

Regulatory Impact Statement

Canterbury Earthquake (Building Act) Order 2013

Agency Disclosure Statement

- 1 This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment.
- 2 Cabinet considered an oral item on 2 September 2013 and agreed that a new Canterbury Earthquake (Building Act) Order 2013 be made under the Canterbury Earthquake Recovery Act 2011 to ensure that the existing extended section 124 notices continue in force.
- 3 The objective of the review of the Canterbury Earthquake (Building Act) Order 2011 is to ensure the health and safety of building users in greater Christchurch is protected while the area responds to and recovers from the impacts of the earthquakes.
- 4 It is clear from the risks identified that none of the options are ideal. It is considered that in the absence of appropriate powers in primary legislation to address the dangerous building situations that exist for earthquake related reasons, it is necessary to retain a statutory mechanism to prevent access to properties where an unacceptable risk has been identified.
- 5 A key concern is that restricting a property owner's access to their home has a significant impact on their property rights. It is generally considered that the health and safety risks associated with letting the Canterbury Earthquake (Building Act) Order 2011, and the extended section 124 notices issued in reliance on it, expire justify the impact on property rights.
- 6 The Canterbury Earthquake Recovery Authority and the greater Christchurch councils were involved in throughout the review process and the development of the policy advice. The Minister for Canterbury Earthquake Recovery has discussed the proposed Canterbury Earthquake (Building Act) Order 2013 with members of the Cross Party Parliamentary Forum and it has been reviewed by the Canterbury Earthquake Recovery Review Panel.
- 7 The Human Rights Commission and the property owners/public were not consulted directly on the making of the new Order. However, the Commission expressed concern to Christchurch City Council in July 2013 about the 2011 Order and property owners concerns have been widely publicised through the media. A complaint was also made to the Regulations Review Committee of Parliament. These concerns have been taken into consideration during the review process.



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Status Quo and Problem Definition

Building Act

- 1 Councils have the power to issue dangerous building notices under the Building Act 2004 where in the ordinary course of events (excluding the occurrence of an earthquake) the building is *likely* to cause:
 - injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property, or
 - damage to other property.

Canterbury Earthquake (Building Act) Orders

- 2 The Canterbury Earthquake (Building Act) Order 2011 (2011 Order) came into force on 17 September 2011 and expires on 16 September 2013.
- 3 The 2011 Order was preceded by the Canterbury Earthquake (Building Act) Order 2010 (2010 Order). The Order extended the powers of the greater Christchurch councils to deal with dangerous buildings including:
 - deeming red and yellow placards issued under the Civil Defence Emergency Management Act 2002 during a state of emergency to be dangerous building notices under the Building Act 2004
 - allowing for access to be restricted to buildings that were not themselves dangerous but were at risk from adjacent or nearby property
 - allowing councils to demolish certain dangerous buildings, where the owner has failed to do so, without the need to obtain District Court approval.
- 4 The 2010 Order and the 2011 Order were made under the Canterbury Earthquake Recovery Acts 2010 and 2011, respectively. They were seen as the best mechanism to continue the direct involvement of the councils, to support the decisions and capacity of the affected community, and to facilitate reconstruction activities.
- 5 The 2011 Order further modified the Building Act 2004 by providing that a dangerous building included a building where there is a risk¹ that:
 - the building could collapse or otherwise cause injury or death to any person in the building as a result of an earthquake that generates shaking that is less than a moderate earthquake; or
 - adjacent or nearby buildings or land could collapse (including collapse by way of rock fall, landslide, cliff collapse, or subsidence) or otherwise cause injury or death to any person in the building.

¹ A risk that something could happen is simply a possibility of that event occurring.

- 6 Where this lower risk threshold is met, the greater Christchurch councils may issue a notice under section 124 of the Building Act 2004 to require work to be completed on a building, or to prevent people approaching, or warn people not to approach the building (referred to as an extended section 124 notice).
- 7 Where a dangerous building notice has been attached to a building preventing people approaching, or warning people not to approach a building, it is an offence to use or occupy the building, or to permit another person to use or occupy a building.
- 8 If a property owner disagrees with a council's exercise of a dangerous building power they can apply to the Ministry of Business, Innovation and Employment (the Ministry) for a determination. If the Ministry makes a determination against the council the section 124 notice can be lifted. Alternatively, the council can lift the notice after the danger has been reduced or mitigated.

Canterbury Earthquake Recovery Act

- 9 The Canterbury Earthquake Recovery Authority (CERA) has powers to address a range of dangerous situations it reasonably considers necessary for the purposes of recovery. These powers allow CERA to:
 - restrict or prohibit access to any specified area, or to any specified building, within greater Christchurch (section 45)
 - demolish, remove or dispose of various building structures and recover related costs (section 38).
- 10 There is no appeal process in the Canterbury Earthquake Recovery Act 2011 from a decision under section 45 of the Canterbury Earthquake Recovery Act 2011. However the exercise of this power could be challenged in the High Court in a judicial review proceeding.
- 11 CERA currently has an estimated 1220 section 45 notices in force in Christchurch to prohibit access to commercial buildings and public spaces.

Extended section 124 notices

- 12 The power to issue extended section 124 notices is the only power in the 2011 Order which is still in use in both the Port Hills (for private residential properties) and in the Waimakariri District (for earthquake risks in commercial buildings).
- 13 As at 31 July 2013, Christchurch City Council had issued an estimated 377 extended section 124 notices to property owners in the Port Hills. Currently, 34 of these properties are located in the Port Hills green zone². On 15 July 2013, Cabinet agreed to rezone 31 of these properties as red zone properties, resulting in an estimated 140 privately owned and 234 Crown owned properties in the red zone with extended section 124 notices [Cab Min (13) 24/8 refers]. The three remaining properties with extended section 124 notices are located in the green zone and owners are able to mitigate the risk on an individual basis.

² The Crown has zoned properties green and residential red "zones" in the Port Hills. Red zones have been declared in areas where residents face an unacceptable level of life risk and an engineering solution to mitigate the life risk would be uncertain, disruptive, not timely and not cost effective.

- 14 These recent decisions have not been announced due to the recent High Court judgement in the Quake Outcasts judicial review case. This judgement raised questions about the decision making process and is currently being appealed.
- 15 Some property owners with extended section 124 notices in the Port Hills are looking to reduce or mitigate the danger with the intent of having their notices lifted. They are developing solutions, in conjunction with the owners of the land where the source of the danger is located.
- 16 The Crown has made an "offer to purchase" insured residential properties in the Port Hills red zone, including those with extended section 124 notices. This offer expires on 31 January 2014. A small number of property owners are unlikely to accept the Crown offer.
- 17 To date, Waimakariri District Council has issued a total of 38 extended section 124 notices for commercial buildings (although some of these may since have been lifted or the buildings demolished). The Council is relying on the extended section 124 notices because risk due to earthquakes is explicitly excluded under the dangerous building provisions of the Building Act 2004. Similar at-risk commercial properties in Christchurch City are being managed by CERA under the Canterbury Earthquake Recovery Act 2011.

Regulations Review Committee complaint

- 18 The Regulations Review Committee is currently considering a complaint about the 2011 Order, which alleges it:
 - is not in accordance with the general objects and intentions of the statute under which it was made (the Canterbury Earthquake Recovery Act 2011)
 - trespasses unduly on personal rights and liberties
 - appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made, and
 - contains matter more appropriate for parliamentary enactment.
- 19 The Committee heard oral evidence from the Ministry on 16 May and 29 August 2013.

The Problem

- 20 The 2011 Order was made as an interim measure and expires on 16 September 2013. If the Order expires the existing extended section 124 notices in the Port Hills and Waimakariri District will not be enforceable.
- 21 There are no provisions in the Building Act 2004 to enable greater Christchurch councils to issue dangerous building notices where buildings may be dangerous due to the risk of new land hazards, such as rock roll, which become apparent after the land has been built on or in a moderate earthquake. This means people may reoccupy their property and be subject to risk.

- 22 Nearly three years on the level of risk the 2011 Order exists to address still remains in those properties with extended section 124 notices. Both Christchurch City Council and Waimakariri District Council expect to identify new situations where an extended section 124 notice is needed.
- 23 Christchurch City Council has indicated there is a possibility further properties with an unacceptable life risk may be identified once the results of the GNS stability reports, due October 2013, have been analysed. Waimakariri District Council estimates another 100 commercial buildings have yet to have a detailed engineering re-assessment carried out. The Council is relying on extended section 124 notices to address any new dangerous buildings because risk due to an earthquake is explicitly excluded under the dangerous building provisions in the Building Act 2004.

Objectives

- 24 The objectives of the powers provided through the 2011 Order are to protect the health and safety of building users in greater Christchurch and to facilitate aspects of the wider response and recovery effort following the Canterbury earthquakes.
- 25 The review process included an assessment of the impact of each option on the on the following six criteria:
- ongoing health and safety for building occupiers
 - certainty for property owners
 - availability of a complaints process
 - enforceability of the existing extended section 124 notices after 16 September 2013
 - minimise legal risks, including precedent setting
 - impact on the property owners rights
 - compliance costs.

Options explored

- 26 After considering an oral item on 2 September 2013 Cabinet agreed that a new 2013 Order be made under the Canterbury Earthquake Recovery Act 2011 to ensure that the existing extended 124 notices continue in force. Cabinet invited the Minister for Building and Construction to issue drafting instructions to Parliamentary Counsel Office and to undertake the necessary consultation with the Canterbury Earthquake Recovery Review Panel and the Cross Party Parliamentary Forum.
- 27 Three main options were explored to address the issue of the extended section 124 notices ceasing to be enforceable on expiry of the 2011 Order:
- Option 1 – Let the 2011 Order expire, existing notices lapse, and rely on powers in the Building Act 2011 and Canterbury Earthquake Recovery Act 2011 to address any dangerous building situations

- Option 2 – Make a new Order extending the existing extended section 124 notices and continuing the ability to issue new extended section 124 notices
- Option 3 – Make a new Order to continue the existing notices only (agreed).

Option 1 – Let the 2011 Order expire and existing notices lapse

- 28 Under this Option the 2011 Order expires on 16 September 2013. The extended section 124 notices will also expire at this time. Councils would need to manage dangerous buildings through their existing powers under the Building Act 2004 (refer paragraph 1). This means that the health and safety objective cannot be met and that there is no certainty for property owners as:
- Christchurch City Council would have no legislative mechanism to restrict access to residential properties where there is a risk to life from earthquake related geotechnical hazards, for example rock roll, as the existing Building Act provisions cannot be used to cover earthquake related activity
 - Waimakariri District Council would have no legislative mechanism to restrict access to damaged commercial buildings as the dangerous building definition in the Building Act 2004 explicitly excludes the occurrence of earthquakes
 - it is unlikely that all of the residential properties in the Port Hills with section 124 notices would meet the criteria for a section 45 notice to prohibit entry, and there may be a gap between the expiry of the extended section 124 notices and imposition of a section 45 notice by CERA (due to the time to assess each case). This means that people may reoccupy their houses and be subject to risk and this situation would be very uncertain for owners
 - notices placed under the 2011 Order could no longer be enforced.
- 29 Each property would have to be assessed on a case-by-case basis to determine whether the property meets the criteria for a section 45 notice under the Canterbury Earthquake Recovery Act 2011. This criteria may be different to that applied by Christchurch City Council to issue extended section 124 notices, causing uncertainty for property owners.
- 30 The assessment costs for 140 properties are estimated at \$700,000 for the geotechnical work. Additional costs would be incurred for other specialist services such as structural engineering assessments. Around \$140,000 would be incurred every four to six week for monitoring the properties. CERA has confirmed it is able to absorb the assessment costs within baseline funding for a small number of assessments only.
- 31 Where the CERA powers are used to prohibit access to land and property, the property owner will not have access to a complaints process. The Canterbury Earthquake Recovery Act 2011 has no appeal process for a decision made under section 45. However, the exercise of the section 45 power could be challenged through a judicial review proceeding in the High Court.

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Withheld under section 9(2)(h) of the Official Information Act 1982.

Option 2 – Make a new Order extending and continuing existing powers to issue extended section 124 notices

- 33 Under this option, a new 2013 Order would be made explicitly continuing the existing powers to enforce existing notices and issue new extended section 124 notices.
- 34 This Option protects the health and safety of building users and provides certainty for affected property owners. It also ensures home owners continue to have access to determinations if they dispute the notices on their properties, and provides a clear process for the notices to be lifted if the hazard is mitigated.
- 35 There are no new compliance costs for councils and they would be able to seek injunctions if required to remove people currently occupying properties with extended section 124 notices.

Withheld under
section 36
9(2)(h) of
the Official
Information
Act 1982. 37

This Option may be seen as unfair. Nearly three years on from the earthquakes, a great deal more is understood about the risks to properties in greater Christchurch. Any new risks which arise are less likely to be directly earthquake related than they were when the 2011 Order was made. This is no different to on-going risk management elsewhere in the country. Continuing Christchurch City and Waimakariri District Councils' ability to issue new extended section 124 notices would put them out of step with other areas and could lead to other territorial authorities seeking similar powers to deal with dangerous buildings.

Option 3 – Make a new order to continue the existing extended section 124 notices only

- 38 Under this option, a new 2013 Order would be made and be limited to ensuring the current extended section 124 notices continue in force. It would not include any of the other provisions from the 2011 Order. The Building Act 2004 or the Canterbury Earthquake Recovery Act 2011 would be used to manage newly identified risks as appropriate.

Withheld under
section 39
9(2)(h) of
the Official
Information
Act 1982. 40

This approach has the same benefits as Option 2

It is proposed that the new Order expire on 18 April 2016, to coincide with the term of the Canterbury Earthquake Recovery Act 2011. This provides certainty for owners with properties that are already subject to extended section 124 notices. It also provides time for property owners in the Port Hills to complete any rock fall protection works they may undertake in the long term as an alternative to accepting the Crown offer.

- 41 An alternative expiry date of 31 January 2014 that coincides with the expiry of the Crown offer was also considered. As it is likely that there will be a small number of property owners who will not accept the Crown offer and wish to remain in the red zone, we consider this would carry the same risks as letting the 2011 Order expire under Option 1. There is not enough time to complete mitigation works to remove the danger by this date.

Conclusion

- 42 The following table summarises the impact of the three Options when they are assessed against the criteria.

Criteria	Option 1	Option 2	Option 3
Ongoing health and safety	No	Yes	Yes
Certainty for property owners	No	Yes	Yes
Complaints process available	No	Yes	Yes
Existing notices enforceable	No	Yes	Yes
Impacts on property rights	Yes	Yes	Yes
New compliance cost	Yes	No	No

Withheld under section 9(2)(h) of the Official Information Act 1982.

- 43 It is clear from the risks identified that none of the Options is ideal. It is considered in the absence of any appropriate primary legislation to address the issue of dangerous buildings from geotechnical risks (such as rock fall), Option 3 should be progressed as:
- the on-going level of risk to life justifies the need to retain a statutory mechanism to prevent access to those properties where an unacceptable risk has been identified
 - we have attached more weight to the health and safety risks of letting the order expire than to the impact on property rights and the risk of legal challenge
 - the Order will continue to assist with the recovery in the greater Christchurch area.
- 44 Progressing Option 3 recognises that the danger still exists for property owners with extended section 124 notices, while signalling a move towards “business as usual” as any new notices would need to be issued under existing legislation.

Consultation

- 45 CERA and the greater Christchurch councils were involved throughout the review process and the development of the policy advice. The councils are in agreement with the purpose of the proposed 2013 Order as it provides continuity and there are other mechanisms to address new dangerous building situations that may emerge.
- 46 The Canterbury Earthquake Recovery Review Panel has reviewed the proposed 2013 Order (as required under section 74 of the Canterbury Earthquake Recovery Act 2011) and recommended that it should be made without change.

- 47 The Minister for Canterbury Earthquake Recovery has been consulted on the proposed 2013 Order, as it has implications for the Canterbury earthquake recovery, and has discussed this matter with members of the Cross Party Parliamentary Forum. The Labour Party and the Green Party have advised that they are unable to support the proposed 2013 Order. New Zealand First and United Future had no comment.
- 48 The Human Rights Commission was not consulted directly. However, the Commission expressed concern to Christchurch City Council in July 2013 about the situation for property owners with extended section 124 notices in the Port Hills. The concern relates to the infringement of property owners' right to "adequate housing" due to the different approaches between Christchurch City Council and CERA.
- 49 There has been no direct consultation with property owners with extended section 124 notices regarding the continuing the 2011 Order. However, property owners views regarding various situations in the Port Hills have been well publicised through the media. The Ministry is aware that the extended section 124 notices are contentious as they impact significantly on property rights. This is evidenced by the complaint to the Regulations Review Committee (refer paragraphs 17 and 18). Further, the Ministry has received 12 applications from property owners in the Port Hills to determine whether their extended section 124 notices are justified. The views of property owners have therefore been taken into consideration throughout the review process.
- 50 The following agencies have been consulted on this paper: the Department of Internal Affairs, Ministry of Civil Defence and Emergency Management, Ministry of Justice, Ministry for the Environment, the Treasury, and Land Information New Zealand. The Department of Prime Minister and Cabinet has been informed. They are generally supportive of the proposed 2013 Order.

Implementation

- 51 Option 3 would be given effect through a new Canterbury Earthquake (Building Act) Order 2013 made under the Canterbury Earthquake Recovery Act 2011.
- 52 Normally, Orders in Council come into effect 28 days after they are notified in the Gazette. In this case, it is highly desirable that the 2013 Order comes into force and is gazetted on the 17 September 2013 to ensure that there is no gap in continuity between the 2011 and 2013 Orders.

Monitoring, Evaluation and Review

- 53 The impact of the proposals will be monitored through discussions with councils and CERA.
- 54 The 2013 Order can be reviewed prior to its expiry on 18 April 2016 if necessary.