cases which were in it, be a substitute for the court system and would be binding (subject to whatever rights of appeal are provided for), adjudication hearings should be open to the public and the determinations in them available in the same way as the judgments or orders of the courts. At the very least, the determination should be publicly available.

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