

The Treasury

Earthquake Commission (EQC) Act Review Submissions Information Release

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Key to sections of the Official Information Act 1982 under which information has been withheld. Certain information in this document has been withheld under one or more of the following sections of the Official Information Act, as applicable:

- [1] 9(2)(a) - to protect the privacy of natural persons, including deceased people;
- [2] 9(2)(b)(ii) - to protect the commercial position of the person who supplied the information or who is the subject of the information.

Where information has been withheld, a numbered reference to the applicable section of the Official Information Act has been made, as listed above. For example, a [2] appearing where information has been withheld in a release document refers to section 9(2)(b)(ii).

In preparing this Information Release, the Treasury has considered the public interest considerations in section 9(1) of the Official Information Act.

New Zealand's Future Natural Disaster Insurance Scheme

Proposed changes to the Earthquake
Commission Act 1993

Submission by FairWay Resolution Ltd

July 2015



THE TREASURY
Kaitohutohu Kaupapa Rawa

New Zealand Government

New Zealand's Future Natural Disaster Insurance Scheme Proposed changes to the Earthquake Commission Act 1993

Our response

FairWay Resolution Ltd is a Crown owned company providing dispute resolution and conflict management services across a range of sectors. Our submission focuses solely on dispute resolution, and is informed by both our practical experience in delivering services in Christchurch in the last 5 years and our experience in other dispute resolution services in other sectors.

Official Information Act 1982

FairWay Resolution has no objection to our submission being made public in its entirety. We have not included personal, commercial sensitive or other information that would require withholding under the OIA. We do provide services through CERA for the Residential Advisory Service, and we have included reference to our experience from that scheme.

Your contact details

For organisations

Organisation name:	FairWay Resolution Ltd
Nature of your business:	Professional services firm specialising in dispute resolution and conflict management.

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In what city, town or province is your organisation's New Zealand headquarters?	Wellington
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What is the purpose of the EQC scheme?

Proposal for discussion

- 1 That the purpose of the EQC Act be to establish a Crown-owned natural disaster insurance scheme for residential buildings in New Zealand that:
- ▶ supports, complements and is closely coordinated with the provision of effective private insurance services to the owners of residential buildings
 - ▶ recognises the importance of housing in supporting the recovery of communities after a natural disaster
 - ▶ supports improved resilience of New Zealand communities and an efficient approach to the overall management of natural hazard risk and recovery in New Zealand
 - ▶ contributes to the effective management by the Crown of fiscal risks associated with natural disasters.

What do you think?

1a Do you agree that these purposes are appropriate and complete?

No.

1b If not, what changes would you suggest, and why?

FairWay recommends the purpose includes reference to early resolution, and a commitment to a process for independent dispute resolution, such as by adding:

- ▶ “provides certainty to all parties with a focus on the early, efficient and independent resolution of disputes in insurance claims”.

What types of perils will EQC cover?

Proposal for discussion

2 That EQC continue to insure against the following perils: earthquake, natural landslip, volcanic eruption, hydrothermal activity, tsunami, and storm and flood (with, in the case of storm and flood, only residential land being covered).

What do you think?

2a Do you agree that EQC should continue to provide cover against the same perils as it currently does?

No comment

2b If not, what changes would you suggest, and why?

No comment

What types of property will EQC insure?

Proposal for discussion

3 That EQC building cover continue to be available to residential buildings and dwellings in non-residential buildings.

What do you think?

3a Do you agree that EQC building cover should continue to only be available to residential buildings and dwellings in non-residential buildings?

We have no comment on the issue of cover. However, where issues of “cover” or “jurisdiction” subsequently become a matter in dispute, there needs to be an independent dispute resolution mechanism to address this.

A fast-track process to make determinations on jurisdiction may also be invaluable in moving disputes forward quickly and providing parties with certainty.

In this example, we note to support the point that the evolution in building use and design means that the circumstances of any particular building may be more open for interpretation than has perhaps been the case in the past. In situations where a claimant may be subject to interpretation after an event, this interpretation should not be left solely with the EQC/insurer for determination after an event. There should be a process in which the insured party has some say in any dispute that may arise after an event.

3b If not, what forms of accommodation or living arrangements do you think should be added or removed, and why?

No comment.

Proposal for discussion

4 That EQC land cover only be available for land associated with residential buildings. Therefore, dwellings in non-residential buildings would not receive any EQC land cover.

What do you think?

4a Do you agree that EQC land cover should only be available for land associated with residential buildings?

We make the same broad comment in relation to the need for an independent process to make determinations of jurisdiction disputes as in 3a.

4b If not, what coverage of land cover would you prefer, and why?

No comment

Extending building cover to include more siteworks and main access way

Proposal for discussion

5 That EQC building cover be extended to include siteworks and the main access to the building.

What do you think?

5a Do you agree that EQC building cover be extended to include siteworks and the main access to the building?

We make the same broad comment in relation to the need for an independent process to make determinations of jurisdiction disputes as in 3a.

In addition we note that from our experience it is clear that a number of disputes that have occurred related to siteworks and access, in particular shared access ways or cross leases. Having clear processes to deal with cover, early resolution and dispute resolution will be important as these disputes can cause multiple parties to be delayed in settlement.

5b If not, what do you think should be done instead, and why?

No comment

EQC to no longer provide contents insurance

Proposal for discussion

6 That EQC no longer offer residential contents insurance.

What do you think?

6a Do you agree that EQC should no longer offer residential contents insurance?

We make the same broad comment in relation to the need for an independent process to make determinations of jurisdiction disputes as in 3a.

6b If not, what level of contents cover do you think EQC should offer, and why?

No comment

6c For insurers, what do you anticipate the impact would be on premiums your company charges for residential contents insurance, if EQC no longer offered residential contents insurance?

No comment

How much insurance will EQC offer?

Proposal for discussion

7 That the monetary cap on EQC building cover be increased to \$200,000 + GST.

What do you think?

7a Do you agree with the proposed increase in the building cap to \$200,000 + GST?

No comment

7b If not, what cap would you prefer, and why?

No comment

7c Do you have strong views on the merits of a \$150,000 + GST cap versus a \$200,000 + GST cap?

No comment

7d If so, what are they?

No comment

7e For insurers, what do you anticipate the impact would be on premiums your company charges for residential property insurance, if the proposals in this document regarding changes to building cover were implemented? Please provide this information for a monetary cap for EQC building cover of both \$150,000 and \$200,000.

No comment

Reinstatement of EQC cover after an event

Proposal for discussion

8 That EQC building cover reinstate after each event.

What do you think?

8a Do you agree that EQC cover should reinstate after each event? If not, what is your preferred alternative, and why?

We make the same broad comment in relation to the need for an independent process to make determinations of jurisdiction disputes as in 3a.

8b Do you agree with retaining the current definition of an event?

No comment

8c If not, what is your preferred definition, and why?

No comment

EQC land cover

Proposal for discussion

9 That land cover be limited to situations where the insured land is a total loss meaning it is not practicable or cost-effective to rebuild on it.

What do you think?

9a Do you agree that the proposed enhanced building cover, combined with restricting land cover to situations where the site of the insured building cannot be rebuilt on, would resolve, for future events, many of the recent difficulties with the interaction between land and building cover?

We make the same broad comment in relation to the need for an independent process to make determinations of jurisdiction disputes as in 3a.

9b If not, what is your preferred alternative, and why?

No comment

9c Do you agree that restricting land cover to situations where the site of the insured building cannot be rebuilt on is appropriate, given the EQC scheme's focus on providing homeowners the resources to repair, rebuild or re-establish homes elsewhere?

No comment

9d If not, what is your preferred alternative, and why?

No comment

9e Do you have any concerns regarding the proposed change to the configuration of building cover in light of the move by most insurers to provide sum insured home insurance policies?

No comment

9f If so, what is your preferred alternative, and why?

No comment

Better aligning EQC and private insurers' standard of repair

Proposal for discussion

10 That EQC's current statutory repair obligation already appears broadly consistent with industry practice.

What do you think?

10a Do you agree with the Government's assessment that EQC's legislated standard of repair is broadly consistent with current industry norms?

We have no comment on the standard of repair, but we do understand there are differing views on this issue. However, where repairs are made and a standard is set, there must be provision for the homeowner/consumer to have redress in the event the repairs do not meet whatever standard is agreed in legislation or contract. The redress should be consistent with standard consumer protection laws. The dispute resolution mechanism that FairWay Resolution proposes in Q23b should also be able to deal with any unintended consequences of the actions of EQC or insurers as a result of disagreements over any aspect of the repair obligation.

10b If so, do you have views on why EQC's standard of repair is seen as markedly different from current insurance industry norms?

No comment

10c If not, do you have suggestions for reforms that you consider would move the EQC standard of repair

closer to current insurance industry norms for residential property?

No comment

Simplifying EQC's claims excess

Proposal for discussion

11 That EQC has a standard claims excess of \$2,000 + GST per building claim.

What do you think?

11a Do you agree that EQC's building claims excesses should be standardised and simplified to a flat dollar amount?

No comment

11b If yes, do you agree that \$2,000 + GST is the appropriate claims excess on building claims?

No comment

11c If not, what would you prefer, and why?

No comment

Proposal for discussion

12 That EQC have no claims excess on land claims.

What do you think?

12a Do you agree that EQC should have no claims excess on land claims?

No comment

12b If not, what would you prefer, and why?

No comment

Regularly reviewing main monetary settings of cover

Proposal for discussion

13 That the EQC Act require monetary caps, premium rates and claims excesses on EQC cover to be reviewed at least once every five years.

What do you think?

13a Do you agree that monetary caps, premium rates and claims excesses on EQC cover should be reviewed at least once every five years?

No comment

13b If not, what alternative would you prefer, and why?

No comment

How will homeowners access EQC insurance cover?

Proposal for discussion

14 That EQC cover continues to automatically attach to fire insurance policies on residential buildings, as defined in the EQC Act.

or

15 That EQC cover automatically attach to insurance policies on residential buildings, as defined in the EQC Act, on a peril by peril basis; so if a peril covered by EQC is excluded from the private policy, it is also excluded from the EQC cover.

What do you think?

14a Do you agree that EQC cover should continue to automatically attach to fire insurance policies on residential buildings? Or

No comment

15a do you agree that EQC cover should automatically attach to insurance policies on residential buildings, and EQC cover should exclude any natural disaster peril that is excluded from the fire insurance policy it attaches to?

No comment

15b If you do not agree with either of these options, what alternative arrangement do you prefer, and why?

No comment

Proposal for discussion

16 That EQC continue to have the ability, but not the obligation, to directly provide EQC cover to homeowners who request it.

What do you think?

16a Do you agree that EQC should continue to be able, but not be obliged, to directly provide EQC cover to homeowners who request it?

No comment

16b If not, what alternative arrangement would you prefer, and why?

No comment

Who will handle EQC claims in future?

Proposal for discussion

17 That all EQC claims be lodged with claimants' private insurers.

What do you think?

17a Do you agree that EQC claimants should be required to lodge all EQC claims with claimants' private insurers?

No comment

17b If not, what alternative arrangement would you prefer, and why?

We do not have a position on whether the above changes would be beneficial or not. However, any changes that simplify the claims process from a claimant perspective would appear, for large events in particular, to provide an advantage for the claimant and would reduce confusion. A number of challenges have arisen in

Christchurch where multiple parties (e.g. EQC and insurer, neighbouring properties and their insurers, uninsured or underinsured parties) are involved in a claim. While this has been an unprecedented scale insurance event, a simplified process for the claimant (or policy holder or party) would be advantageous in most situations irrespective of scale. In particular, if all parties are required to have a claims management process that meets certain best practice standards (e.g. timeframes, openness, information provision etc) this would be an improvement. Where disputes arise from those “in-house” claims management processes and all insurers and EQC were to be subject to the same dispute resolution process it would allow an independent dispute resolution provider to bring the parties together quickly and easily for mediation or adjudication. There have been too many examples where claimants are having to determine which dispute resolution process they can have access to. Simplifying this would in our view be beneficial to all stakeholders and parties.

Deadline for reporting claims

Proposal for discussion

18 That the current three-month time limit for claims notification be retained, but EQC be able to accept claims up to two years after an event, unless doing so would prejudice EQC.

What do you think?

18a Do you agree that the current three-month time limit for claims notification should be retained, but EQC should be able to accept claims up to two years after an event, unless doing so would prejudice EQC?

No comment

18b If not, what alternative arrangements would you prefer, and why?

We have no comment on the merits of the 3 month or 2 year timeframes proposed. However, given the importance of EQC cover and the likely challenges any claimant will be at the time, the question is whether in the instance of a dispute the consumer has any right of redress. The question of whether a decision is prejudicial to EQC may not be best determined by EQC alone. This is why independent dispute resolution process can provide greater confidence when a statutory framework for time limits is to be imposed, as it means dissatisfied people have an ability to be heard by an independent third party.

Ensuring the scheme meets its expected costs

Proposal for discussion

19 That the new EQC Act contain pricing and transparency principles requiring the scheme to adequately compensate the Crown for its expected costs and risks.

What do you think?

19a Do you agree that the new EQC Act should contain pricing and transparency principles requiring the scheme to adequately compensate the Crown for its expected costs and risks?

No comment

19b If not, what alternative arrangements would you prefer, to ensure the scheme’s future financial sustainability, and why?

In relation to transparency, while not related to the future financial sustainability of the scheme, it is important that information is transparent to those who have an expectation of cover as well as the Crown. It would be useful for homeowners and stakeholders to have a regular report from EQC (e.g. annually, or more regularly during a major insurance event) on the extent to which it is settling claims within the reserves it has set (this is clearly of concern to the Crown also). If the EQC is consistently settling at levels that are under reserve this may indicate the claimant/consumer is not receiving a fair deal, and if consistently over reserve then the

Crown or EQC will encounter financial stresses. Reporting on 'good faith' settlement processes would assist by increasing transparency and confidence in the EQC framework.

Allow but do not require differentiated EQC premiums

Proposal for discussion

20 That the current legislative flexibility to charge flat-rate or differentiated EQC premiums be retained.

What do you think?

20a Do you agree that the current flexibility to charge flat-rate or differentiated EQC premiums should be retained?

No comment

20b If not, what alternative arrangement would you prefer, and why?

No comment

20c Do you agree with the Government's intention to continue charging EQC premiums at a universal flat rate?

No comment

How will EQC finance its risk?

Proposal for discussion

21 That the Natural Disaster Fund be retained in broadly its current legislative form.

What do you think?

21a Do you agree that the Natural Disaster Fund should be retained in broadly its current legislative form?

No comment

21b If not, what changes would you like to see considered?

No comment

Proposal for discussion

22 That the Act enable EQC to use other forms of risk transfer, in addition to traditional reinsurance.

What do you think?

22a Do you agree that the Act should enable EQC to use other forms of risk transfer, in addition to traditional reinsurance?

No comment

Do you have any other feedback?

Other feedback

23a Are there any issues not discussed in this document that you would like to bring to the Government's attention at this stage?

Yes. A provision for independent dispute resolution will insure that for any future events claims management and settlement is assisted by an inexpensive and efficient process of resolving property claim disputes

23b What submissions would you like to make on those issues?

FairWay Resolution believes that changes to the Earthquake Commission Act 1993 should include provision for independent (and alternative) dispute resolution.

A well designed and considered dispute resolution system should have the following characteristics¹:

Accessibility – any scheme should be available to customers and promote knowledge of its existence, be easy to use and have no cost barriers”.

Independence - The decision making process (whether facilitative or determinative) and administration of the scheme are independent from scheme members (ie EQC and other insurers).

Fairness - decisions are fair and seen to be fair by observing the principles of procedural fairness, by making decisions in either a facilitative manner with the parties, or where determinative based on the information available and by having specific criteria upon which its decisions are based.

Accountability - the scheme is publicly accountable for its operations by publishing its determinations and information about complaints and highlighting any systematic industry problems. This accountability may be further enhanced by having a right of appeal where a determinative decision is made.

Efficiency - The scheme operates efficiently by keeping track of disputes, ensuring all disputes are dealt with by the appropriate process or forum and regularly reviewing its performance against agreed KPIs.

Effectiveness - The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance. This may include independent governance including representatives of different perspectives.

Culturally appropriate – the scheme recognises the unique requirements of consumers in New Zealand, and links to the expectations of established consumer law, cultural norms, and the services can be delivered in a manner that is culturally appropriate to the parties. This might also include a provision requiring parties to negotiate in good faith.

An independent dispute resolution scheme that is well designed and has a basis in legislation will ensure that for any future events claims management and settlement can be expedited and efficiently processed. This will minimise the need for the claimant to engage in expensive and lengthy litigation, thus freeing Court time. It will also alleviate the potential for further distress for property owners in the event of a natural disaster.

To allow claimants and insurers/EQC early access to an independent dispute resolution process that is fast, technically competent to deal with the issues involved, and as required provides a balance between consensus-based decision making and determinative decision making. Such an approach would provide credibility and independence, and allow policyholders and Insurers/EQC to have confidence in timely resolution to disputed claims, and would allow the parties to quickly reach settlements and move on. Insurers/EQC and claimants will benefit financially from avoiding costly litigation or by being unable to progress a case.

Mediation is one dispute resolution process which FairWay Resolution sees as particularly suitable to the types of disputes likely to arise in this area. The defining principles of mediation are flexibility, self-empowerment, mutually-beneficial solutions, and confidentiality. The flexibility of mediation allows parties to

¹ Adapted from Department of Industry, Science and Tourism, Australian Government ‘Benchmarks for Industry-Based Consumer Dispute Resolution Schemes’, August 1997.

agree on process rules at the outset and can involve multiple decision makers for each party, which facilitates joint decision making by the parties.

The process also allows the parties to creatively develop a solution which satisfies both parties' interests in the dispute. The emphasis should be on providing a process that minimises conflict rather than exacerbates it. Finally, a major driver of mediation's relatively low cost is the absence of an overly legal and adversarial process.

Equally, where mediation does not work for whatever reason, having a determinative process (eg adjudication) to provide a 'tribunal-like' setting to give parties the opportunity to present their 'case' and seek certainty on their position provides further benefit. This means that the principles of policy and law apply, and where required, parties can rely on high quality determinations to be delivered as quickly as possible in the event mediation fails for whatever reason.

Where an adjudication outcome is required (ie a decision is issued) the Courts can then be used to provide relief on appeals against the determination. We do not have a view as to whether appeals would be on points of law only or on a de novo basis, but some form of appeal should be available given the significant impact decisions on cover and related matters will have on any individual claimant and collectively on the EQC / insurer from a precedent perspective. If a high quality dispute resolution service is provided, it would reduce the number of cases going through Courts, but also reduce the number of claimants who may feel powerless to get a decision or move the process forward.

Claimants currently have a variety of dispute resolution providers – the Insurance and Savings Ombudsman, The Residential Advisory Service (RAS), Financial Services Complaints Limited, Financial Dispute Resolution, The Office of the Ombudsman, EQC's Independent Mediation Service, the Disputes Tribunal, and the District and High Court. Having multiple schemes, and some schemes that cannot be accessed because of jurisdictional requirements, has made the current process more confusing for claimants, many of whom are already experiencing psychological distress. A more clearly defined and universally accessible dispute resolution process established in the statute will allow parties to have full knowledge of their rights and a complete understanding of expectations. It is our understanding that the industry is currently working on trying to improve this process, and is making good progress.

A different approach to be considered was taken in North Carolina where a law was enacted to facilitate fair and timely handling of disputed residential property insurance claims arising out of declared disasters. The law gives a consumer the right to attend mediation with their insurance company, facilitated by an independent mediator, who has no connection with the insurance company. Following Hurricanes Katrina and Rita in 2005, mediation programmes were set up by the Department of Insurance and the District Court to facilitate claim resolution. In the Louisiana program, over 15,000 cases were filed for mediation, with a settlement rate achieved of 74%. In Mississippi, over 5,000 cases, with an 82% settlement rate.² In 2004 after four major hurricanes in Florida, the Florida State Insurance Commissioner recognised that the large number of unresolved homeowner's insurance claims had the potential to inundate the judicial system, prompting creation of an insurance mediation programme. The programme for residential claims was so successful that a commercial component was added.³

The current EQC mediation service is administered by AMINZ. EQC makes the decision as to whether a case is suitable for mediation. Mediation is only offered to the client if EQC considers that mediation is appropriate and therefore there is concern from claimants that the EQC mediation process is not truly independent. In future, if the rights to use an ADR process are included in legislation and follow best practice principles, it would remove any debate about the merits of any particular scheme established specifically for the purpose of dealing with a major event.

² American Arbitration Association (2012) Disaster Recovery Claims Resolution Services Programs

³ Rubin M, (2007) Disaster Mediation Lessons in Conflict Coordination

Our understanding is that there are low numbers of issues that reach mediation with EQC. As at 11 October 2013, out of 17,221 recorded complaints⁴, EQC only agreed to mediate in 104 cases⁵. There have also been other barriers to claimants accessing mediation. The EQC was unable to engage in RAS multi-party meetings as it did not want to duplicate the EQC mediation process. Approximately half of the cases lodged with RAS are disputes with EQC and therefore it was difficult to gain value from the multi-party meeting service. We acknowledge the scale of the event was unprecedented, and all service providers attempting to resolve disputes have brought a highly professional approach to what has been a complex series of challenges.

Where mediation is not offered, the avenue for Claimants is litigation in the District or High Court. This is not financially accessible for many claimants, and nor is it likely to be effective for Courts.

We do note that when RAS disputes have proceeded to a mediation forum (which FairWay has delivered under contract to CERA) the success rate has been 89% in reaching full or partial resolution of issues in dispute. The main concern is a very low volume of cases have been resolved in this way, with many apparently remaining unresolved.

The American models could be followed in New Zealand, or modified to suit local needs. Similarly, as with the Accident Compensation Act, provision could be made in legislation for an ADR scheme. As in the American models it should be mandatory for EQC/Insurers to participate and it should be implemented and operated by a service provider that is independent from EQC/the Insurance industry or from claimants.

The dispute resolution element should be part of an integrated EQC and Insurers claim handling process - a one stop integrated independent service for EQC /Insurance disputes, but also one devised and managed by experts in dispute resolution. This will allow for a programme of preventative measures such as training, and education of insurers to minimise disputes arising and allow simple disputes to be resolved quickly in house. For large events in future, it may be possible for technology such as Online Dispute Resolution to play a part in resolving some claims.

FairWay Resolution Limited (FairWay) is an expert conflict management provider and alternative dispute resolution partner. We help manage conflict so clients can build trusted relationships. We provide services to organisations, consumers and families.

Our services span the full conflict management cycle from prevention to organisational learning, so over time our clients can build conflict management capability and FairWay would be happy to assist any discussion or process around implementing an independent service.

⁴ New Zealand Parliament (2013) Order Paper and questions 13559

⁵ New Zealand Parliament (2013) Order Paper and questions 13555