

Hon Andrew Little, Minister of Justice and Minister for Courts

Canterbury Earthquakes Insurance Tribunal – Further Decisions

Date	29 March 2018	File reference	CRT-48-01
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Action sought	Timeframe
Forward and discuss this briefing with the Minister for Greater Christchurch Regeneration	By 10 April 2018
Indicate your decisions on outstanding policy aspects of the Canterbury Earthquakes Insurance Tribunal	By 10 April 2018
Indicate if you intend to make a pre-Budget announcement about the Tribunal.	By 10 April 2018

Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Ruth Fairhall	General Manager, Courts and Justice Services Policy	04 498 2399	s9(2)(a)	<input type="checkbox"/>
Nora Burghart	Manager, Courts and Tribunals Policy	s9(2)(a)		<input type="checkbox"/>
Hayley Denoual	Senior Advisor, Courts and Tribunals Policy	04 466 2923		<input checked="" type="checkbox"/>

Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to: _____		
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister
Minister's office's comments		

In Confidence - Budget Sensitive

Purpose

1. This briefing:
 - 1.1. seeks your approval for outstanding policy decisions relating to the Canterbury Earthquakes Insurance Tribunal (the Tribunal);
 - 1.2. updates you on our implementation plan for the Tribunal; and
 - 1.3. seeks your direction on the timing of a public announcement about the Tribunal, following confirmation of Budget decisions.

Executive Summary

2. Cabinet approved the establishment of the Tribunal on 5 March 2018, subject to funding approvals in Budget 2018 (CAB-18-MIN-0065 refers). s9(2)(f)(iv) [REDACTED]
Budget decisions are due to be finalised by Cabinet on 9 April 2018.
3. Cabinet has delegated authority to you to take any further detailed decisions needed about the Tribunal, in consultation with the Minister for Greater Christchurch Regeneration. We are therefore seeking your decisions on the following policy issues that have arisen in the drafting of the Canterbury Earthquakes Insurance Tribunal Bill (the Bill), namely:
 - 3.1. establishing the boundaries of the Tribunal's jurisdiction; and
 - 3.2. setting the maximum amount for penalties and fines.
4. The Ministry's implementation team is working on a 'go-live' date of **1 December 2018** for the Tribunal to start receiving and considering cases. This is contingent upon:
 - 4.1. the legislative timeframes for the Bill (which assumes introduction in late May 2018, a four month Select Committee process, and enactment by October 2018); and
 - 4.2. the timeframes needed to recruit a Tribunal Chair, and to develop the Tribunal's operational model (processes and procedures) and supporting ICT.

Part 1: We are seeking policy decisions regarding the Tribunal

5. Cabinet agreed to create a specialist Tribunal with the objective of providing access to speedy, flexible and cost-effective procedures for the resolution of disputes between policyholders, the Earthquake Commission (EQC), Southern Response and other insurers (CAB-18-MIN-0065 refers) involving residential land and residential property.¹
6. These objectives have guided the development of the Bill, and the careful balance between maintaining natural justice, and providing processes that are easily accessible for claimants.

¹ Contents and other insurance claims (e.g. loss of earnings) are outside of the Tribunal's jurisdiction. MBIE and Treasury (for EQC) advise there are very few, if any, such claims outstanding.

How should the boundaries of the Tribunal’s jurisdiction be framed?

7. Further decisions are needed on the Tribunal’s jurisdictional boundaries. The Tribunal’s insurance specialisation creates a hard boundary, restricting claims to those involving insurance contract disputes. This means that building and construction disputes, including those involving earthquake damage-related claims where the work was not managed by insurers, will not come within the Tribunal’s jurisdiction.²
8. This hard boundary means that the Tribunal will terminate a claim at any stage of proceedings, if it decides it does not relate to an insurance contract. This situation may arise where, for example, an insurer has taken all steps to assess the damage, scope the repairs, tender and select the contractor, but then arranges for the building contract to be between the home owner and the builder directly. In these circumstances, there may be a dispute over whether the insurer has in fact ‘managed’ the repairs and whether there is any liability on the insurer if the repairs are defective.
9. This type of situation may create other difficulties; for example, claimants who take such a claim to the Tribunal may, in the meantime, lose the ability to file in the courts against a non-insurer party, such as the builder, due to the limitation period.
10. To help manage these situations, it will be helpful to clearly define the Tribunal’s boundaries to maintain the specialist insurance-dispute focus envisaged by Cabinet. We recommend that the Tribunal’s jurisdiction is defined to include the following:

<p><i>Third parties may only be joined to a claim by the Tribunal.</i></p>	<p>Our briefing of 13 December noted that third parties may need to be joined to a claim; for example, an insurer’s building contractor may need to be joined to a dispute related to deficient repairs.</p> <p>We consider that only the Tribunal should be able to join a third party, and only in cases where it considers it in the interests of natural justice and necessary for the fair and speedy resolution of a claim.</p> <p>This should mitigate against the Tribunal being used for disputes that are primarily building-related, while upholding natural justice by still allowing a third party to be joined if appropriate.</p>
<p><i>If a third party is joined to a claim which is later deemed to fall outside of the Tribunal’s jurisdiction, the limitation period will be extended to allow the claimant to file against the third party in court within six months.</i></p>	<p>If the Tribunal joins a third party to their claim, the claimant will have an expectation that the Tribunal will settle disputes involving that third party. If the primary claim is later terminated because it does not relate to an insurance contract, the claimant may lose the opportunity to file against the third party in court, due to the limitation period. Allowing the claimant six months from the date their original claim is terminated in the Tribunal to file a fresh claim in the courts against a third party will mitigate this.</p>

² Disputes relating to warranties under the Building Act 2004, failure to meet obligations under that Act, or breaches of the Consumer Guarantees Act 1993, will continue to be heard by the Disputes Tribunal or the courts.

<p><i>Claimants may include persons to whom an existing insurance claim is assigned.</i></p>	<p>Insurance policies are personal to the insured person and cannot be transferred to another person. However, an insured person may assign an insurance claim. MBIE have noted this practice is increasing with on-sold Christchurch properties, with sellers assigning claims to purchasers.</p> <p>We consider purchasers should be able to access the Tribunal if a claim has been assigned, as they are effectively 'standing in the shoes' of the policyholder.</p>
<p><i>Claims must relate to damage caused by the historic Canterbury earthquakes of 2010 and 2011.</i></p>	<p>There is no existing legal definition of the 'Canterbury earthquakes', and geological definitions vary between specialists. We propose that, for the purposes of this Tribunal, they be defined as the earthquakes of 4 September and 26 December 2010, and 22 February and 13 June 2011, and any aftershocks up until 31 July 2011.</p> <p>Providing a 31 July 'backstop date' allows claimants to bring in claims for additional/further damage from the aftershocks, while excluding claims relating to more recent quakes. This is consistent with the intent for the Tribunal to have a relatively short life-span, and to focus on the speedy resolution of outstanding insurance claims.</p>

11. Some legal disputes have arisen in the Christchurch context which are more appropriately addressed through the courts. We recommend the Tribunal's jurisdiction is defined to exclude the following:

<p><i>Representative claims on a shared issue</i></p> <p><i>e.g. 'class actions' where one of the parties is a group of people represented collectively by a member of that group.³</i></p>	<p>There is one earthquake insurance-related class action⁴ currently before the High Court. s9(2)(ba)</p> <p>Class actions are relatively new in New Zealand. Although they can support judicial efficiency and access to justice (e.g. by allowing costs to be shared), they require a significant amount of time and resource. Further, the nature of insurance contracts means that, even if a shared issue is determined, individual cases still need to be settled separately in respect of the specific damaged property.</p> <p>We consider there is a risk that the Tribunal would be overwhelmed if it were permitted to hear class actions, and its ability to progress other cases would suffer. Further, the Tribunal already has features such as no fees, pro-active case management and funded mediation, which support efficiency and accessibility.</p>
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³ We note the Government asked the Law Commission to review the law relating to class actions and litigation funding in November 2017.

⁴ Southern Response Unresolved Claims Group and Southern Response Earthquake Services Ltd; [2016] NZHC 3105 and [2017] NZCA 489. This class action has been in the courts for over two years and has only recently begun to consolidate its 'common interest'.

<p><i>Disputes involving on-sold properties (except if insurance claim has been assigned).</i></p>	<p>There is an increasing number of issues arising involving on-sold properties. The legal issues emerging from these types of dispute are new, highly complex and have no clear precedent. For example, determining whether EQC or insurers are liable to a new property owner in respect of work completed under a previous owner's claim, if deficiencies are later uncovered.</p> <p>We consider that these novel issues are more appropriately considered by the courts. A precedent-setting decision may help settle the law and provide useful guidance for other disputes.</p>
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Should the fine for breaching Tribunal orders be the same as other tribunals?

- 12. The Bill will contain standard provisions relating to offences and penalties, such as, contempt and breach of a suppression order. We are seeking your agreement to the maximum amount of the fines that can be imposed upon conviction of these offences.
- 13. A key principle is that the maximum amount of a fine should reflect the relative seriousness of the offence. Seriousness is a combination of harm (i.e. the actual or potential consequences) and culpability (i.e. the amount of blame associated with the offence).
- 14. In light of this, and consistent with the maximum fines imposed by other legislation for similar offences, we recommend that the fine on conviction for:
 - 14.1. persons committing an offence against the Tribunal, such as threatening a Member, or failing to comply with an order or direction of the Tribunal during proceedings, be set at a maximum of **\$1,000**; and
 - 14.2. persons breaching a suppression order, which risks confidential information being released into the public domain, be set at a maximum of **\$3,000**.

Part 2: Work is underway to establish the Tribunal by 1 December 2018

- 15. To ensure the Tribunal is effective and able to engage positively with claimants and other parties from day one, it is important that it is appropriately staffed, and underpinned by robust systems and process before 'going live'. The Ministry has undertaken detailed scoping of the various streams of work required to operationalise the Tribunal, so it can receive cases from **1 December 2018**.
- 16. These workstreams include:
 - 16.1. Project Management.
 - 16.2. Appointments; including the statutory appointment of the Chair and Members.
 - 16.3. Operating Model; including developing the Tribunal's process and procedures.
 - 16.4. ICT; including setting up a website and case management system.
 - 16.5. Property; including fitting out the property for the Tribunal's use.
 - 16.6. Communication; including guidance for claimants and legal advisers.

17. Appendix One shows a high-level summary of each workstream, and the timeframes for its various activities. A number of these workstream activities are contingent upon each other and take a set time to complete. Others require Ministerial or Cabinet decisions (notably the statutory appointment of the Chair and Members). There is limited ability to expedite the implementation process.

Bringing the Tribunal Chair on board quickly is a key priority

18. The Chair (and Members) are appointed by the Governor-General, on your recommendation. These are statutory appointments that require Cabinet approval. Although the Chair cannot be formally appointed until the Bill is enacted, it is possible for a candidate to be identified and approved⁵ in anticipation of enactment. We will provide you with a briefing in April on options for identifying a suitable Chair, and advice on managing the appointment process.

19. Developing a strong, flexible operating model is at the heart of an effective Tribunal, and will ensure parties have access to speedy, flexible, and cost-effective procedures. This is a substantial piece of work, which must be progressed in tandem with the Bill.

20. The Chair has a critical role in establishing the Tribunal's operating model and creating its internal practices and working culture. It is therefore a priority to bring the Chair on board as soon as possible. Early identification of a Chair-presumptive will allow him or her to be brought into the project to work with the Ministry on the operating model.

Part 3: An early announcement would help provide certainty to claimants

21. Cabinet approved the Tribunal on 5 March 2018, subject to Budget 2018 decisions. The Tribunal cannot be formally announced until after funding is secured. Budget decisions are due to be finalised by Cabinet on 9 April 2018, and the Budget is scheduled for 17 May 2018.

22. The proposal to establish a Tribunal was well-publicised as part of Labour's election manifesto commitments, and both the Prime Minister and Minister Woods referred to it in their recent visit to Christchurch. An early announcement about the Tribunal would provide greater certainty for all parties about how the Tribunal will operate. It would also assist with the early recruitment of a Chair, and so maximise the time available for the Chair to develop the Tribunal's operational model before 1 December 2018.

23. We also recommend that you agree to release this briefing and the Ministry's earlier briefings of 13 December 2017 and 30 January 2018, the March Cabinet paper and the Regulatory Impact Statement (RIS) at the same time as any public announcement.

24. We note that these papers include details of estimated costs for the Tribunal, which may attract some media comment. Cabinet Office will need to agree to the early release of the Cabinet Paper and RIS, and may seek some redactions of these papers until the full Budget 2018 release of papers.

⁵ The usual time-frame for identifying a candidate, negotiating terms and completing the approval process typically takes at least two and a half months. A pre-Budget announcement of the Tribunal would allow us to start this recruitment process sooner.

Next steps

25. We are seeking your direction on the policy decisions for the Tribunal by 10 April 2018, to allow PCO to complete the drafting of the Bill. We recommend that you forward a copy of this briefing to the Minister for Greater Christchurch Regeneration, and discuss the policy proposals in Part 1 with her.

26. The tentative timetable for finalising the Bill and seeking Cabinet approval for introduction is:

Date	Bill Progression
10 April	Policy decisions from Minister
18 April	Draft Bill provided to Crown Law for BORA vet
18 April	Draft Bill and draft Cabinet LEG paper provided to Minister's Office for cross-party consultation
2 May	Feedback from cross-party consultation provided; PCO to make amendments to Bill resulting from consultation
10 May	LEG paper and draft bill lodged with Cabinet Office
17 May	Cabinet Legislation Committee (LEG)
21 May	Cabinet
22-24 May	Bill Introduced (sitting week)
12 June	First Reading
14 or 21 June	Select Committee (4 months)

Recommendations

We recommended that you:

Part 1: Policy decisions

1. **Agree** that the Tribunal's jurisdiction be established so that:
 - 1.1. Third parties may only be joined as respondents by the Tribunal YES / NO
 - 1.2. If a third party is joined as a respondent to a claim which is later deemed to fall outside of the Tribunal's jurisdiction, the limitation period will be extended to allow the claimant to file against the third party in another jurisdiction within six months. YES / NO
 - 1.3. Persons to whom an existing insurance claim has been assigned may also be a claimant at the Tribunal. YES / NO
 - 1.4. Claims must relate to damage caused by the historic Canterbury earthquakes, which will be defined as the earthquakes of 4 September and 26 December 2010, and 22 February and 13 June 2011, and any aftershocks, up until 31 July 2011. YES / NO

2. **Agree** that the Tribunal will **not** have jurisdiction for the following:
 - 2.1. Representative claims (class actions) on a shared issue. YES / NO
 - 2.2. Disputes involving on-sold properties (except if an insurance claim has been assigned). YES / NO
3. **Agree** that the maximum fine on conviction for:
 - 3.1. Committing an offence against the Tribunal be set at \$1,000. YES / NO
 - 3.2. Breaching a suppression order be set at \$3,000. YES / NO

Part 2: Implementation

4. **Note** that the Ministry's 'go-live' date for the Tribunal is 1 December 2018, but that this date is contingent on the enactment of the Bill by October 2018.
5. **Note** that the Ministry has developed operational workstreams to establish the Tribunal, and that the progression of activities in some workstreams are contingent on others, such as the appointment of a Chair to drive the development of the operating model.
6. **Note** that we will provide you with a briefing in April on options for the recruitment and appointment of a Tribunal Chair.

Part 3: Pre-Budget announcement

7. **Indicate** if you intend to make a pre-Budget announcement about the Tribunal. YES / NO
8. **Agree** to release this briefing, and the Ministry's briefings of 13 December 2017 and 30 January 2018, the March Cabinet paper and the Regulatory Impact Statement (RIS) at the same time as any public announcement, subject to any necessary redactions. YES / NO

Next steps

9. **Forward** and **discuss** this briefing with the Minister for Greater Christchurch Regeneration. YES / NO
10. **Indicate** if you would like to meet with officials to discuss this briefing. YES / NO

Nora Burghart
Policy Manager, Courts and Tribunals Policy

APPROVED SEEN NOT AGREED

Hon Andrew Little
Minister for Justice and Minister of Courts

Date / /

Appendix One has been withheld
under s9(2)(f)(iv) and s9(2)(g)(i)