

Departmental Disclosure Statement

Canterbury Earthquakes Insurance Tribunal Bill
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The departmental disclosure statement for a government Bill brings together a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

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Ministry of Justice
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Part One: General Policy Statement

Purpose

This Bill establishes the Canterbury Earthquakes Insurance Tribunal (the **tribunal**). The tribunal's purpose is to provide speedy, flexible and cost-effective services to help resolve insurance claims between policyholders and insurers (including Southern Response Earthquake Services Limited) and insured persons and the Earthquake Commission under the Earthquake Commission Act 1993 (the **Act**). Claims must relate to damage to residential buildings, property, or land caused by the series of Canterbury earthquakes that occurred in 2010 and 2011. Insurance claim is defined in the Bill as including a claim by a policyholder under a contract of insurance with an insurer or a claim made by an insured person under the Act.

Policy objective of tribunal

The tribunal will be an independent judicial body that provides policyholders and insured persons with an alternative pathway to resolve their insurance claims that is speedy, flexible, and cost-effective. Seven years on from the Canterbury earthquakes, the tribunal will aid in resolving these long-standing insurance claims and, in doing so, assist policyholders and insured persons to obtain some closure and help them get on with their lives.

Tribunal's jurisdiction

The Bill provides that policyholders and insured persons can apply to the tribunal to help resolve their outstanding insurance claims. The tribunal:

- will only be able to consider claims between policyholders and insurers, or insured persons and the Earthquake Commission:
- may join other potentially liable parties to the claim where necessary for the fair and speedy resolution of a claim:
- will decide claims based on existing law and (if relevant) the terms of the insurance contract between the parties:
- will not consider claims relating to properties that have been sold following the damage to which the claim relates because these types of claims are novel and legally complex and will continue to be considered by the courts.

Where a claim has already been filed in the court, policyholders and insured persons will be able to apply for the claim to be transferred to the tribunal.

Policyholders, insurers, insured persons, and the Earthquake Commission can still file claims about their insurance disputes with the courts or access any other dispute resolution services that are available.

Key features of tribunal

The tribunal will—

- be a specialist disputes resolution body that will develop expertise in managing Canterbury earthquake-related insurance claims:
- apply existing law and precedent:
- take an inquisitorial approach to proceedings:
- take a proactive approach to case management; for example, by setting time frames for providing information, or convening conferences of experts:

- appoint independent expert advisers to assist it, for example, on construction, geotechnical, engineering, or any other matters necessary to support the resolution of disputes:
- direct parties to independent mediation where it considers mediation may be helpful to resolve the dispute or narrow down the points at issue:
- have the power to order any remedy that a court can order, and a tribunal decision will be enforced as a District Court order:
- have the power to award general damages against parties as appropriate; for example, for mental stress:
- have the power to award costs against parties as appropriate; for example, if a party causes unreasonable delay during the tribunal process.

Parties will be able to appeal against decisions of the tribunal on questions of fact and law to the High Court, with leave of the High Court, and on questions of law only to the Court of Appeal and the Supreme Court.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	NO
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Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p><i>Canterbury Earthquakes Insurance Tribunal: Regulatory impact statement</i>, prepared by the Ministry of Justice on 2 February 2018.</p> <p><i>Impact Summary: Canterbury Earthquakes Insurance Tribunal – detailed design</i>, prepared by the Ministry of Justice on 14 July 2018.</p> <p>These will be published at:</p> <p>https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/regulatory-impact-statements; and</p> <p>http://www.treasury.govt.nz/publications/informationreleases/ris</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The Regulatory Impact Statements did not meet the threshold for receiving an independent opinion on quality from the Regulatory Impact Analysis Team based in the Treasury.</p> <p>Both RIS were assessed internally by the Ministry of Justice Regulatory Impact Assessment Quality Assurance Panel. The first RIS was determined to meet the quality assurance criteria.</p> <p>The second RIS was determined to partially meet the quality assurance criteria.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
The Regulatory Impact Statement (2 February 2018) contains discussions of the costs and benefits of the proposals.	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO
The tribunal will take a proactive approach to case management. This includes setting timeframes, convening conferences of experts and the use of mediation, to ensure speedy progression of cases. The ability and willingness of parties and experts to comply with the tribunal's case management approach and participate in mediation, will impact on the costs and benefits.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The Ministry of Justice has not identified any obligations that conflict with the policies contained in the Bill.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry of Justice analysed the Bill and did not identify any implications for the rights and interests of Māori protected by the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Crown Law has provided Bill of Rights Act 1990 advice to the Attorney-General.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

YES

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

YES

The Bill contains the following offence provisions:

- The creation of an offence for breaching a suppression order. The maximum penalty is a fine not exceeding \$3,000 upon conviction. (clause 49)
- The creation of an offence of contempt of the tribunal. The maximum penalty is a fine not exceeding \$2,000 upon conviction (clause 62)

The Bill establishes a new tribunal (clause 53). Its jurisdiction is disputes between policyholders or insured persons and the Earthquake Commission, Southern Response or any other insurer, relating to insurance claims for damage caused by the 2010/2011 Canterbury earthquakes (clause 8). The tribunal may join other potentially liable parties to the dispute where necessary for the fair and speedy resolution of a claim (clause 11). The tribunal must comply with the principles of natural justice when managing claims although this does not require it to allow the use of experts or permit cross-examination of a party or person (clause 20 and 37).

Decisions of the tribunal can be appealed, on questions of fact and law, to the High Court, with leave of the High Court. Second and subsequent appeals can be made on questions of law, with leave of the appellate Court (clause 52).

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice has led the policy development of the Bill.</p> <p>The offence provisions were checked internally by a different team to the policy team responsible for the Bill. These provisions were therefore subject to the standard process by which all offence and penalties provisions are vetted by the Ministry of Justice.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>The tribunal must ensure safe custody of its records and papers, which may include some personal information about parties (clause 64).</p> <p>Access to tribunal records and papers will be governed by the existing rules of the District Court (Access to Court Documents) Rules 2017. This aims to ensure that the personal information of parties is protected (clause 64).</p> <p>The District Court (Access to Court Documents) Rules 2017 provide a general right for the public to access the formal court record relating to a civil proceeding. The parties to a proceeding and their lawyers may search, inspect or copy any part of the court file, under the supervision of the Registrar. Any other person may provide a written request to the court to access court documents. It is up to the tribunal to determine whether to grant a request for access.</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	NO
<p>The Bill's provisions on the storage, access and use of the tribunal's records and papers mirror the standard approach of the courts.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	NO
<p>Information about the status quo and problems associated with resolving Canterbury earthquake-related insurance claims has been gathered from Government agencies, the Earthquake Commission (EQC) and Southern Response, and publicly available media sources. The Ministry has not undertaken direct policy consultation with EQC, Southern Response, claimants or private insurers.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
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The provisions in the Bill have been modelled, as far as is practicable, on modern best practice provisions for other existing dispute resolution tribunals.

Many of the tribunal's procedures will be adapted from the Weathertight Homes Tribunal, established in 2006. The Weathertight Homes Tribunal is a specialist tribunal. It adopts a case management approach, and its operating model uses expert advisors and incorporates mediation.

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO
<p>The Bill creates two new strict liability offences, one for breaching a suppression order and one for contempt of the tribunal (clauses 49 and 62).</p> <p>The fine related to breach of a suppression order acts as an incentive for these orders to be upheld and recognises the importance of the protection that they are intended to provide. The contempt offence ensures that the judicial process is respected and that the public interest in upholding the tribunal process and powers are recognised.</p> <p>Strict liability is appropriate for these offences because:</p> <ul style="list-style-type: none"> • there is a need to incentivise people who undertake those activities to adopt appropriate precautions to prevent breaches; • the defendant is best placed to establish absence of fault because of matters primarily within their knowledge; and • the disadvantage faced by the defendant of having to exonerate themselves is outweighed by the importance of the public interest that is threatened by the activity. <p>Further, as per Ministry of Justice best practice, a term of imprisonment is not available for either strict liability offence. For both offences, the common law defence of total absence of fault will automatically apply. These offences are in line with other comparable tribunals, and have been independently vetted by the responsible team at the Ministry of Justice.</p>	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>Clause 63 of the Bill provides the following people with an exclusion of civil or criminal liability for any acts done or omitted in good faith during the performance of their statutory functions under the Bill:</p> <ul style="list-style-type: none"> • the Secretary of Justice; • the Chief Executive of the Ministry of Business, Innovation and Employment; • a mediator, tribunal Member, or expert advisor; and • an officer, agent, or staff member of the tribunal. <p>This exclusion of liability aims to ensure that these people can make decisions and carry out their obligations under the Bill in good faith, and free from the risks of proceedings being brought against them. The immunity extends only to the person and not to their employer or the organisation that they are appointed by.</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The Bill creates a tribunal that will determine liability in disputes between policyholders or insured persons and insurers (the Earthquake Commission, Southern Response or other private insurer). Disputes must relate to unresolved insurance claims for earthquake-related damage to residential land or property, caused by the series of Canterbury earthquakes that occurred in 2010 and 2011 (clauses 8, 9 and 43).</p> <p>The tribunal will decide claims based on the application of existing law, and precedent. It will also be bound by the principles of natural justice, although this does not require it to allow the use of experts or permit cross-examination of a party or person (clauses 20 and 37). In settling claims and issuing determinations, the tribunal will have the power to make any award or remedy that a court can make, and its determinations will be treated, and may be enforced, as a District Court order (clauses 44 and 50).</p> <p>Tribunal determinations can be appealed, on questions of fact and law, to the High Court, with leave of the High Court. Second and subsequent appeals can be made on questions of law, with leave of the appellate Court (clause 52).</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill provides that the Governor-General may, by Order-in-Council, make regulations:</p> <ul style="list-style-type: none"> • to prescribe fees payable for the tribunal (if any); • to make rules related to tribunal procedures; and • for any other matters necessary for administration or for giving full effect to the Act (clause 65). <p>The Bill also provides that the Governor-General may, by Order in Council, make rules regulating the practice and procedure of the District Court or the High Court in proceedings under this Bill. Rules may only be made with concurrence of two or more members of the Rules Committee (clause 66).</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>As a 'homeowner orientated' process, the Bill provides that only policyholders and insured persons can apply to the tribunal to help resolve their outstanding insurance claims. Insurers (including Southern Response Earthquake Services Limited) and the Earthquake Commission will not be able to apply to the tribunal.</p> <p>Having only policyholders and insured persons be able to apply to the tribunal creates inequality of access to the tribunal. However, the Bill does not affect the ability for any party (including insurers and the Earthquake Commission) to file a claim with the courts. Access to other existing dispute resolution processes also remains available.</p>	