

The Treasury

Material Provided to the Public Inquiry into EQC Information Release

August 2021

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- [23] 9(2)(a) - to protect the privacy of natural persons, including deceased people
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- [31] 9(2)(f)(ii) - to maintain the current constitutional conventions protecting collective and individual ministerial responsibility
- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [34] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions
- [35] 9(2)(g)(ii) - to maintain the effective conduct of public affairs through protecting ministers, members of government organisations, officers and employees from improper pressure or harassment;
- [36] 9(2)(h) - to maintain legal professional privilege
- [37] 9(2)(i) - to enable the Crown to carry out commercial activities without disadvantage or prejudice
- [38] 9(2)(j) - to enable the Crown to negotiate without disadvantage or prejudice
- [39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage

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Treasury Report: EQC Independent Ministerial Advisor's Report - Treasury Comments

Date:	1 May 2018	Report No:	T2018/1130
		File Number:	CM-1-3-15-1

Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Grant Robertson)	Note contents	Thursday 3 May 2018
Minister Responsible for the Earthquake Commission (Hon Dr Megan Woods)	Note contents	Thursday 3 May 2018

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Lars Piepke	Senior Analyst, Commercial Operations – Strategy and Policy	[39]	[23] ✓
Shelley Hollingsworth	Acting Manager, Commercial Operations – Strategy and Policy	[39]	[23]

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: Yes - The Report of the Independent Ministerial Advisor to the Minister Responsible for the Earthquake Commission

Treasury Report: EQC Independent Ministerial Advisor's Report - Treasury Comments

Purpose of Report

1. Christine Stevenson, the EQC Independent Ministerial Advisor, has submitted her final report to the Minister Responsible for the Earthquake Commission (appended to this report). This report provides our initial response to her recommendations, focusing particularly on the recommendations that affect the Treasury or that we think could have significant economic or fiscal impacts.
2. We note that the Independent Ministerial Advisor's report reflects the views of its author and has not been based on any policy development process. Many of the recommendations in this report require a policy undertaking before full advice can be provided to Ministers and before any actions should be taken.
3. We also note that, in line with the Terms of Reference, the scope of the report focuses specifically on "speeding up the resolution of outstanding Canterbury earthquake claims". The assessment has therefore been made in isolation of the broader functions of EQC or how the implementation of a wide-ranging, accelerated work-programme in response to this narrow objective may impact on the ability of EQC and officials to ensure that these other, critical functions of EQC are effectively performed.
4. Whilst we broadly agree with a number of the recommendations, or at least agree that work should be undertaken in response to the recommendations, a significant volume of work would be required before fully informed advice could be provided to Ministers. Those recommendations that could have significant fiscal impacts require detailed and substantive work programmes to ensure that all risks are properly assessed and that there are no unintended consequences from acting on these recommendations. In the Treasury's view, a staggered 12 month work programme would be appropriate.

Recommendations that we agree with

5. With regard to all recommendations in the sections under the heading "Operational structure of EQC" and the subheadings "Claimant Reference Panel", "Communications with Claimants" and (for the most part) "Relationship with Private Insurers", these matters are operational and EQC will be best placed to respond to these recommendations. However, we have no major concerns with these recommendations.
6. **EQC and Treasury work together on a proposal that could be put to the Minister for her to determine whether she supports a Ministerial Direction that would allow EQC to reimburse certain legitimate claim-related costs in certain circumstances.**

7. We support this recommendation and note that the Treasury has raised this issue as part of its work and recommendations relating to the EQC Act review process.
[35]
8. [33]
- 9.
- 10. EQC works with private insurers to extend the existing Protocol 1 to allow EQC to make cash settlements above the EQC cap, which would then be recovered from the private insurers.**
11. We support this proposal, but implementation will require a very specific agreement with the over-cap insurers to ensure that EQC will be reimbursed, otherwise the payment of an over-cap amount may be contrary to the EQC Act and hence unlawful. There may be risks relating to any agreement with the private insurers to include an extension of Protocol 1 within the insurer finalisation negotiations.
12. We note that EQC does not have experience settling large over-cap claims that require detailed technical work and costings. As such, we would recommend that any extension should be subject to limits, e.g. EQC only settling up to a certain amount over the cap.
13. While in theory this proposal should not result in a fiscal impact as the over-cap portion is expected to be recovered from the private insurers, it should be noted that any legal agreement with the private insurers will need to be very specific and fully enforceable to ensure increased fiscal risk does not occur. [37] [38]
- 14. The Treasury and MBIE undertake policy work on whether the limitation period in respect of the Canterbury earthquakes could be clarified and made consistent across EQC and the various insurers.**
15. MBIE has instructed Crown Law to provide legal advice on this issue. However, this is a very complicated issue that will most likely need to be determined by the High Court, the Court of Appeal and ultimately the Supreme Court. A legal opinion or policy advice, while better informing the Crown as to the issues, will have no standing when cases are taken to litigation.

16. We have raised this issue as a key parameter in the recent discussions with private insurers that are described in paragraphs 27, 28 and 38 of this report. Some insurers have already begun to apply restrictions based on limitations and the other insurers are looking to do so in the near future, adding complexity to discussions. We note that the limitation issue is a key negotiation element in these discussions and as such the Treasury is of the view that at this stage any engagement with the private insurers on this issue should be done via the Treasury.
17. In our opinion, this is a complicated issue and will require a work stream over a number of months.
18. **The Treasury includes the discharge of claims as part of its policy work on the EQC Act.**
19. We agree with the proposal, and it will be considered as part of the overall EQC Act review process (post the Inquiry into EQC). We note that the lack of a full and final settlement is a significant issue that is a driver of the ongoing potential liability to the Crown and is contrary to the concept of settlement finality that is standard in law and the private insurance market. This is a significant issue and all consequences must be fully understood prior to any shift in policy settings.
20. While the fiscal impact of such a policy is likely to be positive in the future (it is difficult to quantify as it will relate to potential future events), the other policy impacts will need to be carefully considered as well and the work stream required will need to take this into account.
21. **Of considerable concern is the lack of confidence (including by EQC staff) in the various data sets that EQC have available regarding claims activity in Canterbury.**
22. We share these concerns, and agree with the recommendations in the report to address them.

Recommendations that we have concerns with

23. **The report recommends:**
 - a. **that increased focus and resource should be directed to the monitoring function in Treasury relating to service delivery performance and future service risk, confidence by the public, institutional capability and its implementation of change;**
 - b. **MBIE and Treasury work on providing the Minister with advice on which government department is best placed to undertake such monitoring in future.**
24. In leading up to this recommendation, the report comments that Treasury's "focus is on monitoring Crown financial risk" relating to EQC. This is not wholly correct. Since the Canterbury earthquakes the Treasury has put significant effort into monitoring and reporting to Ministers on service delivery, and on policy issues, and will continue to do so. We note that relative focus over time is subject to Ministerial preference, which is changeable.

25. We welcome working with MBIE to advise Ministers on optimal monitoring arrangements, which could involve some combination of monitoring roles between the two departments, as often happens with other Crown entities. However, due to the significant role that EQC plays with regard to the management of Crown financial risk, in our view, the Treasury must retain monitoring responsibility for at least those functions which relate to risk management and risk transfer.
26. Whilst the Treasury will undertake to deliver advice to Ministers together with MBIE on the optimal monitoring arrangements, it should be noted that this has the potential to impact on the Treasury team's ability to concurrently deliver on other matters raised in the Independent Ministerial Advisor's Report.
- 27. The Treasury continues to work with the insurance industry and EQC to test the viability of a new model which could see the management of all new Canterbury earthquake-related claims from insurance entities (EQC, Southern Response, other private insurers) consolidated into one vehicle from a future date.**
28. We will be providing initial advice on these discussions to you in the next week. If after reviewing this advice you want us to continue negotiations with the private insurers, we expect this work stream to continue over a number of months.
- 29. The report recommends that:**
 - a. EQC management engage with Treasury to seek clarity on the Government's policy position and any potential response with regard to the fair and transparent resolution of on-sold damaged property claims;**
 - b. Treasury work with EQC so that there is an agreed policy and legislative position for large scale insurance events in the future.**
30. Whilst the recommendation is very general and indicates a need for a measured policy response, the body of the report is less balanced with regard to the on-sold situation.
31. The report includes statements that in our view give undue weight to the solution favoured by EQC, ahead of policy work by the Crown to affirm this recommendation or to propose other options that may better suit the Crown's purposes. These kind of statements include the following:

"EQC Management has given advice to the EQC Board (in March 2018) that their preferred approach to resolving on-sold over-cap claims is for the Minister to consider making a Ministerial Direction. This is because a Ministerial Direction would allow for resolution of the on-sold over-cap claims, without the claimants having to undertake costly and lengthy court proceedings"

"Work by Treasury on any Ministerial Direction is needed..."

The advice given by EQC management to the EQC board in March 2018 (referenced on page 21 of the Independent Ministerial Advisor's Report) provides a number of different reasons for supporting a Ministerial Direction, many of which being focused on the protection of EQC's own particular interests. Wider considerations (see paragraph 35 below) that are or should be of concern to the Crown are for the most part not addressed - but need to be, if all relevant factors of concern to the Crown are to be taken into account in formulating the appropriate policy response.

32. The report also makes no reference to other parties that may have some responsibility, including the purchasers, private building inspectors or the relevant councils.
- a. As regards purchasers it would be a reasonable expectation that anyone purchasing a house anywhere in New Zealand, let alone in Canterbury after the earthquakes, would insist on a pre-purchase building inspection to identify whether there was any pre-existing damage (e.g. weathertightness issues) and whether this had been appropriately remediated. Any purchaser who did not do this has arguably failed in his or her duty to take care or has at least contributed in part to any loss they may have suffered.
 - b. [37] [38]

33. [38]

“new earthquake damage is identified that requires a change to the original repair strategy. In some cases [where new earthquake damage is identified requiring a change to the original repair strategy] some of the earthquake damage [has been] missed by the previous owner and during the assessments that EQC performed”

“in many instances the purchaser of the on-sold property has relied on the EQC assessment and repair of the earthquake damage”

“These situations raise questions about the responsibility of EQC to subsequent purchasers’ properties that EQC has assessed or repaired”.

34. Ultimately, any recommendation with regard to the on-sold situation should be based on first principles policy advice supported by strong evidence that on-sold damaged property claims cannot be fairly, transparently and appropriately resolved within the current legal environment. This will then require further work to be undertaken to ascertain a policy response that best meets the Crown’s objectives after taking account of all the relevant considerations.
35. For instance it seems to us that the weight given in the report to a speedy resolution to on-sold, over-cap claims needs to be balanced against a number of other factors including
- a. the durability of these kind of settlements;
 - b. the risk of settled claims of this type being reopened;
 - c. the responsibility of other parties (apart from EQC);
 - d. the precedent effect (including the moral hazard implicit in letting private insurers escape liability); and
 - e. the fiscal implications for the Crown.¹

¹ [33] [35] [37] [38]

In our view Ministers should be presented with options that take all relevant considerations into account before publicly disclosing or endorsing any particular recommendation.

36. [31] [37] [38]

Commercial and legal issues

37. On the assumption that Ministers may elect to publicly release the report of the Independent Ministerial Advisor in full, care should be taken with regard to any related communications.

38. [33] [38]

39. [31] [37] [38]

40. [35]

41. [36]

[33] [35] [37] [38]

42. A precautionary approach on public communications continues to be warranted particularly where the full policy analysis is yet to play out and where the overall objective is to ensure that the resolution of the problem (for example the “on-sold” problem) is not burdened by further legal issues resulting from material qualifications or modifications to the previously announced policy following the undertaking of further policy work.³

Recommended Action

We recommend that you **note** the contents of this report.

Shelley Hollingsworth
Acting Manager, Commercial Operations – Strategy and Policy

Hon Grant Robertson
Minister of Finance

Hon Dr Megan Woods
Minister Responsible for the Earthquake Commission

³ As noted above the idea of a Ministerial Direction may make sense from an EQC perspective, but the Crown’s perspective is of course wider. Even the EQC recognises that there are likely to be conditions to which such a Direction would have to be subject (see the report’s reference to the need to engage with EQC on appropriate criteria as to which claims would qualify under the Ministerial Direction and the need for there to be a financial limit (all of which are mentioned in more particular terms in EQC management’s March advice to the EQC board)).