Working to resolve earthquake claims?

Let's get it settled

Canterbury Earthquakes Insurance Tribunal
Practice Notes

MINISTRY OF JUSTICE
Tāhū o te Ture

Introduction

The Canterbury Earthquakes Insurance Tribunal (“Tribunal”) has been set up following the Government’s endorsement in August 2018 of a package of initiatives designed to speed up the process of resolving residential insurance claims, and help homeowners move forward with their lives.

The purpose of the Tribunal is to provide a pathway to resolution that is speedy, flexible and cost-effective and is targeted at resolving long-standing disputes about insurance and EQC claims for physical loss or damage to residential buildings, property and land arising from the Canterbury earthquakes that occurred in 2010 and 2011.

The Tribunal’s processes are:

- inquisitorial, enabling it to investigate the claim in a non-confrontational way
- subject to the principles of natural justice to ensure that its processes are fair and transparent.

From the outset, the parties will be encouraged to work together on matters that are agreed.

The Tribunal is governed by the Canterbury Earthquakes Insurance Tribunal Act 2019 (“the Act”). These Practice Notes have been prepared by the Chair in accordance with clause 2 of the First Schedule to the Act.

Commencing Claims

Applications

An application must be in the approved form and filed directly with the Tribunal, at the Christchurch District Court (Law Courts), by email or by completion of an online form.

The application must contain **sufficient information** to fully inform the other parties and the Tribunal of the substance of the claim and allow the Tribunal to determine whether the claim meets the eligibility criteria.

In addition to the completed application form, the application must be supported by **all documents** referred to in the application and all other documents upon which the applicant wishes to rely at the hearing. These documents might include: proof of insurance, technical reports, scopes of work, quotations, letters, and emails for example.

After the application and supporting material has been filed with the registry of the Tribunal and is regarded by the case manager as complete, it will be referred to the Chair of the Tribunal who will then decide whether the claim can be accepted.

When the claim has been accepted:

- a Tribunal member and a case manager will be assigned to the case
- that case manager will contact the applicant to confirm a date for the first case management conference (a meeting between all parties)
- the date of that conference will be communicated to the applicant in writing
- the case manager will arrange for the application and supporting material to be served on the respondent (insurance company and/or EQC) along with notice of the date for the first case management conference.

Responses

A respondent wishing to respond to the claim must file a response in the approved form and lodge supporting material with the Tribunal within 15 working days.

If respondents believe that 15 working days is insufficient time within which to file a statement of defence they may seek an extension and a new date for the Case Management Conference by filing a memorandum, within five days of receiving notification, with the Tribunal outlining the reasons for that belief and nominating the period they consider to be sufficient. Such applications will be treated as without notice applications and determined on the basis of the overall interests of justice after considering the competing interests of the parties. Respondents unable to file a detailed response due to a lack of clarity in the application should file a pro forma response and orally request further particulars of the claim at the Case Management Conference

The response must contain **sufficient information** to fully inform the other parties and the Tribunal of the case. In addition to the completed response form, the response should be supported by **all documents** referred to in the response and all other documents upon which the respondents intend to rely at the hearing. These documents might include a copy of the full terms of any insurance policy relating to the claim, technical reports, and scopes of work obtained by the respondent concerning the claim alleged by the applicant.

A copy of the response and all supporting documents must be served by the respondent on the applicant at the same time that those documents are filed with the Tribunal.

Cases transferred from the courts

When proceedings are transferred to the Tribunal from a court, the Tribunal will notify all parties immediately that the proceedings have been received and notify the parties of the date for the first case management conference with the Tribunal.

Address for service and contact details

Every application and response must provide:

- an address, both email and postal, to which documents may be sent for the party filing that application or response
- an address, both email and postal, at which the person filing the document wishes to be contacted. The Tribunal would prefer, if possible, to contact the parties and make notifications by email.

If a party nominates a representative to receive documents on their behalf, all notices, documents and other communication relating to the claim will be served on that representative and not on the party. It is the representative's responsibility to ensure that the party they represent receives everything served on the representative.

When any proceedings are transferred to the Tribunal from a court, the addresses for service of the parties shall be as specified in the Court proceedings transferred. Parties might like to consider changing this address for service to their own address if they think this is appropriate.

Whenever a party, or their representative, changes their address for service or contact details they must immediately notify the Tribunal and the other parties of those changes.

Service of documents

All official documents (except the application which will be served by the Tribunal) are to be served, on the Tribunal and other parties to the proceedings, by the person who is relying upon the document.

Service will be deemed to be effective:

- at the time it is personally delivered to the intended recipient's address for service; or
- five working days after it was posted to the intended recipient's address for service; or
- on the first working day after the day on which it was sent to any email address provided by the intended recipient.

Documents may also be served in any other manner approved by the Chair of the Tribunal.

Managing Claims

Using advocates

Parties may have their case presented at conferences or hearings by anyone they choose. Such a person, referred to in these Practice Notes as an advocate, might be: an engineer, builder, lawyer, friend, family member, councillor or care-worker.

There is no requirement that a party must use an advocate or that they use the same advocate on each occasion.

An expert **cannot** act as both an expert witness and an advocate for a party in the same claim.

First case management conference

Notice of the first case management conference will be given to each party once the application has been accepted.

Preparation

Prior to the first case management conference, all parties should complete the pre-conference form sent with the notice of the conference, which is for the benefit of that party only and is not required to be filed with the Tribunal.

Exchange of documents

No later than five days before the first case management conference the parties must supply the other parties with:

- any documents they possess that are adverse to their own case
- all reports and scopes of works they have obtained in relation to the claim, including those on which they no longer rely.

Attendance

All parties are required to attend the first case management conference. Advocates may accompany the parties but each party is required to attend in person.

The conference process

The conference will take the form of a non-threatening, less formal discussion between the tribunal and the parties lasting no longer than 1½ hours.

Applicants will be asked to describe in their own words their experience of the relevant earthquakes and the damage caused to their home. They will be able to tell the Tribunal about their claim and express their feelings about how it has been managed. The respondent will be invited to respond.

The Tribunal will then lead a discussion focussed on:

- identifying what is agreed and what is in dispute
- ensuring that the Tribunal and the parties fully understand the nature of the dispute
- deciding whether other parties should be added
- identifying whether there are documents that should be made available to the parties
- deciding how best to proceed to achieve a speedy, just and cost-effective outcome for the parties.

Encouraging settlement

The Tribunal will encourage everyone to settle and do everything it can to assist. The parties should think creatively when seeking the Tribunal's assistance. For example, the Tribunal:

- is willing to provide preliminary hearings on disputed facts or contested legal issues
- can refer the parties for mediation at any stage in the proceedings, for example after providing a preliminary ruling
- can actively seek evidence or make appropriate enquiries
- can ask the High Court for a ruling on an important legal issue that has not previously been determined by a court (called "stating a case") under section 51 of the Act. For more information on *stating a case* please refer below to the *Miscellaneous* section
- can appoint an expert to convene an experts facilitation at which technical issues can be explored
- can direct that the parties' experts give evidence together and be able to ask each other questions under oath
- can hold a special sitting at which the expert evidence from a number of claims can be heard together so that consistent rulings can be made on complex technical issues.

At the conclusion of the conference

At the conclusion of the conference, the parties will be asked to confer with their advocates and each other and then return to advise the Tribunal whether they have elected to proceed to:

- mediation; or
- determination.

Should the parties elect to mediate, a direction will be made to that effect.

Should the parties elect to proceed to a determination, then the conference will continue as a pre-hearing conference at which pre-hearing directions will be given.

Should the parties not agree on how to proceed, the Tribunal will determine the course to be followed.

Subsequent conferences

If the directions require monitoring, the Tribunal will schedule further case management conferences which will generally be by phone.

Hearing claims

Site visits

The timing for the visit will be agreed between the applicant and the Tribunal. The respondent will be advised of the date for the visit and invited to attend. The visit will proceed, whether or not the respondent is present/represented.

Each visit is likely to last about one hour and will be an opportunity for the Tribunal member to view the damage which is the subject of the dispute. The site visit will assist the Tribunal to understand the evidence and determine the issues in dispute. The Tribunal member may take photographs or other digital recordings which will be distributed to the parties and may be used by the member to understand the evidence.

During the visit, neither party may advance their own case or prejudice the case of the other party by making comments to (or in the hearing of) the Tribunal member. To safeguard the parties and the Tribunal member, the entire visit will be recorded by the Tribunal member. The audio recording will be sent to each party as soon as possible following the visit.

Documents to be used in the hearing

If one party believes on reasonable grounds that another party has, in their possession or control, documents that are relevant to the claim but which were not filed in support of that party's case at the time they filed their application/response, and which are adverse to that party's case or supportive of their own case, they may seek an order from the Tribunal requiring that the other party file a list of all documents it has in its possession or control that are relevant to the claim, and permit the inspection of those documents by the first party.

The only documents that may be introduced into evidence at the hearing are:

- those contained in the bundle of documents filed in compliance with the Tribunal's directions; and,
- any other documents produced under an order for discovery by a third party after the bundle of documents has been filed; and,
- any other documents produced by a witness summoned by the Tribunal to attend and produce documents; and,
- any other documents that the Tribunal has specifically permitted a party to introduce into evidence.

The hearing of evidence

The Tribunal must manage proceedings in a manner that best ensures fair, speedy, flexible and cost-effective dispute resolution. In most cases, this will involve the Tribunal hearing the evidence of the witnesses on separate dates.

The hearing will commence shortly after the pre-hearing conference and proceed as follows:

- evidence from the applicant (normally a half day will be allocated for this)
- evidence from non-technical witnesses for the applicant
- evidence from the respondent
- evidence from non-technical witnesses for the respondent
- evidence from the experts
- submissions from the parties.

If the taking of this evidence is likely to exceed one day, then separate days will be allocated. Each party will have equal opportunities to provide evidence.

Meanwhile, if the Tribunal has indicated that it wishes to hear expert evidence, then appropriate directions will be made at the pre-hearing conference including scheduling a day for the taking of the expert evidence and another separate day for the hearing of submissions.

Evidence shall be given in accordance with the Oaths and Declarations Act 1957.

All evidence will be recorded and provided to the parties in sufficient time to enable them to properly prepare their submissions.

Hearing evidence from the parties and their non-technical witnesses

The applicant, the respondent and the non-technical witnesses called by either party may only give evidence if their evidence:

- has been filed in affidavit form; and
- has been circulated to the other parties; and
- is compliant with the Tribunal's directions.

At the hearing of this evidence:

- the focus will be on clarifying and testing the evidence contained in the affidavits filed
- each witness will be asked a few clarifying questions by the party calling them (or that party's advocate if they have one) before answering questions from the Tribunal
- the other party (or their advocate if they have one) will be permitted to ask questions
- the party/advocate who has called a witness will then be able to ask questions that clarify anything arising out of the questions asked by the Tribunal or the other party/advocate.

The Tribunal has power, where appropriate, to take the evidence of any witness by telephone, A/V link, or other remote access facility.

Evidence from the experts

The expert witnesses will not give their evidence until all factual evidence relevant to the issue or issues concerned, or such evidence as may be specified by the Tribunal, has been given.

No expert witness is entitled to give evidence unless they have:

- complied with the Tribunal's direction to file in the Tribunal, and circulate to the parties an affidavit attaching their technical report; and,
- fully participated in an experts' facilitation from which a report has been submitted to the Tribunal.

If any expert witness who is to give evidence fails to attend, then their affidavit may be introduced into evidence by any party and may be given whatever weight the Tribunal considers appropriate.

All expert witnesses giving evidence will be sworn in one immediately after the other to ensure that anything that they say during the hearing is on oath.

During the hearing, the expert witnesses:

- will each be asked to give an oral statement of their opinion(s) on the issues(s) before the Tribunal
- will each be asked to comment on the opinions expressed by the other expert witnesses
- will be permitted to ask questions of those other expert witnesses
- will answer questions put to them by the Tribunal's expert advisor and the Tribunal.

Where any party instructs an expert to give evidence or provide a report that is to be part of that party's application, response or evidence, they must ensure that the expert understands that they have a duty to assist the assigned member of the Tribunal impartially in relation to technical matters that lie within that expert's area of expertise. All expert witnesses should be familiar with, and always comply with, the Tribunal's Code of Conduct for Expert Witnesses.

Submissions and determination

Once all of the evidence has been taken, each party will be given an opportunity to make closing submissions.

The Tribunal will then give a written decision, including reasons, as soon as practical after the hearing.

The Tribunal will provide a copy of the decision to each party as soon as practical after the decision is made.

In all cases, the Tribunal's decision will be published on the Tribunal's website. The Tribunal has the discretion to suppress the publication of a name and applicant's address if it believes it is in the best interest of a party.

If, at any time before the Tribunal has given its decision, the applicant's claim (or a part of the claim) is settled in some other way by agreement between the parties, you must notify the Tribunal of the details of your settlement and your claim (or that part of it) will then be terminated. Either party may notify the Tribunal of settlement, but the claim will not be terminated until the other parties have confirmed that it has been settled. The parties may request that the Tribunal record those agreed terms of settlement as a decision of the Tribunal.

Any settlement recorded as a decision of the Tribunal is enforceable in accordance with section 50 of the Act but must first be filed by a party in the District Court.

Experts' Facilitation

The Tribunal may direct that an experts' facilitation of the parties be convened and facilitated by an independent expert appointed to advise the Tribunal ("the Tribunal's advisor").

It is for the Tribunal's advisor to determine whether a person qualifies as an expert and may attend the experts' facilitation.

The purpose of the facilitation is to provide the experts with an opportunity to discuss the issues on which they have prepared their reports and identify:

- factual matters on which they agree; and
- matters in dispute and the reasons for the disagreement.

This process is intended to narrow points of difference and save hearing time.

Any expert who acts as an advocate for a party or who does not act impartially during the course of the experts' facilitation may, at the absolute discretion of the Tribunal's advisor, have their involvement in the experts' conference limited, or in extreme cases, be excluded from the conference.

Any expert who is not authorised to reach agreement on appropriate factual matters or to participate appropriately in the experts' conference may have their role in the conference limited. In addition, any party who does not allow the expert to attend or properly participate in the experts' conference, without good cause, may be restricted in the ways they can challenge the matters agreed upon at the experts' conference.

At the conclusion of the facilitation, the experts present must prepare and sign a joint statement setting out the matters on which they agree and the matters on which they do not agree, including the reasons for disagreement. This statement must be prepared without the assistance of any advocate of the parties.

The Tribunal's advisor facilitating the meeting may attend the experts' facilitation hearing and question the experts giving evidence but shall not question them about the conference nor give evidence about the conference in either these proceedings or any other proceedings concerning the same claim.

The joint statement will be provided to the assigned case manager, who will circulate it to all parties to the claim. This statement will be received by the Tribunal as evidence in the proceedings. No party may adduce evidence from any other expert witness on the issues dealt with in the joint statement, except with the leave of the Tribunal.

Miscellaneous

Stating a case

The parties will be given the opportunity to help the Tribunal frame the question for the High Court's opinion and will be asked for written submissions on the issue so that the case stated can set out their views. The High Court will give them a further opportunity to make submissions before it provides its opinion to the Tribunal.

The Tribunal may defer the hearing of the claim until it has received the High Court's opinion.

Once the Tribunal has received the High Court's opinion, it must continue with the hearing of the claim in accordance with that opinion.

Withdrawal of claim

A claim may be withdrawn at any time if the applicant has made the request to withdraw in writing and the other party doesn't object.

If the other party objects, the Tribunal will decide whether the claim will be withdrawn or whether the objection will be upheld.

Settlement

If the claim is settled at mediation, the mediator will notify the Tribunal that the claim has been settled and will provide a copy of the agreed terms of settlement which will be recorded as a decision of the Tribunal.

Code of Conduct for Expert Witnesses

Expert witnesses to comply with the code of conduct.

A party who engages an expert witness must give the expert witness a copy of this Code of Conduct.

An expert witness must comply with this Code of Conduct when:

- preparing any report or affidavit for filing with the Tribunal
- participating in a mediation
- participating in an experts' facilitation
- giving evidence in any proceeding in the Tribunal.

The evidence of any expert witness who has not read, or does not agree to comply with, this Code of Conduct may only be adduced with the leave of the Tribunal.

Duty to the Tribunal

An expert witness has an overriding duty to assist the Tribunal impartially on relevant matters within the expert's area of expertise. This duty continues throughout the adjudication process, including when participating in a mediation and a facilitated experts' conference.

An expert witness is not an advocate for the party who engages them and cannot act as a representative or an advocate for a party in the claim in which he or she is giving evidence.

Evidence of an expert witness

In any evidence given by an expert witness, the expert must:

- acknowledge that the expert witness has read this Code of Conduct and agrees to comply with it
- state the witness's qualifications and experience as an expert
- identify the expert's area of expertise
- state that the expert's evidence and the issues addressed are within the expert's area of expertise
- provide all instructions that define the scope of the expert's report
- state the data, information, facts, and assumptions upon which the expert's opinions are based
- state the reasons for the opinions expressed
- state that the expert witness has not omitted to consider material facts known to the expert that might alter or detract from the opinions expressed
- specify all literature or other material used or relied upon in support of the opinions expressed
- describe all examinations, tests, or other investigations on which the expert witness has relied, and identify, and give details and qualifications of, any person who carried them out
- identify any provisional opinions that are not fully researched and provide the reasons why such opinions have not been or cannot be fully researched.

If any expert witness believes that their evidence, or any part of it, may be incomplete or inaccurate without some qualification, that qualification must be stated in their evidence.

If an expert witness believes that their opinion on any issue is not a concluded opinion because of insufficient research or data, this must be stated in their evidence.

If an expert witness has any reservations about the facts or opinions upon which their opinions are based then they should give the reasons for their reservations.

If an expert witness changes any of their opinions after providing a report or an affidavit, that must be communicated without delay to the party or parties wishing to call the witness and that party shall forthwith notify the Tribunal in writing of such change of opinion.

Directions to confer or conference

An expert witness must comply with any direction of the Tribunal to:

- attend an experts' facilitation
- confer with another expert witness
- give evidence as part of a panel of experts
- seek to reach agreement with the other expert witnesses on matters within the field of expertise of the expert witnesses
- prepare and sign a joint witness statement identifying the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for the disagreement.

When conferring with other expert witnesses, and in preparing a joint witness statement, the expert witness must:

- comply with the Tribunal's Protocol for Expert Witness facilitation.
- exercise independent and professional judgement as to the contents of the Joint Witness Statement
- not act on the instructions or directions of any person to withhold data or information, or withhold or avoid agreement.