Hon Andrew Little, Minister of Justice

Options for resolving remaining Canterbury earthquakes insurance disputes

Date	**13 December 2017**	File reference	CRT-48-01

Action sought	**Timeframe**
Discuss options with the Minister for Greater Christchurch Regeneration	21 December 2017
Indicate your preferred options for inclusion in a bid for Budget 2018	21 December 2017

Contacts for telephone discussion (if required)

Name	**Position**	**Telephone (work)**	**Telephone (a/h)**	**First contact**
Ruth Fairhall	Deputy Secretary, Policy	498 2399	s9(2)(a)	☐
Andrea King	General Manager, Courts and Justice Services Policy	466 1558		☐
Megan Noyce	Principal Advisor, Courts and Tribunals Policy	494 9828		☒

Minister's office to complete

☐ Noted ☐ Approved ☐ Overtaken by events

☐ Referred to: _____

☐ Seen ☐ Withdrawn ☐ Not seen by Minister

Minister's office's comments

Budget sensitive

Purpose

1. The Labour Party's election manifesto included a commitment to help people still experiencing frustration with residual issues from the Canterbury earthquakes. One aspect of this commitment is to establish an arbitration tribunal with an inquisitorial focus to provide an alternative pathway for claimants, the Earthquake Commission (EQC) and insurers to resolve disputes.

2. This briefing seeks your clarification of the nature of the problems the Government wishes to focus on regarding Canterbury earthquake insurance-related disputes, and the objective of any initiative to help resolve these disputes. We have identified some potential options, including the proposed arbitration tribunal. We recommend you discuss these options, and potential funding for them through Budget 2018, with your Ministerial colleagues and advise us of your preferred approach.

Executive summary

3. Most Canterbury earthquake insurance claims have been settled using existing legal processes and dispute resolution schemes. Processes for settling claims, and resolving insurance disputes, have evolved since the earthquakes to deal with an unprecedented number of claims.

4. The remaining earthquake insurance claims are increasingly complex, due to the nature of the claims and the circumstances of some claimants. In addition to those that have not reached settlement, others are being re-opened for a variety of reasons (including discovery of additional earthquake damage, under-costed work, and deficient repairs).

5. While a range of issues is likely to be delaying settlement of disputes, limited availability of technical experts is cited as a main cause of delay. Unless this is improved (and there are few options for doing so), it is unlikely there is much scope to speed up the settlement process.

6. We have identified two broad options that might help claimants resolve these disputes, should the Government choose to intervene. These options, which are not mutually exclusive, include:

    6.1. providing additional support to enable claimants to make better use of existing dispute resolution processes; and

    6.2. building on existing dispute resolution processes with a bespoke mediation service, potentially supplemented with a tribunal to determine disputes that are not resolved through mediation.

7. It is unclear whether a tribunal would offer claimants much advantage over court action. Care also needs to be taken that any changes do not lengthen the process for settling disputes, provide grounds to re-open previously settled claims, or adversely impact on the availability of insurance for catastrophic events.

8. Both options would have cost implications and would not meet Treasury criteria for Budget 2018 (limited to initiatives in the Labour Party's Fiscal Plan, Coalition Agreement or Confidence and Supply Agreement). We suggest you discuss these options with the Minister for Greater Christchurch Regeneration at your meeting on Friday 15 December 2017.

The Canterbury earthquakes insurance situation is extremely complex

Most insurance claims have now been settled, though some are being re-opened

9. EQC and private insurers provide information about their claims and settlements to the Ministry of Business, Innovation and Employment (MBIE). As at 30 September 2017, claims had been received in relation to 167,677 dwellings. 98% of these dwelling claims are settled. The table below sets out the number of remaining claims:

Type of claim	Number remaining
Over-cap[1] dwelling claims (with private insurers and Southern Response[2])	**2,741** as at 30 September 2017
Under-cap dwelling claims (EQC)	**297** claims in litigation as at 30 November 2017, the balance of claims have settled
Land claims (EQC) These relate to land damage such as increased vulnerability to liquefaction or flooding	**465** as at 30 November 2017
Re-opened under-cap dwelling claims (EQC)	**2,523** as at 30 November 2017 EQC continues to receive new complaints about previously settled claims, many of which will result in a claim being re-opened. The rate of these new complaints is slowing. In November, EQC received around **200** new complaints (down from 450 complaints per month for the previous three months). Some re-opened claims will go over-cap and be transferred to private insurers.
Re-opened over-cap dwelling claims (private insurers and Southern Response)	**No data**
Christchurch High Court	**511** active cases as at 28 November 2017
Christchurch District Court	**44** active cases as at 30 November 2017 There have been significantly fewer cases in the District Court, due to its jurisdictional limit.[3]

Profile of remaining claims that have not reached any settlement

10. MBIE advise that of the 2,741 remaining over-cap claims with private insurers, almost a quarter (23%) are in construction and have a clear pathway to settlement. In a further 32% of cases, claimants are considering cash settlements. As insurers categorise their claims information differently, some caution is required when relying on this breakdown.

11. The pathway to settlement is not linear: claims move back and forth between various stages. Insurers indicate that, moving forward, they intend to cash settle as many claims as possible, as they consider this to be a faster route to overall claim resolution.

12. MBIE expects over-cap settlements to continue into late 2019. Based on current resolution rates, EQC expects to have settled its backlog of re-opened claims in the

[1] EQC claims have a cap of $100,000 excluding GST, after which the claim is transferred to the relevant private insurer.
[2] Southern Response is the Crown company responsible for settling the claims of AMI policy holders for Canterbury earthquake damage.
[3] Until 1 March 2017, the District Court could hear cases up to the value of $200,000. Since then, the jurisdictional limit is $350,000. Most remaining earthquake claims are likely to be above this higher threshold.

next year, and will then be dealing only with new re-opened claims. There is likely to be a small tail of increasingly complex cases that may take several more years to resolve.

Profile of re-opened claims

13. Previously settled claims are being re-opened due to the discovery of additional damage, or deficient repair of earthquake damage. Where claims were initially settled by EQC, the re-opened claim can potentially go over-cap leading the claim to be transferred to a private insurer.

14. Southern Response has had approximately 70 claims where homeowners have alleged defects after the completion of Southern Response-managed earthquake repairs and the 12-month maintenance period that follows. Of the 70 claims, some involve genuine issues that can occur normally in construction. Fewer than 10 of these claims had major defects.

15. EQC expects the numbers of new complaints it receives to fall in coming months. However, it is likely that deficient repairs will continue to be discovered for some time yet. As homes are put on the market for sale, building reports may pick up visible repair defects not evident to homeowners. Future renovations or a future major earthquake event may also identify inadequate repairs.

Existing dispute resolution processes have evolved…

16. The response to Canterbury earthquake insurance claims and disputes continues to adapt to the needs of claimants.

17. Insurers established the *Residential Advisory Service* (RAS) in May 2013 to help homeowners facing challenges getting their earthquake-damaged homes repaired or rebuilt. It is now fully funded by MBIE, and provides:

    17.1. free independent legal and technical assistance to residential property owners (legal assistance is provided by Community Law Canterbury);

    17.2. free 'second-opinion' advice from RAS' technical panel of experts (structural engineers, quantity surveyors and geotechnical engineers); and

    17.3. since November 2016, a 'brokering' service. Homeowners can have a face to face meeting with a broker to talk through issues regarding their claim. The broker can call a round-table meeting with key individuals involved in the claim who have authority to settle.

18. RAS does not provide assistance in deficient repair cases where the insurer cash-settled and did not have a role in the repair process.

19. RAS was due to wind up in December 2017. The Government recently announced $0.7m additional funding for RAS, extending it to July 2018. MBIE advise that if demand for RAS remains strong, further extensions are possible.

20. The Christchurch High Court established a special *Canterbury Earthquake List* in May 2012, to manage and expedite earthquake-related cases. The List encourages early identification of issues and exchange of expert reports to encourage parties acknowledge the strengths and weaknesses of their cases earlier. Approximately 93% of cases settle before trial. The List also prioritises cases that have precedent value: clarifying these legal issues enables a raft of other cases to settle. Earthquake appeals are generally expedited.

21. Some insurers offer access to independent *private mediation*. Complaints about EQC can be made to the *Parliamentary Ombudsman*. Remedies are also available through financial service providers' dispute resolution schemes. The *Insurance and Financial Services Ombudsman* can consider complaints about member insurers relating to breaches of contract, statutory obligations or industry code, and non-compliance with relevant industry practice. It has accepted 198 earthquake-related complaints for consideration to date, but its jurisdiction is limited to disputes below $200,000 (this limit is waived by Southern Response). As most of these options are insurer-funded, claimants may perceive they are not sufficiently independent.

22. The Labour Party manifesto also committed to providing an additional $0.5m for community law advice and a $1m fund for test cases to offer clarity on major issues such as the Limitation Act.

...but seven years on from the earthquakes many claims are still not resolved

23. A range of factors appear to be delaying settlement of remaining claims, including:

    23.1. insufficient numbers of qualified and experienced technical experts;

    23.2. frustrated and vulnerable claimants;

    23.3. some claims will only settle in the 'shadow of the court' – parties are more likely to settle before trial; and

    23.4. claimants and insurers waiting for court decisions in precedent cases.

24. We do not have comprehensive information about the extent to which insurer behaviour might be delaying the settlement of claims. RAS observes that while there have been isolated incidents where insurers have caused delay, insurers do not appear to be deliberately delaying settlement.

More complex claims require greater input from a limited pool of technical experts

25. Remaining claims have more complex issues to resolve, and tend to involve larger amounts of money, than those already resolved. Most claims have a combination of technical, legal and costing issues.

26. Both claimants and insurers need advice from experts to make progress with settlement. In contrast to earlier claims, where settlements were based on estimates and indicative technical advice, the more complex claims now being considered require detailed design advice from experts.

27. There is a limited pool of structural engineers with sufficient experience, training and qualifications in earthquake recovery work. The High Court, EQC, RAS and Southern Response all report that one of the main causes of delays in reaching settlement is the limited availability of experts. The specialist nature of this work, and requirement to produce reports to a high standard in a timely way, may limit the ability to bring on board new experts to remove the bottleneck.

Frustration, high expectations and vulnerability may also impede some claimants' ability to fully engage with settlement processes

28. Advice from RAS, Southern Response and EQC suggests that a range of claimant-related factors may also be impeding progress towards settlement. These include:

28.1. Caution: claimants are cautious about taking settlement offers at face value, and seek legal and expert advice on those offers, which increases the time to settle.

28.2. Cost of legal advice and expert reports: some claimants may be unable to make progress because of their financial position. Southern Response has advised that the legal and expert costs associated with mediation (in litigated cases) often exceed $100,000 per case.

28.3. Claimant frustration at the time required to process a 'new' over-cap claim: some cases have only recently gone over-cap and been transferred to the private insurers (eg, where repairs require remedial work), going back to the beginning of the process. Delays can occur while EQC and the private insurer determine which organisation is responsible for managing the claim.

28.4. Vastly different settlement expectations: some advocates or experts may create claimant expectations that are beyond insurance entitlements.

28.5. Vulnerability: 24% of RAS' greater Christchurch cases involve claimants who self-identify as vulnerable (eg, because of health, disability, age, financial vulnerability, and language). RAS provides some assistance and Earthquake Support Co-ordinators (accessible through NGOs) can connect vulnerable claimants to services. However, these services may not meet the needs of some claimants with extreme health issues.

Complex legal issues are still emerging

29. The Christchurch High Court Earthquake List has enabled precedent-setting cases to be identified and dealt with early. These cases have clarified many legal issues which then enable others to settle. However, complex legal issues are still emerging which will likely require the courts to clarify the law.

30. The range of legal issues in cases involving *deficient repairs* mean it is difficult to determine liability. Remedies may be available against insurers and/or EQC, building professionals and/or consenting authorities, or vendors and/or vendors' agents. For on-sold homes, rights under the insurance contract generally do not transfer with sale (ending the insurance company's liability under the policy) unless a home is sold with an assignment of the insurance claim.

31. The settlement approach taken by insurers may also limit their liability, for example:

31.1. Insurers and homeowners have often entered into 'full and final' settlements, which could preclude further claims.

31.2. Where claims were cash-settled, and homeowners managed the repairs, insurers are unlikely to be liable for deficient repairs.

31.3. Even where liability is accepted, the insurance policy (or assignment of the insurance claim) may require the insurer to assess claims based on depreciated indemnity value[4] (reducing the value of the claim).

32. These issues are likely to be determined by the courts: so far 105 deficient repair cases have been filed in the High Court.

33. The *Limitation Act*[5] provides a defence to legal proceedings if the claim is at least six years after the date of the act or omission on which the claim is based. For the

[4] Compensation based on the value of the property at the time of the damage, not the cost to fix the damage.

Canterbury earthquakes, there is some uncertainty about whether the 'act' is the date of the earthquake event that caused the damage, or the date that the insurance settlement was accepted or rejected.

34. Insurance companies are taking different approaches to the limitation period. The Christchurch High Court has seen an influx of cases in 2016 and 2017: claimants have filed proceedings against insurance companies to preserve their legal position. 10% of the High Court's active earthquake cases fall into this category and have been adjourned while negotiations continue. Continuing the litigation is an option if negotiations are unsuccessful.

Objectives and scope of Government initiatives to resolve disputes

35. We seek your direction on the intended scope of any Government initiatives aimed at resolving earthquake insurance disputes.

36. The manifesto commits to establishing an arbitration tribunal with an inquisitorial focus as an alternative pathway for claimants, EQC and insurers to resolve disputes. It states:

    36.1. Principles by which the tribunal will operate include:

    - Fast track: no delays at request of insurance companies;
    - Decide claims based on equity and good conscience;
    - Allow compensation for distress caused by undue delay by insurers;

    36.2. Claimants will face no costs to access the tribunal and the adjudicator will appoint technical experts;

    36.3. There will be a three-week deadline on all participants following filing to supply the tribunal with relevant documentation to ensure a fast resolution;

    36.4. The tribunal will be made up of senior members of the legal profession and be up and running as soon as possible in 2018.

37. In line with these commitments, we have focused on Canterbury earthquake insurance disputes (not those that might arise from more recent events such as the 2016 Kaikōura earthquake). The manifesto suggests that the Government's overall objectives are to:

    37.1. remove barriers to claimants accessing dispute resolution; and

    37.2. achieve faster resolution of claims.

38. Within this broad objective, you have some choices about scope (the types of disputes to be covered by any initiatives). The main question is whether it should be limited to disputes between homeowners and insurers, or apply more broadly to disputes between homeowners and other parties involved in earthquake repairs (eg building professionals and consenting authorities).

[5] The Limitation Act 1950 applies to claims based on acts or omissions that occurred before 31 December 2010, while the Limitation Act 2010 applies to claims based on acts or omissions that occurred after that date.

Scope: option		Benefits	Risks
A	**Insurance claims only:** First-time settlement of insurance claims and re-opened insurance claims involving additional earthquake damage **Disputes between:** • Homeowners • EQC/insurers **Estimated no. of cases:** • Up to 2,741 over-cap claims • Some of 2,523 EQC re-opened claims, insurer re-opened claims, and future claims that will be re-opened	• Tightly defined – only insurance disputes	• Does not include growing problem of deficient repairs
B	**Insurance claims only:** in addition to A above, re-opened claims involving deficient repairs managed by EQC or insurers **Disputes between:** • Homeowners • EQC/insurers **Estimated no. of cases:** • In addition to A above, more of the 2,523 EQC re-opened claims, insurer re-opened claims, and any future EQC/insurer re-opened claims	• Tightly defined – only insurance disputes (though insurer may seek to join building professionals) • Includes deficient repairs where the insurer may have some liability to rectify	• Does not include deficient repairs where the claim was cash-settled and the homeowner managed the repair • May not cover on-sold homes with deficient repairs
C	**Broader range of claims:** in addition to A+B above, any dispute involving deficient repairs not managed by insurers **Includes disputes between:** • Homeowners • Building professionals • Consenting authorities • Potentially other 3rd parties **Estimated no. of cases:** • In addition to A+B above: we have no data on the numbers of deficient repairs in claims where repairs were not managed by insurers	• Covers the full range of existing and future disputes relating to settlement of insurance claims and earthquake repairs	• Complexity, scale and cost increase significantly • Disputes regarding deficient building work are not unique to Canterbury (eg, similar issues have arisen in some leaky home repairs): ○ Homeowners can rely on warranties in Building Act and remedies in general law ○ Risks making an arbitrary distinction between deficient earthquake repairs and other building disputes

39. There are benefits and risks associated with each option, and ultimately the potential cost to Government may be the determining factor:

39.1. Confining scope to disputes regarding insurance claims (options A and/or B) would ensure clarity about the type and number of cases to be covered, limiting the overall cost to Government. On the other hand, it would exclude a significant proportion of cases (relating to deficient repair).

39.2. Expanding scope to cover deficient repair cases, including cases against building professionals (where the insurer did not manage the repairs), would provide more complete coverage of the issues. However, this comes at significantly greater cost and risk to the Government. There is no data on the

numbers of deficient repairs not managed by insurers, so we cannot quantify the number of potential cases or potential cost to Government.

40. We note that the Minister for Building and Construction also has an interest in the resolution of disputes regarding deficient building work. We recommend that you forward a copy of this briefing to her for her information.

Options to assist resolution of remaining claims

41. We have identified two broad options to help resolve remaining earthquake-related claims. Your decisions on scope will affect the cost but not viability of these options. They are not mutually exclusive (and could potentially work in tandem):

    41.1. provide additional support to enable better use of existing dispute resolution processes; and

    41.2. build on existing processes with a bespoke mediation service, potentially supplemented with a tribunal to determine disputes not resolved through mediation.

42. There are benefits and risks associated with both options. At a general level:

    42.1. Government initiatives to improve the situation for weary claimants are likely to be welcome, and if successful they are likely to improve the public's trust and confidence in the dispute resolution system.

    42.2. Any initiative aimed at resolving earthquake disputes needs to be implemented quickly to maximise its value. However, without a thorough understanding of the nature and source of delays, initiatives risk being mistargeted and ineffective. Each option would require government funding, some more than others.

43. At this stage the options are high level and indicative only. Once you have identified your preferred options, further work will be required to test whether they appropriately respond to issues impeding the settlement of earthquake disputes, clarify their design, and fully cost them. Any associated bid for funding from Budget 2018 will be high level due to the requirement that it be submitted by 26 January 2018.

Additional support to enable better use of existing dispute resolution processes

44. We know that progress toward settlement is being slowed by delays in getting expert technical advice, and by claimants struggling with the legal aspects of a dispute or whose wider social or health needs are not being met. Additional support in these areas, before and during dispute resolution processes, could help resolve disputes earlier and more satisfactorily.

45. At this stage, it is unclear where resources would be best directed. There is a risk that further investment in existing support services is perceived as 'more of what isn't working'. If you would like to explore providing more support to claimants, we would recommend further work to scope unmet support needs, and cost potential interventions.

Wait times for technical experts are causing delays in the settlement process

46. Most remaining claims require experts to prepare detailed reports and designs. Both parties engage their own experts and will often commission multiple and follow-up reports, especially where negotiations are protracted.

47. Successful dispute resolution is often predicated on experts coming together and determining where they agree and disagree. This is sometimes called 'caucusing' or 'hot-tubbing' experts, and is being used across dispute resolution mechanisms in Christchurch. As noted above, wait-times for experts, who are in high demand and short supply, is cited as the key cause of delay in resolving disputes. This will also impact on any potential new dispute resolution options, such as a tribunal.

48. Increasing the supply of experts may not be feasible. Constraints include finding suitably experienced and qualified experts and significant time delays for them to develop competence (with an associated risk that reports do not meet required standards in the meantime).

49. Another option could be to encourage more efficient use of experts' time. Officials would need to talk to experts and lawyers about whether and how best this could be done. Avenues to explore could include coordinating or prioritising their time, finding ways to caucus experts earlier in the dispute resolution process, and assisting claimants' access to experts (financially and/or through facilitative services like RAS).

Funding for legal representation, as well as advice, may help claimants in disputes

50. Claimants, especially those with complex cases, need legal advice to help them understand their rights and form reasonable expectations based on their insurance contracts and technical reports. Having legal representation or advocacy services during dispute resolution can help ensure claimants feel heard and that any resolution is fair (and has been fairly reached).

51. Further funding of legal assistance, for both advice and representation, could help claimants using existing mechanisms to resolve disputes more quickly and with more trust and satisfaction in the settlement. Further work would be required to determine the demand for legal services and how to allocate any additional funding.

Existing social services may not be meeting the needs of struggling claimants

52. It is unclear if existing services are meeting the social needs of claimants who may be struggling to deal with the settlement process. RAS estimates up to 5% of its cases involve claimants with high or complex needs, for whom these services are insufficient.

53. A range of initiatives were put in place to support homeowners deal with the aftermath of the earthquakes. Agencies could explore whether these services are sufficient to help vulnerable claimants with the insurance settlement process, with a view to identifying opportunities to improve access to services and support.

Mediation and a tribunal could build on existing dispute resolution processes, but it is unclear whether they would resolve disputes more quickly

54. We have considered the options of improving access to a government-run independent mediation service, and complementing that by establishing a new tribunal.

55. We note that we have not discussed with you how the manifesto intended the proposed tribunal to operate. We have therefore developed options based on our interpretation of the manifesto commitment. In the first instance, we have considered a tribunal option that does not risk unintended consequences (such as creating incentives for claimants to delay settlement or impacting on confidence in insurance markets).

56. While there seems to be scope to make greater use of mediation to help resolve claims, it is unclear whether a tribunal would offer claimants much advantage over court action.

57. Even if there are no costs for claimants to access mediation or a tribunal (in accordance with the manifesto commitment), they would still incur costs for legal representation and expert advice. As discussed earlier, providing funding for legal representation may help claimants, but this comes at greater cost to the Government. Delays in obtaining expert advice may also limit the ability to set strict timeframes for any tribunal process.

Funded mediation could help solve disputes quicker and with less stress

58. It is unclear whether private mediation is being used to its full potential to resolve or narrow issues in dispute. Mediation can be used as a stand-alone dispute resolution option, or to supplement other processes (eg, litigation). Southern Response has been using mediation in the context of litigated claims, and observes that mediation can resolve claims where there are significant differences between the parties.

59. Mediation is a consensual dispute resolution process where the parties reach agreement by themselves, facilitated by an independent third party. If successful, parties enter a contractually binding agreement regarding part or all of a dispute. It is generally less formal, more flexible, quicker and cheaper than court or arbitration, and aims to reach a consensus that meets both parties' needs.

60. A funded independent mediation service could:

    60.1. increase claimants' access to and likely uptake of mediation, which could itself improve the likelihood, speed, satisfaction and durability of settlements;

    60.2. produce durable settlements more quickly than court-based processes, with less stress for claimants; and

    60.3. give trust and legitimacy to the process, especially for weary claimants.

61. Parties could still choose to take their claims to court (or another dispute resolution process) if mediation were unsuccessful.

62. There are a variety of ways the services could be administered and accessed, including via RAS. A Government-run mediation service could be established and managed contractually, without legislation.

63. The Government already funds mediation (and a supporting technical assessment) for Weathertight Homes disputes, usually as part of Weathertight Homes Tribunal (WHT) proceedings (set up in 2007 to resolve leaky home disputes). A similar model could be adopted for Canterbury earthquake insurance disputes. If you wish to explore this

option further, we could speak to insurers and claimants or their representatives about their appetite for Government-funded mediation services.

Mediation could be complemented by a new tribunal, modelled on the Weathertight Homes Tribunal

64. A new tribunal could provide an alternative to court proceedings, and be accessed after parties explore other dispute resolution mechanisms such as mediation.

65. As a comparison, the WHT can make any order a court could make in accordance with principles of law, including awarding general damages for relevant mental distress. It is required to manage cases to ensure they are speedy, flexible and cost-effective. It must encourage parties to work together on agreed matters, and try to use expert conferences to avoid duplication of evidence. It has a flexible procedure and investigative powers. Legislative timeframes are set for respondents and for the WHT's determination, but these can be extended by agreement. Appeals to the courts are allowed on points of law only.

66. Before the WHT hears proceedings, a technical report is prepared on the claim by an expert assessor. If the parties agree, the WHT can also refer the dispute to mediation. Before the referral, it will deal with interlocutory matters such as removal and joinder of parties, and will help to narrow the issues in dispute. Around 95% of WHT proceedings settle before a final determination is made. This figure climbed from around 65%, once a body of precedent had developed.

67. It would take longer for a tribunal to get underway than to increase funding for services and mediation, as legislation would be required to establish it and members would need to be appointed. A tribunal may not be any faster for claimants than taking a case to court (especially given the active case management in the High Court's Earthquake List). It has taken the WHT 10 years to clear the bulk of its cases (1185 since 2007).

We would recommend a new tribunal be bound to apply existing law

68. The manifesto states that a tribunal should decide claims based on equity and good conscience, and allow compensation for distress caused by undue delay by insurance companies. This could potentially be read as implying that the terms of the insurance contract are not determinative.

69. Enabling a tribunal to override contractual terms would retrospectively change the legal basis for determining these disputes, breaching fundamental rule of law principles. Longer-term, this could reduce the confidence of people and businesses to enter into contracts based on New Zealand law, or increase the costs of contractual agreements.

70. This approach risks creating uncertainty in the insurance markets, potentially increasing the financial exposure of insurers (including EQC) and increasing the cost of insurance in New Zealand. International reinsurers may be less willing to provide reinsurance for future catastrophic events.

71. Risks to insurance markets could flow on to the Crown, which may need to step in to ensure reinsurers provide reinsurance for future catastrophic events. For example, the Crown might need to provide confidence to the insurance market that, if the Crown creates a legal risk of insurers being found liable for amounts above the sum-insured, the Crown will cover the cost of such claims rather than having insurers (and reinsurers) price that risk into contracts or exit the market.

72. Deciding claims in this way may also change claimant settlement behaviour. Claimants who are making progress towards settling outstanding claims may have an incentive to delay settlement and take their claim through the tribunal instead. Those who have already resolved their claims under current law may view any such changes as unfair. Such claimants may attempt to re-open claims if there is potential to get more compensation.

73. Finally, there is a significant risk of appeals if the terms of a contract are overridden by use of the 'equity and good conscience' standard. This would prolong and add cost to the resolution process.

Potential costs of mediation and tribunal options

74. Your decisions on scope will impact how many cases are eligible for dispute resolution through mediation or a tribunal. We have developed indicative costs on the basis that eligibility is limited to the approximately 2,700 unsettled claims (scope option A). These costs would increase should scope extend to re-opened claims and cases involving deficient repair. Costs will be refined once you indicate your preferred approach.

Option	Comment	Indicative cost (up to 2,700 eligible claims)
Tribunal that can decide disputes based on equity and good conscience and award general damages	• Assume 2,700 cases: all unsettled cases, even those on pathway to settlement, would have incentive to file claims in the tribunal, due to potential for increased compensation • Does not include independent technical assessment (see separate costing below) • Does not include cost of appeals	s9(2)(f)(iv) [redacted]
Tribunal that applies general law (following mediation)	• Likely to only deal with cases that are not successfully resolved through mediation, or do not agree to try mediation (assume 25% of 2, eligible claims) • Cases will progress more quickly so caseloads would begin to fall from 2021/22 onwards • Does not include independent technical assessment costs	s9(2)(f)(iv) [redacted]
Plus: **Mediation** service	• The Weathertight Homes mediation service costs approx. $7,500 per claim. This is the cost to Government and does not include parties' legal representation or obtaining expert evidence. • Assume 1,500 cases (as some of the eligible claims would continue towards settlement, without mediation) • Does not include independent technical assessment costs	s9(2)(f)(iv) [redacted]
Plus: Independent technical assessment, provided to claimants for **mediation or the tribunal**	• Independent technical reports in the Weathertight Homes model cost around $8,000 per claim for a single dwelling • This cost is additional to the cost of providing mediation or a tribunal • Parties would still be likely to engage their own experts	s9(2)(f)(iv) [redacted]

75. The table above shows that the total cost will vary depending on the elements included. For example:

75.1. s9(2)(f)(iv) [redacted]

75.2. s9(2)(f)(iv) [redacted]

76. Under the Weathertight Homes model, parties bear the cost of legal representation and expert evidence during mediation or before a tribunal. The complexity of earthquake claims means claimants will invariably require legal representation and expert evidence. It would be open to the Government to consider providing a contribution towards claimants' legal representation to reduce their financial burden.

77. The cost of contributing to legal representation costs will depend on scope, eligibility criteria (eg, an income threshold) and how much the Government is willing to contribute per case. For example, a $10,000 contribution to 1,000 cases would cost $10m.

To be effective, initiatives should be implemented in 2018, but funding is needed

78. To have an impact, any Government initiatives aimed at speeding up resolution of the remaining claims should be implemented in 2018.

79. All options for speeding up resolution of claims will have cost implications and would likely require funding through Budget 2018. The Treasury has advised that:

79.1. Budget 2018 funding for new initiatives is limited to initiatives outlined in the Labour Party's Fiscal Plan, the Coalition Agreement or the Confidence and Supply Agreement; and

79.2. any other manifesto initiatives that have been announced outside of these documents should be deferred to future Budgets.

80. The manifesto commitment to establish a tribunal was not outlined in these documents. If funding is not available in Budget 2018, it is unlikely that options for resolving Canterbury earthquake insurance-related claims could be implemented until 2019, which will significantly reduce their impact.

81. We recommend that you discuss the options set out in this paper with the Minister for Greater Christchurch Regeneration at your meeting on Friday 15 December 2017. To enable a Budget bid to be submitted by 26 January 2018, we seek your direction on preferred options by 21 December 2017.

82. Your choices on preferred options will determine which agency should lead the development of a Budget bid. The Ministry of Justice's expertise relates to the role and operation of tribunals. Other options, such as provision of additional earthquake-related social services or mediation services, fall within MBIE's portfolio.

83. Should you choose to establish a tribunal, the Ministry of Justice will lead preparation of a bid. If you do not choose to establish a tribunal, but wish to provide additional social

services and mediation services, the bid should be led by MBIE, reporting to the Minister for Greater Christchurch Regeneration. Should you choose a combination of these options that includes a tribunal, the Ministry of Justice will lead the bid in consultation with MBIE.

Next steps

84. We suggest that you:

    84.1. forward this paper to the Minister for Greater Christchurch Regeneration, the Minister for Building and Construction, and the Minister of Finance; and

    84.2. discuss the options set out in this paper with the Minister for Greater Christchurch Regeneration at your meeting on Friday 15 December 2017 (an aide-memoire is attached).

85. Should you wish to proceed with a tribunal, legislation will be required. You will need to submit a bid for a priority in the 2018 Legislation Programme, due by 26 January 2018.

Consultation

86. We have consulted with the Christchurch High Court Registry, Department of the Prime Minister and Cabinet (Greater Christchurch Group), the Ministry of Business, Innovation and Employment, the Treasury and Crown Law. We have also received information from Southern Response and EQC.

Recommendations

87. We recommend that you:

    1. **Note** that MBIE estimates that most claims will be dealt with, using existing mechanisms, by late 2019, with a small tail of increasingly complex cases that may take several years yet to resolve;

    2. **Note** that there are options to provide additional support to claimants to make better use of existing processes, or to build on those processes by adding a mediation service;

    3. **Note** that a tribunal could be used to supplement a mediation service but it is unclear whether it would offer claimants much advantage over taking court action;

    4. **Forward** this paper to, and **discuss** the options set out in this paper with, the Minister for Greater Christchurch Regeneration, as the options have potential Budget 2018 implications for MBIE;

    5. **Indicate** whether any initiative should apply to:

        5.1. First-time settlement of insurance claims and re-opened claims involving additional earthquake damage only; or — YES / NO

        5.2. In addition to 2.1 above, increase the scope to include re-opened insurance claims involving deficient repairs; or — YES / NO

        5.3. In addition to 2.2 above, increase the scope to include any — YES / NO

other disputes relating to the quality of earthquake repairs;

6. **Note** that waiting times for technical experts is cited as one of main delays in resolving disputes and **refer** this issue to the Minister for Greater Christchurch Regeneration to explore options for using experts more efficiently; YES / NO

7. **Indicate** whether you wish to progress a bid for Budget 2018 to:

   7.1. Provide additional social services to support vulnerable claimants settle their earthquake insurance disputes; YES / NO

   7.2. Contribute to the cost of claimants' legal representation; YES / NO

   7.3. Fund mediation services; YES / NO

   7.4. Build on mediation services with a tribunal modelled on the Weathertight Homes Tribunal, noting that we recommend that a tribunal should not be able to override the terms of an insurance contract when deciding claims; YES / NO

8. **Note** that if you choose to establish a tribunal, the Ministry of Justice will also prepare a bid for the 2018 Legislation Programme;

9. **Forward** a copy of this paper to the Minister of Finance and the Minister for Building and Construction, for their information.

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Ruth Fairhall

Deputy Secretary, Policy

APPROVED SEEN NOT AGREED

_____

Hon Andrew Little

Minister of Justice

Date / /

Attachment: Aide Memoire