Annual Report of the

CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

For the 12 months ended 30 June 2022

In accordance with the provisions of section 23(3) of Schedule 2 of the Canterbury Earthquakes Insurance Tribunal Act 2019

Canterbury Earthquakes Insurance Tribunal

Introduction

[1] The Canterbury Earthquakes Insurance Tribunal (the Tribunal) was established on 10 June 2019, under s 55 of the Canterbury Earthquakes Insurance Tribunal Act 2019 (the Act). This Third Annual Report, required by Schedule 2, s 23(3), covers the period from 1 July 2021 to 30 June 2022.

[2] The Tribunal was set up to provide fair, speedy, flexible, and cost-effective services for resolving disputes about insurance claims for physical loss or damage to residential buildings, property, and land arising from the Canterbury earthquakes. The Tribunal has now had three years' experience handling and resolving claims and has developed robust processes to resolve these, often difficult, disputes.

[3] The Tribunal's jurisdiction is limited, applications can only be considered if:

(a) the applicant was an owner of the property at the time it was damaged by any of the earthquakes experienced in Canterbury between 4 September 2010 and 31 December 2011 (the sequence);

(b) at the time the property was damaged:

(i) it was insured in the name of the applicant; and

(ii) it was used as a residence (if the claim is against an insurance company) or 50% of the property was used as either a residence or a rest home (if the claim is against the Earthquake Commission (EQC)

(c) one of the parties is either EQC or an insurance company; and

(d) there is a dispute between the applicant and an insurance company/ EQC about a claim relating to that damage.

[4] Provided the above criteria are met, there are no limitations on the other related parties that can be joined as respondents, or on the monetary jurisdiction of the Tribunal. Disputes about defective repairs require that builders, project managers, and other construction consultants, whose work is alleged to be negligent, are brought before the Tribunal. This has led to the Tribunal dealing with applications involving ten or more parties, and with disputes about sums in excess of $2 million.

[5] The Tribunal cannot deal with claims which:

(a) solely relate to Canterbury earthquakes which occurred after 31 December 2011;

(b) relate to earthquakes outside of Canterbury, unless there is a claim stemming from the sequence; or

(c) relate to properties that have been "on-sold" (purchased by an applicant after the property suffered earthquake damage during the sequence).

Tribunal personnel and caseload

[6] The Tribunal has had changes of personnel in the last year, with the retirement of Chair Somerville, and the resignation of Members Cogswell and Kilgour. The falling number of new applications and the resolution of others has meant lower caseloads and the current number of members is expected to be sufficient to comfortably deal with case numbers.

[7] The Tribunal had 6 new applications in the 2021/2022 year. It is expected that similar numbers will continue into the 2022/2023 year. Most new and existing applications are for technically and legally complex matters involving the combination of disputed earthquake damage and allegations of defective repair work. Prolonged timeframes during which homeowners have been in dispute with their insurers lead to difficult interpersonal relationships between parties which add to complexity. Earlier this year the Tribunal revised its practice-notes to better address these issues and to formalise the practices which have evolved to address the more complex and demanding matters.

Tribunal practices

[8] Given the broad nature of the applications; some of which are of lower value but of high personal significance, and others where the values in dispute are over $2 million, all of which involve technical and legal complexity, the Tribunal uses flexible processes. A significant number of applicants are self-represented or represented by lay-advocates. Before the Tribunal was established the historically high numbers of litigated matters, small pool of expert witnesses, and fixed pool of defendants (including those same 7 insurers referred to in Table 1) led to experts and lawyers driving the process at the expense of homeowners, and insurers. To offset this the Tribunal has actively developed inquisitorial processes which allow the Tribunal member to be proactive in the management and investigation of applications and to lead the testing of evidence during hearing. Close case management means the assigned member is familiar with the issues.

Case management

[9] The Tribunal puts a particular emphasis on the first case management conference as it allows the homeowner to come face-to-face with a key decision-maker from their insurer, often for the first time, and in a neutral environment. For this reason, the Tribunal has returned to its practice of requiring all parties to attend first case management conferences in person. Covid-19 restrictions led to conferences being conducted by video which lessened their effectiveness.

[10] Often with self-represented homeowners the allegations made in applications are not written in an easily comprehensible way. The first case management conference allows the issues to be discussed and clarified by the presiding Tribunal member in a way which defines the path forward. This process also enables a better understanding between the parties.

[11] Successive case management conferences are generally conducted by teleconference. Recently the Tribunal has moved to requiring a teleconference to allow the parties to provide updates every two months. This change was brought in to prevent the cycle whereby the workloads of lawyers and expert witnesses lead to delays of months or years in matters progressing.

[12] The case management process is proving effective. Approximately one in seven applications settles at, or soon after, the first case management conference, and approximately half of applications settle at or soon after a successive case management conference.

Tribunal experts

[13] The Tribunal regularly appoints experts to assist it. Generally, it is not economic to seek detailed reports, but these experts have been very helpful in resolving technical issues at facilitated conferences of experts and during hearings by answering questions and engaging in debate with the parties' experts. Practices have developed where the Tribunal's expert does not provide evidence but instead assists the Tribunal in testing the expert witnesses evidence. During the year under review the Tribunal spent $162,627.59 on specialist experts.

Mediation and settlement conferences

[14] Alternative Dispute Resolution is a valuable tool in resolving disputes. It allows the parties to control the outcome of the dispute and is usually more cost-effective than proceeding to hearing. For the last two years the Tribunal has conducted its own settlement conferences, presided over by a member of the Tribunal. This process has proved particularly effective, as the Tribunal members are familiar with the disputes and are experts in the jurisdiction, and unlike commercial mediators are able to robustly test the parties and their advocates positions, without fear of losing future business.

[15] No claims were referred to funded mediation through MBIE in the current year, compared with four for the preceding year. This has come about because parties have opted instead for settlement conferences conducted by the Tribunal.

[16] During the current year the Tribunal has held six settlement conferences, of which two resulted in resolution of the claim at the conference and another two settled shortly after. One particularly difficult matter was the subject of the two remaining settlement conferences, and is still yet to resolve, although the issues in dispute have been considerably narrowed.

[17] The Tribunal has introduced a process where an expert's conference is convened before settlement conferences and hearings to reduce the issues in dispute. This has proved highly

effective in narrowing and defining disputes and has led to several matters settling without the need for further input from the Tribunal.

Hearings

[18] The Tribunal has developed flexible practices for hearings, to cope with varying complexity of matters, and to deal with the challenges which formal hearings present to self-represented litigants. The Tribunal's practice is to identify as early as possible issues which can be heard separately, avoiding the need for a long and expensive hearing at the end of the process. This practice has worked effectively, allowing matters to resolve earlier as key issues are resolved more quickly.

[19] The Tribunal has adopted concurrent expert evidence practices (so-called "hot-tubbing") where all expert witnesses in an area of expertise provide evidence as a group. This leads to discussion of the issues between the experts, which tests opinion evidence in a better way than questioning by lawyers and/or the Tribunal member. The Tribunal also uses restrictions on cross-examination and has instituted less formal witness statements which reduce the need for experts to produce long expensive and discursive briefs of evidence.

Annual update

[20] Section 23(3) of Schedule 1 of the Act requires the following information be provided in the Annual Report of the Tribunal:

- number of applications filed, including those referred from another jurisdiction
- number of applications accepted as claims
- number of claims filed against each insurer and the Earthquake Commission
- the way claims were settled, and at which stage they were settled
- the timeliness with which claims have been completed
- the outcome of claims
- the number of claims still to be resolved at the end of the reporting year.

Numbers of applications filed, referred, and accepted

[21] Although claims may only be brought to the Tribunal by homeowners, appropriate cases can be referred to the Tribunal by the High Court, the District Court, and the Disputes Tribunal.

The High Court has transferred 46 claims, none during the current year. The District Court has only transferred two claims, neither during the current year. None have been referred by the Disputes Tribunal. The Tribunal has referred no claims to either the High Court or the District Court under s 28 of the Act.

[22] Homeowners typically choose to bring their disputes to the Tribunal because:

(a) they seek early resolution of the dispute;

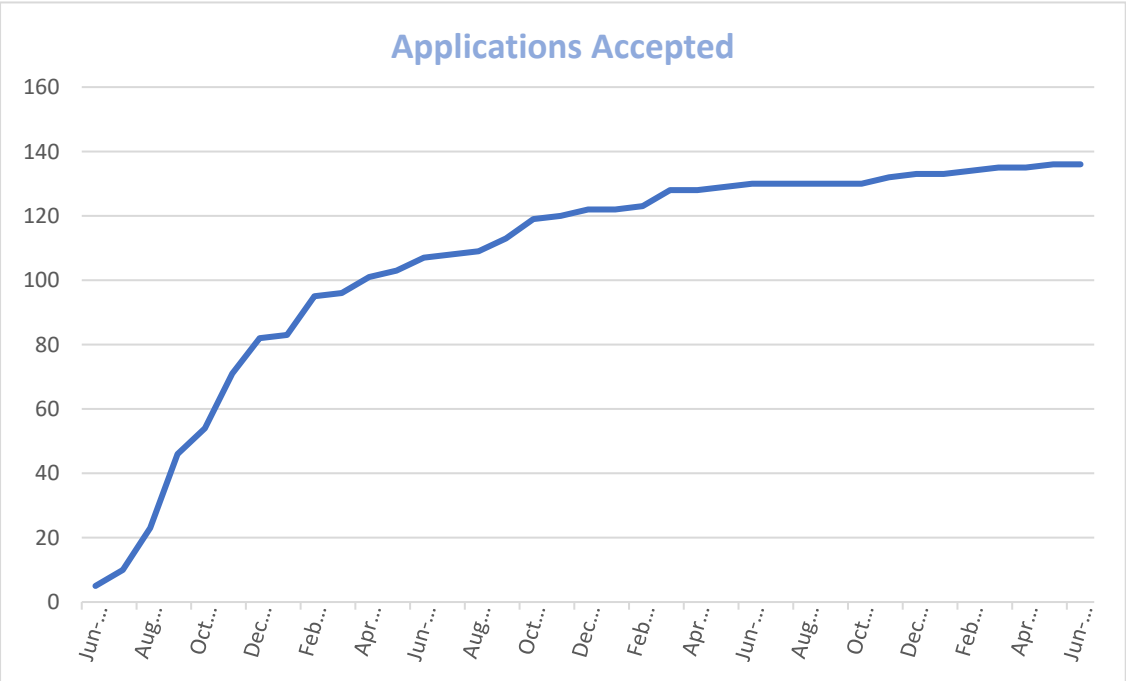
(b) the process is less adversarial than in a court and is easier to negotiate without a lawyer;

(c) the Tribunal has no filing or hearing fees; and

(d) they do not face an award of costs against them if their claim is unsuccessful.

[23] As at 30 June 2022, 136 claims had been lodged with the Tribunal, of which 130 were accepted to continue as active claims, with the remainder not accepted for jurisdictional reasons. A graph showing when the claims were lodged with the Tribunal is set out below. Homeowners filed 6 claims during the current year, all of which were accepted.

Graph 1: Applications accepted since 1 June 2019



Insurers

[24] The claims brought to the Tribunal involve seven separate insurers (IAG is an umbrella entity which owns State Insurance, Lumley General Insurance, NZI and Lantern Insurance within its stable of brands, and AAI is a joint venture between the Automobile Association and Vero). QBE is not included in the figures as its only role is as the liability insurer of an insolvent project management company involved in defective repair claims.

[25] Some homeowners have disputes with both EQC and their insurer, so both are joined as respondents to the claim. Sometimes EQC is later removed as a party because the claim against it is resolved earlier than the claim against the insurers. On other occasions, EQC remains a party until the dispute with the insurer has been resolved.

[26] Set out below is a list of those companies and the number of claims in which each is involved. The numbers in this list exceed the number of open claims because some claims involve multiple insurers.

Table 1: Claims by insurer as at 30 June 2021

	Accepted	Settled	Current	
VERO	23	20	3	87%
IAG	49	38	11	78%
EQC	20	18	2	90%
EQC + Anor	39	34	5	87%
SR	27	24	3	89%
TOWER	16	15	1	94%
MAS	4	2	2	50%
WESTPAC	1	1	0	100%
	179	152	27	85%

Resolution

[27] In the 2021/2022 year the Tribunal has resolved 31 claims, leaving 23 claims still to be resolved.

[28] Of those 23 unresolved applications:

(a) six have been resolved but are classified as active until the completion of agreed repairs, or finalisation of settlement details;

(b) two have been stayed by the parties or are awaiting the outcome of a case in the Court of Appeal;

(c) three have been heard but are awaiting a substantive reserved decision,

(d) one is resolved but is open pending a reserved costs decision

(e) two have been scheduled for hearing;

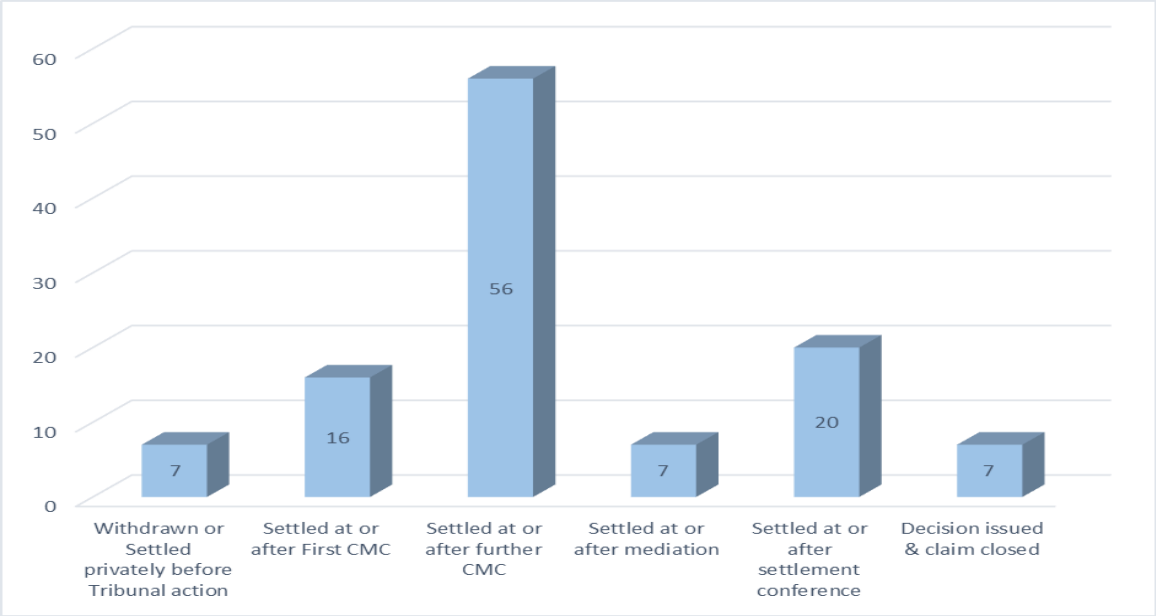
(f) four have been scheduled for settlement conferences; and

(g) five await evidence which is being obtained by the parties.

[29] The table and graphs below show the stage at which the 113 claims were resolved and the average age of each at resolution. The age of the claims settled at a settlement conference is distorted because this process was not instituted until near the end of the first 13 months of the Tribunal's operation and involved the oldest claims at that point.

[30] Table 2: Claims resolved by stage since inception

Stage at resolution	**Total**	**Avg Days**
Withdrawn or Settled privately before Tribunal action	**7**	126
Settled at or after First CMC	**16**	183
Settled at or after further CMC	**56**	405
Settled at or after mediation	**7**	246
Settled at or after settlement conference	**20**	362
Decision issued & claim closed	**7**	603
	113	**351**



[31] The resolution rate by insurer is shown in the table and graph below:

Table 3: Claims history by insurer

	Accepted	Settled	Current	
VERO	23	20	3	87%
IAG	49	38	11	78%
EQC	19	17	2	89%
EQC + Anor	39	34	5	87%
SR	27	24	3	89%
TOWER	16	15	1	94%
MAS	4	2	2	50%
WESTPAC	1	1	0	100%
	178	151	27	85%

Graph 2: Claims history for top six insurers

Rulings

[32] Thirty-seven Tribunal rulings are now recorded on its website. Only one of those, relating to the Tribunal's costs jurisdiction, has been appealed. No suppression orders have been made so far, but every endeavour is made to anonymise the identity of claimants to protect their privacy. The Tribunal's rulings are useful to those resolving disputes outside the Tribunal and the feedback is that this function is highly valued by those providers. Set out below is a list of the issues addressed by the Tribunal over the last year:

Onus of proof

[33] In a recent case an insurer took on the responsibility to manage repairs in 2014. However, the work was poorly managed and was subject to numerous defects. The repairs were not well documented, meaning it was not possible to know whether sections of cladding had been replaced, repaired, or simply re-painted. Amongst other issues with the repairs, the cladding developed cracks after the repairs were completed. The lack of documents meant the only way the homeowners could prove their cladding claim would involve extensive and cost prohibitive destructive testing. Recognising this the Tribunal commented that it would be

unjust to require the homeowners to prove their claim to an exacting standard, rather they needed to show a prima facie case for earthquake damage, and it was up to the insurer to prove otherwise.

Fraud under the Earthquake Commission Act 1993

[34] In a series of related decisions, the Tribunal considered the extent and nature of the Earthquake Commission's powers to decline fraudulent claims and the effect this had on the Insurer's liability. One of the decisions also considered cross-cultural issues, as the homeowner claimed as a defence that the false and inflated repair expenses were part of accepted Chinese business practice.

Limitations under the Consumer Guarantees Act

[35] A homeowner brought a claim for defective repair works under the Consumer Guarantees Act 1993 (CGA). The repair works were completed in May 2014, and the defects period under the building contract expired on 26 August 2014. The application to the Tribunal was filed on 22 February 2022. The Tribunal considered the relationship between the time limit in section 32 CGA, and the primary limitations period under the Limitation Act 2010. The Tribunal found that the Limitation Act 2010 applies to claims brought under the CGA against an insurance policy.

The effect of conditional settlement agreements

[36] An insurer and homeowner had agreed to a settlement with conditions allowing for an additional payment should enhanced foundations be required once the rebuild was underway. The homeowner requested, and the insurer granted four extensions to complete the foundation assessment. A fifth request for an extension was declined, and the homeowner applied to the Tribunal. The Tribunal found that the insurer was not required to grant a further extension. Over a four-year period, the homeowner had failed to follow the agreed process and had not shown enhanced foundations were necessary. The insurer was able to rely on the settlement agreement and close the claim.

Contractual costs between parties

[37] A respondent in a multi-party application sought a determination of a question of law. The question was whether the Tribunal had the jurisdiction to determine the costs available under an indemnity contained in a contract between an insurer and a repairer. As a preliminary issue the Tribunal found that it had the jurisdiction to hear and decide questions of law. The substantive finding was that claims under an indemnity were contractual in nature and fell within section 45(1) of the Act, rather than being captured by the limited party-party costs jurisdiction contained in section 47.

Procedure

[38] The Tribunal has made a number of procedural rulings, including:

(a) In preparation for a hearing the Tribunal ordered experts to confer at a meeting chaired by a Tribunal member. The outcome of the conferral was a minute which recorded agreements and disagreements. The homeowner's expert later expressed reservations about what was recorded in the minute. The other parties argued that this was poor faith. The Tribunal noted that expert witnesses cannot bind their instructing party. However, if an expert resiles from their earlier opinion, they run the risk of reducing the weight of their evidence. The Tribunal noted that if any expert were shown to have changed their opinion due to pressure from a lawyer or instructing party this would invite an award of costs for bad faith.

(b) A homeowner entered EQC's "opt-out" programme and managed her own repairs, which were under-scoped and defective. EQC argued a defence that it could not be liable for defective repairs it did not manage. Consequently, the homeowner sought details of practices and procedures related to EQC's opt-out programme. After EQC abandoned the defence the Tribunal ordered that evidence of the insurer's policies and practices were no longer relevant to the issues and did not need to be disclosed.

(c) In a pre-hearing conference, the homeowner asked that all documents which had been disclosed were included in the hearing bundle. The Tribunal noted that many of the disputed issues had been agreed between the parties and took the view that s37(2)(b) of the Act meant that evidence which was not specifically relevant to the live issues should not be included.

(d) In an application an insurer raised a defence that the homeowner had accepted a payment on a full and final basis and, therefore, they were barred from pursuing the claim further. Rather than allowing this defence to be left latent and overshadow settlement discussions, only to be resolved at a later substantive hearing, the Tribunal directed that the defence should be heard as a preliminary issue.

Cantabrians are moving on

[39] Below are a few case summaries and testimonials to show how the Tribunal is helping Cantabrians to move on.

A v EQC

The homeowner had had cracking to the floor slab of her home which was repaired by EQC in 2014. Sometime later she went to use the in slab underfloor heating system but discovered that it was not working. An engineer working for EQC advised that the system was not damaged in the earthquake. The Tribunal's engineer and an independent heating system expert concluded that the stresses placed on the slab by the earthquake had caused the heating systems water pipes to crack and fill with debris. The claim settled when the EQC agreed to replace the heating system.

B v EQC

Mr B is a homeowner for whom English was a second language. He believed that the money paid to him by EQC to repair foundation damage was inadequate. The Tribunal with assistance from a translator held two case management conferences. At the first conference it was agreed that the EQC would arrange for an engineer to visit and reconsider its assessment of the damage. At the second conference EQC accepted that there was an area of damage for which

the insured had not been compensated and made an offer of additional payment to settle. The Tribunal assisted the homeowner in understanding the situation and the additional payment was accepted.

C v EQC and IAG

Mrs C had foundation damage repaired in 2014. It later eventuated that the repairer had only conducted repairs to externally visible areas and had failed to carry out the underpinning they had been contracted to do. The Tribunal facilitated an engineering assessment during which the extent of the under-repair was documented. EQC and IAG agreed to pay for the repair work to be properly conducted.

Testimonials

"EQC have settled my claim yesterday.

I want to thank you for all you have done for my case. I can't tell you how much I appreciated you allowing another engineer's report at no cost to me as I would not have been able to afford it.

Thank you for showing such respect to me during the Tribunal meetings as this has been a very difficult time. I felt listened to".

"Dear [Case Manager], *can I express my thanks for your courtesy assistance and diligence in relation to this matter. Can I also express my thanks to the member also. The tribunal was clearly instrumental in bringing this matter to a satisfactory conclusion".*

"*Thank you for all of your help again this year… You and your colleagues at the Tribunal have been wonderful. On behalf of all counsel that are involved in Tribunal matters, I want to thank you…"*

"Yes, I am happy, the issue is now resolved. Thank you for all your hard work".

"I would like to thank the Member… who was very precise, and to the point, who throughout the proceedings made sure I was getting what I needed and made everything clear and easy to understand".

C D Boys

Chair - Canterbury Earthquakes Insurance Tribunal