The Treasury

Treasury Advice Related to Modernising the EQC Act Information Release

December 2021

Clarifying Statement

In relation to page 3, paragraph 2:

For clarification: Consultation on a potential time bar related to EQC claims only.

Information Withheld

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act).

Where this is the case, the relevant sections of the Act that would apply have been identified.

Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to sections of the Act under which information has been withheld:

[25] 9(2)(b)(ii) - to protect the commercial position of the person who supplied the information or who is the subject of the information

[26] 9(2)(ba)(i) - to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied

[27] 9(2)(ba)(ii) - to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely otherwise to damage the public interest

[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

[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

Where information has been withheld, a numbered reference to the applicable section of the Act has been made, as listed above. For example, a [25] appearing where information has been withheld in a release document refers to section 9(2)(b)(ii).

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TE TAI ŌHANGA
THE TREASURY

Treasury Report: Modernising the Earthquake Commission Act: Claims Handling and Settlement - Additional Issues

Date:	24 February 2021	**Report No:**	T2021/351
		File Number:	TY-2-1

Action sought

	Action sought	Deadline
Hon Grant Robertson **Minister of Finance**	None	N/A
Hon Dr David Clark **Minister Responsible for the Earthquake Commission**	**Agree** to the recommended changes to the claims handling and settlement provisions in the EQC Act.	12 March 2021

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Elizabeth Bolton	Senior Analyst, Earthquake Commission Policy Team	[39] N/A (mob)	✓
Helen McDonald	Manager, Earthquake Commission Policy Team	[35]	

Minister's Office actions (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: No

Executive Summary

This paper seeks your agreement to a number of recommendations to either make changes to the Earthquake Commission Act 1993 (EQC Act) or otherwise retain the status quo. The recommendations relate to claims handling and settlement, including:

1 a time bar on reopening claims;

2 enabling EQC to require cash settled owners to undertake repairs;

3 lodgement of EQC claims with private insurers for initial validation;

4 delegation of EQC's settlement function; and

5 reinstatement of cover.

The Treasury and EQC recommend different approaches to the first three issues in this report. This is based on our different views on whether the nature and scale of the issues require legislative changes at this time. On the two remaining issues in this paper, the two agencies agree on the proposed changes.

Your decisions on this report will inform a second Cabinet paper seeking Cabinet agreement to proposed changes to the EQC Act. The decisions are required to enable the development of a draft bill, scheduled for introduction in the second half of 2021.

A time bar on reopening claims

EQC continues to receive large numbers of reopened claims relating to the Canterbury earthquake sequence. All of the Canterbury claims currently being managed by EQC are reopened claims, many of which have been reopened multiple times. In order to limit the number of reopened claims following a future event, EQC has proposed the introduction of a legislative time bar on reopening claims. EQC considers that this will address difficulties with attributing damage to an event and increase certainty for all stakeholders in the EQC scheme.

The time bar proposed by EQC would provide claimants with a ten-year time period in which to reopen their claims, starting from the date of the first full EQC settlement for both building and land claims. It would **not** affect the rights of claimants with settled or existing claims arising out of the Canterbury earthquake sequence. In addition, the limitation period in the Building Act 2004 (Building Act) would continue to apply to poor repairs resulting from a managed repair.

While the Treasury recognises that the ability of claimants to reopen claims following the Canterbury earthquake sequence has created administrative burdens for EQC, a time bar will not address the reasons why large numbers of claims have been reopened. As highlighted by the Public Inquiry into the Earthquake Commission (the Inquiry), the primary causes of claims being reopened relate to previous EQC claims handling processes, poor assessments, inadequate scoping of work and poor repairs. EQC data shows that close to 80 percent of reopened EQC claims relate to missed damage or failed repairs.

The Treasury, EQC and the Insurance Council of New Zealand (ICNZ) anticipate that there will be significantly fewer reopened claims following a future event. This is due to operational improvements being implemented by EQC, including the implementation of the Insurer

Response Model (IRM) and use of cash payments as the primary settlement approach. The Treasury's view is that the proposed time bar is attempting to address a set of problems that transpired following the Canterbury earthquake sequence and that are likely to be addressed by these improvements. Should a different set of problems arise following a future natural disaster event, the current flexibility in the EQC Act will ensure that claimants are not denied the opportunity to claim their statutory entitlement for insurance cover up to the value of the EQC cap to repair their homes.

ICNZ and the former EQC Claimant Reference Group (CRG) were consulted on this proposal. ICNZ does not support the proposed time bar. ICNZ considers "that the existing regime is appropriate" and identified a number of challenges and risks associated with a time bar. The CRG was concerned that the proposed time bar could result in property owner with significant damage being unable to access the funds necessary to repair their homes.

Using cash settlements to undertake repairs

EQC proposes an amendment to the EQC Act that would provide EQC with the discretion to require cash settled owners to undertake repairs. EQC is proposing the amendment on the basis that the Inquiry noted anecdotal concerns about the quality of housing in Kaikōura/Hurunui where cash settlements predominated. EQC advises that the proposed amendment would support the long-term quality, safety and reinstatement of New Zealand's housing stock following a natural disaster. EQC is also of the view that the proposed amendment would increase awareness for potential purchasers of homes of unrepaired natural disaster damage, and would also support administrative efficiency of claims management within EQC.

The Treasury agrees that the quality of housing stock is an important aspect of a post-disaster recovery and that there are risks associated with unsafe and insanitary homes where repairs are not completed. However, requiring EQC claimants to use their cash settlements to undertake repairs would be a significant new regulatory intervention and a shift in the EQC scheme. We consider that there is currently insufficient evidence of repairs not being undertaken, and limited understanding about the circumstances when it may be reasonable for the claimant to not apply cash to repairs, to justify such a major change. It would also be premature to make these changes prior to the completion of a planned study into the use of cash settlements which was recommended by the Inquiry. In addition, the proposed discretionary nature of the requirement would create practical and legal uncertainty for claimants, which is inconsistent with the overall intent of the review.

Whilst this study is underway, there are a number of communication and information sharing measures that could be, or are already being taken, to increase understanding of the implications of not undertaking repairs. These include improvements to EQC's communication material, policies and practices relating to cash settlements. In addition, section 31A of the EQC Act provides that EQC may publish information about natural disaster damage to property covered by the EQC Act where this is in the public interest. Proposed provisions [TR2020/3814 refers] putting beyond doubt EQC's ability to pass on information to other agencies will assist with sharing information with territorial authorities regarding dangerous and insanitary buildings.

Lodgement of EQC claims with private insurers for initial validation

Canterbury highlighted that New Zealand's dual insurance system meant claimants had to make separate claims. One claim was to EQC, up to the cap. A second claim needed to be made to the claimant's insurer for over cap losses which are not covered by EQC. The IRM and other recent partnership arrangements enable private insurers to handle both EQC and private insurance claims. From a claimant perspective, the claims process is streamlined so that claimants have one point of contact.

You have a choice about whether this approach is enabled or required in the EQC Act. EQC's preference is to retain the flexibility of the current approach where the default is lodgement with EQC and EQC may negotiate claims handling arrangements with private insurers.

The Treasury's preference is to amend the EQC Act to require claims to be lodged with private insurers for initial validation unless there are exceptional circumstances, such as an insurer failure. This will provide a clear signal from Government to EQC and insurers that they must cooperate at this critical initial stage of the claims process. As the requirement would only apply to initial validation, it would not have the effect of making insurers EQC's claims handlers for the entire process.

Alternatively, a "mid-way" option is to amend the EQC Act to enable EQC to direct claimants to lodge EQC claims with their private insurer for initial validation. This would provide EQC with the ability to decide whether and when to direct claimants to lodge claims with private insurers. This alternative option provides more flexibility and less certainty than the requiring proposal.

Delegation of EQC's settlement function

As noted above, following the Canterbury earthquake sequence, claimants had to make separate claims to EQC and their private insurer. We recognise that this increases cost, complexity and creates confusion for claimants. Currently, the EQC Act enables EQC to appoint any person as its agent to receive claim notices and inquire into claims. It also provides, however, that no settlement may be effected by an agent without EQC's authority. Under the Crown Entities Act 2004 (Crown Entities Act), Ministerial approvals have been given that have enabled EQC to delegate its claims settlement and other functions.

The Treasury is recommending changes to the EQC Act that would enable EQC to delegate the claims settlement function to insurers licensed under section 19 of the Insurance (Prudential Supervision) Act 2010. EQC would be able to do this without the need for Ministerial approval under the Crown Entities Act. EQC supports this recommendation.

This would simplify delegation of the claims settlement function for EQC by avoiding the need for Ministerial approval. Delegations not requiring approval would be to licensed insurers whose activities are subject to regulatory oversight. It would, however, maintain the Ministerial approval requirement for any other, possibly unregulated, parties that might be considered in future as potential delegates.

Reinstatement of cover

We previously advised you that we have been undertaking further analysis on reinstatement of cover, in consultation with EQC [T2020/2874 refers]. The Treasury and EQC recommend that the status quo is retained on the basis that none of the alternative approaches are materially better than the status quo, which is now well understood by EQC, insurers and claimants.

Recommended Action

We recommend that you:

Time bar on reopening claims

a note that EQC continues to receive large numbers of reopened claims relating to the Canterbury earthquake sequence

b note that 55% of reopened claims relate to missed damage, and 23% relate to issues with previous EQC repairs

Either

c a **agree** to retain the status quo where there is no limitation on a claimant's ability to reopen a claim up to the value of the EQC cap (the Treasury's preferred option)

Agree/disagree.

Or

d **agree** to a 10-year time bar on reopening EQC claims starting from the date of the first full settlement for land and building claims (EQC's preferred option)

Agree/disagree.

e **note** that if you agree to a time bar on reopening claims, that the limitation period in the Building Act 2004 of 10 years starting from the date of the act or omission giving rise to the claim will continue to apply to poor repairs undertaken as part of a managed repair

Requiring cash settled owners to undertake repairs

f **note** that the Inquiry concluded that there is currently insufficient evidence that repairs have been left uncompleted or ignored, and made recommendations to improve the evidence base regarding the advantages and disadvantages of cash settlement

g **note** that as part of the Government response to the Inquiry, EQC undertook to invite bids for a study involving an assessment of the impacts of cash settlement in Kaikōura/Hurunui by March 2021

h **note** that where claimants choose not to use cash settlements to undertake repairs they will not be able to claim for the same damage, and in some cases may be ineligible for ongoing cover

Either

i **agree** to retain the status quo whereby owners are not obligated to use cash settlements to undertake repairs and EQC cannot require them to do so, whilst a study is undertaken on the impacts of cash settlement (the Treasury's preferred option)

Agree/disagree.

or

Further advice please as per discussion

j **agree** to amend the EQC Act to provide EQC with a discretion to require cash settled owners to undertake repairs (EQC's preferred option)

Agree/disagree.

If you agree to recommendation (h) above,

k **note** that EQC is proposing that the requirement will be enforced using either statutory declarations, tranche payments or land covenants

l **note** that proposed enforcement mechanism relating to land covenants would require an amendment to the EQC Act to provide that EQC may require the Registrar-General of Land to register covenants on property without the claimant's consent

m **direct** officials to report back to you with further advice on the proposed enforcement mechanisms

Lodgement of EQC claims with private insurers for initial validation

n **note** that requiring claimants to lodge claims with both EQC and their private insurer is inefficient and can be confusing

o **note** that cooperation arrangements between EQC and private insurers, such as the Kaikōura Memorandum of Understanding and the recently announced Insurer Response Model (IRM) are intended to establish more efficient and customer-friendly processes for claimants, with private insurers handling both EQC and private insurance claims

p **agree** to one of the following three options relating to whether or not the Act enables or requires the lodgement of claims with private insurers:

Either:

i. **agree** that no changes are made to the EQC Act regarding claims lodgement, which means claims would continue to be lodged with EQC or EQC's agent (EQC's preferred option)

Agree/disagree.

or

ii. **agree** to amend the EQC Act to require claimants to lodge EQC claims with their private insurer for initial validation (that is, simple receipt of the notice of claim and confirmation that the claimant has a private insurance policy that triggers EQC cover for the damaged property), unless exceptional circumstances such as the failure of a private insurer make such lodgement impracticable (the Treasury's preferred option)

Agree/disagree.

or

iii. **agree** to amend the EQC Act to enable EQC to direct claimants to lodge EQC claims with their private insurer for initial validation which would give EQC the ability to decide whether and when to direct claimants to lodge claims with private

insurers (an alternative "midway" option to the above two options acceptable to both EQC and Treasury, but not preferred by either)

Agree/disagree.

Delegation of EQC's settlement function to private insurers

q **note** that delegation of the EQC claims settlement function is necessary to enable more efficient partnership arrangements between EQC and private insurers

r **note** that delegation is currently enabled through a 'standing' Ministerial approval under the Crown Entities Act 2004

s **note** that it would simplify matters for EQC if the Ministerial approval requirement for settlement delegations did not relate to licensed insurers who are the subject of specific regulatory oversight (as opposed to other, possibly unregulated, parties that might be considered in future as potential delegates)

t **agree** to amend the EQC Act to enable EQC to delegate the EQC claims settlement function to an insurer licensed under section 19 of the Insurance (Prudential Supervision) Act 2010 without the need for Ministerial approval under the Crown Entities Act 2004

Agree/disagree.

Reinstatement of cover

u **note** that the Inquiry recommended that the Government "review the EQC Act in light of the High Court ruling on reinstatement of cover following each natural disaster event"

v **note** that the alternatives all present challenges and we consider there is insufficient justification to shift away from the status quo approach

w **agree** EQC cover should continue to reinstate following each natural disaster event

Agree/disagree.

Helen McDonald
Manager, Earthquake Commission Policy team

Hon Dr David Clark
Minister Responsible for the Earthquake Commission

Purpose of Report

1. This report seeks your agreement to a number of recommendations to change the Earthquake Commission Act 1993 (the EQC Act), or to otherwise retain the status quo. The recommendations relate to claims handling and settlement.

2. Your decisions on this report will form the basis of a second Cabinet paper requesting policy decisions to be presented to Cabinet later this year (along with your decisions on the Treasury reports, *Modernising the Earthquake Commission Act: Technical Issues* and *Modernising the Earthquake Commission Act: Aligning with the Crown Entity Framework*). The decisions will inform the development of a draft bill, scheduled for introduction in the second half of 2021.

Analysis

Claims handling and settlement

Introduction of a time bar on reopening claims

3. EQC continues to receive large numbers of reopened claims relating to the Canterbury earthquake sequence. The EQC categorises reopened claims as claims by property owners who have previously settled with EQC requesting reviews of their entitlements.

4. The EQC Act currently includes a statutory notification period,[1] which places a time limit on when an initial claim must be lodged by following an event. In contrast, once a claim has been lodged and settled, there is no time limit on claimants' ability to reopen a claim, for example if further damage is later discovered. The Earthquake Commission Act 1993 (the EQC Act) does not distinguish between open, closed and reopened claims.

5. EQC currently receives around 450 – 600 reopened claims a month. 55% of reopened claims relate to missed damage, while 23% relate to issues with previous EQC repairs. All of the Canterbury earthquake sequence claims currently being managed by EQC are reopened claims, many of which have been reopened multiple times. 50% of all reopened claims are reopened by property owners who did not own the damaged property at the time of the original claim.

6. EQC has proposed the introduction of a legislative time bar on reopening claims. The proposed time bar would provide claimants with a ten-year time period in which to reopen their claims, starting from the date of the first settlement.

7. A first settlement is not currently defined in the EQC Act. EQC has advised that the first settlement would be "*the date on which all aspects of both building and land claims related to a property are finalised."*

[1] Claimants must notify EQC of a claim not more than three months after the damage occurred, or if this period has expired, not more than two years after the damage occurred. In both cases the notification period can be extended via regulation.

8. It is important to note that a time bar would not apply retroactively. This means that it would not affect the rights of claimants whose claims arose from the Canterbury earthquake sequence, or any other natural disaster prior to the entry into force of an amended EQC Act.

How would a time bar work?

9. EQC proposes that the EQC Act is amended to introduce a 10-year time bar on reopening claims, starting from the date of the first settlement.

10. EQC advises that the 10-year period aligns with the 10-year limitation period in the Building Act 2004. This reflects a time period in which it is reasonable to expect a claimant to complete repairs and which will enable claimants to detect building damage that may not have been included in the settlement, or faulty building work where EQC was responsible for managing the repairs.

11. EQC advises that the first settlement would be the date on which all aspects of both building and land claims relating to a property are settled for the first time. The time bar would not remove the ability of claimants to bring legal proceedings or access dispute resolution mechanisms in relation to the claim, prior to and following the expiration of the time bar.

12. EQC is of the view that a time bar starting from the date of the first full settlement is fairer to all claimants than starting from the date of the event. EQC is also of the view that it would provide greater clarity and finality compared to starting the time period from the date of the last payment, which may reset a number of times.

13. EQC does not currently hold data on the number of Canterbury claims that have been reopened and settled within different periods starting from the date of the first settlement. This reflects how many Canterbury claims were part settled as each aspect of a claim (for example the land claim) was capable of finalisation. The claims management system used by EQC at the time of the Canterbury earthquake sequence was not able to reflect the date of first full settlement of the entire claim. EQC upgraded its claims management system in 2017 so that in future it will be able to identify the date of the first settlement of a claim.

14. EQC proposes that any legislative time bar be mandatory and not be subject to any exceptions. EQC considers that if legislation gives EQC a discretion on when to end the claimant's ability to reopen a claim, or provides for a number of exceptions, EQC's decisions will be open to judicial review.

15. EQC advises that in order to mitigate any risks to claimants associated with a time bar, that it would:

    - Provide clear, effective communication with claimants about the time bar and requirements for reopening claims, including the benefits of repairing property damage soon after settlement (because there is a specific period of time to reopen the claim).

    - As with all aspects of the IRM, work closely with private insurers to support them to appropriately and effectively manage the reopening of EQC claims and inform claimants of their rights.

Why is EQC proposing a time bar?

16. EQC advises that it strongly supports claimants having the ability to reopen claims, particularly in circumstances where they have identified natural disaster damage that was not factored into their original claim settlement. EQC has taken steps to mitigate the need to reopen claims, such as operational improvements and significantly improved the claimant experience through the introduction of the IRM. Despite these

improvements, however, EQC expects that some claims will have to be reopened following settlement, for example when damage that is hard to detect through non-invasive means is discovered as part of repair work to the property.

17. EQC's view is that a 10-year time bar provides a reasonable timeframe, which balances the impact on the rights of claimants to access entitlements, with a number of negative impacts caused by the open-ended ability to reopen claims.

18. There are two main drivers for EQC's proposal to introduce a time bar on reopening claims.

    a. Addressing difficulties to attribute damage; and
    b. Increasing certainty for all stakeholders in the EQC scheme.

Addressing difficulties attributing damage

19. The primary driver for the proposal is to address difficulties attributing damage to an event as time passes. This is problematic for both claimants and EQC. The longer the period since the event cover is being claimed for, the more difficult it will be to find evidence to support damage being related to a natural disaster event, vis-à-vis other causes such as age and general maintenance of the property. This is especially the case as properties get on sold.

20. EQC advises that a 10-year time bar incentivises claims to be reopened within a reasonable time period to enable claims finalisation at a time when damage can be attributed to the occurrence of a natural disaster without undue complexity. This approach should also support better community recovery overall.

Increasing certainty for other stakeholders in the EQC Scheme

21. Introducing a time bar would also increase certainty for other stakeholders in the EQC scheme, including reinsurers and EQC. It would mitigate the issues caused by the open-ended ability for claimants to reopen claims. These issues are:

    a **Claims handling complexities and associated claims handling costs**: The lack of certainty around attributing damage increases complexities associated with handling reopened claims and increases claims handling costs. This is due to difficulty accessing evidence and key witnesses (such as assessors) and increasingly complex decision-making processes needed as a result.

    EQC advises that a 10-year time bar reduces claims handling complexities by reducing claims handling costs over time for both EQC and private insurers through incentivising earlier finalisation of EQC claims.

    b **Influence on future reinsurance appetite:** EQC advises that there is concern by reinsurers about the unknown open-ended liability relating to reopened claims. The uncertainty around liability due to reopened claims has been demonstrated by the Canterbury earthquake sequence with there being continuous increases to the liability associated with reopened claims over the past few years. As 70 - 80% of reinsurers in EQC's current reinsurance programme were part of EQC's programme at the time of the Canterbury earthquakes, this has a direct impact on their exposure, meaning they have needed to regularly increase their provisions in relation to the Canterbury earthquake sequence.

    EQC advises that while there has been no impact on reinsurance appetite to date, the issue of re-openings is regularly discussed between EQC and reinsurers. There is a potential risk of reduced risk appetite from reinsurers should there be other significant, loss paying events. A 10 year-time bar would mitigate the risk of EQC reinsurance costs increasing over time.

c **Effect on the EQC levy:** EQC advises that there is a flow on impact for levy payers as any increase in claims handling costs and/or costs of reinsurance are factored into setting the levy rate. A 10-year time bar balances a reasonable time limit for claimants with ensuring fairness for all those who pay for EQC cover.

22. EQC considers that these challenges can be addressed through a package of approaches: faster, accessible claims processes (including through the IRM); effective dispute resolution though EQC, private insurers and external dispute resolution; and a 10-year time bar on reopening claims.

23. EQC estimates that a 10-year time bar would have a limited impact on claimants accessing their entitlement under the EQC Act, as only a small number of claimants are likely to seek to reopen their claim beyond the proposed 10-year time bar.

The Treasury recommends retaining the status quo

A time bar is unlikely to address the reasons why large numbers of claims have been reopened

24. The Treasury recognises that the ability of homeowners to continue to reopen claims has placed a significant administrative burden on EQC following the Canterbury earthquake sequence. However, the Treasury considers that the changes underway to EQC's claims handling and settlement practices, are the appropriate way to ensure that claims are settled in a fair, timely and enduring way following a future event. This will lessen the likelihood of large numbers of claims being reopened several years later.

25. As highlighted by the Inquiry, claims handling processes, poor assessments, inadequate scoping of work and poor repairs have led to ongoing issues for property owners and large numbers of reopened claims in relation to the Canterbury earthquake sequence. EQC data suggests that close to 80 percent of reopened claims relate to missed or failed repairs.

26. Since the Canterbury earthquake sequence, and in response to the Inquiry, EQC has implemented a number of changes to its policies, procedures and organisational culture. Changes include the implementation of the IRM and the preference for cash settlement as the default settlement approach. Both the Treasury and EQC agree that that these changes should significantly reduce the likelihood of reopened claims following a future event. ICNZ agree and noted that consistent with this view, there were only a limited number of reopened claims following the Kaikōura/Hurunui earthquake. Following this event, insurers acted as EQC's agent and claims were predominantly cash settled.

27. Where there are reopened claims following future events, limiting claimants' ability to reopen claims would limit the ability of claimants to access the full amount of the cover they have paid for. The claimant has paid a premium for cover up to the amount of the EQC cap. The Treasury's view is that this would have the effect of depriving claimants of a statutory entitlement which, often through no fault of their own, they have not received the full benefit of.

EQC's liability is capped regardless of whether there is a time bar or not

28. Regardless of when, or how many times, a claim is reopened, the amount that will be paid by EQC to the claimant (and consequently the liability of EQC's reinsurers) is limited by the amount of the EQC cap.

29. The Treasury recognises that it becomes increasingly difficult the more time passes following an event for claimants to be able to link the natural disaster to damage to the property. Claimants are currently required to provide evidence of their claim. Proposals to further strengthen these existing requirements should leave no doubt that the

obligation is on claimants to satisfy EQC that the damage being claimed for was caused by an event for which a claim has previously been made.

Matters to consider if a decision is made to proceed with a time bar

30. If you wish to proceed with a 10-year time bar, our advice is that detailed design and drafting of the time bar will require some further consideration to ensure certainty regarding the interaction with wider legal settings, including the time bars on civil proceedings in the Building Act,[2] and the Limitation Act[3] .

31. Both the Limitation Act and the Building Act use the date of the act or omission giving rise to the claim as the starting point for a time bar on proceedings. The Building Act will be relevant in the context of a managed repair and applies a 10-year limitation period from the date of the act or omission giving rise to the claim (rather than from the date of a first settlement). The 10-year period starting from the date of the act or omission in the Building Act reflects a policy decision regarding the time period in which it is reasonable to expect a claimant to detect building damage, including faulty building work. ICNZ has advised, and the Treasury agrees, that any proposed time bar relating to poor repairs should not be more favourable than is provided for in the Building Act. ICNZ also commented that "In the interest of certainty…legislation should address how any different time bars interact. For example, the way the Building Act treats this matter is to state that the Limitation Act applies but that there is a 10 year long-stop."

Concerns raised by the insurance industry

32. ICNZ considers "that the existing regime is appropriate" and does not support the proposed time bar. The status quo largely aligns with private insurance. Private insurers are unable to limit their liability via time bars as section 9 of the Insurance Law Reform Act 1977 generally prohibits time bars in insurance contracts. The introduction of a time bar in the EQC Act would introduce a new difference between EQC and private insurer claims.

33. ICNZ notes that this is an extremely complex matter that cannot be fully considered in short timeframes. ICNZ has identified the following challenges and risks associated with a time bar on reopening claims that would need to be worked through:

    - Introducing the time bar for EQC claims could lead to a divergent response in so far as the claim was, or became, over cap. Private insurers could find themselves in a situation where they need to deal with multiple different time bars for the same claim event, as the time bar would start from the date of the first full settlement which will vary between claimants. In this situation there is potential for the EQC claim component to be time barred while the private insurer component is not (or vice-versa).

    - This would also likely result in poor customer outcomes (for example, claimants could be left in a position without the necessary funds to reinstate their house). This may also lead to reputational issues for EQC and pressure being placed on the private insurer to meet costs that would have been met by EQC had the claim not been time barred.

    - A divergent outcome would also cause additional complexity and claim management costs for private insurers.

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2 The Building Act provides a defence to civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

3 The Limitation Act provides a defence to civil proceedings if the defendant can prove that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based

- The introduction of a new time bar may also, precipitate more litigation, including potential class action or claims involving advocates as claimants find themselves under time-bound pressures to make the strongest case via adversarial / litigious means rather than an orderly resolution via the standard claims process. A time bar that sees the clock start running upon settlement may see EQC claim lifecycles prolonged with customers being less comfortable to accept settlement. Again, this may lead to more involvement by insurance advocates (whose practices were highlighted by the Inquiry).

Other issues raised in consultation

34. The option of a time bar on the re-opening of claims was not a proposal that was consulted on in the 2015 discussion document and was not a recommendation of the Inquiry. This means our understanding of the views of stakeholders on this issue is quite limited.

35. In addition to consulting with ICNZ, we did consult with the Canterbury Claimant Reference Group (CRG) who noted that some types of damage, for example, structural damage is difficult to discover. The CRG expressed concern that claimants who discover significant damage after the expiry of the time bar will be unable to access the funds necessary to undertake repairs.

The Treasury recommends retaining the status quo

36. While the Treasury recognises that the ability of claimants to reopen claims following the Canterbury earthquake sequence has created administrative burdens for EQC, a time bar will not address the reasons why large numbers of claims have been reopened. In addition, we anticipate that operational improvements will result in significantly fewer reopened claims following a future event. Should a different set of problems arise following a future natural disaster event, the current flexibility in the EQC Act will ensure that claimants are not denied the opportunity to claim their statutory entitlement for insurance cover up to the value of the EQC cap to repair their homes. For these reasons the Treasury recommends retaining the status quo.

Requiring cash settled owners to undertake repairs

37. The EQC Act provides EQC with a discretion to decide whether it repairs or reinstates a property, or makes a cash settlement. The EQC's current operational preference is for cash settlement as reflected in the insurer agreements. A cash settlement approach was also used in the Kaikōura/Hurunui districts following the 2016 earthquakes.

38. The EQC Act does not impose duties on property owners to undertake repairs. There are, however, consequences for property owners if cash settlements are not used for that purpose. This includes an ability for EQC to decline claims where the damage to which the claim relates was caused or exacerbated by damage for which the EQC has previously made a payment.[4] The EQC may also cancel insurance where a claim is cash settled and the property is not replaced or reinstated to the satisfaction of the EQC.[5] In addition, the EQC may limit its liability in some circumstances where the property is likely to suffer the same or substantially the same damage.[6]

39. EQC is proposing an amendment to the EQC Act that would enable it to require cash settlements to be used by the claimant to repair natural disaster damage to residential properties.

[4] EQC Act, Schedule 3, Clause 3(a)
[5] EQC Act, Schedule 3, Clause 4(1)
[6] EQC Act, Schedule 3, Clause 5

EQC's preference is to be able to require owners to repair properties on a discretionary basis

Why EQC thinks a discretion is necessary

40. EQC advises that this proposal has three objectives:

    1) supporting the long-term quality, safety and reinstatement of New Zealand's housing stock;

    2) supporting potential homeowners' awareness of unrepaired damage; and

    3) supporting administrative efficiencies by providing EQC an opportunity to formally communicate to claimants the risks of not undertaking repairs.

EQC prefers that the requirement is discretionary

41. EQC's preference is to have discretion regarding which conditions to apply to a cash settlement and under which circumstances. EQC advises that an ability to impose the requirement on a discretionary basis would enable EQC to consider a range of mechanisms for balancing a claimant's unique circumstances, with also considering the long term quality of New Zealand's housing stock, and the needs of future purchasers of a property that has unrepaired natural disaster damage.

42. If this proposal is progressed, EQC advises that it would develop operational policy and a decision-making framework to guide the exercise of the discretion. EQC notes that the operational policy would provide clarity on when conditions would be imposed, and it is currently envisaged that it would focus on the type of damage that needs to be repaired. For example, conditions may be put on claims where the damage affects the structural integrity or performance of the dwelling (for example, foundation damage). Owners might also be required to repair properties where the damage is higher value, with the amount of the entitlement being a proxy for severity. However, the value of the damage would not override other considerations, for example, a damaged marble kitchen benchtop may be costly to repair, but does not affect the structural integrity, weathertightness or performance of the property. EQC advises that the requirement is unlikely to be imposed on land damage that is unrepairable.

43. EQC is proposing that the requirement would be enforced using either: statutory declarations; tranche payments; or land covenants. EQC advises that it anticipates that land covenants would be the primary enforcement mechanism. EQC would decide on the mechanism on a discretionary basis and the mechanisms could be used in combination or individually. EQC would also like to retain the flexibility to use any other mechanisms that may be developed in future.

44. EQC's view is that to effectively make use of land covenants, that the EQC Act would need to be amended to allow EQC to register a land covenant without the requirement to obtain the claimant's consent. This would enable EQC to require homeowners to repair properties and inform potential purchasers of natural disaster damage to the property.

45. EQC notes that Land Information New Zealand (LINZ) raised questions regarding the potential risks associated with placing covenants on titles. For example, it is possible that purchasers of properties will rely on the discharge of the EQC covenant as evidence that the repairs have been completed to a satisfactory standard. LINZ also noted that covenants would need to be used consistently and according to clear criteria. Otherwise there is a risk that purchasers may assume that the absence of a covenant means that no claim has been made and/or that the necessary repairs have been carried out. EQC believes that this risk can be addressed via an education

campaign that makes it clear what the purpose of a covenant is and when EQC will register a covenant.

The Treasury recommends retaining the status quo

There is insufficient evidence of cash settlements not being used to undertake repairs or the reasons why this might have occurred

46. We think that there is currently insufficient evidence to determine whether a regulatory intervention is needed, and, if so, the most effective form of intervention. This includes insufficient evidence on the extent to which cash settlements have not been used to repair houses; and the reasons why this might have occurred.

47. The Inquiry noted that there is a risk, "as yet unmeasured, that cash settlements might not translate to repaired houses". However, Dame Silvia concluded that while she had been told of some homeowners in the Kaikōura and Hurunui districts who had decided not to spend their cash settlements on repairs, that:

> *"it is not possible to make a confident determination that repairs have been left uncompleted or ignored and that the quality of the housing stock has been affected"*[7].

48. Dame Silvia also noted that there may be other reasons for failing to undertake repairs, including pressure on local contractors, or the homeowner's lack of confidence in being able to manage a repair.

49. The Inquiry made a number of recommendations on this point, including that EQC: improve communication around the consequences of not using cash to undertake repairs; and undertake an assessment of the impacts of cash settlements in Kaikōura/Hurunui.

50. As part of the Government response, EQC undertook to invite bids for a study on the impacts of cash settlement in Kaikōura/Hurunui by March 2021. EQC has advised that it does not expect the study to be completed until 2022/2023, and that it does not think it is advisable to wait for the outcomes of the study prior to making a recommendation on this issue.

51. ICNZ has been consulted on this issue and also supports undertaking a study on cash settlements prior to taking this matter further. This includes an assessment of cash settlements in Kaikōura/Hurunui, that considers the characteristics of cases where cash settlements have not been applied to repairs. ICNZ advised that while in principle it supports changes that improve the likelihood of claimants undertaking repairs, what is proposed is complicated and multifaceted and lacks an evidence base. ICNZ strongly supports the study on cash settlements in Kaikōura/Hurunui being undertaken prior to any decisions being made on requiring cash settled owners to undertake repairs.

This would be a significant change to the EQC scheme

52. The Treasury considers that requiring cash settled owners to undertake repairs would represent a significant shift in the EQC scheme. The requirement would introduce a new limitation on how homeowners can use their insurance payment. In some situations, this will have the effect of binding property owners to properties and locations that they would rather leave. The requirement would also change the role of EQC, requiring it to monitor and assess whether repairs have been completed.

Use of a discretion in this context has significant implications

[7] Dame Silvia Cartwright, *Report of the Public Inquiry into the Earthquake Commission*, p.207

53. The Treasury is concerned that a discretion enabling EQC to decide when it will impose and how it will enforce this requirement, has the potential to create practical and legal uncertainty for claimants and EQC. Without clear legislative criteria regarding when the discretion can be exercised, and which proposed enforcement mechanisms will be applied, property owners will be uncertain of their obligations. A lack of clarity and certainty and the arbitrary application of the discretion also increases the likelihood of disputes arising. The Treasury's view is that this could be seen as contrary to one of the objectives of the EQC Act review, which is to improve clarity and certainty in relation to the role of EQC and the cover it provides.

54. The Legislation Design and Advisory Committee (LDAC) advises that where legislation is vague or leaves too much to discretion, then there is the potential for confusion and inconsistency. LDAC states that where "citizens cannot find the legislation that applies to them or if that legislation cannot be understood, then both the efficacy of the legislation and the rule of law itself are undermined". This has the potential to create significant costs for parties subject to the discretion, and also creates constitutional concern regarding the lack of legal clarity regarding rights and obligations.[8]

Effectiveness of the proposed enforcement mechanisms

55. The Treasury considers that the extent to which a discretionary requirement to force owners to repair properties would increase the numbers of homes being repaired will largely depend on levels of compliance with and the enforceability of the obligation.

56. Tranche payments would involve the EQC paying settlements in part payments to align with building work. This would provide some alignment between the cost of the work and the value of the settlement. It would also enable the EQC to monitor whether the work has been done. Tranche payments require considerable staff time to administer payments on an ongoing basis while the repairs are underway.

57. Statutory declarations that repairs will be undertaken are difficult to enforce. Where statutory declarations are not monitored or enforced, it is unlikely that they will create the right incentives on claimants to undertake repairs.

58. The third possible mechanism suggested by the EQC is the registration of "land covenants in gross". The effect of covenants on the rate at which homes are repaired following an event may depend on market conditions. In a buoyant property market where purchasers do not require its removal as a prerequisite to purchasing a home, it may have less of an effect in encouraging timely repairs than in a market where purchasers require its removal as a condition of the sale.

Other issues associated with the use of covenants

59. LINZ has raised questions regarding the potential risks associated with placing covenants on titles. For example, it is possible that purchasers of properties will rely on the discharge of the EQC covenant as evidence that the repairs have been completed to a satisfactory standard. LINZ also noted that covenants would need to be used consistently and according to clear criteria. Otherwise there is a risk that purchasers may assume that the absence of a covenant means that no claim has been made and/or that the necessary repairs have been carried out.

Ease of implementation

60. The Treasury thinks there is significant complexity associated with introducing a statutory obligation for claimants to undertake repairs, and there are unresolved issues with important implications including:

[8] LDAC Legislation Guidelines, 2018 edition

- how long claimants would have to undertake the work prior to being subject to enforcement action;
- whether EQC or homeowners would bear the cost of price increases during the course of the required repairs;
- the interaction with private insurance on over cap claims, ICNZ noted that where EQC imposed the requirement in relation to an over cap claim, this should not have the effect of limiting or binding the settlement options of insurers and their customers; and
- how the obligation would apply to owners of Multi-Unit Buildings or other situations where the repair work involves different parties agreeing to repair damage to items owned in common (for example, party walls or retaining walls).

Alternative mechanisms for achieving the same outcomes

61. The Treasury considers there are a number of other mechanisms that may achieve the same outcomes. These include improvements to EQC's communication material, policies and practices relating to cash settlements to increase claimants' understanding of the potential impacts of not undertaking repairs. In addition, section 31A of the EQC Act provides that EQC may publish information about natural disaster damage to property covered by the EQC Act where this is in the public interest. Furthermore, as part of the review, we are recommending that for the avoidance of doubt, the EQC Act be amended to confirm EQC's ability to disclose information held by EQC to another government agency. These provisions will enable EQC to pass on information about unrepaired homes left in a dangerous or insanitary state to agencies responsible for the Building Act 2004 (Building Act). Territorial authorities currently have the ability under the Building Act to restrict access to dangerous and insanitary buildings.

62. This approach is supported by ICNZ, which suggests that EQC can assist claimants by improving communication around the implications of not applying cash settlements to repairs.

Lodgement of EQC claims with private insurers for initial validation

Dual claim lodgement processes are inefficient and can be confusing for claimants

63. The response to the Canterbury earthquake sequence highlighted that New Zealand's dual insurance system meant claimants had to make separate claims to: EQC (up to a capped level of the damage); and to their private insurer for losses not covered by EQC.

64. The requirement for claimants to notify damage to EQC, as well as their private insurer, increases complexity and creates confusion. This includes where claimants are unsure about which organisation they must notify, and ultimately which organisation will handle the claim through to settlement.

65. Having two parties involved generates additional cost and delay for properties subject to 'double-handling'. This includes when claims reach the EQC cap and are transferred to the private insurer to calculate their exposure above the EQC portion. EQC and private insurers must match the claims they have separately received with each other, and then with individual properties and claimants.

66. The Inquiry found that better coordination of the residential insurance response is necessary to ensure a housing recovery following a natural disaster. This includes clarity regarding roles and responsibilities.

Recent partnership arrangements have improved the situation

67. The IRM and other recent partnership arrangements involve relevant private insurers handling both EQC and private insurance claims. These arrangements recognise the primary relationship between insurers and their customers and acknowledge that claims handling is a core daily function of private insurers. From a claimant perspective, the claims process is streamlined so that claimants have one point of contact.

68. However, the EQC Act must also be able to be implemented effectively in the absence of such arrangements. That is because EQC and/or some or all insurers may choose not to participate in such arrangements, and any arrangements made may not be continuously maintained.

Previous consideration of the lodgement issue

69. The 2015 public discussion document acknowledged that attempting to capture partnership agreements like the IRM in an Act or regulation would create an excessively prescriptive and unwieldy legislative environment for EQC and insurers. Accordingly, there was no proposal to require EQC to outsource all claims handling. Rather, the legislation would simply continue to allow claims handling responsibilities to be outsourced.

70. However, it was proposed that the EQC Act should require claimants to lodge EQC claims with their private insurer. It was envisaged that private insurers would need to validate these claims and then, depending on the agreed commercial arrangements, pass the claim onto EQC for further processing, or complete some or all the claim management on EQC's behalf.

71. The 2015 discussion document noted that:

> "…*legislatively requiring EQC claims to be lodged with the claimant's private insurer sends a strong signal to EQC and private insurers that the Government expects EQC and insurers to work closely together to improve the claims experience for claimants, while avoiding overly detailed and prescriptive legislation on the claims handling process*".

72. Extending the legislative requirement further into the claim management process (that is, beyond lodgement), was not proposed in 2015 because of two key concerns (which remain relevant today), namely:

- Legislation cannot guarantee that EQC and all private insurers would always be able to reach and/or continuously maintain arrangements that worked for all parties. Using legislation to force the parties together, even if they considered the resulting arrangements to be unworkable or not in their interests, would create unacceptably high risks for future claims handling.

- Arrangements between EQC and private insurers should be able to evolve as time passes and best practice changes. Enshrining a particular approach in legislation would freeze the arrangements in place, creating the risk that they would become increasingly outdated and inappropriate.

73. This proposal was considered again in 2017. It did not proceed as it was a lower order priority pending the outcome of the Inquiry.

Treasury's proposal to require EQC claimants to lodge claims with private insurers

74. We propose that the EQC Act be amended to require claimants to lodge EQC claims with their private insurer for initial validation where EQC cover arises from a private

insurance contract. This is consistent with the 2015 proposal and the Inquiry finding that better coordination of the residential insurance response is necessary.

75. This 'requiring' option is preferred by Treasury primarily for the reasons set out in the 2015 discussion document. That is to *"…signal to EQC and private insurers that the Government expects EQC and insurers to work closely together to improve the claims experience for claimants…".* As noted in 2015 this can be done *"…while avoiding overly detailed and prescriptive legislation on the claims handling process".*

76. Recent discussions with ICNZ on this proposal have confirmed that private insurers are not opposed to such a requirement. Insurers are concerned to ensure, however, that the proposed change does not create an opportunity for EQC to impose significant additional requirements or costs on private insurers relative to the status quo (that is, 'scope creep'). If that opportunity were created, private insurers would argue for provisions in the EQC Act that require EQC to reimburse the insurers for the actual and reasonable costs they incur in complying with EQC requirements. Private insurers do acknowledge that they would derive some benefit from knowing, early, that one of their customers has made an EQC claim.

77. ICNZ has indicated that the key to addressing the private insurers' concern about scope creep and avoiding the need for related cost reimbursement provisions will be clarity in the EQC Act regarding 'lodgement'. This would be achieved by clarifying that 'lodgement' is simply the act of receiving the notice of claim and validating cover (that is, confirming that the claimant has a private insurance policy that triggers EQC cover for the damaged property).

EQC does not support this proposal

78. EQC has advised that it welcomes the opportunity to work closely with private insurers to improve the claims experience for customers. However, EQC does not support amending the EQC Act to create a new obligation regarding the lodgement of claims with insurers. EQC's preference is to retain flexibility in case EQC is ever required to 'step in' and manage claims through contractual arrangements. We have acknowledged this EQC position by including a 'no change' option in the recommendations.

79. EQC considers that its existing ability to delegate certain functions, require relevant information and to negotiate and agree terms with private insurers around claims lodgement/validation (and any subsequent claims handling) is sufficient. EQC is also of the view that Government expectations are already well-known and understood.

80. EQC has further advised that:

    a *EQC prefers retaining the status quo, because of its flexibility and to avoid an amendment that would embed a specific operating model into the EQC Act, when there may be changes to this model (both through the Scheme's policy and operational settings) over time, or EQC may be required to step in and manage claims directly if an insurer fails;*

    b *if change is pursued, the requirement should not be absolute as there may be some situations where claims need to be lodged with EQC or third-party agents (for example, insurance brokers); and*

    c *If legislative change is pursued, EQC prefers Treasury's alternative 'enable' proposal.*

81. The Treasury has considered EQC's views, but still prefers the 'requiring' option with provision for exceptional circumstances such as the failure of a private insurer. This is because the 'requiring' approach also removes the risk of private insurers using the initial lodgement and validation step as leverage in any negotiations with EQC over

subsequent claims handling processes. We consider that changes can be made in a way that address ICNZ's concerns about scope clarity and EQC's concerns about exceptional (as opposed to routine) situations where claims may need to be lodged directly with EQC or other parties.

Alternative option: Enable EQC to direct claimants to lodge claims with private insurer

82. An alternative "midway" option to the requirement proposal would be to amend the EQC Act to enable EQC to direct claimants (or persons acting on the claimant's behalf) to lodge EQC claims directly with their private insurer for initial validation. This is provided that relevant arrangements between EQC and the private insurer have been negotiated and put in place prior to such direction.

83. As with the 'requiring' proposal, it would be helpful for the EQC Act to clarify the scope of 'lodgement'. That detail would be less critical under this approach due to negotiated arrangements being a prerequisite to the exercise of the EQC direction power.

84. This alternative option provides more flexibility, but less certainty than the requiring proposal. This option would also be a weaker signal from the Government to EQC and private insurers about its expectations of them working closely together to improve the claimants' experience with natural disaster insurance. A downside with making the ability for EQC to direct claimants to lodge claims with their private insurer a matter of EQC discretion, is that EQC may find it difficult to use the discretion if it was opposed by insurers.

85. Both ICNZ and EQC have indicated that they are not opposed to this alternative option.

What happens beyond lodgement and validation of the claim?

86. Regardless of the option chosen, what happens beyond the narrow lodgement/validation process would continue to depend on what, if any, arrangements are negotiated on commercial terms between EQC and the private insurer. Such arrangements might include further information gathering and sharing, processing and/or settlement of the claim by the private insurer for EQC purposes. In the absence of any such arrangements, the claim as lodged would simply be passed on to EQC for action.

87. As noted above, private insurers are concerned about ensuring that amendments to the EQC Act are not an opportunity for EQC to impose significant additional requirements or costs on private insurers. This is unless the EQC Act also provides that:

    a insurers will be reimbursed for the actual and reasonable costs they incur; or

    b the imposition cannot be made except with prior agreement on relevant terms and conditions.

88. The concerns about extending the legislative provision beyond claim lodgement, as articulated in the 2015 discussion document, are why we have not recommended an extension beyond lodgement and validation. As evidenced by the IRM negotiations and other recent partnership arrangements such as the Kaikōura MoU, EQC and private insurers have demonstrated that they can negotiate and establish appropriate claim handling processes beyond the initial lodgement.

89. We consider it desirable to maintain flexibility around the future development of such arrangements. We see legislative 'codification' of arrangements between EQC and private insurers as likely to be more problematic than helpful (that is, as less flexible and a constraint on future development and innovation).

90. Arrangements beyond the lodgement requirement would be a form of EQC delegation. Routine Crown monitoring and the ability of the responsible Minister, under the Crown Entities Act, to direct EQC to give effect to a government policy that relates to EQC's functions and objectives mean that the Crown will maintain the ability to intervene to ensure that such delegations are utilised (or not) appropriately.

Delegation of settlement function to private insurers

Existing statutory provisions already enable delegation of the settlement function

91. The EQC Act enables EQC to appoint any person as its agent to receive claims notices and to inquire into claims, but no settlement may be effected by an agent without EQC's authority.[9]

92. Section 73(1) of the Crown Entities Act 2004 (Crown Entities Act) gives the EQC Board the ability to delegate EQC functions or powers to, among others, any persons or class of persons approved by the responsible Minister. Ministerial approvals for the delegation of EQC's claims settlement and other specified functions have been granted unconditionally and for an unlimited time. The most recent 'standing' approval was in May 2020, replacing a previous, March 2008, approval.

New, more efficient partnership arrangements rely on EQC's ability to delegate

93. The IRM announced in November 2020 is enabled by the Ministerial approval and EQC delegations. The IRM is a formal partnership arrangement between EQC and eight private insurers,[10] who provide most of the natural disaster cover for residential buildings in New Zealand. The IRM builds on the model used following the Kaikōura earthquake, and more recently in responding to the Northland floods in August 2020.

94. From the second quarter of 2021, anyone with home insurance whose home or land is damaged in a natural disaster will lodge their claim(s) through their private insurer only. The private insurer will assess, manage and settle claims on behalf of EQC at the same time as any private insurance aspects of the claim.

95. The IRM recognises that EQC cannot respond to a large natural hazard event alone. It will streamline the insurance process and make best use of existing sector capability and expertise to meet the needs of New Zealanders when a natural disaster occurs. The IRM includes appropriate safeguards to ensure that private insurers undertake their partnership role in a way that protects the interests of EQC and the Crown.

Proposal to remove need for Ministerial approval for delegation to licensed insurers

96. We propose that the EQC Act be amended to enable EQC to delegate the EQC claims settlement function to insurers without the need for Ministerial approval under the Crown Entities Act. Insurers will need to be licensed under section 19 of the Insurance (Prudential Supervision) Act 2010.

97. This proposal recognises that better, more efficient and claimant-focused coordination of the residential insurance response following a natural disaster is achieved by enabling EQC to negotiate directly with properly authorised and supervised private insurers. It also recognises the benefits of EQC being able to enter into formal partnership arrangements that include appropriate safeguards.

98. The interests of the Crown can be managed effectively by EQC as evidenced by: the unconditional Ministerial approvals that have been granted for an unlimited time; the Kaikōura memorandum of understanding (MoU) with private insurers; and the IRM.

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[9] Clause 7(5) of Schedule 3 to the EQC Act.

[10] AA Insurance, Chubb, FMG, Ando (Hollard), IAG, MAS, Vero, and Tower.

99. The Crown will maintain the ability to intervene to ensure that delegations are utilised (or not) appropriately. This includes via routine Crown monitoring and the ability of the responsible Minister, under the Crown Entities Act, to direct EQC to give effect to a government policy that relates to EQC's functions and objectives.

100. EQC and ICNZ have been consulted and both support the proposal to remove the need for Ministerial approval for delegation to licensed insurers.

Reinstatement of EQC cover

101. In late 2011, the High Court ruled that EQC cover reinstates to the cap (then $100,000 plus GST) after each natural disaster event, rather than being limited to an aggregate claim of $100,000 over the term of the underlying insurance contract. Damage resulting from each earthquake could give rise to a claim. Therefore, it became necessary to determine what was new or aggravated damage to properties following each event. This became known as "apportionment" and increased complexity. It also contributed to delays in the processes for assessment and for managing claims, in part because the Court's decision was applied retrospectively.

102. Apportionment between different earthquakes led to many disputes between EQC and private insurers. The way damage is apportioned across events can have significant impacts on how EQC and private insurers share costs. This is because apportionment can determine whether damage was caused by one over cap event or multiple under cap events. For example, in the Canterbury earthquake sequence when the cap was $100,000, if $300,000 damage was attributed to one event, the private insurer would be liable for $200,000 of the damage. If instead the damage was attributed to two events, EQC would be liable up to the $100,000 cap twice, and the insurer would only be liable for $100,000. If the damage was attributed to four events, the insurer would have no liability.

103. The Canterbury experience of multiple events is rare, even by international standards. It is unusual for a series of aftershocks to cause greater levels of damage than the original shock. Nevertheless, the complexity, uncertainty, and delays of the apportionment process mean it is worth considering other models that might better manage multiple events if a similar situation arose in the future.

104. The Inquiry recommended that the Government "review the EQC Act in light of the High Court ruling on reinstatement of cover following each natural disaster event and other judicial determinations that have had a significant impact on EQC's work."[11]

105. We previously advised you that we have been working through further policy analysis on reinstatement in consultation with EQC [T2020/2874 refers].

Options analysis for reinstatement

106. Advice by the Treasury and EQC has focused on three options:

- **Option 1: The status quo:** accept the current reinstatement model and require EQC and private insurers to develop joint systems and processes ahead of time to deal with apportionment issues, should they arise in future events, or
- **Option 2: EQC cover reinstates with the renewal of the underlying private insurance policy:** EQC's maximum liability under the building and land cover would not exceed an amount equal to one maximum payment under that cover during each period in which the underlying contract of fire insurance is in force.

[11] Recommendation 1.3.2 of the Public Inquiry into EQC.

- **Option 3: EQC cover reinstating on completion of repairs.** Reinstating on completion of repairs.

The Treasury recommends the status quo approach to reinstatement is maintained

107. All options for reinstating EQC cover (including the status quo) have downsides. Given the challenges that alternatives present, and that EQC and insurers have learned a great deal about operationalising the status quo, we consider there is insufficient justification to shift away from the status quo approach.

108. During consultation, there was broad support for the retention of the status quo including support from insurers and homeowners. EQC's former Claimant Reference Group emphasised the value of retaining a tried and tested system, which EQC, the Courts, the public and private insurers understand.

109. At the same time, apportionment processes associated with the status quo will be less likely to cause major problems as claims management processes become better integrated between private insurers and EQC.

110. For these reasons, the Treasury recommends that EQC cover should continue to reinstate following each natural disaster event. EQC is supportive of this recommendation.

Consultation

111. The Treasury consulted with EQC, LINZ, the Ministry of Justice and the Department of Prime Minister and Cabinet. Feedback received is incorporated throughout this paper.

112. In terms of external consultation, as part of the development of this advice, the Treasury has consulted with ICNZ and the CRG. The views expressed by these stakeholders verbally and in writing are reflected in the report.

Next steps

113. Your decisions on the policy matters covered in this briefing will inform the development of a second Cabinet paper seeking Cabinet agreement to the proposed changes to the EQC Act.

114. Following Cabinet approvals, the Treasury will provide drafting instructions to the Parliamentary Counsel Office with a view to a bill being ready for introduction in the second half 2021.