

# Impact Summary: Canterbury Earthquakes Insurance Tribunal – detailed design

## Section 1: General information

### Purpose

The Ministry of Justice is solely responsible for the analysis and advice set out in this Impact Summary, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing second-order policy decisions related to the jurisdiction and design of the Canterbury Earthquakes Insurance Tribunal, the establishment of which Cabinet has previously agreed [SWC-18-MIN-009 and CAB-18-MIN-0065], and for which a Regulatory Impact Summary has already been completed ('the original RIS').

After section 2, this document separately analyses two sets of options to ensure the Tribunal can deal with claims before it efficiently and expertly, and to enhance the homeowner-orientation of the Tribunal process:

Part A assesses an option to limit the *eligibility of claims* that the Tribunal can deal with (beyond the standard eligibility criteria already developed), to exclude claims in respect of properties that have been sold since the earthquake damage to which the claim relates.

Part B assesses options to limit the *eligibility of claimants* who may file a claim in, or apply to have a court case transferred to, the Tribunal, to restrict insurers' ability to initiate the process.

### Key Limitations or Constraints on Analysis

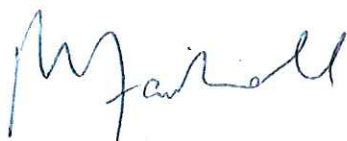
This analysis has been constrained by:

- the short period of time available in which to scope and develop it (to allow for the proposals' inclusion in the introduction version of the Bill establishing the Tribunal)
- due to those timeframes, an inability to consult with key affected parties (insurers and policyholders)
- a lack of data about the nature and extent of the problems and the number of stakeholders affected (particularly in relation to Part A).

In light of these constraints, the Ministry of Justice cautions against using the analysis in this impact summary to support or fully inform decisions to change policy settings.

Targeted consultation and further collation and analysis of data would assist in mitigating these constraints, although this would risk delaying the Bill, and the establishment of the Tribunal.

### Responsible Manager:



Ruth Fairhall  
General Manager, Courts and Justice Services Policy  
Ministry of Justice

Date: 4/7/18

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Ruth Fairhall  
General Manager, Courts and Justice Services Policy  
Ministry of Justice

Date:

<b>Quality Assurance Reviewing Agency:</b>
Ministry of Justice
<b>Quality Assurance Assessment:</b>
The information and analysis partially meets the Quality Assurance criteria.
<b>Reviewer Comments and Recommendations:</b>
<p>As is clearly explained in the Impact Summary, officials did not have an opportunity to consult on the proposals. The lack of consultation has compounded the lack of data, which means Cabinet faces some significant unknowns, particularly in relation to the proposal set out in Part A. The Impact Summary clearly draws the limitations and constraints to Cabinet's attention and cautions decision-makers against placing too much reliance on the analysis in it. The candour of this Impact Summary sufficiently offsets the lack of data and consultation to enable the QA Panel to assess it as partially meeting the Quality Assurance criteria.</p> <p>The QA Panel notes that, to some extent, the lack of consultation can be remedied during select committee consideration of the Canterbury Earthquakes Insurance Tribunal Bill.</p>

## Section 2: Context

### 2.1 What is the context within which action is proposed?

Cabinet has agreed to establish a Canterbury Earthquakes Insurance Tribunal, to resolve insurance disputes between policyholders (including insured persons under the Earthquake Commission Act) and insurers (including EQC) stemming from the Canterbury Earthquakes of 2010/11. The Tribunal will:

- be an alternative pathway to existing dispute resolution mechanisms, including the courts, services provided by the Residential Advisory Service (RAS), and other avenues such as the Insurance and Financial Services Ombudsman, private mediation and arbitration, and informal settlement processes
- actively case manage disputes, and refer parties to funded mediation in appropriate cases
- be able to join third parties to the dispute where it is in the interests of justice to do so.

Most insurance claims relating to the Canterbury earthquakes have been resolved (either through settlement or through dispute resolution, including in the courts), but a small, increasingly complex 'tail' of claims remain unsettled or unresolved. The Tribunal is designed to ensure these remaining claims in respect of residential property are settled or otherwise resolved fairly and quickly, with as little cost and stress to claimants as possible.

Some of the more detailed aspects of the Tribunal's design were not explicitly discussed in the original RIS, or firmly settled at the time Cabinet agreed to the establishment of the Tribunal. Assumptions that therefore underpinned several conclusions in the original RIS were based on the broad range of different issues that may arise in the context of Canterbury earthquakes insurance disputes, and standard Tribunal design settings. Settings based on these assumptions, which form the counterfactual for the purposes of this analysis, are:

- the tribunal's jurisdiction would include claims between an insurer and a policyholder, who had acquired the relevant property after the earthquake events giving rise to the claim, only where the earthquake insurance claim had been assigned by the original policyholder to the new owner, and
- either the insurer or the policyholder could initiate the Tribunal process by filing a claim.

### 2.2 Are there any constraints on the scope for decision making?

Ministers responsible for the development of the Tribunal are seeking Cabinet agreement to progress these proposals.

The ongoing work of the Canterbury Earthquake list (established by the judiciary in May 2012 to manage and expedite the disposal of earthquake-related cases in the Christchurch High Court) and appellate courts is closely related, as restrictions on claims eligible to enter the Tribunal process may affect their caseloads. Issues arising in recent and ongoing reviews of EQC and insurance law, and other Government workstreams, are also connected. In particular:

- the EQC review recommended further policy work in relation to how issues with on-sold properties are dealt with<sup>1</sup>

<sup>1</sup> Christine Stevenson, *Report of the Independent Ministerial Advisor to the Minister Responsible for the Earthquake Commission* (April 2018), pp 20 – 22.

- DPMC is supporting the regeneration of greater Christchurch, including work to support better outcomes for insurance claimants
- MBIE is undertaking a review of insurance contract law and insurers' conduct. While this work programme may lead to changes in insurance contract law it is forward looking, so will not affect the operation of the Tribunal.

### 2.3 What do stakeholders think about the problem and the proposed solution?

These proposals have been developed and analysed extremely quickly, to allow for their inclusion in the introduction version of the Bill establishing the Tribunal. Due to these timing constraints, no external consultation has been undertaken on these proposals. Core Government departments with particular responsibilities in the Canterbury earthquakes space have been informed, or consulted on this analysis.

As these proposals will be reflected in the legislation establishing the Tribunal, the select committee process will provide an opportunity for stakeholders and interested parties to express their views, and for any appropriate modifications to be made.

## Part A: Eligibility of claims ('on-solds')

### Section A3: problem definition and objectives

#### A3.1 What is the policy problem or opportunity?

The Tribunal is intended to provide speedy, flexible, low-cost dispute resolution and to bring subject-matter expertise to bear on decision-making. We expect that many outstanding insurance disputes which may come before the Tribunal will be complex (legally and/or technically).

Court cases, and anecdotal evidence, indicate that insurance disputes involving properties that have been sold to a new owner since sustaining earthquake damage contain an additional layer of legal complexity – for example, whether and which rights under the insurance contract have been validly assigned or otherwise transferred to the new owner, questions of estoppel (where one party relies on a promise made to them, to their detriment), and defences of waiver (where it is alleged one party to a contract gives up their rights under the contract).

Other elements of complexity (irrespective of rights having been assigned) may include:

- whether third parties are liable for some of the loss suffered by the purchaser (for example, pre-purchase building inspectors, councils signing off on remedial work)
- whether the purchaser should have exercised more care or caution (due diligence) before buying the property
- whether and to what extent EQC is liable for the cost of remediation or additional work over the level of EQC cover (\$100,000), if there are questions about the quality of the scoping and performance of the original work.<sup>2</sup>

These extra elements of complexity may undercut the intended benefits of the tribunal model (particularly speed and cost-effectiveness), for example because they are likely to:

<sup>2</sup> Ibid.

- absorb significant Tribunal resource and time, reducing the speed at which a case can be resolved, and (given the finite resources of the Tribunal) hampering the progress and resolution of other cases
  - necessitate extensive legal advice and representation for parties (which make up a large proportion of the overall cost of dispute resolution for claimants), reducing the cost savings a tribunal process can provide
  - require the decision-maker to have particularly specialised legal expertise
- Withheld in accordance with 9(2)(f)(iv): Confidentiality of advice  
Withheld in accordance with 9(2)(g)(i): Free and frank
- mean that a higher proportion of these cases may be appealed to the courts, involving duplication of work.

While policyholders and insurers still have the option of filing claims in the courts, and the Tribunal may refer complex issues to the courts to determine, there is a risk that claims will be filed in the Tribunal that would be more efficiently and expertly dealt with by the courts at first instance.

The evidence base for this problem definition is small but relatively reliable (sourced from court judgments, the independent EQC report and subject-matter experts). There is no evidence as to the number of insurance claims captured by the problem definition. However, it appears only a small proportion of Canterbury earthquakes-related court judgments have so far dealt with on-sold or assignment issues.<sup>3</sup> There is a risk that the problem may grow larger over time, as more homes are sold or otherwise transferred, but we have no way of modelling this impact.

### A3.2 Who is affected and how?

While we do not know the number of insurance claims this problem will affect, the key affected parties are:

- policyholders who have purchased or otherwise obtained the property to which an insurance claim relates, after the damage that is the subject of the claim has occurred, and
- insurers to which those claims relate.

These parties will be able to access existing dispute resolution mechanisms, including the courts, to settle or otherwise resolve their disputes. To ensure the Tribunal can deal with and resolve the majority of claims efficiently and effectively, the option for change would mean they will not be able to file relevant claims in the Tribunal. In some cases, this may be seen as a disadvantage (for example, because parties will not have access to funded mediation). However, it may benefit affected claimants who would otherwise have filed in the Tribunal, only for their claim to be appealed or referred to the courts (adding cost and delay to the resolution process).

Policyholders and insurers whose disputes are within the Tribunal's jurisdiction will benefit from the exclusion of more complex cases, as the efficiency of the Tribunal process should increase.

<sup>3</sup> Based on a key word search of available judgments, it appears around 10 judgments in the High Court and appellate courts have dealt with on-sold issues, of around 560 judgments relating to the Canterbury Earthquakes – we have not been able to do a full manual search of all judgments in the time available.

## Section A4: Options identification and impact analysis

### A4.1 What options have been considered?

We have assessed the option of excluding from the Tribunal's jurisdiction all claims in relation to property that has been sold since sustaining the earthquake damage or loss giving rise to the claim.

That option is compared to the counterfactual, which would allow all claims between an insurer and a policyholder to be heard by the Tribunal (that is, on-sold properties would be included provided there is an earthquake insurance dispute, for example because the original policy-holder's rights were assigned to the purchaser).

### A4.2 What criteria, in addition to costs and benefits, have been used to assess the likely impacts of the options under consideration?

Costs and benefits of the proposed Tribunal were assessed in the original RIS. Further refinement of those costs and benefits is not possible in the time available and given the lack of data about the number of claims and claimants likely to be affected.

We have assessed the options against the following criteria, which reflect the objective of the proposed change (enhancing the efficiency of the Tribunal's dispute resolution) and overarching purposes and principles of the Tribunal:

- i. The Tribunal process is efficient
  - Individual cases are resolved, and caseloads can be managed and progressed, quickly and without duplication of work.
- ii. Decision-making is competent and good-quality
  - The best-placed decision-maker adjudicates disputes, taking into account the expertise of different decision-makers.
- iii. Access to justice, and procedural fairness, are preserved and enhanced
  - Claimants have access to an inexpensive and accessible avenue for resolving insurance disputes.
  - Any restrictions on access to the Tribunal do not result in unfair outcomes or go further than necessary to achieve the objective.
- iv. Resolution process is homeowner-oriented
  - Policyholders and insured persons are in control of where and how their claim is determined, to the extent appropriate within a judicial process.

### A4.3 Marginal impact: How does each of the options identified at section A4.1 compare with the counterfactual, under each of the criteria?

The extent of the impacts illustrated in the table below almost exclusively depend on assumptions as to the number of claims included or excluded by the option. As there is little evidence on which to refine those assumptions, the preferred option is likely to more heavily depend on the weight assigned to each of the criteria.

**Key, compared to counterfactual:**

++ much better / + better / 0 about the same / - worse / -- much worse

	Counterfactual: include all insurance disputes within Tribunal's jurisdiction	Change option: exclude disputes relating to on-sold properties within Tribunal's jurisdiction
i. Efficiency	Complexity of cases involving on-sold properties may slow the efficiency of the Tribunal increasingly over time, as more of these claims are likely to come before it.	+ Likely to reduce the number of complex/long cases before the Tribunal, makes way for simpler cases, less duplication of work (lower risk of appeals). More likely to reduce the caseload over time as these claims are likely to increase.
ii. Quality	May risk robustness of decision-making in cases related to property transfers and assignment of rights, if the Tribunal member lacks specific expertise.	+ May help to ensure quality of decision-making, as courts are likely to be better-placed to adjudicate complex legal issues related to on-sold properties.
iii. Access to justice, fairness	Claimants whose claims meet the other eligibility criteria are eligible to enter the Tribunal process, as a more accessible and cheaper alternative to the courts. Eligible claims involve insurance disputes related to the Canterbury Earthquakes – in line with the overall rationale for the Tribunal.	- The only formal adjudicative/judicial dispute resolution option for claimants who are excluded is the courts (more expense and stress, less accessible), despite meeting other eligibility criteria and rationale for the Tribunal's establishment. The exclusion may be seen as unfair to exclude claims where purchasers have exercised caution and due diligence in buying the property.
iv. Homeowner-oriented	Claimants can choose which dispute resolution pathway they take up, provided they meet the other eligibility criteria for the Tribunal.	- Removes some claimants' choice as to which dispute resolution pathway they take up.

## Section A5: Conclusions

### A5.1 Which of the options is the proposed approach?

Taking all criteria on equal weighting, the option for change is equally rated against the counterfactual. If the analysis is weighted toward efficiency and quality, the change option is preferable; toward fairness, access to justice and homeowner-orientation, the counterfactual is preferable. We consider that the information available to inform this analysis and to quantify the assumptions sitting behind it, including the nature and extent of the emerging legal issues in this space, is insufficient to determine a preferred option.

The options analysed are generally compatible with the Government's 'Expectations for the design of regulatory systems'<sup>4</sup>. There are clear objectives that the options seek to achieve while remaining flexible and efficient. However, due to time constraints the analysis has not benefitted from an understanding of the extent and underlying cause of the problem, or from consultation with affected and interested parties about the proposed options.

<sup>4</sup> See [www.treasury.govt.nz/regulation/expectations](http://www.treasury.govt.nz/regulation/expectations).



## Part B: Eligibility of claimants to file claims

### Section B3: Problem definition and objectives

#### B3.1 What is the policy problem or opportunity?

The rationale for the Tribunal included recognition that homeowners felt powerless or frustrated in their attempts to resolve their insurance claims fairly (without spending lots of time, effort and money on lawyers and experts). The Tribunal is intended to improve the position of homeowners by providing an alternative pathway to resolve insurance disputes that does not require as much stress and resource as other, more formal mechanisms.

Generally, claimants in tribunals of this nature will be the policyholder, and the insurer will be the respondent. This is reflected in proceedings that have been filed in the courts in relation to earthquake insurance disputes, where only six cases of 1,015 (from May 2012 to 30 September 2017) on the Canterbury Earthquake List were initiated by the insurer. We expect this trend to continue, so the vast majority of claims will be filed by policyholders.

There is an opportunity to enhance the benefits of the Tribunal for policyholders, by ensuring they feel empowered and in control of the dispute resolution process. Surveys conducted in 2017 indicated that respondents with unresolved Canterbury insurance claims experienced significantly more stress, difficulty or dissatisfaction with life, than either those with settled claims or other Cantabrians generally.<sup>5</sup> Respondents with unresolved insurance disputes were also more likely to lack confidence in earthquake recovery decision-making, and be dissatisfied with the opportunities to influence earthquake recovery decisions.<sup>6</sup>

A corollary is a perceived risk that insurers may seek to use the tribunal process as a delaying tactic, or otherwise to disadvantage or disempower policyholders. While there is little evidence on which to determine the scope of this problem, this perceived risk, and any realisation of it, may undermine the Tribunal's legitimacy in the eyes of the public and the elements of its rationale focused on empowering homeowners to resolve their claims fairly.

#### B3.2 Who is affected and how?

The key affected parties are:

- insurers who wish to file claims in, or to initiate a transfer of an eligible case from the court to, the Tribunal (likely to comprise very few of the total number of claims), and
- policyholders with unsettled claims.

Under the options for change, insurers will be able to access existing dispute resolution mechanisms, including the courts, to settle or otherwise resolve claims, but will not be eligible to file claims in the Tribunal. In some cases, this may be seen as a disadvantage (for example, because parties to a claim initiated by an insurer will not have access to funded mediation). However, it may benefit affected claimants if the insurer would otherwise have filed in the Tribunal, only for their claim to be appealed or referred to the courts (adding cost and delay to the resolution process).

<sup>5</sup> A summary of *All Right? Research Findings* (February 2017), p 2 ([allright.org.nz/our-research/](http://allright.org.nz/our-research/)); Neilsen, *Wellbeing Survey* (Report prepared for the Canterbury District Health Board and partnering agencies), June 2017, p 14 ([www.cph.co.nz/wp-content/uploads/CantyWellbeingSurveyJun2017.pdf](http://www.cph.co.nz/wp-content/uploads/CantyWellbeingSurveyJun2017.pdf)).

<sup>6</sup> Neilsen, *Wellbeing Survey*, June 2017, p 15.

## Section B4: Options identification and impact analysis

### B4.1 What options have been considered?

The options we have considered in the analysis below are:

1. Only policyholders can initiate the Tribunal process
  - insurers (including EQC) cannot file a claim in the tribunal, and may not apply to transfer a court case to the tribunal.
2. Insurers can file a claim in the tribunal only with homeowner's agreement
  - Where an insurer wishes to initiate the tribunal process, they must seek and obtain the homeowner's agreement beforehand.
3. Additional eligibility criteria for insurers to apply to tribunal
  - An insurer wishing to file a claim must provide the Tribunal evidence that it has taken reasonable steps to reach settlement with the homeowner.

We considered, but excluded, three further options:

- Tribunal only binds insurers: if a homeowner is not satisfied with the decision or outcome of the Tribunal process, the decision has no effect
  - Excluded as it is not a judicial process (it does not result in a determination that is binding on both parties).
- Where the insurer files a claim, they must pay the homeowner's costs, irrespective of the outcome of the adjudication
  - Excluded because it would require significant policy work to establish its feasibility and to minimise unintended and/or undesired consequences.
- Insurers wishing to file a claim in the tribunal must pay a filing fee equivalent to or more than the High Court filing fee (\$540), subject to fee-setting principles.
  - Excluded because it would be ineffective in deterring insurers from accessing the Tribunal, and fees should not be used as a barrier to access a judicial process.

### B4.2 What criteria, in addition to costs and benefits, have been used to assess the likely impacts of the options under consideration?

Further refinement of the costs and benefits assessed in the original RIS is not possible in the time available and given the lack of data about the size of the impacts.

We have assessed the options against the following criteria, again reflecting the objective of the proposed change (ensuring the process is homeowner-driven) and overarching purposes and principles of the Tribunal:

- i. Resolution process is homeowner-oriented
  - policyholders and insured persons are in control of where and how their claim is determined, to the extent appropriate within a judicial process
- ii. The Tribunal process is efficient
  - The option is simple to implement and apply
- iii. Access to justice, and procedural fairness, are preserved and enhanced
  - Claimants have access to inexpensive and accessible dispute resolution services.
  - Any restrictions on access to the Tribunal do not result in unfair outcomes or go further than necessary to achieve the objective.
- iv. Negative and unintended effects are minimised
  - Adverse impacts on insurance markets and homeowners in the wider dispute resolution context are minimal

**B4.3 Marginal impact: How does each of the options identified at section B4.1 compare with the counterfactual, under each of the criteria?**

**Key, compared to counterfactual:**  
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	Counterfactual: no restrictions	1. Policyholder applications only	2. Policyholder agreement	3. Extra eligibility criteria for insurers
<b>i. Homeowner-oriented</b>	Homeowners can (and likely will, in the majority of cases) initiate the process; but insurers can also file claims.	++ Policyholders are the only ones who can initiate Tribunal proceedings, so have total control over whether the process is used (subject to eligibility)	+ Requirement for policyholders' agreement gatekeeps the Tribunal process.	0 / + Would not be significantly more homeowner-oriented (as insurers could still initiate Tribunal proceedings).
<b>ii. Efficient</b>	No additional rules to apply, apart from standard eligibility criteria.	0 Creates a bright line rule (so is easy to apply). No impact on overall efficiency of Tribunal process.	- Likely to create complexity and delays prior to and at the application stage, as insurers will need to obtain homeowners' agreement and then provide evidence of that agreement.	- Likely to create complexity and delays prior to and at the application stage, as insurers will need to take steps toward settlement and then provide evidence of those steps.
<b>iii. Access to justice, fairness</b>	Equal access to the Tribunal between parties. Recognises insurers may have legitimate reasons to initiate proceedings, based on their contractual rights and obligations.	-- Unequal access to the Tribunal between parties. Restricts insurers who may have legitimate reasons to initiate Tribunal proceedings. Effects are disproportionate to aims.	- Unequal access to the Tribunal between parties. Restricts insurers who may have legitimate reasons to initiate proceedings.	- Unequal access to the Tribunal between parties. Restricts insurers who may have legitimate reasons to initiate proceedings.
<b>iv. Negative effects minimised</b>	No significant adverse impacts. To the extent there is a risk insurers misuse the Tribunal process, this option leaves that risk open.	-- Policyholders are likely to be worse off if the insurer files in the courts instead (as court is likely to involve more cost and stress). Treating parties to a contract differently in respect of access to a judicial body may set undesirable precedent.	- Policyholders may feel pressured to agree to avoid the insurer filing in court. May set undesirable precedent.	0 / + May set undesirable precedent, but encourages insurers to proactively engage with policyholders, and may encourage wider aims of claim settlement and resolution.

## Section B5: Conclusions

### B5.1 Which of the options is the proposed approach?

In the context of the small number of cases likely to be affected (and therefore the narrow positive impact of the options for change), we consider the analysis above should be weighted in favour of access to justice. Our preferred approach is therefore the counterfactual. This preference also reflects:

- that all options for change are negatively rated against the counterfactual (taking all criteria on equal weighting)
- the risk that restricting insurers' ability to file in the Tribunal makes it more likely that the policyholder would be drawn into the court process instead (which undermines the homeowner-oriented objective of the options for change).

Ministers responsible for the development of the Tribunal have indicated a preference for allowing only policyholders to apply to the Tribunal.

All options for change are likely to be incompatible with some of the Government's expectations for the design of regulatory systems:

- Contrary to the expectation that regulatory systems treat all parties proportionately, fairly and equitably, each option creates inequality of access to the Tribunal.
- All options for change also risk setting an undesirable precedent that does not conform with best regulatory practice in the context of a judicial process.

## Section 6: Implementation, monitoring, and review

### 6.1 How will the new arrangements be given effect?

Legislation establishing the Tribunal will give effect to the proposals to be progressed. Implementation and risk management in relation to the proposals will be undertaken in the context of the project as a whole – these arrangements are detailed in the original RIS.

### 6.2 How will the impact of the new arrangements be monitored and reviewed?

Monitoring arrangements for the impact of the Tribunal's settings as a whole are contained in the original RIS, which details standard monitoring processes, legislative reporting requirements, and collection and analysis of data generated by case management systems. For monitoring the effects of these proposals in particular, the Ministry will include any relevant comparator data from the courts. Administrative staff and processes in both the Tribunal and the courts may provide further qualitative information as to the size and nature of impacts, for example if claimants who would be otherwise eligible make inquiries or attempt to file in the Tribunal.

No formal review of the new arrangements is planned, given their inextricability from the Tribunal's overall design and jurisdiction.